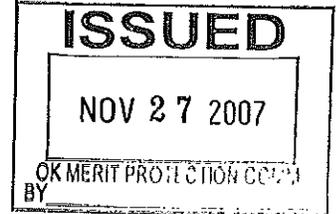


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**HOLLY L. KELLY,** )  
Appellant, )  
 )  
v. ) Case No. MPC 06-120  
 )  
**OKLAHOMA STATE BUREAU** )  
**INVESTIGATION,** )  
Appellee. )  
 )  
 )



**ADDENDUM DECISION**

This matter comes on for addendum decision before the duly appointed, undersigned Administrative Law Judge for the Oklahoma Merit Protection Commission, upon a Motion for Attorney Fees and Costs of the Appellant, Holly L. Kelly, through her counsel, Loren Gibson. The Appellee, Oklahoma State Bureau of Investigation, through counsel, Jimmy Bunn, Jr. has responded, objecting in general to the award of attorney fees, as well as objecting to the amount of fees requested.

After careful consideration of the Motion and Response, including all attachments, as well as the entire record below, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

**FINDINGS OF FACT**

1. Appellant, Holly Kelly (hereinafter "Kelly") is a permanent, classified state employee who appealed an adverse disciplinary action of discharge. Kelly's discharge was effective February 7, 2006. She timely appealed that decision and the matter was litigated over the next eighteen months. Two previous Administrative Law Judges were assigned to the case, prior to the assignment of the matter to the undersigned ALJ to conduct the evidentiary hearing.
2. One of the primary initial issues in the case involved challenges to the Fitness for Duty Evaluation Waiver form that Oklahoma State Bureau of Investigation (hereinafter "OSBI") required of Kelly. While this matter was previously assigned to ALJ Annita Bridges, the parties filed Motions and Briefs on that issue. Appellant argued that the Waiver form was improper and/or illegal based upon various legal theories including HIPPA, ADA and *Garrity* case law.

ALJ Bridges entered an Order on February 28, 2007 finding that there were no legal impediments to the fitness for duty evaluation that Appellee, Oklahoma State Bureau of Investigation, ordered Appellant to attend on January 10, 2006 and that there were no legal impediments to the Waiver which might excuse or justify Appellant's failure to attend the evaluation or to sign the Waiver. As a result, Kelly did not prevail in any of her arguments on those important issues. ALJ Bridges' Order was given full deference and those issues were not revisited in the evidentiary hearing.

3. A lengthy administrative hearing was held on August 21, 27, and 30, 2007 and testimony of witnesses was presented, along with exhibits. Following the close of the evidentiary hearing, the parties were given additional time to file written summations. These were timely filed by each party and were received and considered.

4. A Final Order was issued sustaining in part Kelly's appeal. The Order found that OSBI had not met its burden of proof regarding the insubordination charge of November 9, 2005. The Order did find, however, that OSBI had met its burden of proof regarding the insubordination charge of January 9, 2006 when Kelly refused to submit to a fitness for duty evaluation and that just cause existed to discipline Kelly for that act of insubordination. In addition, it was determined that the discipline of discharge imposed on Kelly was unduly harsh and unfair given the totality of the evidence. The discipline imposed upon Appellant was reduced to a sixty day suspension without pay. Kelly was also ordered to successfully complete the fitness for duty examination prior to returning to OSBI.

5. Appellant maintains in her Motion that she is the prevailing party. Appellee disputes that position. The Appellant clearly received a significant part of the relief she sought with the reversal of her discharge and return to her position with the OSBI, even though she was not the prevailing party on the January, 2006 insubordination charge. However, pursuant to OAC 455:10-15-1 (c), Kelly will be found to be the prevailing party on the November, 2005 insubordination charge.

6. In order to be eligible for an award of attorneys fees and costs, there must be a finding that the non-prevailing party's position was without reasonable basis or was frivolous pursuant to OAC 455:10-15-1 (d), Standards, which states as follows:

"The without reasonable basis or frivolous standard includes, but is not limited to:

(1) where the nonprevailing party's action was clearly without merit or was wholly unfounded;

- (2) where the nonprevailing party initiated an action against the prevailing party in bad faith, including where the action was brought to harass or intimidate the prevailing party;
- (3) where the nonprevailing party committed a gross procedural error which prolonged the proceeding or severely prejudiced the prevailing party; and
- (4) where the nonprevailing party knew or should have known he or she would not prevail on the merits of the action taken.”

7. The determination of whether the action was without reasonable basis or frivolous must be made on an objective basis from a review of the entire record.

8. There is no evidence that OSBI brought the disciplinary action in bad faith. There is no evidence that OSBI's action was designed to harass or intimidate Kelly. There is also no evidence that OSBI knew or should have known that it would not prevail and that its actions were clearly without merit, especially in light of the lengthy period of litigation, the three day evidentiary hearing and OSBI's aggressive defense. Furthermore, the Final Order herein found that imposition of a lesser formal discipline was warranted. Therefore, it cannot be said that the action of the OSBI was clearly without merit or wholly unfounded.

9. There is, however, substantial evidence of gross procedural errors committed by OSBI, which prolonged the proceedings and/or prejudiced Kelly. Those procedural errors include OSBI's failure to use Kelly's eight (8) previous performance evaluations as part of the decision to terminate Kelly as required by Title 74 O.S. § 840-4.19; OSBI's reliance upon Jack Dailey and Rick Zimmer's 2003 "secret" and inaccurate memos; the manner in which OSBI presented the FFDE notice and waiver to Kelly; OSBI's failure to provide an adequate explanation or summary of the agency's evidence to support the discipline as required by Title 74 O.S. §840-6.5 and OAC 455:10-11-17; and OSBI's failure to consider mitigating circumstances. Each of these issues is discussed fully in the Final Order.

10. As provided by OAC 455:10-15-4 (2), the application for attorney fees must be accompanied by evidence of:

- (A) "adequate time records so the reasonableness of the claimed fee can be ascertained;
- (B) a copy of any fee agreement between the attorney and the client or any fee agreement between the attorney and any organization, union or association representing the client;
- (C) the attorney's customary billing rate for similar work, provided the attorney has a billing practice to report;
- (D) evidence of the prevailing community rate sufficient to establish a market value for the services rendered;
- (E) specific evidence of the prevailing rate for similar work of attorneys of comparable experience and reputation; and

(F) specific detailed documentation identifying the actual costs associated with the request.”

11. Mr. Gibson filed detailed time records for representation of Kelly as an attachment to his Motion. Appellee correctly points out that a substantial amount of hours listed were for matters which were not before the Merit Protection Commission or which were spent on the pre-hearing issues of the legality of the fitness for duty waiver.

12. Hours spent on matters not heard before the Merit Protection Commission are not properly includable in a request for attorney fees. The hours listed on Exhibit “A” to Appellee’s Response are found to be excluded from consideration on that basis. In addition to the 49.1 hours listed by Appellee, an additional 3.1 hours have been identified by the undersigned and are also excluded, as set out in Attachment #1 to this Order. A total of 52.2 hours are excluded from consideration for attorney fees because they represent time spent on matters not heard before the Merit Protection Commission.

13. Hours spent on the pre-hearing issues of the legality of the fitness for duty waiver are also not properly includable in this Motion because Appellant clearly was not the prevailing party on those issues. The hours listed on Exhibit “B” to Appellee’s Response are found to be excluded from consideration on that basis. In addition to the 78.9 hours listed by Appellee, an additional 17.5 hours have been identified by the undersigned and are also excluded, as set out in Attachment #1 to this Order. A total of 96.4 hours are excluded from consideration for attorney fees because they are related to the pre-hearing issues of the legality of the fitness for duty waiver wherein the Appellant clearly was not the prevailing party.

14. Mr. Gibson’s Motion for Attorney Fees listed 396.9 hours of work performed. A total of 52.2 hours must be deducted for time spent on matters not before the Merit Protection Commission. An additional 96.4 hours must be deducted for time spent on the unsuccessful challenges to the Fitness for Duty Waiver form. Those two deductions leave 248.3 remaining hours for consideration. Appellant prevailed on the charge of insubordination stemming from the November 9, 2005 telephone call. She did not prevail on the charge of insubordination stemming from her refusal to submit to a Fitness for Duty Evaluation. The issue for which the Appellant prevailed constituted less than half of the case and therefore, it is reasonable to award attorney fees to Appellant for one-half of the remaining hours spent representing her in this

matter. According to the time records submitted by Mr. Gibson, it is reasonable to award attorney fees based upon 124.15 hours.

15. As part of his Motion, Mr. Gibson provided a copy of the fee agreement between himself and Kelly, dated October 16, 2003. It references "all legal dealings with OSBI" and provides for a fee of \$150.00 per hour. Although Mr. Gibson argues that his rate has increased in the last four years, there is no evidence that he and his client modified the retainer agreement. Mr. Gibson also provided affidavits regarding the prevailing community rate and his usual and customary rate. Nonetheless, the fee agreement between counsel and his client at \$150.00 per hour will apply as the maximum reasonable amount to be considered in this case.

16. Having considered the entire record, the amount of attorney fees requested is not reasonable given the totality of the matter. It is reasonable to grant attorney fees for 124.15 hours at an hourly rate of \$150.00 per hour for a total of \$18,622.50.

17. Appellant also moves that she be reimbursed for costs in this matter. Appellee failed to address the reasonableness of the costs or to object to the award of the amount requested. However, following the line of reasoning in the award of attorney fees, it is determined that only one-half of the costs are reasonable to be awarded. The Appellant is awarded her costs in this matter in the amount of \$961.42.

### **CONCLUSIONS OF LAW**

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Application was timely.

2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.

3. The burden of proof regarding this Application is upon the Appellant pursuant to OAC 455:10-15-1 and Appellant has met her burden of proof.

4. Following application of the standards established in Title 74 O.S. § 840-6.8 and OAC 455:10-15-1, the undersigned Administrative Law Judge, after review of the pleadings and the entire record, finds that there is sufficient evidence to support a finding or conclusion that the actions of the Appellee, OSBI, were without reasonable basis or were frivolous because of the procedural errors committed by OSBI, which prolonged the proceedings or prejudiced Kelly.

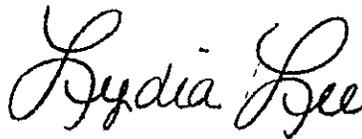
5. Pursuant to OAC 455:10-15-3 (2), the hourly rate of \$150.00 agreed upon in the fee agreement between the attorney, Loren Gibson, and his client, Holly Kelly, is the maximum reasonable amount which can be applied in this matter.

6. Attorney hours spent researching or representing Kelly on matters not before the Merit Protection Commission are not proper for consideration in this Order. Costs and attorney hours spent researching or representing Kelly regarding issues for which she was not the prevailing party are also not proper for consideration in this Order.

7. The hours and billing rate claimed have been duly scrutinized by the undersigned pursuant to OAC 455:10-15-5. After a review of the entire record, the facts and evidence are sufficient to support an award of attorney fees only for 124.15 hours at an hourly rate of \$150.00 per hour for a total of \$18,622.50 and for an award of costs in this matter in the amount of \$961.42.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the undersigned Administrative Law Judge that the Motion for Attorney Fees and Costs of Appellant Holly Kelly, MPC 06-120 be **SUSTAINED IN PART**. OSBI is ordered to pay to the Appellant's counsel, Loren Gibson, as attorney fees, the amount of Eighteen Thousand Six Hundred and Twenty-two dollars and fifty cents (\$18,622.50). OSBI is furthered ordered to pay to the Appellant's counsel, Loren Gibson, as costs, the amount of Nine Hundred Sixty-one dollars and forty-two cents (\$961.42).



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Lydia Lee, OBA # 10374  
Administrative Law Judge

**ATTACHMENT #1**

**Additional hours excluded for matters not heard before the MPC**

8-21-06	1.3
9-12-06	.4
9-15-06	.4
10-17-06	.3
1-25-07	.7
<b>Total additional hours</b>	<b>3.1</b>
<b>Hours cited by Appellee</b>	<b>49.1</b>
<b>Total hours excluded for matters not heard before MPC</b>	<b>52.2</b>

**Additional hours excluded for matters relating to the Fitness for Duty Waiver**

1-13-06	5.9
1-16-06	3.9
6-22-06	3.6
10-18-06	4.1
<b>Total additional hours</b>	<b>17.5</b>
<b>Hours cited by Appellee</b>	<b>78.9</b>
<b>Total hours excluded for matters relating to FFDE Waiver</b>	<b>96.4</b>