

Order of Dismissal, which was entered prior to the hearing and the pre-hearing conference, stated:

As part of her Pre-hearing Submission, Appellant presented evidence that Appellee has rescinded the adverse action which is the subject of this appeal, has adjusted Appellant's pay accordingly, and has expunged from Appellant's records any reference to the suspension.

Upon review of said evidence, the undersigned Administrative Law Judge finds that no further issues appear to exist between the parties in this matter; Appellant has received all that she might have expected to receive or sought to receive through this proceeding; and this matter is now moot.

Accordingly, the instant case is hereby **DISMISSED** with prejudice in accordance with Merit Rule 455:10-3-13(a)(1) and the Pre-hearing Conference set for November 15, 2007 is vacated.

Order of Dismissal dated November 17, 2007

Section 840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455: 10-15-1 provide that a presiding official **of any hearing** may order payment of reasonable attorney fees and costs to the prevailing party, if the position of the non-prevailing party was without reasonable basis or was frivolous. (emphasis added) The prevailing party must show, by a preponderance of the evidence, that he is entitled to an award of attorney fees and costs.

Merit Rule 455:10-15-1(d) states in relevant part:

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

- (1) where the non-prevailing 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.

This matter was dismissed with prejudice by the undersigned after the adverse action was rescinded and before a hearing or pre-hearing conference was held in this matter. This administrative law judge was not the "*presiding official of any hearing*," as no hearing was held. Section 840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455: 10-15-1 clearly contemplate a situation where a hearing was held and there is a prevailing party and a non-prevailing party, e.g. a winner and a loser. This is not that situation. As there was no hearing, there were no prevailing and non-prevailing parties, and Appellant cannot afford herself of the provisions of Section 840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455: 10-15-1 to seek an award of attorney fees.

Unable to clear this initial hurdle as "the presiding official of any hearing", and having no prevailing and non-prevailing party, this administrative law judge cannot consider whether Appellee's position was without reasonable basis or was frivolous, and cannot determine the reasonableness of the fees sought.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled cause.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Section 840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455:10-15-1 provides that the presiding official of any hearing may order reasonable attorney fees to the prevailing party if the position of the non-prevailing party was without reasonable basis or was frivolous. In this matter, there was no hearing and therefore the undersigned was not the presiding official of a hearing.
4. Merit Rule 455:10-15-1(b) states that the prevailing party must show by a preponderance of the evidence that he is entitled to an award of attorney fees.
5. Merit Rule 455:10-15-1(d) states in relevant part:

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

- (1) where the non-prevailing 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.

6. After a review of the record, Appellant's Application for the Award of Attorney's Fees and Costs and Brief in Support, and Appellee's Response and Brief in Support Opposing Appellant's Application for Attorney Fees and Costs, and after applying the above standards, the undersigned finds that Section 840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455: 10-15-1 are inapplicable in this case and Appellant Stephanie Monroe is not eligible for an award under said statute and Merit Rule.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge, that Appellant's Application for Attorney Fees and Costs is **DENIED**.

Dated this 25th day of January, 2008.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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