

To: The Select Board, Town of Brookline
From: Hon. Bonnie H. MacLeod (Ret.), JAMS
Re: Report of The Third Party in the Matter of the Indemnification of Stanley Spiegel

Introduction

This claim for indemnification arises under G.L., Chapter 258, section 13 which provides that the Town of Brookline (“the Town”) “shall indemnify and save harmless municipal officers, elected or appointed officials from personal financial loss and expense including reasonable legal fees and costs, . . . arising out of any claim, demand, suit or judgment by reason of any act or omission . . . if the official at the time of such act or omission was acting within the scope of his official duties or employment.” Stanley Spiegel has sought indemnification under the statute for legal fees and costs related to his defense of claims brought against him under 42 U.S.C. Section 1983 in the matter of Alston v. Town of Brookline, et al, C.A. no. 15-13987-GAO (D. Mass.).

On November 18, 2021, the Town voted to set aside an appropriation in the amount of \$198,050, representing the total of the claimed fees of \$169,050 and a contingent fee of \$29,000 (17 %), based upon obtaining the indemnification. In setting aside this appropriation, the Town further voted that any indemnification payments were premised on two conditions: (1) execution of a settlement agreement and a release satisfactory to the parties and (2) a determination by a neutral third party as to the reasonableness of the amount of the claimed indemnification payment in addition to a determination by the neutral of the fairness of the proposed contingent fee payment and its consistency with normal contingent fee practice.

The Review Process

My approach to this review was the one I follow in every neutral analysis or investigation I have conducted. I began by requesting that the parties provide all documents that they considered both relevant and critical to my evaluation. The robust submissions I received included both documents that are publicly available and documents that are private and confidential. Those documents in the public record that I reviewed include: the entire federal court docket in the underlying matter; the Report and Recommendation of United States Magistrate Judge Kelley dated March 22, 2018; the Opinion and Order of United States District

Judge O'Toole dated January 7, 2019; and the Order of Judge O'Toole on November 29, 2021, ordering disbursement of the sanctions-fees award to Mr. Spiegel. Confidential documents and records that I reviewed include: detailed position statements submitted by Attorney Jonathan Simpson and Attorney Martin Rosenthal in addition to the entire billing records, invoices and payment information related to Mr. Spiegel's representation by Attorney Rosenthal and his colleagues Attorney David Duncan and Attorney Naomi Shatz. All of these documents were submitted confidentially by the parties in keeping with JAMS procedure and, although they represent a significant foundation of my analysis and ultimate opinion, they must retain their confidentiality and I thus will not recite their contents in this public report. In addition to reviewing the comprehensive documentation, I had the opportunity to speak with counsel for the Town and for Mr. Spiegel individually several times and the three of us spoke together for over an hour by teleconference. (I would be remiss if I failed to note the high level of civility and professionalism that has characterized their interactions throughout this process.)

Discussion

Since I am aware that the public documents referenced above may have likely been widely disseminated, I believe it is appropriate that those who read this Report have a sense of the professional background and experience that have informed my evaluation of the fees at issue in this claim for indemnification. My relevant legal experience includes the following;

- (1) I have been a lawyer in the Commonwealth of Massachusetts for 50 years (as of 12/15/22).
- (2) For over a decade (1976-1989), I served as First Assistant Bar Counsel where I had countless opportunities to evaluate the reasonableness of fees and fee structures as well as billing practices in light of the applicable ethics rules.
- (3) As a judge in the Massachusetts trial court for 27 years (1989-2002, District Court and 2002-2016, Superior Court), I addressed no fewer than 100 applications for assessment of attorneys' fees and costs, with awards ranging from the low 5-figures to high 6-figures.
- (4) For over 40 years, as a member of the adjunct faculty at four Boston law schools, I taught full semester courses in professional ethics, each of which addressed the subject of setting, charging and collecting legal fees.

(5) In my arbitration practice at JAMS over the past five years, I have addressed applications for legal fees and costs in virtually every case.

I am hopeful that this admittedly self-serving recitation of my background will serve to provide context for the broad “lens” through which I have examined the subject fees and demonstrate why my analysis may thus be perceived to differ from that in the federal fee/sanctions’ decision.

“Lodestar” and Other Factors

The Magistrate Judge in determining the amount of the fee/sanction to be imposed applied the “lodestar method”, the same analysis that I have applied in all cases involving the assessment of fees and costs against a non-prevailing party. The lodestar application requires consideration of:

the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.

Linthicum v. Archambault, 379 Mass. 381, 388-89 (1979).

The determination of a lodestar, however, is not done in a vacuum, which is the reason that courts have consistently held that the amount assessed by a judge as the lodestar is “discretionary.” (Indeed, the lodestar method does not require that each factor be given equal weight. For example, one or two of the factors in and of themselves may warrant more consideration, such as the nature of the case, or the unique reputation of counsel.) Further, it must be emphasized that a determination by a judge or other factfinder that a particular amount constitutes “reasonable fees and costs” for the purpose of assessing that amount against an adverse party is **not** equivalent to a finding that the claimed fees that a judge failed to assess were either unreasonable or excessive. This is especially relevant here where the “lens” through which the legal fees were being scrutinized by the District Court was the extent to which the plaintiff should be subject to monetary sanctions for litigation misconduct. As Senior District Judge O’Toole noted: “The purpose of the sanction is to deter similar misconduct in the future. It

is not to make Spiegel whole for litigation expenses incurred ... [and therefore] not a reason to disagree with the Magistrate Judge's analysis." (Emphasis added.)

Because this neutral third party has been tasked with determining the reasonableness of the legal fees and because of the broad discretion permitted judges (as well as arbitrators and other factfinders) in assessing fees, my examination of all the submissions has led me to conclude that, based on the extensive record I reviewed, there are several areas where I disagree with the analysis of the Magistrate Judge. My disagreement is based entirely upon my own experience in the arena of examining, assessing, teaching on, and awarding legal fees and not intended as a determination that *her* assessment was unwarranted based on *her* view of the evidence she considered in the full exercise of *her* discretion.

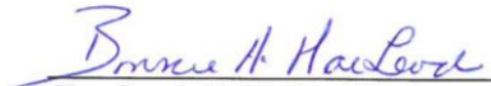
The disparity in our assessments is most likely due in part to the differences in the focus of our respective assessments of the fees, namely: the court's Rule 11 task was to evaluate the global reasonableness of the fee request for the purposes of assessing an appropriate sanction against the adverse party; in *this* setting, my charge has been to evaluate and determine the reasonableness of the legal fees in the context of the "save harmless" requirement of Chapter 258, section 13. (It is not my intention here to enumerate the areas in which my evaluation may differ from that of the Magistrate Judge as there is no doubt that any number of judges/reviewers might differ in the conclusions to be drawn from the evidence in the exercise of their discretion.)

Based upon my review of all of the evidence, which includes my careful examination of all the time records, invoices, and payments, I have concluded that the totality of the evidence establishes that the reasonable fee in this matter for the purpose of indemnification is \$165,173. I further find that a contingent fee in the amount of 17%, or \$28,080, is well within and consistent with governing contingent fee practices and is fair and reasonable. I also find that a deduction in the amount of the disbursed sanction, \$20,589, which was intended to mitigate Mr. Spiegel's legal fees should be made. (While counsel for the indemnitee may object to this deduction, the legal precedent under Rule 11 amply establishes that a monetary sanction awarded directly to an aggrieved party, rather than paid into the court coffers, is intended to defray the legal expenses incurred by that party.)

Recommendation

Based upon the foregoing discussion, in accordance with my review of the totality of the evidence presented, I have determined that the total amount of the indemnification payment, including the contingent fee award, should be in the amount of \$172,664.

Date: May 2, 2022



Hon. Bonnie H. MacLeod (Ret.)
Arbitrator