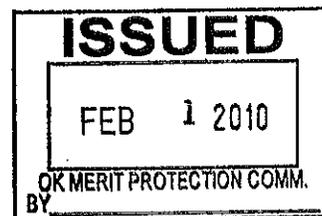


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

COREY DAY,)
Appellant,)
)
v.)
)
DEPARTMENT OF CORRECTIONS,)
Appellee.)
)

Case No. MPC 09-219



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 Request for Attorney Fees and Costs of the Appellant, Corey Day, through his counsel, Kevin Donelson. The Appellee, Department of Corrections, by and through counsel, Larry Foster, has responded, objecting in general to the award of attorney fees and costs, as well as objecting to the amount of fees and costs requested.

Appellant Corey Day is a permanent, classified state employee who appealed an adverse disciplinary action of suspension without pay for five (5) days. After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issued a Final Order, including findings of fact and conclusions of law. The Final Order sustained the petition of Appellant, rescinded the discipline imposed, restored his back pay and benefits for the period of suspension without pay and directed that his personnel records were to be expunged of all references to the disciplinary action.

After further consideration of this Request for Attorney Fees and the Response, including all attachments, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Appellant Corey Day (hereinafter "Day") is a classified employee of the Appellee Department of Corrections (hereinafter "DOC"). Day is a correctional officer, employed at the rank of Lieutenant at the Joseph Harp Correctional Center. On June 5, 2009, DOC provided Day

with final notice of discipline, imposing a five (5) day suspension without pay. DOC alleged that Day violated the Rules Concerning the Individual Conduct of Employees and the Use of Force and Reportable Incidents policies based upon an incident between Day and an offender in January, 2009. He timely appealed that decision and an administrative hearing was held.

2. The Final Order in this matter concluded that DOC failed to present sufficient evidence to support its allegations that Day engaged in misconduct by violating DOC OP-110215 – Rules Concerning the Individual Conduct of Employees and OP-050108 Use of Force and Reportable Incidents, failed to meet its burden to prove, by a preponderance of the evidence that just cause existed to discipline Day, and failed to meet its burden to prove, by a preponderance of the evidence, that it followed the DOC Progressive Disciplinary Procedure.

3. Appellant maintains in his Request for Attorney Fees that he is the prevailing party. Appellee does not appear to dispute that position. Based upon the record and pursuant to OAC 455:10-15-1 (c), Day received “all or a significant part of the relief sought” and will be found to be the prevailing party in this matter.

4. In order to be eligible for an award of attorney 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 state 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.”

5. 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.

6. There is not sufficient evidence that DOC’s action was clearly without merit or was wholly unfounded, that DOC initiated an action against Day in bad faith, or that DOC brought this action to harass or intimidate Day. Further, there is not sufficient evidence of a gross procedural error on the part of DOC which prolonged the proceeding or severely prejudiced Day.

7. There is, however, ample and sufficient evidence, that DOC, the nonprevailing party, knew or should have known that it would not prevail on the merits of the action. The factors and evidence to support this finding include DOC's failure to use and consider progressive discipline, lack of evidence concerning consistent imposition of discipline, DOC's interference with the investigatory process and DOC's failure to consider mitigating circumstances. Each of these issues is discussed fully in the Final Order. As a result, Day is entitled to an award of attorney fees.

8. As provided by OAC 455:10-15-4 (2), the request for attorney fees shall 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.”

9. Mr. Donelson, Appellant's attorney, submitted detailed time records for representation of Day as an attachment to his Request, including over 63 hours of work performed by his paralegal. [OAC 455:10-15-4 (2) (A)]. Mr. Donelson also included a copy of the fee agreement [OAC 455:10-15-4 (2) (B)] and his affidavit to support his customary billing rate [OAC 455:10-15-4 (2) (C)]. Also, attached as Exhibit “C” to the Request was one affidavit to support the prevailing rate in the community and, arguably, to support the prevailing rate for similar work of attorneys of comparable experience and reputation [OAC 455:10-15-4 (2) (D) & (E)].

10. The Request did not include “specific evidence” of the prevailing rate for similar work of attorneys of comparable experience and reputation, particularly in administrative appeals or attorneys who practice before the Merit Protection Commission. [OAC 455:10-15-4 (2) (E)]. The failure of the Appellant's counsel to provide this information is not fatal to this determination because of terms of the fee agreement in this matter and the findings herein below.

11. The Request also failed to contain “specific detailed documentation” identifying the actual costs associated with the request. [OAC 455:10-15-4 (2) (F)]. The failure of the

Appellant's counsel to provide specific details regarding this information is fatal to an award of costs.

12. The pivotal issue in determining the reasonable award of attorney fees herein is the clear and unambiguous terms of the fee agreement itself. Exhibit "B" to his Request is a copy of the professional service agreement between himself, OPEA and its membership. It specifically provides that counsel will provide representation to OPEA members at a flat fee of "\$2000.00 for suspensions without pay". There is no evidence that counsel is entitled to an hourly fee for Merit Protection matters.

13. Having considered the entire record, the arguments of counsel and the law and regulations governing this matter, the amount of attorney fees requested of \$12,862.00 is not reasonable given the totality of the matter, especially considering the written fee agreement. Therefore, the fee agreement between counsel and his client setting a flat fee of \$2000.00 will apply as the maximum reasonable amount to be awarded in this case.

14. Appellant also requests that he be reimbursed for costs in this matter. Appellant failed to provide specific detailed documentation identifying the actual costs associated with the request as required by OAC 455:10-15-4 (2) (F). The fee agreement does not address the expenses except for "contingent or hourly rate matters". Further, without specific detailed documentation, it is impossible to ascertain if the costs are reasonable. For example, there is no accounting for the number of miles driven or the number of copies made. No receipts were provided. The Appellant has not met his burden of proof in order to award costs in this matter as requested, and such request is denied.

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 this Request 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 Request is upon the Appellant pursuant to OAC 455:10-15-1 and Appellant has met his burden to prove, by a preponderance of the evidence, that he is the prevailing party and that he is entitled to an award of attorney fees.

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, DOC, were without reasonable basis or were frivolous because DOC knew or should have known that it would not prevail on the merits of the action.

5. Pursuant to OAC 455:10-15-3 (2), the fee agreement between the attorney and OPEA establishes "a presumption that the amount agreed upon is the maximum reasonable amount" which can be applied in this matter. This presumption was not rebutted by the Appellant.

6. Pursuant to OAC 455:10-15-4 (2) (F), Appellant has failed to provide specific detailed documentation identifying the actual costs associated with this Request. Therefore, the Appellant has not met his burden of proof in order to award costs in this matter as requested, and such request is denied.

7. The Request has 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 as provided in the fee agreement in the amount of \$2000.00 as the maximum reasonable amount.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the Request for Attorney Fees and Costs of Appellant Corey Day, MPC 09-219 be **SUSTAINED IN PART**. DOC is ordered to pay to the Appellant the amount of Two Thousand dollars (\$2000.00), as provided in this Order.



Lydia Lee, OBA # 10374
Administrative Law Judge