

**ORDER AWARDING ATTORNEY FEES AND COSTS**

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**DAVID TEIGEN,**  
Complainant,

vs.

**DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL  
FACILITY,**  
Respondent.

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THIS MATTER is before the Administrative Law Judge (ALJ) on Complainant's Application for Attorney Fee Award, Respondent's Response to Complainant's Attorney Fee Application, and Complainant's Reply. The hearing on attorney fees was held on February 22, 2006. The record remained open until February 24, 2006 for submission of supplemental exhibits. Complainant appeared through counsel, William Finger, of Frank & Finger, P.C. Respondent appeared through Christopher Puckett, Assistant Attorney General. Both parties presented expert witnesses. Upon review of the evidence, pleadings, and the applicable law, the ALJ hereby enters the following order.

**BACKGROUND**

This case involves Complainant's appeal of the following: the abolition of his Case Manager III position at the Department of Corrections (DOC); his denial of retention rights to a Case Manager III position held by an employee with less state service; his involuntary transfer, via reorganization, to a different position; and DOC's policy of denying re-employment rights to laid off employees with pending Board appeals unless they agree to drop their appeals. Complainant also requested an award of attorney fees and costs under the State Personnel System Act, at section 24-50-125.5, C.R.S.

Complainant filed his appeal on May 14, 2003. The case first proceeded through the Preliminary Review stage for a determination of whether Complainant was entitled to a discretionary Board hearing. The parties filed Information Sheets with proffered exhibits for review by an ALJ. On April 29, 2004, the ALJ issued a Preliminary Recommendation granting a hearing. On June 1, 2004, the State Personnel Board (Board) affirmed the Preliminary Recommendation.

After a lengthy pre-trial process, hearing was held on December 14, 15, and 16, 2004. The ALJ issued the Initial Decision on January 31, 2005. Complainant prevailed

on all of his claims. The ALJ concluded that Respondent's abolishment of Complainant's position was in violation of the state layoff statute and Board rules governing layoffs; that Respondent's denial of retention rights to a junior Case Manager III position violated the layoff statute and rules; that Respondent modified Complainant's position via an illegal reorganization; that an August 15, 2003 memo from DOC management to the wardens led to illegal retaliation against Complainant for exercising his right to file an appeal with the State Personnel Board; that Respondent's action was arbitrary and capricious; and that the State Personnel System Act mandated an award of attorney fees and costs to Complainant.

Respondent filed a motion to recuse the ALJ and to vacate the Initial Decision. Complainant filed a response. The motion was denied. Respondent appealed the Initial Decision to the Board. The Board affirmed the decision in its entirety. Respondent filed a motion to reconsider its final order; Complainant responded. The Board denied the motion. Respondent did not appeal the final Board order to the Colorado Court of Appeals.

Complainant submitted an Attorney Fee Application, requesting attorney fees in the amount of \$54,205.40 and costs in the amount of \$3,219.72. Mr. Finger billed 152 hours on the case at an hourly rate of \$295.00 per hour; Mr. Gerganoff, an associate, billed 41.80 hours on the case at an hourly rate of \$200.00; and two paralegals billed a total of 10.19 hours at either \$60.00 or \$100.00 per hour. The Application contains a detailed itemization of each separate billing entry. It notes that this case required substantial effort and involved complex legal issues. It asserts that fees were driven up by Respondent's conduct in filing groundless motions, in refusing to enter into factual stipulations prior to hearing, and in its pattern of violating discovery rules and orders.

Respondent filed a Response to the Application, challenging the reasonableness of the number of hours billed to the case and of the hourly rates charged by Frank & Finger, P.C. Respondent argues, in part through the affidavit of its expert, that a range of \$150.00 to \$175.00 per hour was appropriate for Mr. Finger as lead counsel in a matter before the State Personnel Board, and that the hourly rates of Mr. Gerganoff and the paralegals were unreasonable and should also be reduced. Respondent avers that the number of hours billed was excessive for several reasons: first, the dollar amount of damages at issue was nil and Complainant experienced no financial loss in the transfer of his position category; second, administrative proceedings involve simplified procedures and issues as compared with district court litigation; third, proceedings before the Board consist primarily of "template litigation" involving the repetitive use of form pleadings; and fourth, because Frank & Finger represented thirty other DOC employees subject to layoff in 2003, it benefited from cumulative billing.

In its Response, Respondent requested written discovery and to depose Mr. Finger.

Complainant filed a Reply after retaining an expert to rebut the assertions of Respondent's expert, attaching ten exhibits. Complainant's expert certified that based

on her review of the case file, the pleadings were case-specific and were not templated. She stated that because Respondent raised unusual, collateral issues and filed meritless or dilatory pleadings, the number of hours expended was necessitated by Respondent's conduct and by the complexity of the litigation. With respect to hourly rates, Complainant attached several affidavits and a Colorado Federal District Court opinion establishing the hourly rate for a senior attorney of Mr. Finger's experience at a range of \$275.00 to \$325.00 per hour.

Due to the extraordinary circumstance of Frank & Finger having represented over two dozen DOC employees whose positions were abolished in 2003, the ALJ granted Respondent's request to depose Mr. Finger, solely on the issue of his multiple representation. The Office of the Attorney General was in possession of all of the pleadings from all of those cases; therefore, the deposition of Mr. Finger on the multiple representation issue enabled Respondent to fully explore the extent to which Frank & Finger P.C. may have engaged in duplicative billing.

### **STANDARD OF REVIEW**

Attorney fees awarded under the State Personnel Systems Act, at section 24-50.125.5, C.R.S., must be reasonable. *State Personnel Board v. Dept of Corrections*, 988 P.2d 1147, 1151-52 (Colo. 1999). Where, as here, a statute providing for a fee award does not define the term, "reasonableness," the amount of the award must be determined in light of all the circumstances, based upon the time and effort reasonably expended by the prevailing party's attorney. *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143, 147 (Colo.App. 1996).

Complainant bears the burden of proving the reasonableness of the hours spent on this case and of the hourly rate sought. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). To determine the reasonableness of a fee request, a court must begin by calculating the lodestar amount of a fee. *Id.*; *Hibbard v. County of Adams*, 900 P.2d 1254, 1266 (Colo. App. 1994)[reversed in part on other grounds in *County of Adams v. Hibbard*, 918 P.2d 2312 (Colo. 1995)]. The lodestar amount consists of "the number of hours that reasonably should have been expended by counsel and the reasonable hourly rates for the services rendered that would be charged by private lawyers in the community." *Hibbard*, 900 P.2d at 1266.

Once the lodestar rate has been determined, that "basic rate may be adjusted, either upwards or downwards, by considering the nature of the services rendered, the degree of success achieved, and other pertinent factors." *Hibbard*, 900 P.2d at 1266. "Many of these factors will be reflected in the lodestar amount, and no adjustments should be made if the lodestar amount already reflects these considerations." *Spensieri v. Farmers Alliance Mutual Insurance Company*, 804 P.2d 268, 271 (Colo. App. 1990). "The 'lodestar' amount is presumptively the reasonable fee to be awarded." *Hibbard*, 900 P.2d at 1266. See also, *Robinson v. City of Edmond*, 160 F.3d 1276 (10<sup>th</sup> Cir. 1998).

## LODESTAR RATE

### Reasonable Hourly Rate.

Rule 1.5, C.R.P.C., mandates the following: "(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent."

Mr. Finger has practiced employment and labor law for thirty-five years. He is an expert in Colorado State Personnel Board practice, procedure, and substantive law. He has unique knowledge of DOC operations, especially relating to the layoff process implemented in 2003. He practices in state and federal district court as well as in administrative forums. Complainant's counsel turns down multiple potential clients on a regular basis in order to maintain his practice before the Board. He charged all DOC layoff rate by \$10.00 an hour in order to reflect his multiple representation of DOC layoff clients.

Mr. Gerganoff has practiced law for twenty-two years and is very experienced in district court and administrative practice, particularly before the Board. While he co-counseled this case with Mr. Finger, he has been lead attorney in other Board matters. Elaine Gosnell has been a legal secretary since 1970, received a paralegal certificate in 1983 from Los Angeles Community College, and received a paralegal degree in 1992 from the Denver Paralegal Institute.

The affidavits submitted by Complainant establish that the customary hourly rate for attorneys with 30 or more years of experience in the Denver metro area in 2003 was in the range of \$275.00 to \$325.00 per hour. Additionally, the affidavits show that the customary hourly rate for attorneys with the same experience as Mr. Gerganoff was actually above the \$200.00 requested, and that paralegal rate of \$100.00 is appropriate to Ms. Gosnell's years of experience.

Complainant submitted the 2003 affidavit of Ms. Diane King, who conducted a market survey of lawyers who practice in the employment field and who handle complex litigation cases. According to the affidavit, attorneys with 17 years of practice charged

at a rate of \$250.00 to \$300.00 per hour; attorneys with 19 – 22 years of experience charged \$230 to \$340.00 per hour; and attorneys with 26 to 35 years of experience charged \$280.00 to \$330.00 per hour, reflecting a flattening effect of long-term practice. The average rate for attorneys with 30 years of experience was \$320.00.

Federal District Court Judge Marcia Krieger recently found that an hourly rate of \$300.00 per hour “reflects prevailing rates in the Denver civil rights legal community.” Opinion and Order Granting Motion for Award of Attorney’s Fees, *Milham v. Perez*, (D.Colo.), 2005WL 1925770, August 11, 2005, Slip Opinion at page 6. The May 2005 affidavit of a 13-year attorney in the Office of the Colorado Attorney General, filed in Arapahoe County District Court, Case Number 2004 CV 58, attests that his reasonable hourly rate is \$225.00. This requested rate is higher than that requested by Mr. Gerganoff, who possesses six years more experience.

Respondent’s expert submitted an affidavit suggesting that an hourly rate of \$150.00 to \$175.00 is the appropriate rate for Mr. Finger. He based this figure on the hourly rate he bills the Office of the Attorney General, under contract. Respondent’s expert has practiced law since 1969. His law firm has handled public entity defense litigation on behalf of the Colorado Office of the Attorney General since 1972, including civil rights litigation. Governmental entities can often negotiate reduced hourly rates for legal representation in exchange for the steady stream of business and predictability of payment. Therefore, the rate paid by a public entity to Respondent’s expert is not an accurate reflection of market rates in the community for private employment of an attorney of his stature.

Respondent’s chief argument concerning the hourly rate charged by Frank & Finger is that state personnel board litigation is far less complicated than state and federal district court litigation. Therefore, a lower hourly fee should be charged for personnel board matters. Respondent’s expert testified in depth regarding the major differences between the two forums: district court jury practice is far more complex, demanding, and time consuming; there is no need to educate administrative law judges who have specialized knowledge concerning the law; there are fewer dispositive motions in administrative practice; the nature of the claims are simpler and there are no damages determinations in administrative cases; experts are used less often in administrative practice; and, trial practice is far smoother in administrative proceedings than in district court. In addition, issues relating to standing and governmental immunity do not apply in administrative forums.

Complainant’s expert counters that having spent her entire thirty-year career practicing in both administrative and district court forums, the “only cognizable distinctions between State administrative litigation of the instant kind and district court litigation are that 1) the time from inception to trial is usually shorter in the administrative case, 2) the [judges] are more accessible and responsive in administrative cases, and 3) there are no juries in administrative cases. . . [A]dministrative practice requires the same full command of the rules of civil procedure, rules of administrative civil procedure, rules of evidence, and substantive, controlling law. Additionally, it requires

the full command of organic (statutory) rules of procedure and a thorough understanding of each . . . agency involved in the litigation. Additionally, it requires the full command of appellate practice as internal to the administrative process. Discovery is conducted nearly identically in both settings, although there is, historically, less abuse, maneuvering, and delays in administrative cases." This expert has authored the Colorado Bar Association's review of Administrative Law in the *Annual Survey of Colorado Law* since 1985.

In addition, Mr. Finger counters in his supplemental affidavit attached to the Reply that "proceedings at the administrative agencies are frequently more difficult than federal or state court proceedings because there is frequently a presumption of regularity that exists for administrative proceedings where personnel decisions have been made . . . It is therefore necessary to establish the strongest possible record that can be created for argument to the Board."

Litigation of Board matters is not as complex or protracted as trying a case to a jury in district court. Board cases are akin to trials to the court. Discovery is the same as in district court, and the procedural rules governing hearings, including admission of hearsay evidence, is nearly identical to district court practice. The question is whether the differences in forums warrant the imposition of a lower hourly rate for attorneys who, like Mr. Finger, turn down district court litigation in favor of accepting State Personnel Board matters. They do not.

Respondent's expert argued that Frank & Finger's hourly rates should be greatly reduced because practice before the State Personnel Board is a streamlined process based predominantly on templated pleadings. The expert testified at hearing that he did not review any of the pleadings in this case. The case file contains one hundred and forty pleadings and Board orders. While some standard procedural motions prepared by Frank & Finger's paralegals were simple in nature, a review of the entire file reveals that none of the pleadings in this case was templated.

Respondent's expert also opined that because the State Personnel Board attempts to assist individuals representing themselves by offering written handouts for *pro se* litigants, any individual can successfully litigate a Board case without counsel. He also stated that it is common practice to assign the newer attorneys in the Office of the Attorney General to handle State Personnel Board matters.

The Office of the Attorney General assigned two lawyers to handle the trial of this matter. The senior attorney had well over twenty years of legal experience; the junior attorney was a former criminal defense attorney, seasoned in trial practice. Moreover, the vast majority of employees are represented by counsel before the Board.

Respondent's expert testified that two employment law attorneys he spoke with indicated they charge a lower fee for administrative cases. According to the expert, however, neither of these attorneys appears before the Board.

Mr. Finger conducted a survey of several employment law attorneys in the Denver area who practice in district court and before the Board. None of the attorneys have separate rates for State Personnel Board proceedings. Complainant's expert has an active district court and administrative practice and charges the same hourly rate for all forums. Mr. Finger has historically and continues to have an active complex civil litigation practice in the district courts, but chooses to dedicate a significant part of his practice to Personnel Board matters. He turns down work in district court in order to maintain his Personnel Board practice.

To impose a lower hourly rate for administrative practice on Complainant's counsel herein would defeat the purpose of the attorney fee provision of the State Personnel System Act. The purpose behind attorney fee provisions such as that in the State Personnel Systems Act is not to give private lawyers an unwarranted windfall, but rather to ensure compensation "adequate to attract competent counsel." *Robinson v. City of Edmond*, 160 F.3d 1275, 1281 (10<sup>th</sup> Cir. 1998) (citing Congressional history of the Civil Rights Attorney's Fees Awards Act, citations omitted). As the Tenth Circuit noted, "It goes without saying that if a court's compensation is not adequate to match what the market will bear for a lawyer's services, then competent lawyers will go elsewhere to offer their services. Such a result would do irreparable damage to our system of private enforcement of federal civil rights." *Id.* Here, to force a senior attorney, seasoned in Board practice, to go elsewhere, could impede state employees' access to competent counsel of choice.

Respondent contends that to award Complainant the hourly rate charged in this case would shut out state employees from representation before the Board, ultimately defeating the Board's very mission. Respondent argues that no classified state employee could possibly afford Frank & Finger's hourly rates,<sup>1</sup> suggesting that the rates charged herein may be ethically questionable. The evidence presented by Frank & Finger's other Board clients does not support this assertion. Further, applying the factors in Rule 1.5, C.R.P.C., this case was novel and presented difficult, complex legal issues requiring Board expertise; acceptance of this and other Board cases did preclude Frank & Finger from accepting other employment; the fee charged in the community (the market rate) is the fee charged by Mr. Finger and Mr. Gerganoff; the results obtained were a complete victory on all issues for Complainant; and Mr. Teigen testified at hearing that he retained Frank & Finger because of its excellent reputation for handling DOC cases before the Board with success. The reasonable hourly rate established in this case is limited to the facts presented herein.

The hourly rates charged by Frank & Finger P.C. are within the range of customary charges of attorneys in private practice with similar legal experience, training and education who practice employment law in the district court and administrative law

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<sup>1</sup> Respondent's expert also opined that merely incurring the obligation to pay fees does not support an award of attorney fees. In fact, a plaintiff need not incur any fee obligation in order for reasonable attorney fees to be awarded. Attorneys representing clients on a pro bono basis are entitled to an award of reasonable attorney fees based on the market value in the community of the services rendered. *Hibbard*, 900 P.2d at 1266.

forums. For the reasons set forth above, the hourly rates charged by Frank & Finger are found to be reasonable.

### Reasonable Hours

The determination of whether the number of hours spent on a case was reasonable is "controlled by the overriding consideration of whether the attorney's hours were 'necessary' under the circumstances." *Robinson*, 160 F.3d at 1281. "The prevailing party must make a 'good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.'"

Among the factors to be considered in assessing the reasonableness of hours expended are 1) whether the tasks being billed would normally be billed to a paying client; 2) the number of hours spent on each task, 3) the complexity of the case, 4) the number of reasonable strategies pursued, 5) the responses necessitated by the maneuvering of the other side, and 6) potential duplication of services by multiple lawyers. *Robinson*, 160 F.3d at 1281. The overriding question is what hours would a reasonable attorney have incurred and billed in the marketplace under similar circumstances. *Id.*

Applying these factors to this case, the work billed would normally be billed to a paying client; the number of hours spent on each task was reasonable and necessary (with the exception of a few deductions in hours made by the ALJ in the discussion below); the case was unusually complex; no unnecessary strategies were used; Respondent's conduct was responsible for significant increases in fees incurred by Complainant; and, Frank & Finger billed for no duplication of services.

Respondent asserts that at the amount of hours spent on the case far exceeds its value; therefore, the number should be reduced by one third. Respondent contends that Complainant did not benefit from this litigation because the dollar amount of damages at issue was nil, and Complainant experienced no financial loss in the transfer of his position category. It also points out that Complainant transferred to another Case Manager III position one month prior to trial; hence, he need not have litigated the issue of his reinstatement to that position.

While the amount of damages at issue can be one factor among many in determining the lodestar amount, it alone is not determinative. *Spensieri, supra; Hibbard, supra*. The amount of fees awarded is not to be reduced because the rights involved may be nonpecuniary in nature. *Hensley v. Eckerhart*, 461 U.S. 424, 430, n. 4 (1983).

Complainant asserts that his victory has immense value, not only to him, but to all classified state employees. He points out that he won every issue presented to the Board, including a retroactive reinstatement to the Case Manager III to the date his job was abolished. He argues that this retroactive change in status is relevant to future promotion opportunities. He points out that the Board decisions on reorganization, job

abolishment, and retaliation have enormous precedential value in the state personnel system. For example, one of the central holdings of the case was that to involuntarily transfer an employee out of the class in which he was certified, without offering retention rights to another position in his own class or in a class to which he has been previously certified, is a violation of his rights. State employees apply for positions in specific classifications for career planning purposes; to deprive employees of their chosen class series without retention rights has significant implications for the professional aspirations of classified employees.

Respondent's expert opined that the retaliation claim need not have been litigated in this case; he asserted that the law is the law and state agencies can certainly be expected to follow it. The expert never read the August 15, 2003 memo instituting the policy under which DOC wardens were prohibited from re-hiring laid off employees with pending Board claims, unless the employees agreed to drop their lawsuits.

Complainant responds that Respondent's position at hearing was that the August 15, 2003 memo did not constitute retaliation against employees for filing Board appeals. He points out that Respondent waited until well after the Board issued its third order affirming the Initial Decision to rescind the memo.

The record demonstrates that litigation was necessary to prompt Respondent to withdraw the memo. Further, the case did involve fundamental rights of certified employees to file Board appeals without fear of retaliation, and it clarified the retention rights of employees whose jobs are abolished or transferred.

In its Response to the fee application, Respondent argued that Frank & Finger's fee application included charges that should have been spread among the 30 other DOC layoff complainants, demonstrating a lack of billing judgment under *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Specifically, the Response alleged that Frank & Finger P.C. charged an inordinate amount of research and preparation, document drafting, and deposition time, in this case, because it is substantially similar to many others.

Respondent failed to present any evidence supporting this argument at hearing. The evidence demonstrated that all depositions taken related solely to this case. The three sets of Interrogatories submitted as Respondent's exhibits demonstrated that each was tailored to the specifics of that case; the documents shared standard definition and instruction sections only. Complainant's counsel billed two hours for drafting discovery requests in this case; there is no basis in the record for reducing this amount.

Respondent also contends that Frank & Finger's hours should be reduced because the case was neither complex nor unique. In fact, this case was unusually complex and unique in several respects. It involved extensive discovery into DOC's layoff procedures and decisionmaking criteria, necessitating review of thousands of documents. It raised novel questions regarding what constitutes a reorganization, a

transfer, and illegal retaliation, and the circumstances under which employees' retention rights are triggered. Respondent was responsible for much of the complexity of this case. Its violation of discovery rules and orders forced Complainant's counsel to file the motion to compel, which was granted. The order noted that Respondent's pattern of violations warranted the imposition of sanctions; however, sanctions were not entered. In addition, after Respondent moved for recusal of the ALJ and to vacate the Initial Decision after it was issued, it was necessary for Frank & Finger to become well versed in the law of recusal. An ex parte communication from Respondent's Executive Director, forwarded to the Board President, was also addressed by Complainant's counsel.

Complainant's Application asserts that this case required substantial effort and had many unique features, including the following: defense of a motion to dismiss; defense of a second renewed motion to dismiss; submission of an Information Sheet in the early stages of the litigation in order to secure a discretionary hearing before the Board; the filing of a motion to compel discovery, which was granted; settlement negotiations, during which Respondent offered no concrete settlement offer; Complainant's submission of proposed Stipulated Facts and Respondent's refusal to stipulate; depositions of two DOC managers in Colorado Springs and one employee in Denver; defense of Complainant's deposition; limited stipulations of fact entered on the record at the outset of hearing, necessitating a longer hearing; after issuance of the Initial Decision, defense of a motion to recuse the ALJ and to vacate the decision; response to an ex parte communication regarding the ALJ; preparation of a twenty-page appeal brief; and defense of a petition for reconsideration of the Board's order affirming the Initial Decision. Respondent's argument that this case was neither complex nor unique is rejected.

Respondent's arguments in support of a one-third reduction in hours expended are based exclusively on policy-based assertions and references to case law. Neither the Response nor the expert at hearing cited to any specific entry on Complainant's fee itemization, any pleading, or any action taken by Frank & Finger that appeared unnecessary or unwarranted.

Respondent's expert testified that he did not review the pleadings in this case, that he was unaware there was a Preliminary Review phase of the case addressing hearingworthiness, and that he was unaware that settlement negotiations had occurred on an ongoing basis. The Preliminary Review phase of this case took one year, engaging 14 hours of Mr. Finger's time and two hours of paralegal time. The settlement negotiations took one hour of Mr. Finger's time and over six hours of Mr. Gerganoff's time. Therefore, Respondent's expert was unaware of ten percent of the total hours spent on the case by Frank & Finger.

The Tenth Circuit has warned against trial courts "eyeballing" a fee request and "cutting it down by an arbitrary percentage." *Robinson*, 160 F.3d at 1281. In *Robinson*, the Tenth Circuit held it was reversible error to reduce a fee award without record

support. Therefore, it would be inappropriate, in the absence of record support, to do so here.

Complainant's Fee Itemizations. The following is the ALJ's review of the reasonableness of hours charged in this case, under the legal standards set forth above.

Complainant's expert witness's affidavit and testimony divided the litigation of this matter into several phases. The first phase involved the petition for hearing, transpiring over a period of twelve months. The amount billed was 14.11 hours for Mr. Finger, none for Mr. Gerganoff, and 1.99 of paralegal time. This phase involved review of the case and documents relating to Complainant's position, drafting an appeal of retention rights, drafting an Information Sheet setting forth proffered facts, exhibits, and witnesses' testimony in the event a hearing were granted, and responding to a motion to dismiss. Mr. Finger spent two hours preparing a discovery request prior to the time a hearing was granted; had a hearing not been granted it would have been unnecessary. However, the time was not duplicated and that was the total amount billed for that task by Frank & Finger. Therefore, all of the work performed during this phase was reasonable and necessary.

The second phase consists of pre-trial preparation, discovery, and trial, over a seven-month period. Mr. Finger billed 81.5 hours, Mr. Gerganoff billed 36.45 hours, and paralegals billed 6.2 hours, during this time. Mr. Finger spent several hours at the outset of this phase handling appearances before the ALJ, conferences with his client, reviewing discovery responses, drafting a motion to compel (which was granted), participating in a motions hearing, and reviewing Respondent's pre-trial disclosure. All of this time was reasonable and necessary. He then turned the case over largely to Mr. Gerganoff until a month before trial.

Mr. Finger's time preparing for, taking, and defending depositions in Colorado Springs and in Denver totaled 24.95 hours. He had make two separate trips to Colorado Springs for two depositions because the first Rule 30(b)(6) deponent was unable to answer some questions. All of this time was reasonable and necessary.

Mr. Finger billed approximately 3 hours for preparation of Complainant's Amended Prehearing Statement, 17 hours for trial preparation, and 23.75 hours over the three days of trial. The minimal amount of time spent in trial preparation demonstrates extremely efficient use of time and billing practices. All of the time spent by Mr. Finger during this phase was reasonable and necessary.

Mr. Gerganoff handled the bulk of the work on the case during the period August through November 2004. He spent 8.55 hours preparing Complainant's Prehearing Statement. He spent 1.2 hours drafting a five-page list of proposed Stipulated Facts, sent to Respondent in an effort to streamline the hearing. During the period of early September through early November spent approximately 10 hours handling several procedural matters relating to discovery, continuance of the hearing, appearing before the ALJ by telephone to address procedural and scheduling matters, conferring with the

client and opposing counsel, and reviewing a Board decision on a recent layoff case. In early November, he spent 1.7 hours reviewing and preparing a letter addressing deficiencies in discovery responses. All of this time was reasonable and necessary.

Mr. Gerganoff spent 2.9 hours preparing for Complainant's deposition and 1.5 hours defending it. This time was reasonable and necessary. He spent 3.05 hours researching and drafting the motion to exclude evidence subject to attorney/client privilege. This amount of time was excessive and will be reduced by 2.00 hours.

Notably, on at least four separate occasions, when Msrs. Finger and Gerganoff both participated in conferences with the client or opposing counsel, the time was billed only to Mr. Gerganoff at the lower hourly rate. There are no redundant billings in the fee request.

All paralegal time spent in the pre-trial phase, 6.2 hours, consisted of preparation of subpoenas and exhibit notebooks. Much of this work is often performed by attorneys. It was reasonable and necessary.

The third phase of the representation by Frank & Finger consists of settlement negotiations. Mr. Finger billed 1.1 hour; Mr. Gerganoff billed 6.35. This work was reasonable and necessary.

The fourth phase of representation concerns the period following the issuance of the Initial Decision. Respondent filed a motion to recuse the ALJ and to vacate the decision. Mr. Finger spent 8.55 hours responding to the motion. Mr. Gerganoff spent 2.85 hours. Given the novel nature of the motion, the time spent was reasonable and necessary.

Mr. Finger spent 36.8 hours preparing his appeal brief submitted to the Board. This brief defended the decision and required significant legal research and reference to the trial record. However, the amount of time is excessive and will be reduced by 10 hours.

The total amount of reasonable attorney fees charged through litigation of the merits of this case therefore totals \$50,855.40. (This figure represents the total amount billed \$54,205.40, minus reductions as indicated above, 2 hours for Mr. Gerganoff in the amount of \$400.00, and 10 hours for Mr. Finger in the amount of \$2950.00.)

The fifth phase of representation pertains to the contested attorney fee application. Mr. Finger submitted a short attorney fee application, applying the lodestar analysis to the litigation of this case. In order to keep costs down, he did not retain an expert. Instead, he submitted four attachments, consisting of the itemization of fees, the affidavits of himself and Mr. Gerganoff, and a copy of the letter with proposed stipulations sent to Respondent as evidence of Complainant's effort to streamline the litigation.

Mr. Finger billed four hours for a total of \$1180.00 for the Application. This amount was reasonable and necessary.

Respondent retained an expert and attached the affidavit of the expert to the Response. In addition, Respondent requested discovery on several issues, an unusual tactic in litigating attorney fees. These actions by Respondent resulted a significant escalation of attorney fees incurred by Complainant in litigating the lodestar. For example, Complainant was forced to retain an expert in turn, resulting in costs of \$6311.15 for all costs through preparation for and appearance at hearing. That cost has not been challenged by Respondent. In addition, because Respondent sought discovery of information pertaining to Frank & Finger's representation of other clients, Mr. Finger spent several hours of time contacting present and former clients, generating documents responsive to Respondent's discovery request, and drafting the response to Respondent's discovery request.

Respondent's assertion that Frank & Finger had utilized poor billing judgment by failing to spread out fees among its DOC clients is a unique feature of this case. This allegation, unproven at hearing, forced Mr. Finger to review the case files of his other DOC clients; to prepare for a deposition to defend his law firm on the issue of the multiple representation; and to prepare and file a Reply addressing the issue. In addition, he directed his paralegal to pull data and create a "comparison" chart of DOC clients, to compare their litigation histories to that of Mr. Teigen. Mr. Finger used this document in deposition. This was an enormously time consuming task, resulting in additional paralegal fees of 15.4 hours at \$100.00 per hour. This is excessive and her total amount spent in the lodestar phase, 22.35, and will be reduced by 8 hours, to 14.35 hours.

Mr. Finger spent extensive time responding to the Response, interviewing other senior level employment law attorneys in the Denver area, collecting affidavits and other documents for use as attachments to the Reply, and preparing the Reply.

The total number of hours expended by Mr. Finger in litigation of the attorney fee issue, following receipt of the Response and request for discovery, including preparation for and appearance at hearing (one full day), is 63.05 hours. This amount is excessive and will be reduced by 10 hours. It is, however, noted that the bulk of this time was necessitated by Respondent's discovery request, its extraordinary request to depose Mr. Finger, and its allegations regarding multiple representation.

Mr. Gerganoff was present for the entire day of hearing on the attorney fee issue and presented a bill for \$200.00 an hour for all of that time. However, his presence was necessary only during the time Mr. Finger testified. The parties should have arranged for Mr. Gerganoff's presence and Mr. Finger's testimony during a specific time frame. The amount requested is excessive and Mr. Gerganoff's time will be approved for four hours.

The total amount of reasonable fees charged by Frank & Finger for litigation of the lodestar attorney fee award is \$19,045.00. This amount reflects Mr. Finger's 4 hours for the fee Application and 53 hours for the remainder of the lodestar litigation, at \$295.00 per hour, totaling \$16,815.00, Mr. Gerganoff's 4 hours at \$200.00 per hour, totaling \$800.00, and Ms. Gosnell's 14.35 hours at \$100.00 per hour, totaling \$1430.00.

Calculation of Lodestar. The ALJ has found the hourly rates charged by Frank & Finger, P.C. to be reasonable. Mr. Finger's rate of \$295.00 is to be multiplied by 142 hours for litigation of the case on the merits through appeal to the Board, and by 57 hours for litigation of the lodestar amount, for a total of \$58,705.00. Mr. Gerganoff's rate of \$200.00 is to be multiplied by 39.80 hours for litigation of the merits and by 4 hours for the attorney fee hearing, for a total of \$8760.00. Paralegal work at the rate of \$100 per hour is to be multiplied by 9.85 hours for the merits litigation and by 14.35 hours for the lodestar phase, for a total of \$2420.00. Lastly, paralegal work at the rate of \$60.00 per hour is to be multiplied by .34 hours, for a total of \$20.40.

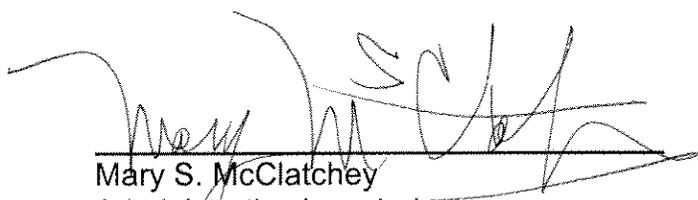
The total lodestar amount of reasonable attorney fees awarded to Complainant is \$69,900.40. All appropriate factors have been integrated into this lodestar calculation; therefore, no adjustment will be made.

Costs. Costs have not been challenged by Respondent. They amount to \$3219.72 in general costs incurred in the merits litigation, \$6311.15 for Complainant's expert witness on attorney fees, and \$310.05 for Mr. Finger's deposition. Costs are awarded to Complainant in the amount of \$9840.72.

### ORDER

Respondent shall pay Complainant's reasonable attorney fees and costs in the amount of \$79,741.12.

DATED this 7<sup>th</sup> day  
of **April, 2006** at  
Denver, Colorado.

  
Mary S. McClatchey  
Administrative Law Judge  
633 17<sup>th</sup> Street, Suite 1320  
Denver, CO 80202

**CERTIFICATE OF MAILING**

This is to certify that on the 9<sup>th</sup> day of April 2006, I placed true copies of the foregoing **ORDER AWARDING ATTORNEY FEES AND COSTS AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

William Finger  
Frank & Finger, P.C.  
Post Office Box 1477  
29025 D Upper Bear Creek Road  
Evergreen, Colorado 80437-1477

And interagency mail to:

Christopher Puckett  
Assistant Attorney General  
Employment Section  
1525 Sherman Street 5<sup>th</sup> Floor  
Denver, Colorado 80203

  
Andrea C. Woods

## NOTICE OF APPEAL RIGHTS

### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68B, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

### RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69B, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72B, 4 CCR 801. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73B, 4 CCR 801.

### ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule R-8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule R-8-65B, 4 CCR 801.