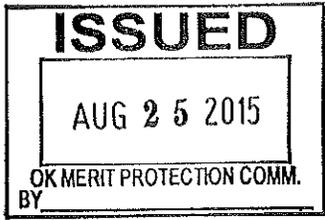


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA**

**CARLA HUMPHRIES,** )  
                  **Appellant,** )  
                                  ) )  
**v.** ) )  
                                  ) )  
**OKLAHOMA DEPARTMENT OF** )  
**VETERANS AFFAIRS,** )  
                  **Appellee.** ) )

**Case No. MPC 14-148**



**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 Motion for Attorney Fees and Costs of the Appellant, Carla Humphries, through her counsel, Daniel Gamino. The Appellee, Oklahoma Department of Veterans Affairs, by and through counsel, Kara Smith, 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 Carla Humphries is a permanent, classified state employee who appealed an adverse disciplinary action of discharge. 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 The Final Order sustained the petition of Appellant, rescinded the discipline imposed, restored her back pay and benefits for the period of time while discharged and directed that her personnel records were to be expunged of all references to the disciplinary action.

Appellant’s counsel filed a Motion for Attorney Fees in a timely manner after the Final Order was issued. The Appellee filed a Motion for Rehearing, Reopening or Reconsideration, to be heard before the Commission, as well as a Request to Stay the Final Order. The Stay was granted on both the Final Order and the Application for Attorney Fees and Costs. Reconsideration was unanimously denied by the Commission. Thereafter, the Appellant amended her Motion for Attorney Fees to add the additional time spent post-hearing. 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 Carla Humphries (hereinafter "Humphries") had been employed as an LPN by the Appellee, Oklahoma Department of Veterans Affairs, (hereinafter "ODVA") at the Oklahoma Veterans Center in Clinton, OK (hereinafter "Center") since November, 2005. In December, 2013, Humphries was confronted about removing certain daily reports and medication sheets from the Center. Humphries admitted to removing some of the reports for her own use. Certain reports were retrieved from her vehicle trunk and/or from her bag. ODVA discharged Humphries for misconduct and a violation of HIPAA and ODVA SOP 1300. She timely appealed that decision and an administrative hearing was held. Humphries claimed that there was no violation of policy or regulation and her use of the reports was appropriate and permitted. She further claimed disparate treatment in that numerous other violations by other employees did not result in any disciplinary action.
2. The Final Order in this matter concluded that ODVA failed to meet its burden of proof that the cited policy and regulations prohibited the Humphries from removing those certain records from the Center for her own use in charting at a later time and that the evidence failed to show that Appellant Humphries engaged in misconduct necessitating disciplinary action.
5. Key findings in the Final Order included that ODVA itself failed to follow the requirements of HIPAA and took no action to document or report the alleged "breaches" of confidentiality to the residents or to the Secretary of Health and Human Services, and that the cited policy failed to contain any such prohibition of removal of documents from the Center, as alleged. ODVA then shifted gears and argued that it was "common knowledge", despite the testimony of several witnesses to the contrary
3. Appellant asserts in her Motion for Attorney Fees that she 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), Humphries 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 ODVA initiated an action against Humphries in bad faith, or that ODVA brought this action to harass or intimidate Humphries. Further, there is not sufficient evidence of a gross procedural error on the part of ODVA which prolonged the proceeding or severely prejudiced Humphries.

7. There is, however, ample and sufficient evidence, that the position of ODVA was clearly without merit and/or was wholly unfounded and that ODVA knew or should have known that it would not prevail on the merits of the action. Despite ODVA's arguments to the contrary, the evidence to support this finding include ODVA's failure to report the alleged HIPAA violations or comply with the requirements of HIPAA themselves, ODVA's lack of consistent investigations or imposition of discipline regarding other alleged breaches of confidentiality at the Center, and ODVA's failure to consider mitigating circumstances. Each of these issues was discussed fully in the Final Order. As a result, Humphries 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. Gamino, Appellant’s attorney, submitted detailed time records for 66.5 hours of work for representation of Humphries up to the issuance of the Final Order as an attachment to her Request. [OAC 455:10-15-4 (2) (A)]. Mr. Gamino included a statement that the fee agreement was oral [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 seven (7) affidavits to support the prevailing rate in the community and to support the prevailing rate for similar work of attorneys of comparable experience and reputation [OAC 455:10-15-4 (2) (D) & (E)]. These affidavits affirmed that the Mr. Gamino’s rate of \$225 per hour is reasonable and customary.

10. Mr. Gamino amended his Motion for Attorney Fees after the Commission denied Reconsideration. He submitted detailed time records for an additional 26.7 hours of work for a total request of 93.2 hours of time.

11. The Request also contained an itemized listing identifying the actual costs associated with the copies and enlargements used in this matter. [OAC 455:10-15-4 (2) (F)]. The itemized list is reasonable and is also eligible as an award of costs.

12. ODVA argues that the fee request is excessive, citing \$2025 of repetitive fees. This is a legitimate assertion and is accepted.

13. Attorney fees for the post-hearing period of the reconsideration appear to be excessive. The Appellant is allowed \$2000 as attorney fees for the period following the issuance of the Final Order as reasonable fees.

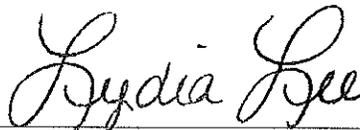
14. Having considered the entire record, the arguments of counsel and the law and regulations governing this matter, the amount of attorney fees requested in the original Motion for Attorney Fees of \$14,962.50 less the repetitive charges of \$2025.00, plus \$157.00 in costs and \$2000 in post-hearing fees is reasonable given the totality of the matter. Therefore, attorney fees and costs in the amount of \$15,094.50 will be awarded in this case.

#### 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 her burden to prove, by a preponderance of the evidence, that she is the prevailing party and that she is entitled to an award of attorney fees as set forth in this Order.
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, ODVA, were clearly without merit and/or were without reasonable basis and/or were frivolous.
5. The Motion 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 herein in the amount of \$15,094.50 as reasonable considering all of the relevant facts and circumstances.

**ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the undersigned Administrative Law Judge that the Request for Attorney Fees and Costs of Appellant Carla Humphries, MPC 14-148 be **SUSTAINED IN PART**. ODVA is ordered to pay to the Appellant the amount of Fifteen Thousand and ninety-four dollars and fifty cents (\$15,094.50) as provided in this Order.



Lydia Lee, OBA # 10374  
Administrative Law Judge