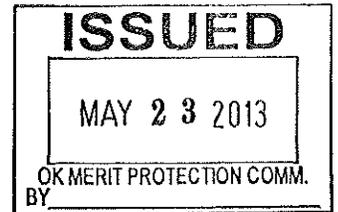


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**RICKY SANDERS,** )  
Appellant, )  
 )  
v. )  
 )  
**OKLAHOMA DEPARTMENT OF** )  
**MENTAL HEALTH AND** )  
**SUBSTANCE ABUSE SERVICES,** )  
Appellee. )  
 )

Case No. MPC 12-224  
and 12-228



**REMANDED ADDENDUM DECISION**

This matter comes on for decision before the duly appointed, undersigned Administrative Law Judge for the Oklahoma Merit Protection Commission, upon remand from the Commissioners. The Motion for Attorney Fees by the Appellant, Ricky Sanders, by and through counsel, Melvin Hall was denied. The Appellant filed a Motion for Reconsideration, which was heard by the Commissioners en banc. The Motion was granted and the issue of award of Attorney’s fees was remanded to be reconsidered without taking into consideration the untimely filed response of the Appellee, Oklahoma Department of Mental Health and Substance Abuse Services.

After careful consideration of the Motion and the Final Petition Decision, 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 Ricky Sanders (hereinafter “Sanders”) was a permanent, classified state employee of the Oklahoma Department of Mental Health and Substance Abuse Services (hereinafter “the Dept.”), appealing an adverse disciplinary action of termination. An administrative hearing was held and testimony of witnesses was presented, along with exhibits.

2. A Final Order was issued granting the Appellant’s Motion for Summary Judgment and sustaining the appeal, prior to the conclusion of the administrative hearing. The findings relevant to this Motion were that the Dept. was in violation of jurisdictional requirements in imposing the

discipline. Although testimony was provided in the record regarding the misconduct of the Appellant, there were no specific findings of whether discipline was warranted or whether the discipline so imposed was appropriate.

4. Appellant argues that he should be considered the prevailing party in that he received all of the relief he sought. Appellee apparently does not dispute that position. For purposes of this Motion, the preponderance of the evidence shows that Appellant did in fact receive the relief he requested and the Appellant will therefore be found to be the prevailing party.

5. In order to be eligible for an award of attorney fees and costs, there must be a finding that the nonprevailing 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.”

6. The determination of whether the action was without reasonable basis or frivolous must be made on an objection basis from a review of the entire record. The findings and discussion contained in the Final Order are incorporated by reference herein for that purpose. It must also be noted that evidence and testimony relating to Sanders' misconduct is part of the record and was considered in making this decision.

7. There is no evidence that the action of the Dept. was clearly without merit or was wholly unfounded, was initiated in bad faith or was brought to harass or intimidate Sanders. Further, there is no evidence that the Dept. knew or should have known it would not prevail on the merits of the action, as the matter was not determined on the “merits”.

8. Pursuant to the Merit Rule above cited, the remaining ground to be eligible for an award of attorney fees, is that there must be “a gross procedural error which prolonged the proceeding or severely prejudiced” Sanders, as the prevailing party. Sanders argues that the Dept. committed a gross procedural error because the procedural errors were pointed out by the Appellant prior to the Dept.'s final action, but ignored, thereby prolonging the proceedings.

Absent consideration of the arguments of the Dept., the undersigned must still review the entire record.

9. It is clear that the appeal was sustained because of a procedural error committed by the Dept. However, in granting the Motion for Summary Judgment, the undersigned advised Sanders that the decision did not in any way condone or excuse his behavior and that he had “dodged a bullet” as a result of the error. However, without the ability to consider the Dept.’s arguments, the Appellant has met his burden to prove by the preponderance of the evidence that the nonprevailing party’s action was without reasonable basis or was frivolous pursuant to OAC 455:10-15-1, due to the commission of a “gross procedural error”.

10. 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.”

11. The Appellant’s counsel included a detailed time record showing the basis for the fee request.

12. The Appellant’s counsel included a copy of the fee agreement stating an attorney’s fee of \$200.00 per hour.

13. The Appellant’s counsel represents that this agreed upon rate is his customary billing rate for similar work. Appellant’s counsel has filed an affidavit in support thereof.

14. The Appellant has provided affidavits from other attorneys as evidence of the prevailing community rate sufficient to establish a market value for the services rendered and as specific evidence of the prevailing rate for similar work of attorneys of comparable experience and reputation.

15. As a result, the hourly fee of \$200.00 per hour, being the agreed upon rate and representing the prevailing rate as discussed herein, will be used in making this award.

17. The Appellant has not requested costs associated with this appeal.

18. The undersigned is charged to review the Application and to “scrutinize with due care the hours and billing rates claimed” to determine the “reasonableness” of the fee award. It must be noted that there was 14.25 hours spent prior to the appeal on pre-disciplinary matters which should be appropriately excluded from this award. In addition, it appears that the hours billed are “excessive” given the totality of the matter. For example, 4 hours were billed for “drafting” the Petition for appeal, 5 hours to draft the prehearing statement, 8 hours to draft discovery documents, and 20 hours work on the Motion for Summary Judgment. While Mr. Hall is very thorough, and the time may well have been spent in this appeal, this amount of time appears to be excessive for consideration in this Motion.

19. Having considered the entire record, the arguments of counsel and the law and regulations governing this matter, the amount of attorney fees requested for 123 hours for the appeal and 15.75 hours for the Reconsideration at the rate of \$200.00 per hour is not reasonable given the totality of the matter. Based upon the totality of the matter, attorney fees for a total of 80 hours is reasonable and is awarded at the rate of \$200.00 per hour.

#### CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause.

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

3. Pursuant to OAC 455:10-15-1 (c), Appellant is the prevailing party in this appeal since he received substantially all of the relief he sought.

4. The burden of proof regarding this Application is upon the Appellant pursuant to OAC 455:10-15-1(b). Pursuant to the remand and directions to disregard the Appellee’s response, Appellant has met his burden of proof to show that the position of the Dept., the non-prevailing party, was without reasonable basis or was frivolous, pursuant to the application of the standards established in Title 74 O.S. § 840-6.8 and OAC 455:10-15-1 and that he is entitled to an award of attorney fees.

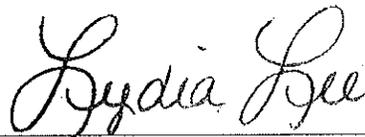
5. Pursuant to OAC 455:10-15-3 and the reasoning set forth in this decision, attorney fees shall be based upon \$200.00 per hour in this matter and the Appellant has met his burden regarding this customary rate.

6. Pursuant to OAC 455:10-15-4 (2) (F), Appellant has not requested costs associated with this appeal.

7. The Application 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 for a total of 80 hours at the rate of \$200.00 per hour. As a result, attorney fees in the total amount of \$16,000.00 are awarded to the Appellant.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the undersigned Administrative Law Judge that the Motion for Attorney Fees of Appellant Ricky Sanders, MPC 12-224 and MPC 12-228 be **SUSTAINED** as reflected herein. The Dept. is ordered to pay to the Appellant the amount of Sixteen Thousand dollars (\$16,000.00), as provided in this Order.



\_\_\_\_\_  
Lydia Lee, OBA # 10374  
Administrative Law Judge  
Oklahoma Merit Protection Commission