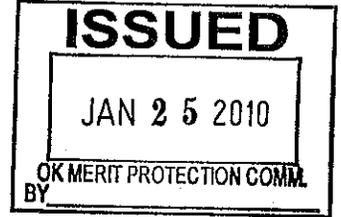


OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

STANLEY DOWLING,)
)
 APPELLANT,)
)
 v.)
)
)
)
 ALCOHOLIC BEVERAGE LAWS)
 ENFORCEMENT COMMISSION,)
)
)
 APPELLEE.)

MPC-09-137



ADDENDUM DECISION

This matter comes on for consideration after a Decision regarding Appellee's Motion for Summary Judgment was issued by the undersigned Administrative Law Judge on December 22, 2009. On January 4, 2010, Appellee filed a Motion for attorney fees and brief in support. On January 6, 2010, Appellant filed a Response to Appellee's Motion.

On December 31, 2009, Appellant filed a request for an *en banc* hearing before the Oklahoma Merit Protection Commission regarding the December 22, 2009, Decision. Appellee's Motion for attorney fees was held in abeyance until after the Commission considered Appellant's request. On January 21, 2010, the Commissioners considered and denied the Appellant's request.

FINDINGS OF FACT

Title 74 of the Oklahoma Statutes Section 840-6.8 and OAC 455:10-15-1 allows the presiding officer of any hearing before the Oklahoma Merit Protection Commission to require the payment of reasonable attorney fees and costs to the prevailing party if the position of the nonprevailing party was without reasonable basis or was frivolous.

OAC 455:10-15-1(d), **Standards** states is pertinent part:

"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."

Appellee has argued it is entitled to attorney fees because the petition for appeal filed by Appellant was clearly without merit and was wholly unfounded and/or Appellant knew or should have known he would not prevail on the merits of the action taken.

Appellant maintains that his actions were not without merit and that Appellee should not be considered the prevailing party since there was no hearing on this matter.

At the August 26, 2009, prehearing on this matter, Appellee requested leave to file a motion for summary judgment. Thereafter, Appellee filed its motion and Appellant requested additional time to respond. Appellant was granted additional time however failed to respond. Hearing on Appellee's motion for summary judgment was then set for November 13, 2009.

On November 13, 2009, both parties appeared at the hearing and presented oral arguments regarding Appellee's motion and Appellant's objection thereto. At the conclusion of the hearing, Appellant was again granted additional time to file a written response to Appellee's motion. Appellant did not file a written response and summary judgment was granted to Appellee on December 22, 2009.

The Oklahoma Personnel Act does not contain a definition of the word "hearing". However, OAC 455:10-1-2, **Definitions** does define the word "hearing" as "an open, formal proceeding conducted by an Administrative Law Judge, Executive Director, or Commissioners to decide an appeal. The proceeding is to provide each party with an opportunity to present evidence in support of their side of the case. The hearing is governed by the Oklahoma Administrative Procedures Act, Section 309 through 316 of Title 75 of the Oklahoma Statutes."

Further, OAC 455:10-9-2, **Hearing**, states in paragraph (h):

"Summary Judgment. The Administrative Law Judge may decide appeals based on summary judgment when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only [a] question of law is involved."

In this case, there was an open, formal proceeding conducted by the undersigned on November 13, 2009, at which time each party was allowed an opportunity to present documentation and oral argument in support of their side of the case. As a result, summary judgment was granted to Appellee.

The language of OAC 455:10-1-2 and 455:10-9-2 supports that the November 13 proceeding was a hearing and the undersigned can find no language in the rules or statutes

indicating that such a hearing must be a full evidentiary hearing as implied by Appellant. Rather, the rule simply requires an open, formal proceeding conducted by an Administrative Law Judge where each party is provided an opportunity to present evidence in support of their case. This was done at the November 13, 2009, hearing.

To adopt the argument of Appellant is to narrowly interpret the word "hearing" and such interpretation is not consistent with Merit Rules or State Statute. Furthermore, to accept such a narrow interpretation would allow, in the future, either party to an action to pursue frivolous cases before the Commission using the threat of protracted litigation and expense of that litigation. The parties could then "settle" a few minutes before the scheduled hearing was convened knowing they were protected from being assessed attorneys fees for pursuing a frivolous appeal because there was no "hearing." Such an interpretation would not be in the best interests of state employees or state agencies.

Accordingly, the undersigned finds that there was a hearing within the meaning of 74 O.S. Section 840-6.8 and that the standard applied in that section should be used in this case. Therefore, under Section 840-6.8, Appellee would be entitled to attorney fees in this case if it is found that it was the prevailing party and Appellant's position was without reasonable basis or was frivolous.

Although Appellant disputes the fact, Appellee was the prevailing party in this matter. Therefore, as the prevailing party, Appellee must show by a preponderance of the evidence that it is entitled to an award of attorney fees and costs.

When determining whether the Appellant's case was without reasonable basis or was frivolous, the undersigned must look at the entire record and must determine whether a legitimate legal or factual basis exists to support Appellant's position. *TRW/Reda Pump v. Brewington*, 829 P.2d 15 (OK 1992); *See U.S. Industries, Inc. v Touche Ross and Company*, 554 P.2d 1223, 1244 (10th Cir. 1988).

Furthermore, as the Oklahoma Supreme Court held in the *TRW/Reda Pump* case:

"Frivolous appeals are those which have absolutely no legitimate legal or factual basis and should not be mistaken for those having some arguable merit, though ultimately unsuccessful . . . an appeal is not frivolous merely because a trial court judgment or decision is affirmed and such fact does not imply an appeal is wholly unreasonable or without a proper foundation. . . . Only if there are no debatable issues upon which reasonable minds might differ and the appeal is so totally devoid of merit that there is no reasonable possibility of reversal will an appeal be deemed frivolous." 829 P.2d 15, 22-23,

In addition, the Oklahoma Supreme Court stated in *Broadwater v. Courtney*, 809 P.2d 1310 (Ok. App. 1991) that sustaining a demurrer to the evidence does not mean that the trial court found the lawsuit was not well grounded in fact; only that the evidence presented did not create a *prima facie* case of the theory of law upon which the claim was based. Id at 1312. The Supreme Court also found in *Broadwater* that if such determination by the judge that the lawsuit was not frivolous is supported by the record of the proceedings, that determination cannot be held to be an abuse of discretion.

The undersigned has reviewed the entire record of this case, including but not limited to, Appellee's Motion for summary judgment, the oral arguments offered at the November 13, 2009, hearing, the December 22, 2009, Decision, Appellee's January 4, 2010, Motion for attorney fees and Appellant's January 6, 2010, Response to Appellee's Motion. After review, the undersigned does not find Appellant's position to be without reasonable basis or frivolous.

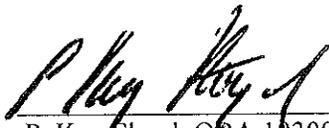
CONCLUSIONS OF LAW

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. The burden of proof regarding this Motion is upon the Appellee pursuant to OAC 455:10-15-1 and Appellee has failed to meet its 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 entire record, finds that there is insufficient evidence to support a finding or conclusion that the actions of the Appellant were without reasonable basis or were frivolous.
5. Absent a showing that the position of Appellant, the non-prevailing party, was without basis or was frivolous, reasonable attorney fees will not be awarded.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the Appellee's Motion for Attorney Fees be **DENIED**.

Signed this 25th day of January, 2010.



P. Kay Floyd, OBA 10300
Administrative Law Judge
Oklahoma Merit Protection Commission
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Oklahoma City, OK 73112
405-525-9144