

WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter Of:

Docket No. 2013-LGW-0001

AARON SWANSON,

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER**

PETITIONER.

Agency: Seattle City Light  
Program: Local Government Whistleblower

1. ISSUE

1.1. What amount of attorney fees, costs, and post-judgment interest does Respondent Seattle City Light ("SCL") owe Petitioner Aaron Swanson ("Mr. Swanson")?

2. ORDER SUMMARY

2.1. SCL owes Mr. Swanson attorney fees in the amount of \$88,215.50, and costs in the amount of \$8,318.50. Respondent also owes Mr. Swanson post-judgment interest, calculated at the rate of 12% per annum beginning September 17, 2013, in the amount of \$7,691.99. Total amount owed Mr. Swanson: **\$104,225.99.**

3. DOCUMENTS CONSIDERED

3.1. I considered the following documents submitted by the parties:

- a. Complainant's Petition for Attorney Fees and Costs, and attachments thereto;
- b. Declaration of John P. Sheridan in Support of Swanson's Petition for Attorney Fees and Costs ("Sheridan Decl."), and attachments thereto;
- c. (Proposed) Findings of Fact and Conclusions of Law Regarding Complainant's Petition for Attorney Fees and Costs;
- d. City of Seattle's Response to Swanson's Petition for Attorney Fees and Costs;
- e. Declaration of Katrina Kelly in Support of Response to Swanson's Petition for Attorney Fees and Costs, and attachments thereto;

- f. Declaration of Zahraa Wilkinson in Support of Response to Swanson's Petition for Attorney Fees and Costs, and attachments thereto;
- g. Complainant's Reply in Support of Petition for Attorney Fees and Costs, and attachments thereto;
- h. Supplemental Declaration of John P. Sheridan in Support of Swanson's Reply re: Petition for Attorneys Fees, and attachments thereto;
- i. Revised (Proposed) Findings of Fact and Conclusions of Law Regarding Complainant's Petition for Attorney Fees and Costs;
- j. January 19, 2017 correspondence from SCL counsel regarding notice of partial settlement;
- k. January 26, 2017 correspondence from Mr. Swanson's counsel regarding partial settlement;
- l. Second Supplemental Declaration of John P. Sheridan in Support of Swanson's Petition for Attorneys Fees, and attachments thereto; and
- m. February 14, 2017 correspondence from SCL counsel regarding January 26, 2017 correspondence from Mr. Swanson.

#### 4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

##### *Jurisdiction*

- 4.1. On September 17, 2013, I issued Findings of Fact, Conclusions of Law, & Final Order ("Final Order") in this matter that awarded attorney fees and costs to Mr. Swanson with post-judgment interest at 12% per annum under RCW 4.56.110(4) and RCW 19.52.020(1). SCL appealed this Final Order to King County Superior Court.
- 4.2. On June 18, 2014, King County Superior Court reversed the Final Order, finding in favor of SCL. Decl. of Katrina Kelly, Ex. F. Mr. Swanson appealed.
- 4.3. On May 9, 2016, the Washington State Court of Appeals, Division I, issued a decision reversing King County Superior Court, affirming the Final Order, and "remand[ing] to the ALJ to determine the amount of attorney fees and costs." *City of Seattle v. Swanson*, 193 Wn.App. 795, 798 (2016). On July 8, 2016, the Court of Appeals Commissioner issued an award of appellate court costs to Mr.

Swanson under RAP 14.3(a) in the amount of \$1,422.17. Wilkinson Decl., Ex. G. On August 12, 2016, the Court of Appeals mandated the matter back to King County Superior Court for further proceedings in accordance with its May 9, 2016 decision. Sheridan Supplemental Decl., Ex. 4. On October 10, 2016, King County Superior Court ordered the case remanded to this tribunal “to rule on the Complainant’s Petition For Attorney Fees and Costs (Sheridan Dec., Ex. 1).” Sheridan Supplemental Decl., Ex. 7.

*Attorney Fees and Costs Incurred*

- 4.4. On October 24, 2012, Mr. Swanson entered into a Retainer Agreement with attorney Jack Sheridan (“Mr. Sheridan”) for purposes of legal representation in this matter. Sheridan Decl., Ex. 20. This mixed contingent fee agreement provided in pertinent part that Mr. Swanson would pay up to \$20,000.00 in hourly fees incurred by attorneys and staff beginning October 1. *Id.*, p.6. Mr. Swanson paid \$18,835.00 in hourly fees by December 21, 2012. However, Swanson’s counsel accounts for only \$17,905.00 in fees in 2012, as set out below.
- 4.5. During 2012, Mr. Sheridan and others in his office performed the following reasonable work, at the following reasonable fee rate, totaling 57.5 hours and **\$17,905.00**:

Hourly Rate	Work Performed	Total Hrs
Jack Sheridan \$475/hr.	Meet with client, review client emails and documents, develop witness list, identify possible exhibits, interview witness, review/edit complaint to mayor, review applicable statute and ordinance, and review and edit draft letter to mayor requesting hearing	12.6
Beth Touschner \$300/hr.	Review client files and documents, meet with client, chronologize events, draft letter to mayor, review whistleblower statute	24.5
Ashalee May \$175/hr.	Scan documents	.4
Andrew Ackley \$225/hr.	Review documents, draft exhibit and witness list	20

Sheridan Decl., Ex. 17. Though counsel billed for performing similar tasks, these tasks were not unnecessarily duplicative under the circumstances.

- 4.6. On or around January 1, 2013, while representing Mr. Swanson, Mr. Sheridan joined the law firm of McDonald Hoague and Bayless (“MHB”) as partner. Sheridan Decl. While at MHB, Mr. Sheridan and others at MHB worked on this case through the administrative hearing and the appeal to King County Superior Court. The parties do not dispute that Mr. Swanson paid the remaining \$1,165.00 in fees called for under the Retainer Agreement by February 1, 2013.
- 4.7. On January 18, 2017, MHB and SCL entered into a Settlement Agreement under which SCL agreed to pay MHB \$106,000.00 in compensation for Mr. Swanson’s attorney fees incurred while Mr. Sheridan worked at MHB. Sheridan Second Supplemental Declaration, Ex. 2. This Settlement Agreement specifically excluded \$8,230.39 that Mr. Swanson personally paid in costs during this time. *Id.* \$615.19 are deducted from these costs by stipulation of the parties, leaving **\$7,615.20** in unpaid costs.
- 4.8. On or around August 1, 2014, Mr. Sheridan left MHB to return to his own practice. Sheridan Decl., p.12. Mr. Sheridan continued to represent Mr. Swanson in his appeal to King County Superior Court and the Court of Appeals, and continues to represent Mr. Swanson in the present proceeding on remand. Since August 2014, Mr. Sheridan and others at his law firm have incurred reasonable fees in the amount of **\$70,310.50** in performing the following reasonable, non-duplicative work:

Hourly Rate	Work Performed	Total Hrs
Jack Sheridan \$550/hr.	Reviewed and edited reply brief on appeal, prepared for oral argument, attended appellate hearing, reviewed and assembled billings for fee petition, drafted findings for fees, reviewed reply in support of fee petition, reviewed January 26, 2017 letter to ALJ with findings,	19
Mark Rose \$350/hr.	Researched and reviewed motion to extend time for appeal, drafted appellate brief and reply brief, drafted motion for remand to ALJ and petition for attorney fees, reviewed opposition to petition, drafted reply in support of petition, and drafted January 26, 2017 letter to ALJ	166.68

Patti Lane \$175/hr.	Prepared and submitted clerk's papers and other appellate documents for filing	8.7
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Sheridan Decl., Ex. 19; Sheridan Supplemental Decl., Ex. 10; Sheridan Second Supplemental Decl., Ex. 1.

4.9. Additional reasonable, unreimbursed costs since August 2014 total **\$703.30**. Sheridan Decl., Ex. 19.

4.10. In the 43 months since the September 17, 2013 Final Order assessed post-judgment interest at 12% per annum, a total of **\$7,691.99** in post-judgment interest has accrued on the \$17,905.00 in as yet unpaid, reasonable attorney fees.

## 5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

### *Jurisdiction to award attorney fees and costs incurred during appeal process*

5.1. The administrative law judge may award costs and reasonable attorneys' fees to the prevailing party. RCW 42.41.040(7).

5.2. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand. RAP 18.1(i). *See Martini v. Boeing* ("We award attorney fees on appeal to Martini, the amount of which shall be determined by the trial court on remand."); *Perry v. Costco*, 123 Wn.App. 783, 809 (2004) ("Perry requests attorney fees on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. As the prevailing party, Perry is entitled to those fees. We direct the trial court to determine the proper amount of appellate fees, as well, on remand.)

5.3. Under RCW 42.41.040(7) and applicable state case law, I have jurisdiction to award costs and attorney fees Mr. Swanson and his counsel incurred in successfully defending SCL's appeal of the September 17, 2013 Final Order.

*Mr. Swanson is entitled to reasonable attorney fees.*

5.4. The Washington Supreme Court has adopted the lodestar approach for computing a reasonable attorney fee. *Martinez v. City of Tacoma*, 81 Wn.App. 228, 239 (1996), *citing Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581 (1983). Under this approach, the trial court identifies the number of

documented hours reasonably spent in litigation by each attorney, multiplies each attorney's contribution by his or her individual reasonable hourly fee, and adds the results to calculate total attorney fees. *Martinez* at 239; *Bowers* at 597-598.

- 5.5. Attorneys must provide reasonable documentation of the work performed. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.). The court must limit the lodestar to hours reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

*Bowers* at 597.

- 5.6. Where a plaintiff brought "distinctly different claims for relief that are based on different facts and legal theories", counsel's work on unsuccessful claims cannot be deemed to have been expended on successful claims. But where the plaintiff's claims involve a common core of facts and related legal theories, "a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Martinez* at 242-243, citing *Hensley v. Eckerhart*, 461 U.S. 424, 435, 440 (1983); see *Pham v. City of Seattle*, *Seattle City Light*, 159 Wn.2d 527, 538 (2007).
- 5.7. Generally, time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable. See *Fisher Properties v. Arden-Mayfair*, 115 Wn.2d 364, 378 (1990), citing *Daly v. Hill*, 790 F.2d 1071 (4<sup>th</sup> Cir. 1986)(Time spent defending entitlement to attorney fees compensable) and *Copeland v. Marshall*, 641 F.2d 880 (D.C.Cir. 1980)(Time spent litigating the fee award itself compensable); see *Steele v. Lundgren*, 96 Wn.App. 773, 782, (1999)("Lundgren has failed to show that awarding Steele the entire amount of fees she requested for preparation of the fee petition was an abuse of discretion.").
- 5.8. The fees of non-lawyer personnel may be properly requested as part of an attorney fee award. *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn.App. 841, 848 (1995).
- 5.9. The party seeking attorney's fees bears the burden of proving the reasonableness of the fees. *Mahler*, 957 P.2d at 651. Supporting documentation of attorney fees need not be exhaustive or in minute detail, but must inform the court of the type of work performed. *Bowers* at 203.

- 5.10. Excluding the period of time covered by the settlement agreement between SCL and MHB, under *Bowers*, Mr. Swanson's legal team reasonably expended 57.5 hours on Mr. Swanson's whistleblower retaliation claim in 2012, and another 194.38 hours beginning in mid-2014. Although some hours billed in 2012 were for similar tasks performed by different team members, there is insufficient evidence that these tasks were unnecessary or unwarranted. Rather, they constituted reasonable services performed in gearing up for Mr. Swanson's claim.
- 5.11. SCL argues that Mr. Swanson's counsel unnecessarily incurred fees in submitting its January 26, 2017 letter and supporting materials following the settlement agreement. However, given that (a) the petitioner is generally entitled to the final word in support of his fee petition, and (b) counsel reasonably and foreseeably responded to such a significant development as a settlement agreement on the subject, Mr. Swanson may recover attorney fees incurred in preparing this response.
- 5.12. SCL argues that Mr. Swanson's fee award should be reduced by 75% because (1) his unsuccessful claims outnumbered his successful claims, and (2) his relief was less than requested. However, Mr. Swanson made only one claim, i.e. for relief relative to local government whistleblower retaliation, and prevailed. Although the evidence supporting his claim involved alleged previous instances of retaliation, such evidence did not detract from his case. Nor did the amount of the monetary award detract from the substantial non-monetary relief the remedy sought to afford Mr. Swanson. Consequently, Mr. Swanson's fee award is not subject to reduction.

*Mr. Swanson is entitled to post-judgment interest dating back to September 17, 2013.*

- 5.13. Judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. *In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.*

RCW 4.56.110(4)(Emphasis added).

- 5.14. On September 17, 2013, I rendered a verdict which unequivocally held SCL liable for Mr. Swanson's attorney fees. Because this final order establishing the amount of attorney fees is issued at the express direction of the appellate court in this

matter, under RCW 4.56.110(4), post-judgment interest dates back to the date of the verdict.

- 5.15. SCL argues that post-judgment interest cannot date back to the verdict because the amount of attorney fees was not "liquidated" at that time. For support, SCL cites to irrelevant state case law regarding pre-judgment interest, which is not at issue in this matter. The plain language of RCW 4.56.110(4) governing post-judgment interest mandates that the post-judgment interest awarded herein, at the direction of the Court of Appeals, dates back to the verdict, where the entitlement to fees was secured. Consequently, SCL must pay post-judgment interest on the attorney fees awarded herein, beginning September 17, 2013.

## 6. FINAL ORDER

### IT IS HEREBY ORDERED THAT:

- 6.1. Complainant's Petition for Attorney Fees and Costs is GRANTED as set out herein.
- 6.2. Respondent Seattle City Light shall pay Mr. Swanson's (1) remaining attorney fees in the amount of **\$88,215.50**, (2) legal costs in the amount of **\$8,318.50**, and (3) post-judgment interest in the amount of **\$7,691.99**.
- 6.3. Under RCW 34.12.039, all costs for the services of the Office of Administrative Hearings (OAH) in this case shall continue to be paid by Respondent City of Seattle, Seattle City Light without apportionment to, or contribution by, Petitioner.

Issued from Tacoma, Washington, on the date of mailing.

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Lisa N. W. Dublin  
Administrative Law Judge  
Office of Administrative Hearings

## PETITION FOR RECONSIDERATION

Within 10 days of the service of this order, any party may file a petition for reconsideration with the Office of Administrative Hearings at 949 Market Street, Suite 500, Tacoma, WA 98402. The petition for reconsideration must state the



specific grounds upon which relief is requested. RCW 34.05.470(1). WAC 10-08-215.

The petition for reconsideration will not stay the effectiveness of this order. Id. at (2). An order is not required to file a petition for reconsideration before filing a petition for judicial review. RCW 34.05.470(5).

### **PETITION FOR JUDICIAL REVIEW**

This order becomes final on the date of mailing unless within thirty (30) days of mailing, a party files a petition for judicial review with the Superior Court. RCW 34.05.542(2). The petition for judicial review may be filed in the Superior Court of Thurston County, of the county where petitioner resides, or of the county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514(1). The petition for judicial review must be served on all parties of record within thirty (30) days of mailing of the final order. Service of the petition for judicial review on opposing parties is completed when deposited in the U.S. Mail, as evidenced by the postmark. RCW 34.05.542(4).

The petition for judicial review must include the following: (1) the name and mailing address of the petitioner; (2) the name and mailing address of the petitioner's attorney, if any; (3) facts that demonstrate that the petitioner is entitled to obtain judicial review; (4) the petitioner's reasons for believing that relief should be granted; and (5) a request for relief, specifying the type and extent of relief requested. RCW 34.05.546.

**CERTIFICATE OF MAILING IS ATTACHED**

**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2013-LGW-0001**

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

Zahraa V. Wilkinson Assistant City Attorney 701 Fifth Avenue, Suite 2050 Seattle, WA 98104	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Katrina R. Kelly Assistant City Attorney 701 Fifth Avenue, Suite 2050 Seattle, WA 98104	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
John Sheridan Attorney at Law Hoge Building, Suite 1200 705 Second Avenue Seattle, WA 98104	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Friday, April 21, 2017

OFFICE OF ADMINISTRATIVE HEARINGS



Melanie Barnhill  
Legal Assistant