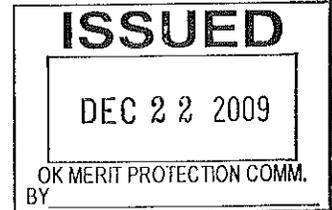


**OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

STANLEY DOWLING, )  
 )  
 APPELLANT, )  
 )  
 v. ) MPC-09-137  
 )  
 )  
 )  
 ALCOHOLIC BEVERAGE LAWS )  
 ENFORCEMENT COMMISSION, )  
 )  
 )  
 APPELLEE. )



**DECISION REGARDING APPELLEE'S MOTION FOR SUMMARY**

**JUDGMENT**

**I.**

Prehearing on this matter was held August 26, 2009, at the Merit Protection Commission offices in Oklahoma City Oklahoma. The Alcohol Beverage Law Enforcement Commission (hereinafter "Appellee" or "ABLE") was represented by Margaret McMorrow-Love, Attorney at Law. Appellant appeared *pro se*. At that time, Appellee requested leave to file a motion for summary judgment. Appellee was given until October 5, 2009, to file its motion and Appellant was given until October 26, 2009, to file a response. Hearing on this matter was set for November 16, 2009.

Thereafter, Appellee filed its motion for summary judgment and Appellant requested additional time to respond. Appellant was given an additional five days but did not respond. Hearing on Appellee's motion for summary judgment was set for November 13, 2009.

On November 13, 2009, both parties appeared and presented oral arguments regarding Appellee's motion for summary judgment. At the conclusion of oral arguments, Appellant was granted an additional twenty-one days to file a written response to Appellee's motion. The additional time was granted over the objection of Appellee.

Appellant did not file a written response by the deadline and on December 10, 2009, Appellee again requested summary judgment be entered in its favor.

As of the date of this Decision, Appellant has yet to file any written response to Appellee's Motion for Summary Judgment.

## II.

It is Appellee's position that the undisputed evidence as presented in its motion and accompanying brief demonstrates that there are no material facts in controversy and that Appellee is entitled to summary judgment as a matter of law.

In support, Appellee offers the following statement of material facts not in controversy:

1. The ABLE Commission is a duly constituted State agency designed to protect the public's welfare and interest in the enforcement of laws pertaining to alcohol beverages, charity games and youth access to tobacco. The Commission has a seven-member Board of Commissioners appointed by the Governor. (Citation omitted).

2. The current Director of the ABLE Commission is A. Keith Burt. He has held that position since September of 2002. (Affidavit Burt, Exhibit "1") The Assistant Director is Jim Hughes. Mr. Hughes became the Assistant Director effective as of September of 2007. (See Statement of the Case and Requested Remedy of A BLE Commission submitted on August 25, 2009).

3. Appellant, Stanley Dowling, has been an employee of the ABLE Commission since 1986. He currently holds the position of Senior Agent assigned to the Oklahoma City District. (Affidavit Burt, Exhibit "1"). Since the spring of 2008, his immediate supervisor has been Roger Chandler, ABLE Agent Level 5 (Special Agent in Charge).

4. In 2007, Appellant filed an appeal with the Merit Protection Commission, MPC 07-107, following denial of a grievance in which he asserted that he had not been properly consulted in connection with the resolution of certain matters in which he had been involved as an investigating officer.

5. Pursuant to Merit Rules 455:10-17-8, Dowling and the ABLE Commission participated in mediation held on April 18, 2007, in case number MED MPC 07-040.

6. An agreement was reached between Dowling, and the ABLE Commission at the mediation conference. Pursuant to Merit Rule 455:10-18-8 (j):

If an agreement is reached, it shall be reduced to writing and signed by each participant and the mediator. The agreement shall be reviewed and approved by the Executive Director before it can become final or before dismissal of an appeal shall be entertained.

A copy of the Voluntary Mediation Agreement reached between the parties in Case No. MED MPC 07-040, was signed by the Mediator and approved by the Executive Director. (Exhibit "2")

7. As a part of the resolution of Dowling's appeal MPC 07-107, the ABLE Commission, in the Mediation Agreement, agreed:

(A) That a revised penalty schedule would be submitted by H. T. Scott (then Assistant Director) to Director Burt by October 18, 2007, and that the Director would present the schedule to the Commission thereafter;

(B) That H.T. Scott would design and implement a notation system for case records to notify the attorney that an agent wants to consult with the attorney before a recommendation is made, the designed to be made by July 18, 2007; and,

(C) That Director Burt would prepare a memo to the Legal Department expressing his desire for consistency and the handling of cases.

8. Shortly after the mediation, former Assistant Director H.T. Scott resigned from the ABLE Commission. (Affidavit Burt, Exhibit "1").

9. Consequently, Director Burt prepared the proposed revised penalty schedule as contemplated by subparagraph A at page 2 of the Mediation Agreement and presented the proposed revised schedule to the Chairman of the ABLE Commission. (Affidavit Burt, Exhibit "1").

10. Furthermore, by Memorandum dated April 19, 2007, a copy of which is attached as Exhibit "3", Director Burt advised the then General Counsel of the ABLE Commission, Kurt Morgan, of his desire for consistency in the handling of cases. (Affidavit Burt, Exhibit "1").

11. Thereafter, by Memorandum dated July 18, 2007, a copy of which is attached as Exhibit "4", all enforcement personnel were advised by Director Burt that if an agent who wrote a ticket wanted to discuss the same with the ABLE Commission's attorney before settlement, the agent could place a red star with a circle around it at the top of the citation and/or report. (Affidavit Burt, Exhibit "1").

12. On or about November 10, 2008, Dowling filed an Internal Agency grievance form with the ABLE Commission (Exhibit "5"). In his grievance, Dowling alleged:

"The Director of the ABLE Commission has purposely violated his agreement made during mediation with the Merit Protection Commission on April 18, 2007."

The grievance asserted, at page 2, paragraph 3, that the Mediation Agreement "clearly states that an agent will be consulted before a recommendation is made". At paragraph 4 on page 2 of the grievance, Dowling alleged that the Memorandum issued by Director Burt of April 19, 2007, (Exhibit "3") as part of the Mediation Agreement

"clearly states that a method is to be developed for an agent to consult before a case is settled or recommendation is made." He contended that the alleged violations of purported portion of the Mediation Agreement were intentional acts. The remedy requested was:

"Since the Director took responsibility and signed off on the agreement dated October 30, 2007, without insuring the Mediation Agreement was not followed, there should be disciplinary action. Since the Director will not punish himself, I fill [sic] this should be taken to the Commission for their conceration [sic] on punishment. (Exhibit "5").

13. By letter dated January 13, 2009, Director Burt denied the grievance (Exhibit "6").

14. Dowling filed a Petition for Appeal in accordance with Merit Rule 455: 10-19-46 after the denial of his grievance. Carol Shelley, Personnel Program Analyst, by letter dated May 6, 2009, issued her initial Investigative Report. Thereafter, by letter dated May 7, 2009, Ms. Shelley submitted an Amended Investigative Report. The recommendation was that the Executive Director dismiss the case in accordance with Merit Rule 455:10-3-13. Stanley Dowling thereafter appealed the decision of dismissal.

15. Pursuant to the Pre-hearing Conference Order entered on August 26, 2009, Appellee was granted leave to file a motion for summary judgment by October 5, 2009.

### III.

Merit Rule 455:10-1-2 allows that a motion for summary judgment may be filed as a request for a decision on issues where there is no dispute as to any material fact. The Rule also provides that an Administrative Law Judge may decide appeals based on summary judgment, where there is no dispute as to either material fact or inferences to be drawn from undisputed facts or, if only questions of law are involved. (Merit Rule 455:10-9-2).

The Appellee maintains that the Merit Rules are consistent with established case law, including case law which states that at the summary judgment stage of a proceeding, a party opposing summary judgment must come forward with material facts in dispute, not mere suspicions, speculation or hope. *The Indian National Bank v. State of Oklahoma, 1993 OK 101, paragraph 22, 857 P.2nd 53, 63.*

Appellee asserts that Appellant has no material facts to show that ABLE Commission violated the clear and unambiguous language of the mediation agreement. After reviewing all pleadings, documents, and materials provided by both the Appellant and Appellee, the undersigned agrees.

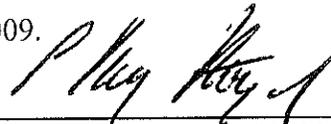
Furthermore, Appellee correctly points out that at the prehearing conference, Appellant admitted that the ABLE Commission had complied with the three items

enumerated in the mediation agreement. Pursuant to Merit Rule 455:10-9-2 (f)(2), the burden of proof, if a hearing were held, would be on the Appellant since he has alleged a violation of the Act or Rules and he would have to prove his case by a preponderance of the evidence. Appellee asserts Appellant would not be able to prove his case.

The undersigned has carefully examined and considered all pleadings, documents, and materials provided by both the Appellant and Appellee and finds that the material facts of this case are addressed and supported by admissible evidence and those facts are hereby admitted along with the exhibits attached to Appellee's motion for summary judgment. Therefore, the undersigned finds that judgment for the Appellee is proper.

Accordingly, Appellee's motion for summary judgment is **Granted**.

DATED this 21<sup>st</sup> day of December, 2009.



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P. Kay Floyd, OBA #10300  
Administrative Law Judge  
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