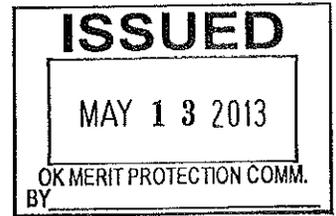


BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

ALECIA SWAIN,)
)
)
 Appellant,)
)
 v.)
)
 DEPARTMENT OF MENTAL HEALTH)
& SUBSTANCE ABUSE SERVICES,)
)
 Respondent.)

Case No. MPC 13-071



ADDENDUM DECISION

This matter comes on for decision before the duly appointed, undersigned Administrative Law Judge for the Oklahoma Merit Protection Commission, upon Application for Attorney Fees and Costs of the Appellant, Alecia Swain, through counsel, George Freedman and Sarah Clutts. The Respondent, Department of Mental Health & Substance Abuse Services, appears through counsel, C. Allen Shaffer, and objects to the award of attorney fees.

After careful consideration of the Application and Response, including all attachments, 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 Alecia Swain (hereinafter "Swain") is a classified employee of the Respondent Department of Mental Health & Substance Abuse Services (hereinafter "DMHSAS.").
2. On October 12, 2012, Swain was discharged from her position for six stated causes including misconduct and insubordination. Swain timely appealed the discharge to the Merit Protection Commission.
3. The matter was set for Prehearing Conference on December 17, 2012. The Respondent failed to appear on that date, however C. Allen Shaffer, counsel for DMHSAS was contacted by telephone and indicated that the Respondent intended to settle this matter. He requested a

continuance of the Prehearing Conference. The Prehearing Conference was continued by agreement until the 9th day of January, 2013.

4. On January 9, 2013, Appellant appeared by counsel, after having filed her Prehearing Conference Statement, which the ALJ reviewed. The Respondent also appeared by counsel, but failed to file its Prehearing Conference Statement. Respondent announced that the Respondent is in agreement with the majority of the claims for relief sought by the Appellant. The Respondent asserts that it failed to file the Statement because the parties had been in discussion regarding the settlement terms with only a few items remaining to be determined.

5. On January 9, 2013, based upon the admissions of settlement, the undersigned sustained the Appellant's appeal and granted her requested relief, including return to her position in the exact manner, in terms of position, shift, days off, and all other matters, as of the time of the discharge, no later than January 20, 2013, an award of all back pay and benefits owing from October 12, 2012 through the date of reinstatement, purging of her personnel file of any and all reference to discipline and/or discharge related to this matter, and correction of her revised Performance Management Process ("PMP").

6. Appellant made Application for Attorney Fees and Respondent responded, objecting to the award.

7. Appellant's appeal was sustained in its entirety and she was granted all of the relief that she requested. Pursuant to OAC 455:10-15-1 (c), Appellant is clearly the prevailing party as she was successful in having the discharged reversed as a matter of law.

8. In order to be eligible for an award of attorney fees, 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 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."

9. In order to make a determination of whether Appellee's action was without reasonable basis or frivolous, an objective review of the entire record must be made.

10. The record of this matter reflects that the Respondent made a conscious decision to settle this matter and was working to resolve all outstanding issues. Because this matter was decided as a procedural matter prior to the submission of evidence or testimony, evidence of the basis for the action and the position of the parties is lacking.

11. 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.”

12. The Appellant's counsel included an itemized invoice showing the services rendered, but failed to include any assertion of the billing rate or the amount of time spent on each item as required by OAC 455:10-15-4 (2). In order to determine the reasonableness of the fees, this information is indispensable.

13. The Appellant's counsel stated that Swain entered into an agreement for a flat fee but failed to include a copy of the fee agreement as required by OAC 455:10-15-4 (2).

14. The Appellant's counsel avers that this invoice represents the customary times spent but failed to include the billing rate. Other than counsel's assertions, the Application fails to contain “evidence of the prevailing community rate sufficient to establish a market value” and “specific evidence of the prevailing rate for similar work of attorneys of comparable experience and reputation” as required by OAC 455:10-15-4 (2). Failure to provide this evidence is fatal to this request.

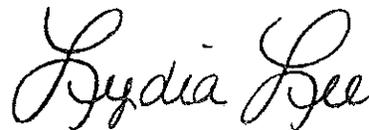
15. As a result of the above findings, it is unnecessary to address whether the Respondent's action rises to the level of being without reasonable basis or was frivolous in accordance with the standards of the Merit Protection System.

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 she received substantially all of the relief she sought.
4. The burden of proof regarding this Application is upon the Appellant pursuant to OAC 455:10-15-1(b). The Application has been duly scrutinized by the undersigned pursuant to OAC 455:10-15-5.
5. Appellant has failed to meet her burden of proof because the Application failed to include required evidence of “the prevailing community rate sufficient to establish a market value” and/or specific evidence of “the prevailing rate for similar work of attorneys of comparable experience and reputation” as required by OAC 455:10-15-4 (2). The Application also failed to include a copy of the fee agreement that Appellant admitted existed as required by OAC 455:10-15-4 (2).
6. As a result of these deficiencies, it is unnecessary to determine if DMHSAS, 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.
7. After a review of the entire record, the Appellant has not met her burden of proof in order to award attorney fees in this matter as requested, and such request is denied.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the Application for Attorney Fees and Costs of Appellant Alecia Swain, MPC 13-071 is **DENIED**.



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