

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

AMERICAN CIVIL LIBERTIES)
UNION OF ALASKA, BONNIE L.)
JACK and JOHN D. KAUFFMAN,)

Plaintiff,)

v.)

MICHAEL DUNLEAVY, in his)
official capacity as Governor of)
Alaska, and the STATE OF ALASKA,)

Defendant.)

Case No. 3AN-19-08349CI

**ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR ATTORNEYS'
FEES**

This matter is before the Court on Plaintiffs' motion for prevailing party attorney fees. The parties agree that Plaintiffs prevailed on their claims that Governor Dunleavy's line-item vetoes at issue violated the separation of powers doctrine embodied within the Alaska State Constitution. The parties also agree that in doing so, Plaintiffs prevailed on those constitutional claims, *i.e.*, claims "concerning the establishment, protection, or enforcement of a right under the . . . Constitution of the State of Alaska." See AS 09.60.010(c). The parties further agree that Plaintiffs "did not have sufficient economic incentive" to serve as a basis for bringing the claims, and thus that Plaintiffs are entitled to recover "full reasonable attorney fees and costs" for those constitutional claims that they prevailed on. See AS 09.60.010(c) and (d). Finally, the parties agree that

Plaintiffs are not entitled to recover fees associated with their claims that the Governor's vetoes at issue unconstitutionally reallocated appropriations.

Regarding Plaintiffs' entitlement to recover full reasonable fees and costs associated with their separation of powers claims, the parties also agree on the criteria that the Court should consider, and the basic process involved, in calculating the award. When determining reasonable attorney fees, the Court begins its analysis with the number of hours an attorney or attorneys reasonably spent on the prevailing claims, and then multiplies that number by a reasonable hourly rate. See e.g., *Valdez Fisheries Dev. Ass'n, Inc. v. Froines*, 217 P.3d 830, 833 (Alaska 2009) (*Froines III*). Unless there are extraordinary circumstances, the reasonable hourly rate is based on fees "customarily charged in the locality for similar legal services." *Nautilus Marine Enterprises, Inc. v. Exxon Mobil Corp.*, 332 P.3d 554, 559-60 (Alaska 2014). The parties further agree that other factors the Court may consider in determining the reasonableness of an attorney fee rate include: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the preclusion of other employment by the attorney due to acceptance of the case; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the undesirability of the case; the nature and length of the professional relationship with the client; and awards in similar

cases. See, e.g., *Krone v. State, Dept. of Health & Social Serv.*, 222 P.3d 250, 257-58 (Alaska 2009).

With all of those points of agreement in mind, the parties' primary disagreements are two-fold. The parties disagree about what attorney fee rate the Court should consider reasonable in light of the above factors, and the parties disagree about how many attorney hours were directed at the Plaintiffs' successful separation of powers claims as opposed to their unsuccessful reallocation claims. Plaintiffs request that the Court find a reasonable attorney fee rate of \$600 per hour, and attribute – based upon their attorney affidavits and the Court's and parties' respective treatment of the claims – 95 percent of attorney time billed to the separation of powers claims, to arrive at 184.9 hours of attorney time, amounting to \$110,950.50 in attorney fees. Defendants meanwhile urge the Court to find a reasonable attorney fee rate of \$285 per hour, matching discounted rates cited by private counsel in separate lawsuits, and without offering any alternative for breaking down attorney time between Plaintiffs' successful and unsuccessful claims, request that the Court award Plaintiffs no more than \$52,696.50 in attorney fees. Defendants do not appear to contest the requested award of costs amounting to \$3,606.32.

Regarding a reasonable attorney fee rate, the Court notes that the separation of powers issues litigated by the parties were novel and quite difficult. As stated by the Court in its order on summary judgment, while a multitude of

legal authority and precedent certainly guided and supported the Court's ultimate determination, there was no single authority or precedent that addressed separation of powers squarely in the context presented by this case. Any suggestion by Defendants that the separation of powers issues in this matter were not complex belies the positions taken and arguments made in their briefing throughout the matter. In spite of the matter's complexity, the Court agrees that the actual attorney hours expended in case were fewer than one might expect. The Court attributes this to the collective experience and efficiency of the involved counsel, and specifically does not find that such efficiency somehow suggests that this was a simple case. The Court agrees with Plaintiffs and with the attorneys providing affidavits in support of their motion that the case, and particularly the separation of powers claims, were litigated with great skill. This was consistent with the experience, reputation, and ability of those attorneys.¹ The Court is further mindful of the "risk premium" associated with Plaintiffs' counsel taking on this case while understanding that they would receive no money for doing so unless able to prevail and recover attorney fees. See *Adkins v. Collens*, 444 P.3d 187, 200 (Alaska 2019). Finally, the Court understands that Plaintiffs' counsels' acceptance and handling of the case may have required foregoing some amount of other cases and/or clients, but given the hours billed, does not find that Plaintiffs' counsel were precluded from significant other employment.

¹ While the Court focuses particularly upon Plaintiffs' counsel, in light of their Motion for Attorneys' Fees, the Court also notes that both Plaintiffs' and Defendants' counsel were highly skilled and presented very high-quality work in their briefing and argument.

The Court is also mindful of the parties' positions, and the evidence offered, regarding awards in similar cases, as well as what would constitute "the fee customarily charged in [this] locality for similar legal services." *Nautilus Marine Enterprises*, 332 P.3d at 559. Plaintiffs submit three affidavits suggesting that the fees requested by Plaintiffs are reasonable for the representation and case at issue. Plaintiffs also point to the State's hiring of Washington D.C. counsel at \$600 per hour in a separate state constitutional case that the State views as headed toward the United States Supreme Court. Defendants conversely cite attorney fee awards and motions for the same in separate, recent litigation regarding significant State issues in Superior Court, and ultimately urge the Court to calculate Plaintiffs' attorney fees in this case at the discounted rate of private counsel in separate litigation – that being \$285 per hour.

The Court does not find that either of the parties' proposed rates represents "the fee customarily charged in [this] locality for similar legal services." *See id.* Defendants' suggestion that the discounted rate for private counsel represents the fee customarily charged is not persuasive. Plaintiffs' citation of rates for counsel that the State hires for litigation that it believes will ultimately be before the United States Supreme Court is similarly difficult. Moreover, although the affidavits submitted by Plaintiffs state support for the rate Plaintiffs seek, they also estimate the standard fee for experienced litigation attorneys in Anchorage with more than ten years of experience as being between \$375 and \$600 per

hour, with \$600 per hour being the top of the range. See Affidavits of Walter Featherly, Lloyd Miller, and Heather Kendall Miller. Two of the three affidavits also state that “a total of 180 to 200 hours is well below, and fees of \$110,000 to \$125,000 would be well within, a normal range for a case like this.” See Affidavits of Lloyd Miller and Heather Kendall Miller. This suggests to the Court that the attorney fee rate used to arrive at the ultimate attorney fee award requested by Plaintiffs, keeping in mind the very low number of hours billed, is a higher than customary rate.


In their reply brief, Plaintiffs propose that if the Court is not satisfied that \$600 per hour is the fee customarily charged in this locality for similar services, the Court should look to rates in the \$450 per hour range recently awarded in separate specialized and significant State litigation. The Court notes that these rates are within the range of non-discounted rates cited by counsel involved in those lawsuits cited by Defendants on the issue of attorney fees. The Court appreciates that the non-discounted rates quoted were not requested in those separate lawsuits, but also notes that such private counsel often enjoy a greater ability to discount their rates than do counsel working on a contingency basis. Considering the evidence offered by both parties, in light of all of the factors the Court is to consider, the Court determines that a reasonable attorney fee rate in this matter is \$450 per hour.

Regarding the number of attorney hours the Court should look to, the Court agrees that it should reduce the total hours worked by Plaintiffs' attorneys on the case by five percent in order to remove the hours spent on Plaintiffs' unsuccessful reallocation claim. The Court understands and agrees with Defendants' argument that it may not prorate an attorney fee award based on, for instance, the number of successful versus unsuccessful claims litigated. See *e.g., Manning v. State, Department of Fish & Game*, 355 P.3d 530 (Alaska 2015). And that is not what Plaintiffs propose or what the Court orders. Here, while the strongest evidence of the breakdown in time spent on various claims would be a contemporaneous breakdown of billable hours, designating particular claims worked on, and the Court encourages that type of specificity in billing where possible, the Court also recognizes that there are situations in which it would be very difficult, if not impossible, to do so designate work as regarding specific claims. Here, while Plaintiffs' counsel's statements of billable hours could have been more specific, at least in places, regarding the claims being worked on, the statements were still quite thorough and specific, and Plaintiffs' counsel have offered an affidavit attesting that five percent of the attorneys' time working on the matter was dedicated to their unsuccessful reallocation claims. This is, frankly, highly consistent with the Court's observations of the parties' time and effort spent addressing claims in motion work and oral argument. The Court's observation over the case has been that both parties very minimally, or barely, addressed these claims, with the great bulk of their time and effort being devoted to the separation of powers claims. In light of all of the above, including the

Court's own experience with the case and observations of the parties, the Court accepts Plaintiffs' counsel's sworn statement that 95 percent of the hours billed by Plaintiffs' attorneys were devoted to Plaintiffs' successful separation of powers claims. This yields a total of 184.9 hours.

The Court will issue a corresponding judgment, noting that the parties' have agreed that Plaintiffs shall receive full attorney fees and costs related to their successful separation of powers claims, and having resolved the disputed issues of the reasonable fee rate and total number of hours worked, at \$450 per hour and 184.9 hours, with costs being non-opposed at \$3,606.32.

DATED at Anchorage, Alaska this 23rd day of August, 2021.



JENNIFER HENDERSON
SUPERIOR COURT JUDGE

I certify that on 08.23.2021
a copy of the above was emailed to each of
the following at their addresses of record:
Decker, Koteff, Leah, Harrison

Jessica Isaako
Judicial Assistant

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

American Civil Liberties Union of
Alaska, Bonnie L. Jack, and
John D. Kauffman;

Case No. 3AN-19-08349CI

Plaintiffs,

v.

Michael J. Dunleavy, in his official
capacity as Governor of Alaska;
and the State of Alaska,

(14)
[Proposed] Order Granting
Plaintiffs' Motion for
Attorney Fees and Costs

Defendants.

ACLU OF ALASKA FOUNDATION
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JAN 29 2021

The Plaintiffs moved for attorney fees of \$110,950.50, reflecting
Stephen Koteff's and Joshua Decker's 184.9 combined hours at \$600
per hour, and costs of \$3,606.32. Their motion is granted.

in part and denied in part, as reflected in separate order. JTB

It is ~~therefore~~ ordered that because the Plaintiffs are
JTB
constitutional public interest litigants who did not have sufficient
economic incentive to bring this suit, per Alaska Stat. 09.60.010(c)(1),
they are awarded their full reasonable attorney fees and costs of:

Attorney fees (184.9 hours at \$450/hour) *\$83,205.00*
\$110,950.50 *JTB*

Date awarded: 8/23/21

Judge: Henderson

S

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Costs

\$3,606.32

Date awarded: 8/23/21

Judge
Clerk: Henderson

Total judgment

~~\$86,811.32~~
\$114,556.82

Post-judgment interest rate

3.25%

Dated at Anchorage, Alaska on August 23, 2021.



Jennifer Henderson
SUPERIOR COURT JUDGE (Pro tem)

Identical copies of the above were made on 8/23/21 a copy of the above was made to each of the following at their addresses of record.
Kotek, Leah, Harrison

[Signature]
Administrative Assistant

Stephen Koteff, No. 9407070
Joshua A. Decker, No. 1201001
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SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

**American Civil Liberties Union of
Alaska, Bonnie L. Jack, and
John D. Kauffman,**

Plaintiffs,

v.

**Michael J. Dunleavy, in his official
capacity as Governor of Alaska;
and the State of Alaska,**

Defendants.

Case No. 3AN-19-08349CI

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**[Proposed] Order Granting
Joshua A. Decker's
Motion to Withdraw**

Joshua A. Decker's motion to withdraw as Plaintiffs' co-counsel is

GRANTED.

Dated at Anchorage, Alaska on ~~July~~ ^{August} 23, 2021.

I certify that on 8/23/21 a copy
of the above was mailed to each of the
following at their addresses of record:
Koteff, Leah, Harrison, Decker


Jennifer Henderson
SUPERIOR COURT JUDGE (Pro tem)

Administrative Assistant

ACLU of Alaska v. Dunleavy
[PROPOSED] ORDER GRANTING JOSHUA A. DECKER'S MOTION TO WITHDRAW
Case No. 3AN-19-08349CI

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JUL 13 2021