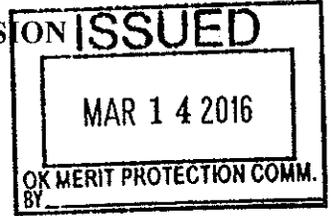


BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA



CHRISTINA KOVASH, )  
 APPELLANT, )  
 )  
 V. )  
 )  
 OKLAHOMA DEPARTMENT OF )  
 HUMAN SERVICES, )  
 APPELLEE. )  
 )

CASE NO. MPC 16-001

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, Christina Kovash, through her counsel, Daniel Gamino. The Appellee, Oklahoma Department of Human Services, by and through counsel, John Douglas, has responded, objecting in general to the award of attorney fees and costs.

Appellant Christina Kovash 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 The Final Order sustained in part and denied in part the petition of Appellant, rescinded the discipline of discharge, reducing it to an involuntary demotion, restored her back pay and benefits for the period of time while discharged and directed that her personnel records were to be expunged consistent with that decision.

Appellant's counsel filed a Motion for Attorney Fees in a timely manner after the Final Order was issued. The Appellee did not file any Motions for Rehearing, Reopening or Reconsideration or appeals of the decision. The Appellee did file an Objection to the granting of attorney fees. 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 Christina Kovash (hereinafter “Kovash”) had been employed as a Child Welfare Specialist III by the Appellee, Oklahoma Department of Human Services (hereinafter “DHS”). On August 20, 2014, following the death of an infant that had been the subject of a previous DHS referral, the DHS Director requested an investigation by the Office of Client Advocacy. This investigation was required to be completed within 45 days. This investigation was not completed for almost 200 days. During that time, the investigator enlarged the scope of the investigation to include three additional “hand-picked” cases, focused upon Kovash. During the 6 months that the investigation was on-going, Kovash was apparently assigned to “special duty”, exceeding the 60 day temporary assignment period provided in DHS policy. The investigation was concluded and the report submitted on March 6, 2015.

2. Almost two months after the Investigation Report was filed, on May 4, 2015, Kovash was given Notice of Proposed Disciplinary Action – Discharge. The notice provided details on the results of the investigative report and alleged that Kovash was guilty of violations of OKDHS:2-1-7(i)(1), Unsatisfactory performance; OKDHS:2-1-7(i)(2), Misconduct; OKDHS:2-1-7(i)(2)(A), Unauthorized disclosure of confidential information; OKDHS:2-1-7(i)(2)(B), Willful failure; OKDHS 2-1-7(i)(2)(F), Dishonesty; OKDHS 2-1-7(i)(4), Neglect of duty; OAC 340:75-1-42, Client Information confidentiality; and OAC 340:75-3-200, General protocols for Child Protective Services (CPS) assessments and investigations. Following a pre-termination hearing, held on June 3, 2015, DHS issued the Notice of Final Formal Discipline on June 17, 2015, discharging Kovash from her position. Kovash timely appealed the disciplinary action.

3. The Final Order in this matter concluded that DHS failed to meet its burden of proof on all allegations except unsatisfactory performance. The Final Order ordered a reduction of the discipline from discharge to an involuntary demotion of one level.

4. Key findings in the Final Order included that DHS failed to follow its own rules and policies by grossly exceeding the time allotted for the investigation, by expanding the investigation and targeting Kovash, by exceeding the length of time assigned to detail to special duty, by failing to respond to the Kovash’s grievance in a proper manner and by failing to properly utilize progressive discipline.

5. Appellant asserts in her Motion for Attorney Fees that she is the prevailing party. Appellee argues that because an involuntary demotion was imposed, she received a significant

part of the relief she sought, but not all. To be considered a prevailing party, pursuant to OAC 455:10-15-1 (c), a party must receive “all or a significant part of the relief sought”. Based upon the findings in the Final Order, and the admission of the Appellee that Appellant received a significant part of the relief she sought, Appellant will be found to be the prevailing party in this matter.

6. 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.”

7. 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.

8. The Appellant makes a compelling argument that Appellee’s actions were frivolous. Given the citations to findings in the Final Order, there is ample and sufficient evidence that the position of DHS was clearly without merit and/or was wholly unfounded and that DHS knew or should have known that it would not prevail on the merits of the action. Despite DHS’ arguments to the contrary, the evidence to support this finding include the improprieties in the investigation process, singling out Kovash for discipline when fault was indicated for several other employees indicating DHS’ lack of consistent imposition of discipline, and most particularly, the failure to properly utilize the progressive disciplinary process. Each of these issues was discussed fully in the Final Order.

9. There is no evidence to find that DHS took this action in bad faith. Since the final decision upheld a portion of the disciplinary action, it cannot be said that DHS’ actions were “wholly unfounded”. There is a reasonable argument supported by the evidence to support that DHS knew or should have known that it would not prevail on the merits, given the facts and evidence of this case. However, the failure to follow procedures in expanding the investigation

and ignoring the time constraints for completing the report, as well as DHS complete failure to utilize progressive and/or consistent discipline constitute “gross procedural errors” which both prolonged the proceedings and prejudiced the Appellant. As a result, Kovash is entitled to an award of attorney fees.

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. Mr. Gamino, Appellant’s attorney, submitted detailed time records for representation of Kovash up to the issuance of the Final Order as an attachment to the Motion [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 four (4) 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. The request did not include any amounts attributable to costs [OAC 455:10-15-4 (2) (F)].

12. DHS provided no argument that the fee request is excessive. There was no objection to the hourly rate or the number of hours expended in this matter. DHS does not offer any challenge to the amount requested except for the general argument that no fees should be allowed.

13. 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.

14. First, it must be noted that there were 19.9 hours spent prior to the appeal on pre-disciplinary matters which should be appropriately excluded from this award pursuant to 455:10-

15-3, which permits an award of fees and costs “devoted to the appeal”. Time spent before the appeal is disallowed.

15. This leaves consideration of the remaining 62.5 hours of work spent on the appeal. The appeal was denied in part based upon the Appellant’s unsatisfactory performance issues. Although the insufficient investigations and mislabeling of contact attempts were not willful, they were a serious matter deserving of an involuntary demotion and the Final Order herein so reflected that. This was only one part of the appeal and having considered the entire record, it is reasonable to attribute three-fourths of the fees of this appeal to the issues on which Appellant prevailed. Three-fourths of those fees are 49.89 hours of work.

16. 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 is reduced by the amount of time spent on pre-disciplinary appeal matters and further reduced to reflect the time spent on the matters for which the Appellant did not prevail. Attorney fees for of \$225.00 per hour for 49.89 hours of work is reasonable given the totality of the matter. Therefore, attorney fees and costs in the amount of \$11,225.25 will be awarded in this case.

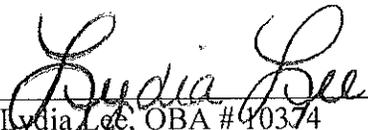
### **CONCLUSIONS OF LAW**

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 Appellee, DHS, committed gross procedural errors which both prolonged the proceedings and prejudiced the Appellant.

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 for 49.89 hours of time at the uncontested hourly fee of \$225.00 per hour. As provided herein, attorney fees in the amount of \$11,225.25 are 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 Christina Kovash, MPC 16-001 be SUSTAINED, as set forth herein. DHS is ordered to pay to the Appellant the amount of Eleven Thousand Two Hundred and Twenty-five dollars and twenty-five cents (\$11,225.25) as provided in this Order.

  
Lydia Lee, OBA #40374  
Administrative Law Judge