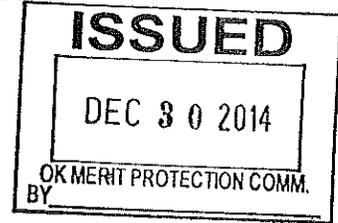


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

TAMMY NEWMAN,)
Appellant,)
)
v.)
)
OKLAHOMA DEPARTMENT)
OF CORRECTIONS,)
Appellee.)
)

Case No. MPC 14-107



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 Appellee, Oklahoma Department of Corrections (hereinafter “DOC”), through counsel, Michele Minietta. The Appellant, Tammy Newman, (hereinafter “Newman”), appears personally and through counsel, Daniel Gamino, 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 Newman was a permanent, classified employee of DOC, appealing an adverse disciplinary action of termination. DOC alleged that Newman’s conduct constituted misconduct and insubordination for failure to devote full time, attention and effort to her duties, failure to follow the lawful orders or directives of supervisors or managers, and willful failure to carry out her assigned duties.
2. On October 21, 2013, DOC provided Newman with written notice of termination. Newman generally denied all allegations of misconduct and alleged that DOC was expecting her to work outside of her classification. She timely appealed the disciplinary action to the Merit Protection Commission.

3. An Administrative Hearing on this appeal was held and a Final Order was issued, denying the appeal and upholding the termination. The Order found that Newman's conduct in refusing to perform her assigned duties met the DOC definition of insubordination contained in OP-110215 and that DOC had met its burden to prove, by a preponderance of the evidence, that just cause existed to discipline Newman for her insubordination. The Order further found that the assignment to Newman of additional duties of acting as the CATCH Coordinator for the medium security offenders was within her current classification of Drug and Alcohol Counselor III. Finally, the Order found that the discipline of termination was appropriate under the circumstances and consistent with progressive discipline, as no other method of discipline would have been effective given the nature of the misconduct.

4. Following the issuance of the Final Order, the Appellee made Application for Attorney Fees and Appellant responded, objecting to the award. Appellant argues that her actions were neither frivolous nor without reasonable basis and she had reasonable cause given her spotless work record and DOC's alleged failure to follow progressive discipline.

5. It is not disputed that Appellee was the prevailing party, in order to be eligible for an award of attorney fees. However, the next step requires a finding that Newman'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. Although not specifically delineated, Appellee seems to argue that Appellant's actions were without reasonable basis or frivolous, and as such, an objective review of the entire record must be made.

7. The record of this matter reflects that the Appellant's position on being asked to work outside of her classification was without merit, in that her primary argument was that she refused because of a promise that she had made to her son. However, based upon her work history with

no prior disciplinary actions, formal or informal, she did make an argument for violation of progressive discipline. The fact that she did not prevail on that issue does not make her position frivolous.

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. The burden of proof regarding this Application is upon the Appellee pursuant to OAC 455:10-15-1(b).
4. Pursuant to OAC 455:10-15-1 (c), Appellee is the prevailing party in this appeal.
5. However, Appellee failed to meet its burden to show that the Appellant's position regarding a possible violation of progressive discipline was without reasonable basis or was frivolous pursuant to OAC 455:10-15-1 (d).
6. As a result, after a review of the entire record, the Appellee has not met its 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 Appellee, Department of Corrections, in MPC 14-107 is **DENIED**.



Lydia Lee, OBA # 10374
Administrative Law Judge