

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CITY OF WARWICK, :
Plaintiff, :
 :
v. : CA 08-366 ML
 :
LABORERS' INTERNATIONAL UNION :
OF NORTH AMERICA NATIONAL :
(INDUSTRIAL) PENSION FUND, :
Defendant. :

MEMORANDUM AND ORDER
GRANTING MOTION FOR ATTORNEYS FEES

Before the Court is Defendant's Motion for Attorneys Fees (Doc. #13) ("Motion"). By the Motion, Defendant Laborers' National (Industrial) Pension Fund¹ ("Defendant" or the "Fund") seeks an order requiring Plaintiff City of Warwick ("Plaintiff" or "City") to reimburse the Fund for \$45,568.75 in attorneys' fees incurred in successfully defending this action. The Motion has been referred to me for determination. No hearing has been

¹ Defendant is identified in the Complaint as the Laborers' International Union of North America National (Industrial) Pension Fund. See Complaint for Declaratory and Injunctive Relief (Doc. #1) ("Complaint"). Defendant identifies itself in its filings as the Laborers' National (Industrial) Pension Fund. See, e.g., Motion. According to Defendant:

The Pension Fund's full name is the "Laborers' International Union of North America National (Industrial) Pension Fund." However, because of that name's length, the Pension Fund is commonly referred to as the "Laborers' National (Industrial) Pension Fund."

Letter from Ray to Martin, M.J., of 4/29/09. To be consistent with the Motion, the Court identifies Defendant by the name appearing in that document.

requested by the parties, and the Court has determined that none is necessary. For the reasons stated herein, the Motion is granted to the extent that the City shall pay to the Fund attorneys' fees in the amount of \$40,975.00.

Background

The following background is taken from Chief Judge Mary M. Lisi's Memorandum and Order of February 23, 2009.

In 1976, the City entered a collective bargaining agreement ("CBA") with the Public Employees Local Union 1033 of the Laborers' International Union of North America, AFL-CIO ("LIUNA") in connection with the City's employment of crossing guards. Compl. ¶ 5. As provided in the CBA, the City agreed to make contributions to the Fund for the purpose of providing retirement benefits for the crossing guards. Compl. ¶ 6. In addition, the City signed an Agreement and Trustee Designation (the "Designation") in 1976, under which the City was bound by the terms and provisions in the Agreement and Declaration of Trust ("ADT") which established the Fund in 1967. Def.'s Exh. B.

For the next more than three decades, the City entered into a series of CBAs for the crossing guards' employment and continued to make contributions to the Fund. Shortly before the latest CBA was scheduled to expire in June 2007, the City and the crossing guards began negotiating a new CBA. Compl. ¶ 25. Although a tentative agreement was reached, the City council voted against ratification of the new CBA. Compl. ¶ 26. In November 2007, the City terminated employment of its crossing guards and contracted for crossing guard services on a daily basis.FN1 Id. According to the City, it discontinued making pension payments after February 15, 2008, "[a]s there was no longer a [CBA] in place." Compl. ¶ 27.

FN1. The crossing guards filed charges with the Rhode Island State Labor Relations Board (the "Labor Relations Board") and sought to be reinstated to their prior positions. Compl. ¶ 28. The Labor Relations Board issued a complaint against the City which is currently pending.

In a letter dated June 27, 2008, the Fund informed the City that the City's obligation to contribute to the Fund terminated as of February 25, 2008; that such termination constituted a withdrawal; and that the Fund was required by federal law to assess and collect a withdrawal liability from the City. Compl. ¶ 29, Ex. B. The Fund's actuaries estimated a withdrawal liability of \$198,444 and the Fund suggested a six-year installment plan to the City which called for a first payment of \$9,769 on July 31, 2008. Compl. Ex. B. The Fund also advised the City that it could request a review of the Fund's assessment within ninety (90) days, but that payment had to be made in the interim. Id.

In a letter dated September 18, 2008, the Fund notified the City that it was in default for non-payment; that the time period to request a review was about to expire; and that the Fund would initiate collection proceedings if the default were to continue. Compl. Ex. D. In response, the City made a formal demand for review on September 26, 2008 and requested additional information to help it identify possible inaccuracies in the Fund's assessment. Compl. Ex. C. The City also suggested that its "defined contribution plan" was exempted from federal withdrawal liability provisions and it asked the Fund to consider whether a withdrawal had actually occurred while the labor dispute over termination of the crossing guards was still pending. Id.

On October 3, 2008, the City filed a declaratory judgment action in this Court to establish that the City is not subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 et. seq. ("MPPAA"); and to enjoin the Fund from enforcing any withdrawal liability assessed against the City. Compl. ¶ 1, 8. In the alternative, the City sought a declaration that it has not completely withdrawn from the Fund because contributions have merely been suspended during a labor dispute. Id. at ¶ 2, 9.

City of Warwick v. Laborers' Int'l Union of N. Am. Nat'l (Indus.) Pension Fund, C.A. No. 08-366ML, 2009 WL 462690, at *1-2 (D.R.I. Feb. 23, 2009) (alterations in original).

The Fund moved to dismiss the City's declaratory judgment action pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that federal law requires the parties to participate in arbitration proceedings before seeking judicial review. See Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. #7) ("Motion to Dismiss"). On February 23, 2009, Judge Lisi granted the Motion to Dismiss, finding that "the determination whether the City's termination of the crossing guards and discontinuance of contributions to the Fund constitutes 'complete withdrawal' will be made by the arbitrator." Memorandum and Order Granting Defendant's Motion to Dismiss (Doc. #11) at 11-12. Thus, Judge Lisi agreed with the position which the Fund had espoused. See Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defendant's Dismissal Mem.") at 19 ("Accordingly, arbitration is mandatory for any dispute regarding EWL [employer withdrawal liability] that is not resolved through the informal review process, and an employer is required to exhaust this administrative remedy before commencing litigation in a federal court.") (footnote omitted).

Discussion

In its memorandum in support of the instant Motion, the Fund states that the City's action was, in essence, an action brought under section 4301(a)(1) of the Employee Retirement Income

Security Act ("ERISA"), 29 U.S.C. § 1451(a)(1).² See Memorandum of Points and Authorities in Support of Defendant's Motion for Attorneys Fees ("Fund Mem.") at 1. The City has not challenged this statement, see Plaintiff's Memorandum in Opposition to Defendant's Motion for Attorney Fees (Doc. #14) ("City Mem."), and the Court agrees with the Fund's characterization of the action. ERISA section 4301(e), 29 U.S.C. § 1451(e), provides for the award of attorney's fees to a prevailing party in an action brought under the section:

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

ERISA section 4301(e), 29 U.S.C. § 1451(e).

The Fund is the prevailing party in this action, and it included in its Motion to Dismiss a request for attorneys fees and costs in accordance with ERISA. See Motion to Dismiss at 1. The City does not dispute that the statute permits the Court to

² ERISA section 4301(a)(1), 29 U.S.C. § 1451(a)(1), provides in pertinent part:

A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

ERISA section 4301(a)(1), 29 U.S.C. § 1451(a)(1).

award attorney's fees and costs. See City Mem. at 1. However, the City appears to argue that application of the relevant factors in determining whether to award such fees and costs should result in the denial of the Motion. See id. at 2-3. Alternatively, the City argues that the hours claimed by the Fund's attorneys are not reasonable and that any award of attorneys' fees should be reduced to a reasonable amount. See id. at 3-4.

In deciding whether to award fees and costs to a party the Court should consider five factors: 1) the degree of culpability or bad faith attributable to the losing party; 2) the depth of the losing party's pocket, i.e., his or her capacity to pay an award; 3) the extent (if at all) to which such an award would deter other persons acting under similar circumstances; 4) the benefit (if any) that the successful suit confers upon the plan participants or beneficiaries generally; and 5) the relative merit of the parties' positions. Rhode Island Carpenters Annuity Fund v. Trevi Icos Corp., 533 F.Supp.2d 246, 249-50 (D.R.I. 2008) (citing Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 225 (1st Cir. 1996)). "These so-called Cottrill factors are guidelines and do not preclude the Court from consideration of other factors. Rather, the Court may—and should—consider additional criteria that seem apropos. Ultimately, the test for granting or denying attorney's fees and costs in an ERISA case

is, in a word, flexible." Id. (internal quotation marks and citations omitted).

Degree of Culpability or Bad Faith Attributable to City

The Court agrees with the Fund that this lawsuit was unnecessary and that it should not have been brought. ERISA is explicit that arbitration is mandatory and that resort to the courts is available only for review of an arbitrator's decision. See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc., 762 F.2d 1137, 1139 (1st Cir. 1985) ("The statute provides that the amount of withdrawal liability is calculated by the trustees of the pension plan. If an employer disputes either the amount or the fact of liability, it can negotiate with the pension plan and, if there is no resolution, the dispute must be arbitrated."). The Fund also advised the City prior to the suit being filed that if there was a dispute regarding the withdrawal liability assessment that the City and the Fund could not resolve informally, the City could "invoke arbitration as provided in the Pension Fund's rules." Complaint for Declaratory and Injunctive Relief (Doc. #1) ("Complaint"), Exhibit ("Ex.") B (Letter from Speakes to City of 6/27/08) at 2. Thus, the City was on notice before the lawsuit was filed of the requirement for arbitration.

Most significant, however, for purposes of determining the City's culpability is the fact that after the lawsuit was filed

counsel for the Fund contacted counsel for the City, advised her of the specific error which the City was making, and requested that the City voluntarily dismiss the lawsuit without prejudice and pursue the administrative process.³ Despite again being alerted to the requirement to pursue arbitration, counsel for the City declined the Fund's suggestion. A week later, counsel for the Fund, in acknowledging the City's declination of his suggestion, again alerted counsel for the City that its course was misguided and likely to be costly:

OK. I was just trying to save the Pension Fund and the City some money on legal fees, and to save Court resources. The ERISA-mandated exhaustion procedure involves an[] appeal process and then, if necessary, arbitration. I had thought that the appeal process would help clarify the facts of this matter through an informal exchange of information, and **that the clarification process would be particularly helpful to the City because the complaint reflects some misunderstandings that can be easily resolved.**

³ The final paragraph of a December 4, 2008, email from the Fund's counsel to the City's counsel states:

The motion will be based on a failure to exhaust administrative remedies/lack of jurisdiction inasmuch as ERISA requires an employer that has been assessed withdrawal liability to first give the Board of Trustees an opportunity to consider and decide any defense to the assessment and then to invoke arbitration as provided in the statute. The US Supreme Court as well as the USCA First Circuit has repeatedly affirmed this process. We could avoid some costly motion[] practice if the City voluntarily dismisses the lawsuit without prejudice and pursues the administrative process. Please advise if the City is interested.

Supplemental Affidavit of James S. Ray in Support of Defendant's Motion for Attorneys Fees ("Ray Supp. Aff.") ¶ 3(a).

Supplemental Affidavit of James S. Ray in Support of Defendant's Motion for Attorneys Fees (Doc. #17) ("Ray Supp. Aff.") ¶ 3(c) (bold added). Notwithstanding this final opportunity to reconsider its action, the City pressed onward. Thus, the Court finds that the first factor strongly favors the award of attorneys' fees.

Capacity to Pay

Plaintiff asserts that "[i]n these times of multi-million dollar municipal deficits and statutory caps on the amount of taxes municipalities can raise, the City's ability to pay Defendant's demand is in question." City Mem. at 2. Plaintiff offers no evidence to support this assertion. The City is a large municipality, and, while the amount of attorneys' fees sought is substantial, there is no reason to believe that it would bankrupt the City.

Deterrence

Imposing a fee award on the City would deter other plaintiff-employers from ignoring the ERISA mandate to arbitrate employer withdrawal liability disputes. Such deterrence would preserve pension fund assets, allowing payment of benefits to participants and beneficiaries, and spare the courts from dealing with unnecessary litigation.

Benefit Conferred on Participants or Beneficiaries

The Court's dismissal of the City's lawsuit protected the Fund's assets from being further diminished by litigation expenses and removed implements to the Fund collecting employer withdrawal liability from the City in accordance with the Fund's rules and ERISA. The deterrent effect of the dismissal also conferred a benefit on Fund participants because it makes it less likely that other plaintiff-employers will initiate similar lawsuits. This will save Fund assets which would otherwise be consumed by legal expenses.

Relative Merits

The Fund's position was supported by statutory and case law. In contrast, the City's claims were not supported legally or factually. As already noted, this lawsuit should not have been brought, and the City was repeatedly advised by the Fund that its path was misguided. The City disregarded the Fund's reasonable request to dismiss the action without prejudice, and it elected to press forward despite warnings that doing so would cause both the Fund and the City to incur legal expenses which could otherwise be avoided.

Amount of Award

ERISA does not provide a formula to calculate the reasonable amount of recoverable attorney's fees. Decisional law provides that when faced with a quiescent statute, a court should apply the "lodestar" method. Tennessee Gas Pipeline Co. v. 104 Acres of Land, 32 F.3d 632, 634 (1st Cir. 1994); see also Radford Trust v. First Unum Life Ins. Co. of Am., 399 F.Supp.2d 3, 10 (D. Mass. 2005) ("The First Circuit has stated that where the

relevant statute does not provide an alternate method for calculating reasonable attorney's fees, as is the case with the ERISA statute, the 'lodestar' method should be used."), rev'd in part on other grounds, 491 F.3d 21 (1st Cir. 2007); Hedley-Whyte v. Unum Life Ins. Co. of Am., No. CIV. A. 94-11731-GAO, 1996 WL 208492, *3 (D. Mass. Mar. 6, 1996) (application of lodestar method in fee award under 29 U.S.C. § 1132(g)).

The lodestar amount is calculated by multiplying a reasonable hourly rate by the total number of hours reasonably devoted to the case. Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984). The reasonable hourly rate is derived from a survey of rates prevailing in the community, as well as the "qualifications, experience, and specialized competence" of the attorney for whom fees are requested. Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 295 (1st Cir. 2001). Once obtained, the lodestar serves as a reference rate subject to additions or subtractions based on the specific circumstances of the case. Grendel's Den, 749 F.2d at 950.

Rhode Island Carpenters Annuity Fund v. Thrive Ibos Corp., 533 F.Supp.2d 246, 254 (D.R.I. 2008).

The Fund requests attorneys' fees of \$45,568.75. See Motion at 1. In support of its request, the Fund has submitted affidavits from the two attorneys for whom it seeks fees, James S. Ray ("Attorney Ray") and Darren F. Corrente ("Attorney Corrente"). The affidavits set forth the hourly rates charged by them in this matter and have detailed billing statements for each attorney for the services they provided. See Fund Mem., Attachments. Attorney Ray, whose office is located in Alexandria, Virginia, states that his hourly rate for services rendered to the Fund is \$275. See Affidavit of James S. Ray in

Support of Defendant's Motion for Attorneys Fees ("Ray Aff.") ¶ 7. He further states that this rate is substantially below the market rate for his services. See id. ¶ 8. In support of this claim, Attorney Ray has attached to his affidavit a copy of the Laffey Matrix used by the U.S. District Court for the District of Columbia for determining attorney's fees in civil litigation. The matrix reflects that the market hourly rate for a general practitioner in Washington, D.C., with Attorney Ray's experience was \$440 per hour as of June 2008. See id. (citing Ex. A (Laffey Matrix)). In his affidavit, Attorney Corrente states that he charged a rate of \$200.00 per hour for his services in this matter and that this rate is a reduction from his standard rate of \$275.00 per hour. See Affidavit of Darren F. Corrente in Support of Defendant's Motion for Attorneys Fees ("Corrente Aff.") ¶ 7. The hourly rates of both attorneys are further supported by an affidavit from Frederick P. McClure ("Attorney McClure"), a local member of the Rhode Island bar whose practice is focused in the areas of executive compensation, pension, and employee benefits law. See Affidavit of Frederick P. McClure in Support of Defendant's Motion for Attorneys Fees ("McClure Aff.") ¶ 6. Attorney McClure attests that in his opinion "the hourly rate submitted is more than reasonable for the type of services provided by [A]ttorney Ray and [A]ttorney Corrente." Id. ¶ 8. The City has not questioned the hourly rates claimed by Attorney

Ray and Attorney Corrente, and the Court finds that they are reasonable.

The City does, however, challenge the number of hours claimed by the attorneys. See City Mem. at 4. It notes that the matter was not protracted in that only eighteen days elapsed from the filing of the Complaint to Defendant's Motion to Dismiss and that the Fund filed its reply memorandum a week after the City filed its opposition to the Motion to Dismiss. See id. The entire duration of the case from the filing of the Complaint to the order of dismissal was only 4½ months. The City particularly takes issue with the number of hours claimed by Attorney Ray for legal research because he has been primary legal counsel for the Fund for thirty years and his practice is primarily devoted to employee benefit plan matters. See City Mem. at 3-4; Ray Aff. ¶ 6. The City also notes that Attorney Ray's statement of hours indicates that for six consecutive days he appears to have worked on virtually no other matters, that for five days he billed eight to eleven hours each day, and that on the sixth day he billed 6.5 hours to this matter. See City Mem. at 4; see also Ray Aff., Ex. B (Time Charges).

After reviewing the bills submitted, the Court agrees that there is some excess in the amount of time claimed. Together Attorneys Ray and Corrente billed approximately forty-five hours for work on or related to the Fund's fifteen page reply

memorandum (Defendant's Reply to Plaintiff's Objection to Defendant's Motion to Dismiss) (Doc. #10). The Court also has some reservations with respect to the three days in which Attorney Ray billed in excess of eight hours.⁴ Finally, the Court agrees with the City that given Attorney Ray's experience and familiarity with the law in this area, the amount of time claimed for legal research is more than was necessary. For these reasons, the Court will reduce by ten percent the number of hours claimed by Attorney Ray. It will reduce Attorney Corrente's bill by the same percentage because the hours he billed in connection with the reply brief constitute almost a third of his total hours.

Accordingly, the Court finds that Attorney Ray is entitled to be compensated for 137 hours [152.25 hours claimed - 15.25 (10% reduction) = 137 hours] at \$275.00 per hour, resulting in an attorney's fee of \$37,675.00 (137 hours x \$275.00 = \$37,675.00). Attorney Corrente is entitled to be compensated for 16.5 hours [18.5 hours claimed - 2.0 hours (10% reduction) = 16.5 hours] at \$200.00 per hour, resulting in an attorney's fee of \$3,300.00 (16.5 hours x \$200.00 = \$3,300.00). Thus the total amount of attorneys' fees awarded is \$40,975.00 (\$37,675.00 + \$3,300.00 =

⁴ Attorneys, like other workers, must take rest breaks, use the restroom, and eat during the course of a day. Unlike some workers who may be entitled to paid coffee breaks and use of the restroom while still being paid, attorneys are entitled to their high hourly rates of compensation only when they are actually working. Thus, to accumulate eight billable hours requires more than eight hours.

\$40,975.00).

Conclusion

Based on the foregoing analysis, the Motion is granted to the extent that the City shall pay the Fund attorneys' fees in the amount of \$40,975.00. Payment is to be made within thirty days of the date of this order.

So ordered.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
May 1, 2009