UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ROBERT CARLOW and LONNIE ST. JEAN, Plaintiffs,	:	
v.	:	CA 02-538ML
STANLEY J. MRUK, Individually and in his official capacity as Chief of the Anthony Fire District, and THE ANTHONY FIRE DISTRICT, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is Plaintiffs' Motion for Attorney's Fees and Costs (Document #25) (the "Motion"). Plaintiffs Robert Carlow and Lonnie St. Jean (collectively "Plaintiffs") seek attorney's fees in the amount of $10,860.00[1] and costs of $150.00. Defendants Stanley J. Mruk ("Chief Mruk") and the Anthony Fire District[2] (collectively "Defendants") have filed an objection to the Motion.

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[1] In their motion, Plaintiffs state that they are seeking attorney's fees in the amount of $11,010.00 and costs of $150.00. See Plaintiffs' Motion for Attorney's Fees and Costs (Document #25) (the "Motion") at 1. However, in the accompanying memorandum and affidavit of Plaintiffs' counsel, John W. Dineen, Plaintiffs listed the amounts sought as $10,860.00 in attorney's fees and $150.00 in costs, see Memorandum in Support of Plaintiffs' Motion for Attorney's Fees and Costs ("Plaintiffs' Mem.") at 2; Affidavit of John W. Dineen dated March 31, 2004 (Document #26) ("Dineen Aff."), Attachment ("Att.") (Time Records) at 4, for a total of $11,010.00. The court accepts the $10,860.00 figure as the correct request for attorney's fees.

[2] Defendants note that "[t]he Anthony Fire *Department* is located in the *Coventry* Fire District." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Attorney's Fees (Document "30) ("Defendants' Mem.") at 1 n.1 (italics omitted).

This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on May 17, 2004. After reviewing the memoranda, affidavit, and exhibits submitted and performing independent research, I recommend that Plaintiffs be awarded $10,860.00 in attorney's fees and $150.00 in costs, for a total of $11,010.00.

Facts and Travel

Plaintiffs, two Coventry firefighters, filed this § 1983 action for declaratory and injunctive relief, as well as damages and costs, on December 19, 2002. See Complaint (Document #1) ¶ 1. They challenged, on First Amendment grounds, certain actions and Bylaws (the "Bylaws" or "Rules and Regulations") of Defendants which allegedly restrict firefighters from speaking publicly on matters of public concern. See id.

Specifically, Plaintiffs allege that after speaking to parent-teacher groups and the press about the issues of firefighter training and school safety in October and November of 2002, they received letters from Chief Mruk dated November 15, 2002, which reprimanded them for violating certain policies of the Coventry Fire District. See Complaint ¶¶ 1, 6-10; see also id., Attachments ("Att.") 1-2 (Letters from Mruk to Carlow and St. Jean dated 11/15/02) at 1. Among the listed infractions were speaking disrespectfully of the Chief, failure to follow the chain of command, conduct prejudicial to the good reputation of the Coventry Fire District, and neglect of duty. See Complaint ¶¶ 8-9; see also id., Att. 1-2 at 1. The letters warned both Plaintiffs that Chief Mruk would "recommend to the Board of Engineers[3] that [their] employment be terminated if [they]

[3] The Board of Engineers, which consists of Chief Mruk, his son, and a third person appointed by Chief Mruk, is the governing body of the Anthony Fire Department. See Complaint ¶ 11.

engage in any further misconduct of any kind." Id. ¶ 10; see also Complaint, Att. 1-2 at 2.

Plaintiffs allege that the following provisions of the Constitution and By-Laws of the Anthony Fire Department have a chilling effect on free speech:

A. Article 4, Section 1: "Every member speaking at any time, at any regular special meeting shall rise and respectfully address the Chair, confine himself to the question being debated, and avoid all personalities." [Note: the Chair is Chief Mruk].

B. Article 6, Section 9D: "Conduct prejudicial to the good reputation or discipline of the department" (unconstitutional as applied); Section 9K: "Neglect of duty at a fire or other times" (unconstitutional as applied); Section 9N: "Speaking disrespectfully to or of any officer or person connected with the department."

C. Article 6, Sec. 10: "Penalties- members against whom charges are pending shall not solicit or cause any person to act as intercessor in their behalf with the Board of Engineers or any member thereof, relative to the disposition to be made of such charges."

D. Article 6, Section 13 (page 8): "No information relative to the business or affairs of the Department shall be furnished parties not connected therewith, except as authorized by the Chief of Department."

E. Article 6, Section 13 (page 8): "Any member requesting an interview with the Board of Engineers must receive permission from the Chief of Department."

Complaint ¶ 16 (bracketed material in original). Plaintiffs state that they wish to continue to speak publicly on matters of public concern, see Complaint ¶ 14, but that they "are fearful of losing their jobs should they trigger a violation of the November 15 letter's warning," id. ¶ 15.

Defendants filed a motion to dismiss the Complaint on March

13, 2003. See Defendants' Motion to Dismiss the Complaint (Document #6). A hearing on the motion to dismiss was held on May 28, 2003, and the motion was denied. See Order denying motion to dismiss (Document #15). On March 17, 2004, a Consent Judgment (Document #24) was entered by the court.

Plaintiffs filed the instant Motion (Document #25), a memorandum in support thereof, and the Affidavit of John W. Dineen dated March 31, 2004 (Document #26) ("Dineen Aff."), on March 31, 2004. On April 16, 2004, Defendants' Objection to Plaintiffs' Motion for Attorney's Fees and Costs (Document #28) ("Defendants' Obj."), with supporting memorandum (Document #30), was filed. Plaintiffs on April 29, 2004, filed a reply memorandum (Document #32). The Motion was referred to this Magistrate Judge on April 30, 2004. A hearing was conducted on May 17, 2004, and the matter was subsequently taken under advisement.

Discussion

I. Prevailing Party

Title 42, U.S.C. § 1988 provides in relevant part:

(b) Attorney's fees

> **In any action or proceeding to enforce a provision of** sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, **title IX** of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, **the court, in its discretion, may allow the prevailing party,** other than the United States, **a reasonable attorney's fee as part of the costs**, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C.A. § 1988 (2003)(alterations in original)(emphasis added).

A prevailing party is ordinarily entitled to recover attorneys' fees pursuant to § 1988 unless "special circumstances would render such an award unjust." Pontarelli v. Stone, 781 F.Supp. 114, 119 (D.R.I. 1992)(citations omitted), appeal dismissed, 978 F.2d 773 (1st Cir. 1992). A prevailing party is one who has been awarded some relief by the court. See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 603, 121 S.Ct. 1835, 1839, 149 L.Ed.2d 855 (2001). "[A]t a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989); see also Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992)("In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.").

Plaintiffs argue that they are "entitled to an award of fees and costs in this case because they are the prevailing party, for purposes of 42 U.S.C. Section 1988." Memorandum in Support of Plaintiffs' Motion for Attorney's Fees and Costs ("Plaintiffs' Mem.") at 1. Plaintiffs rely on the Consent Judgment,[4] according to which terms they obtained both declaratory and injunctive relief, which "invalidat[ed] challenged rules of the Fire

[4] Although Defendants assert that "Plaintiffs' Motion for Attorney's Fees alludes to the 'Catalyst' test ...," Defendants' Mem. at 4, Plaintiffs explicitly stated that they were "not urging the catalyst theory but instead point to the Consent Judgment entered by the Court on March 17, 2004," Plaintiffs' Mem. at 1.

District and enjoin[ed] further enforcement," Plaintiffs' Mem. at 1, as well as damages in the amount of $200.00 each, see id. Moreover, the Consent Judgment "itself states that defendants 'shall pay such costs, including reasonable attorney's fees, as shall be determined by the Court.'" Plaintiffs' Mem. at 2. Defendants counter that the fees sought are excessive because, aside from the damages award, "Defendants conferred all the relief Plaintiffs sought long before this Court entered the Consent Judgment," Defendants' Memorandum in Opposition to Plaintiffs' Motion for Attorney's Fees ("Defendants' Mem.") at 1, and, indeed, "most of Plaintiff's [sic] stated goals were 'achieved' even before the lawsuit was filed," id.

Applying the standard described above, the court has no difficulty concluding that Plaintiffs are the prevailing party in this matter. The Supreme Court has held that a consent judgment may serve as the basis for an award of attorney's fees. See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 604, 121 S.Ct. 1835, 1840, 149 L.Ed.2d 855 (2001)("Although a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'") (quoting Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989))(alterations in original) (internal citation omitted).

According to the Consent Judgment:

> 1. Declaratory judgment enters for plaintiffs and Article VI of the Constitution and By-Laws of the Anthony Fire Department ("Rules and Regulations") is declared void and of no further effect as violative of plaintiffs' First Amendment rights. Defendants are enjoined from further reliance on or enforcement of Article VI. This same declaratory and injunctive relief also applies to a portion of

Article IV, Section 1, from which shall be deleted the terms "respectfully" and "avoid all personalities." Article IV, Section 1, is otherwise not affected by this Consent Judgment.

2. The letters of November 15, 2002, from Chief Stanley Mruk to the plaintiffs are hereby rescinded and shall not in any way be included in plaintiffs' personnel files.

3. Damages are awarded to each plaintiff in the amount of $200.00.

4. Defendants shall pay such costs, including reasonable attorney's fees, as shall be determined by the Court ....

Consent Judgment at 1-2. Clearly, the dispute has been resolved in a way which alters the legal relationship between the parties. See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. at 792, 109 S.Ct. at 1493. Defendants have been enjoined from any further reliance on Article VI of the Bylaws, which has been declared void, or enforcement of Article VI, against Plaintiffs or anyone else. Certain terms have been deleted from Article IV. The November 15, 2002, letters, which threatened Plaintiffs with termination for future violations, have been rescinded and kept from Plaintiffs' personnel files. Plaintiffs, therefore, have been awarded "some relief by the court," Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. at 603, 121 S.Ct. at 1839, which will affect the behavior of Defendants toward Plaintiffs, see Rhodes v. Stewart, 488 U.S. 1, 4, 109 S.Ct. 202, 203, 102 L.Ed.2d 1 (1988). The court concludes that Plaintiffs are entitled to an award of attorney's fees as a prevailing party. They have "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit ....'" Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. at 791-92, 109 S.Ct. at 1493 (quoting Nadeau v.

Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978))(first alteration in original).

II. Lodestar

The usual starting point in determining the amount of attorney's fees is to calculate a lodestar by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1190 (1st Cir. 1996); Lipsett v. Blanco, 975 F.2d 934, 937 (1st Cir. 1992). "In implementing this lodestar approach, the judge calculates the time counsel spent on the case, subtracts duplicative, unproductive, or excessive hours, and then applies prevailing rates in the community (taking into account the qualifications, experience, and specialized competence of the attorneys involved)." Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 295 (1st Cir. 2001)(citing Lipsett, 975 F.2d at 937); see also United States v. Metro. Dist. Comm'n, 847 F.2d 12, 15-17 (1st Cir. 1988); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950-51 (1st Cir. 1984).

A. Determining Reasonable Number of Hours

"Typically, a court proceeds to compute the lodestar amount by ascertaining the time counsel actually spent on the case 'and then substract[ing] from that figure hours which were duplicative, unproductive, excessive or otherwise unnecessary.'" Lipsett v. Blanco, 975 F.2d 934, 937 (1st Cir. 1992)(quoting Grendel's Den, 749 F.2d at 950)(alteration in original). Work that could be performed by clerks and secretaries should not be billed at lawyers' rates, even if performed by lawyers. See Lipsett v. Blanco, 975 F.2d 934, 940 (1st Cir. 1992)(holding that translations of documents and court filings should not be compensated at lawyer's rate). A court has an "obligation to reduce fee claims for overstaffing or 'where the hours expended

on the litigation are excessive given the nature of the specific task, the experience of the attorney, the number of attorneys assigned to the task, and the results obtained.'" United States v. Metro. Dist. Comm'n, 847 F.2d 12, 18-19 (1st Cir. 1988) (quoting United States v. Metro. Dist. Comm'n, C.A. No. 85-0489 (D. Mass. April 24, 1987)(citing Hensley v. Eckerhart, 461 U.S. 424, 433-34, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983))).

B. Determining Reasonable Hourly Rate

"In determining a reasonable hourly rate, the Supreme Court has recommended that courts use 'the prevailing market rates in the relevant community' as the starting point." Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1190 (1st Cir. 1996)(quoting Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S.Ct. 1541, 1547 n.11, 79 L.Ed.2d 891 (1984)). Prevailing market rates are defined as "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. at 895 n.11, 104 S.Ct. at 1547 n.11; see also United States v. Metro. Dist. Comm'n., 847 F.2d 12, 19 (1st Cir. 1988). An attorney seeking court awarded fees may submit evidence of his customary billing rate and of the prevailing rates in the community, but the court is not obligated to adopt that rate. See Andrade, 82 F.3d at 1190; see also Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 296 (1st Cir. 2001)("[T]he court may take guidance from, but is not bound by, an attorney's standard billing rate."). A court may rely upon its own knowledge of attorney's fees in its surrounding area in arriving at a reasonable hourly rate. See Andrade, 182 F.3d at 1190; Nydam v. Lennerton, 948 F.2d 808, 812-13, (1st Cir. 1991); United States v. Metro. Dist. Comm'n, 847 F.2d at 19.

The party seeking attorneys' fees has the burden of submitting sufficient documentation and "evidence supporting the

hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); see also Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 297 (1st Cir. 2001)("Our cases make clear that prevailing parties who intend to seek counsel fee awards ordinarily must ensure that contemporaneous time records are kept in reasonable detail.").

C. Upward or Downward Adjustment

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor the 'results obtained.'" Hensley, 461 U.S. at 434, 103 S.Ct. at 1940. The Supreme Court noted that "[t]his factor is particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." Hensley, 461 U.S. at 434.

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444, at 5049 (C.D. Cal. 1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley, 461 U.S. at 435, 103 S.Ct. at 1940.

Although the Supreme Court has stated that in some cases the lodestar may not represent a reasonable attorney's fee and may require upward adjustment, see Blum v. Stenson, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); Hensley v.

Eckerhart, 461 U.S. 424, 434, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983), the First Circuit has "repeatedly cautioned that such enhancements will be rare." Lipsett v. Blanco, 975 F.2d 934, 942 (1st Cir. 1992); see also Wildman v. Lerner Stores Corp., 771 F.2d 605, 610 (1st Cir. 1985). Indeed, the First Circuit noted that a subsequent opinion by the Supreme Court suggested that "[b]ecause considerations concerning the quality of a prevailing counsel's representation normally are reflected in the reasonable hourly rate, the overall performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'" Lipsett, 975 F.2d at 942 (quoting Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 478 U.S. 546, 566, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986)).

On the other hand, a downward adjustment in the fee may be appropriate where "a plaintiff has achieved only partial or limited success." Hensley v. Eckerhart, 461 U.S. at 436, 103 S.Ct. at 1941. The Supreme Court has observed that the fact that a "plaintiff is a 'prevailing party' ... may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." Hensley, 461 U.S. at 436, 103 S.Ct. at 1941. In recognition of this fact, a "district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." Id. at 436-37.

III. Application

A. Attorney's Fees

1. Reasonableness of number of hours

Plaintiffs seek an award of $10,860.00 in attorney's fees, based on 54.3 hours of work at an hourly rate of $200.00 per hour. See Dineen Aff., Att. (Time Records) at 4. Defendants submit that "the appropriate award should take into account a reduction of 50% based upon the fact that[] Plaintiffs need not

have filed this action at all to invalidate the offending By-Laws." Defendants' Mem. at 5. Alternatively, Defendants argue that the amount of Plaintiffs' fees should be reduced by fifty percent for any fees incurred after any of the following points: (1) the March 9, 2003, clarification by the Board of Engineers regarding the status of the Bylaws, see Defendants' Mem. at 5 n.12; (2) the September 22, 2003, Offer of Judgment (Document #18) ("Offer"), see id. at 5-6; or (3) the September 25, 2003, retraction of the November 15, 2002, letters, see id. at 3, 5. The court rejects each of these contentions.

Defendants argue that the Bylaws had been superceded by a new set of rules, the Standard Operating Procedures (the "SOPs"), which were adopted by the Coventry Fire District as of June 12, 2002, six months before Plaintiffs filed their Complaint. See Defendants' Mem. at 2, 4. Therefore, in Defendants' view, "Plaintiffs cannot be said to have prevailed in voiding already outdated regulations." Id. at 4; see also id. at 5 ("Because the By-laws which the Plaintiffs sought to invalidate were already superceded, they cannot be said to have prevailed as to that part of their complaint for purposes of 42 U.S.C. § 1988.").

Defendants overlook the fact that Chief Mruk clearly relied on the supposedly "outdated regulations," id. at 4, in his November 15, 2002, letters to Plaintiffs. The letters are replete with references to the "Rules" or "Rules and Regulations." See Complaint, Att. 1 (Letter from Mruk to Carlow dated 11/15/02) at 1-2 (referring twice to the "Rules and Regulations of the Coventry Fire District" and once to the "Rules"); id., Att. 2 (Letter from Mruk to St. Jean dated 11/15/02) at 1-2 (referring twice to the "Rules and Regulations of the Coventry Fire District"). Plaintiffs had good reason to expect Chief Mruk to continue to cite to the Bylaws, especially since he had threatened to fire them for "any further misconduct

...." Id., Att. 1-2 (Letters from Mruk to Carlow and St. Jean dated 11/15/02) at 2. Moreover, as Plaintiffs observe in their reply memorandum, the June 7, 2002, and June 10, 2002, notices regarding the SOPs do not state that the SOPs are to replace the Bylaws. See Reply Memorandum of Plaintiffs ("Plaintiffs' Reply Mem.") at 2; see also Defendants' Mem., Exhibit ("Ex.") A (6/7/02 notice);[5] id., Ex. B (6/10/02 notice/minutes). It was apparently not until September 25, 2003, that such notice was posted. See Defendants' Mem., Ex. F at 2 (9/25/03 notice).

As for Defendants' request for a 50% reduction in any fees awarded for work performed "after the March 9, 2003[,] clarification as to the status of the By-Laws," Defendants Mem. at 5 n.12, the court declines to do so. At the March 9, 2003, meeting, the board "voted to re-affirm that the S.O.P. which took effect on June 12, 2002, were intended to and did supercede rules and regulations previously approved by the Board of Engineers and included in the by-laws of the Anthony Fire Department and the Board of Engineers. Approval of tho[se] rules and regulations was revoked thereby and Repeal Paragraph 1, 2 and 5 of Responsibilities of Members section of S.O.P. 0300-1 is here-by made." Defendants' Mem., Ex. C (Minutes of Board of Engineers' March 9, 2003, meeting). This action neither provided the injunctive relief Plaintiffs were seeking, nor did it retract the letters which Chief Mruk had sent to Plaintiffs (and which threatened them with termination "for any further misconduct," see Complaint, Att. 1-2 (Letters from Mruk to Plaintiffs dated 11/15/02) at 2). Additionally, it is not clear to the court that the paragraphs repealed are the ones challenged by Plaintiffs.

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[5] The court additionally notes that according to the June 7, 2002, notice the SOPs "will be added to from time to time and modified as conditions and any rules and regulations may require." Defendants' Mem., Ex. A (6/7/02 Notice).

As Plaintiffs note, the minutes refer to "'Paragraphs 1, 2, and 5' being revoked. The complaint ... challenged Article 4, Sec. 1; Article 6, Section 9D; Article 6, Sec. 10; and Article 6, Section 13." Plaintiffs' Reply Mem. at 2. Moreover, the Consent Judgment appears to contemplate the continuing application of at least some of the Bylaws: "This same declaratory and injunctive relief also applies to a portion of Article IV, Section 1, from which shall be deleted the terms 'respectfully' and 'avoid all personalities.' Article IV, Section 1, is otherwise not affected by this Consent Judgment." Consent Judgment at 1.

Defendants further contend that Plaintiffs are not entitled to fees after Defendants' September 22, 2003, Offer.[6] See Defendants' Mem. at 5-6; see also id., Ex. E. (Offer filed on 9/22/03). Defendants cite Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985), for the proposition that Plaintiffs are not entitled to payment of fees after the Offer was made because the Consent Judgment is not more favorable than the Offer, see Defendants' Mem. at 6.

In Marek v. Chesny, the Supreme Court stated that "Rule 68 provides that if a timely pretrial offer of settlement is not accepted and 'the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay *the costs incurred after the making of the offer*.'" 473 U.S. at 5, 105 S.Ct. at 3014 (quoting Fed. R. Civ. P. 68). The Court reasoned that "[i]n a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff--although technically the prevailing party--has not received any monetary benefits from the

[6] Defendants note that they issued a renewed offer of judgment and cite to "Exhibit H" of their memorandum. See Defendants' Mem. at 5 n.13. However, there is no "Exhibit H" included in Defendants' Mem. At the May 17, 2004, hearing, Defendants stated that the only difference between the September 22, 2003, Offer and the October 25, 2003, offer of judgment was that the latter clarified that Plaintiffs were to receive $200.00 *each* in damages. See Tape of 5/17/04 hearing.

postoffer services of his attorney." Id. at 11, 105 S.Ct. at 3017.

In the instant matter, the Offer contained the following provisions:

- Damages are awarded to the Plaintiffs in the amount of $200; and

- Article VI of the Constitution and By-Laws of the Anthony Fire Department entitled "Rules and Regulations of the Anthony Fire Department," is declared void; and

- That portion of Article IV of the Constitution and By-Laws of the Anthony Fire Department which states "and avoid all personalities" is declared void; and

- The Letters of November 15, 200[2], from Chief Stanley Mruk to the Plaintiffs are declared null and void and shall not appear in the Plaintiffs' personnel files; and

- Defendants will pay costs incurred to date by the Plaintiffs. Defendants intend by "costs" to include reasonable attorneys' fees incurred to the date of this Offer as agreed upon by the Parties or, if the Parties cannot agree, as determined by the Court following acceptance of this Offer of Judgment.

Defendants' Mem., Ex. E (Offer of 9/22/03) at 1-2. As discussed previously, the Consent Judgment provides that:

1. Declaratory judgment enters for plaintiffs and Article VI of the Constitution and By-Laws of the Anthony Fire Department ("Rules and Regulations") is declared void and of no further effect as violative of plaintiffs' First Amendment rights. Defendants are enjoined from further reliance on or enforcement of Article VI. This same declaratory and injunctive relief also applies to a portion of Article IV, Section 1, from which shall be deleted the terms "respectfully" and "avoid all personalities." Article IV, Section 1, is otherwise not affected by this Consent Judgment.

2. The letters of November 15, 2002, from Chief

> Stanley Mruk to the plaintiffs are hereby rescinded and shall not in any way be included in plaintiffs' personnel files.
>
> 3. Damages are awarded to each plaintiff in the amount of $200.00.
>
> 4. Defendants shall pay such costs, including reasonable attorney's fees, as shall be determined by the Court ....

Consent Judgment at 1-2. Comparing the two documents, the court finds that the Consent Judgment is "more favorable than the offer," Marek v. Chesny, 473 U.S. at 5, 105 S.Ct. at 3014; see also Plaintiff's Reply Mem. at 4. The Consent Judgment encompasses the injunctive relief Plaintiffs sought in the Complaint, see Complaint at 6, which relief was not part of the Offer. Without the injunctive relief, Plaintiffs risked future violations and possible adverse action for "further misconduct," Complaint ¶ 10; id., Att. 1-2 at 2. Moreover, the Consent Judgment also orders that the term "respectfully" be removed from Article IV, see Consent Judgment at 1, which term could be open to interpretation if future problems were to arise between the parties. The court therefore concludes that Plaintiffs are entitled to attorney's fees for costs incurred after the rejection of the Offer. Cf. Marek v. Chesny, 473 U.S. at 5, 105 S.Ct. at 3014.

Defendants make similar arguments regarding Chief Mruk's unilateral retraction of the November 15, 2002, letters on September 25, 2003. See Defendants' Mem. at 3, 5; see also id., Ex. F at 1 (Letters from Mruk to St. Jean and Carlow dated 9/25/03) ("I hereby retract my letter to you dated November 15, 2002 .... Neither this letter nor the November 15th letter has ap[p]eared in your personnel file nor will either appear in the file."). Plaintiffs, on the advice of counsel, refused to accept the retraction due to the ongoing litigation and the fact that

the letters did not bear Chief Mruk's signature in ink. See Defendants' Mem., Ex. G (Letters from St. Jean and Carlow to Mruk dated 9/26/03) at 1-2. The court cannot fault Plaintiffs for hesitating to rely on Chief Mruk's retraction of the letters without any kind of guarantee that the same thing would not happen in the future. Accordingly, the court declines to reduce Plaintiffs' award of attorney's fees incurred for work performed after September 25, 2003.

2. Reasonableness of hourly rate

Defendants also contend that Plaintiffs' request for fees is excessive because the hourly rate claimed is too high. See Defendants' Mem. at 6. Although Defendants "do not question the skill and experience of [P]laintiffs' counsel," id., Defendants submit that "given their unwillingness to resolve this matter, and given the fact that they sought to invalidate already voided rules, Plaintiffs could well have been adequately served by a somewhat less experienced, less skilled, and less expensive attorney," id. (footnote omitted). Defendants suggest an hourly rate of $150.00. See id.

> In determining a reasonable hourly rate, the Supreme Court has recommended that courts use "the prevailing market rates in the relevant community" as the starting point. Blum v. Stenson, 465 U.S. 886, 895 n. 11, 104 S.Ct. 1541 & 1547 n. 11, 79 L.Ed.2d 891 (1984) (defining "prevailing market rates" as "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation"). While an attorney may inform the court's analysis by providing evidence of her customary billing rate and of prevailing rates in the community, the court is not obligated to adopt that rate. Moreover, the court is entitled to rely upon its own knowledge of attorney's fees in its surrounding area in arriving at a reasonable hourly rate ....

Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1190 (1st Cir. 1996). In O'Rourke v. City of Providence, 77 F.Supp.2d 258

(D.R.I. 1999), aff'd in part and rev'd in part on other grounds, 235 F.3d 713 (1st Cir. 2001), Senior District Judge Ronald R. Lagueux expressed agreement with Magistrate Judge Robert W. Lovegreen's finding that "an appropriate range for civil rights litigation in this area is $125 - $200 per hour," 77 F.Supp.2d at 269, with $200 per hour being reasonable for "a well-established, highly-regarded trial attorney in the Rhode Island legal community ... [with] substantial trial experience both in the federal and state courts for over twenty years," id.; see also Johnson v. Rhode Island, No. C.A. 98-266T, 2000 WL 303305, at *5 (D.R.I. Mar. 22, 2000) (Report and Recommendation of Lovegreen, M.J.)("Based upon this court's experience and knowledge of prevailing rates in this community as to counsel with similar experience [16 years and many litigated cases, including civil rights matters], the hourly rate of $150.00 is below that range."). This Magistrate Judge has previously found that an appropriate range for civil rights litigation in the Providence, Rhode Island, area is between $135 and $210 per hour. See Cohen v. Brown University, R.I. CA No. 92-197, N.H. CA No. 99-485-B (D.R.I. Aug. 10. 2001)(Report and Recommendation of Martin, M.J.) at 93-94.

Here, Mr. Dineen affirms that he has been admitted to practice before this court since 1980 and has also been admitted before the supreme courts of Rhode Island and Pennsylvania, the Courts of Appeals for the First and Third Circuits, and the United States Supreme Court. See Dineen Aff. at 1. He further states that the $200.00 hourly rate sought is his usual hourly rate for federal court litigation. See id.[7]

Based on the foregoing, as well as this Magistrate Judge's

[7] Mr. Dineen has not submitted affidavits from other area attorneys, although he offered to do so if necessary. See Dineen Aff. at 2. The court finds that it is not necessary.

knowledge of hourly rates in this area, the court concludes that reimbursement at the rate of $200 per hour is reasonable for an attorney of Mr. Dineen's skill and experience. Moreover, the court rejects Defendants' suggestion that Plaintiffs could have been "adequately served by a somewhat less experienced, less skilled, and less expensive attorney," Defendants' Mem. at 6. The court is not inclined to minimize the positive effect of that skill and experience. Not only did the Consent Judgment include the majority of the relief Plaintiffs were seeking in the lawsuit, see Complaint at 6-7, Mr. Dineen was able to persuade Judge Lisi to deny Defendants' motion to dismiss.

The court concludes that Plaintiffs should be awarded attorney's fees for the 54.3 hours claimed at an hourly rate of $200.00, for a total of $10,860.00. I so recommend.

B. Reimbursement for Costs

Rule 54(d) directs that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs ...." Fed. R. Civ. P. 54(d). The term "costs" as used in Rule 54(d) is defined in 28 U.S.C. § 1920.[8]

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[8] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441, 107 S.Ct. 2494, 2497, 96 L.Ed.2d 385 (1987); In re Two Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 994 F.2d 956, 962 (1st Cir. 1993); Johnson v. Rhode Island, No. C.A. 98-266T, 2000 WL 303305, at *13 (D.R.I. Mar. 22, 2000); Bonilla v. Trebol Motors Corp., CIVIL NO. 92-1795 (JP), 1997 U.S. Dist. LEXIS 4341, at *10 (D.P.R. Mar. 27, 1997), rev'd in part and vacated in part on other grounds sub nom. Bonilla v. Volvo Car Corp., 150 F.3d 88 (1st Cir. 1998).

In the instant matter, the only costs for which Plaintiffs seek reimbursement is the filing fee of $150.00. See Motion at 1; Plaintiffs' Mem. at 2; Dineen Aff., Att. (Time Records) at 4. Defendants do not dispute that Plaintiffs should be awarded costs in the amount of $150.00. See Defendants' Mem. at 7.

Summary

The court concludes that Plaintiffs, as the prevailing party, should be awarded attorney's fees in the amount of $10,860.00 and costs in the amount of $150.00, for a total of $11,010.00. I so recommend.

Conclusion

For the foregoing reasons, I recommend that the Motion be granted and that Plaintiffs be awarded attorney's fees and costs in the amount of $11,010.00. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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DAVID L. MARTIN
UNITED STATES MAGISTRATE JUDGE
March 31, 2005