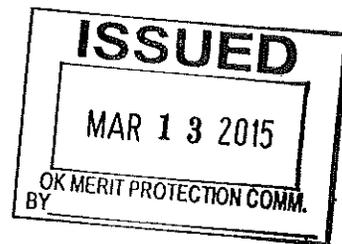


OKLAHOMA MERIT PROTECTION COMMISSION

STATE OF OKLAHOMA

IN RE: CONSOLIDATED CASES -- )  
JANICE MOONEYHAM, )  
DAROLD LARISON, )  
TRACY WILKINSON, )  
LETICIA ROSE BOLLINGER )  
GLEN WILLIAMS, )  
LINDA SUE PACE, and )  
RUTH JOHNSON )  
Appellants, )  
vs. )  
OKLAHOMA DEPARTMENT OF )  
VETERANS AFFAIRS, )  
Appellee. )



MPC 14-065  
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MPC 14-071

ADDENDUM DECISION

This matter comes before the undersigned Administrative Law Judge pursuant to Appellants' Motion for Attorney's Fees and Costs following issuance of the Final Order in this matter granting Appellants' appeal. Appellee has filed its Response to Appellants' Motion for Attorney Fees and Costs, objecting to the award of attorney fees and costs generally and to the amount of fees and costs requested. Appellants have filed a Reply Brief in Support of Their Motion for Attorney Fees and Costs.

After careful consideration of Appellants' Motion and Reply, Appellee's Response, and the entire record in this case, the undersigned issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Appellants, all long-term employees at the Oklahoma Veterans Center in Norman, accepted bequests under a resident's will, after seeking advice from their

Center Administrator and receiving permission from the administrator, the ODVA Executive Director, and the ODVA legal counsel prior to their acceptance. The ODVA legal counsel advised that there were no agency rules or regulations prohibiting the employees from accepting the bequests, and that the agency had no jurisdiction over the will or the employees' acceptance of bequests under the will. Three years later, a subsequent ODVA Executive Director, knowing that Appellants' acceptance had been reviewed and approved by then ODVA Executive Director and ODVA Legal Counsel at the time, discharged the seven Appellants for having accepted the bequests.

Section 840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455: 10-15-1 provide that a presiding official of any hearing may order payment of reasonable attorney fees and costs to the prevailing party, if the position of the non-prevailing party was without reasonable basis or was frivolous.

There is no dispute that Appellants were the prevailing parties in this matter. As such, they must show, by a preponderance of the evidence, that they are entitled to an award of attorney fees and costs.

Merit Rule 455:10-15-1(d) states in relevant part:

**Standards.** The without reasonable basis or frivolous standard includes, but is not limited to:

- (1) where the non-prevailing 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.

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. *TRW/Reda Pump v Brewington*, 829 P.2d 15 (OK 1992); See: *U. S. Industries, Inc. v Touche Ross and Company*, 554 F.2d 1223, 1244 (10<sup>th</sup> Cir. 1988).

In the final Order, this Administrative Law Judge stated:

Prior to termination, Appellee was aware of the approval given to Appellants in 2009 and 2010. ... Appellants were being discharged three years later for actions that had been approved at the time. ...

Most telling, however, is Executive Director John McReynold's admission that investigator Steve Pancoast told him that the Appellants had asked for and received permission to accept the bequests and that this permission was communicated to them by Norman Center Administrator Christy Howell. Director McReynolds further testified that he did not care what Appellants were told, and he did not care what advice legal counsel had given. All he needed to know was that Appellants were named in the will and that they received the bequests, as evidenced by the cancelled checks. It was on this basis that he made the decision to discharge Appellants. *Appellee's action to discharge Appellants was, under the circumstances, unfounded, without merit, and in bad faith.*

*(emphasis added)* Final Order, page 11.

Further, in reference to Appellee's argument that the advice given by ODVA legal counsel and ODVA Executive Director that ODVA lacked jurisdiction in the matter was not really "approval", this Administrative Law Judge stated:

*This is a specious and disingenuous argument.*

*(emphasis added)* Final Order, page 9.

In finding that Appellee was estopped from imposing disciplinary action in this instance, this Administrative Law Judge said:

I also find that Appellee is estopped from taking disciplinary action after it has already reviewed and approved the action taken by Appellants that it now seeks to punish. In attempting to do so in this instance, *Appellee has acted in bad faith.*

*(emphasis added)* Final Order, page 11.

Having considered the entire record, the undersigned finds that Appellee's position was without reasonable basis pursuant to the standards set forth in Section

840-6.8 of Title 74, Oklahoma Statutes and Merit Rule 455: 10-15-1, and Appellants are entitled to reasonable attorney fees and costs.

Merit Rule 455:10-15-4(2) provides that the application for attorney fees must be accompanied by:

- (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 . . .
- (C) the attorney's customary billing rate for any 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.

Appellants' Motion sought attorney fees in the amount of \$78,749.25 and expenses of \$3,379.64 for a total of \$82,128.89. Appellee argued that Appellants' Motion should be denied for their failure to attach the fee agreement, and in the alternative, that the amount should be reduced by \$22,322.70 because the rates are in excess of the prevailing community rate for attorneys representing parties at MPC hearings, fees and costs were included that were not attributable to this MPC matter, and unnecessary and duplicative fees were incurred by Appellants' counsel.

In Reply, Appellants attached an unsigned Attorney Fee Agreement, lowered the rate of lead counsel from \$300 to \$225, and conceded that time associated with the civil case should not be included in the award. Appellants have modified their fee request to \$70,409.25, which includes \$1,755 in additional fees incurred after the Final Order was issued in this case. Appellants also reduced the requested costs by removing \$213.70 of erroneously included costs associated with the civil action, for total costs of \$3,165.94. The total award requested was modified to \$73,575.19.

### **Fee Agreement**

Appellee argues that the fees should be denied for failure to attach a written fee agreement. The fee agreement must be attached, if a written fee agreement exists. Appellants have attached a fee agreement specifically referencing and detailing the terms of agreement as relates to Appellants in this matter and other related matters.

Although unexecuted, the attached Fee Agreement satisfies the requirements of Merit Rule 455:10-15-4(2)(B).

### **Customary and Prevailing Billing Rate**

Appellants have filed the requisite time records, and have reduced the rate of the lead attorney in this case from \$300 to \$225 per hour. It has previously been held by this tribunal and this Administrative Law Judge that \$225 per hour is “within the spectrum of prevailing community rates and prevailing rates for similar work” by attorneys representing Appellants before the Merit Protection Commission.<sup>1</sup> As Appellee has not objected to the rate of co-counsel at the rate of \$225 per hour, both Mr. Glass and Mr. Brockman’s rate of \$225 per hour is deemed reasonable under the circumstances of this case.

### **Time Records**

Appellee argues that the time spent by counsel on the criminal and unemployment issues related to discharge are improper fees. Although, as argued by Appellants, these matters may be related to the discharge of Appellants, and counsels’ activities in those matters may be useful in their preparation of this MPC case, those matters are not within the jurisdiction of this tribunal and this Administrative Law Judge.

Merit Rule 455:10-15-3, **Reasonable Attorney Fees** states:

Reasonable attorney fees shall be determined primarily through the analysis of the number of *hours devoted to the appeal* multiplied by a reasonable hourly billing rate.

*(emphasis added)*

Time spent on unemployment matters and time spent on the criminal matter is not time “devoted to the appeal”, as contemplated by the Merit Rule. Appellants’ attorney fees must be reduced for Mr. Brockman’s time spent during 2013 on OESC matters on November 11, 12, 13,14,19, and 25, 2013, and on December 12 and 18, 2013, totaling \$2,560.50. Reductions must also be made for Mr. Brockman’s time spent

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<sup>1</sup> Appellants correctly point out that the exact language used by this ALJ in the referenced case stated “single Appellant representation” before the Merit Protection Commission, and differentiate that case from this one with multiple Appellants. Nonetheless, Appellants concede the reasonableness of a fee of \$225 per hour in this instance.

in 2014 on criminal matters on March 19 and 27, 2014 and May 13, 2014, totaling \$517.50.

Appellee also argues that when two attorneys are involved in the same activity on the same day and time this results in unnecessary and duplicative time. Appellee seeks to disallow time of a second attorney where both appear at hearings, depositions, conferences with key witnesses, and at trial, and reduce fees for this "duplication" by \$8,212.50. This Administrative Law Judge disagrees. In a case involving seven (7) Appellants and a two-day trial, the appearance of two attorneys at trial and in hearings and depositions is not unreasonable, and there is no evidence presented that their work is duplicative and unnecessary.

In their Reply Brief, Appellants claim additional fees for counsels' time spent in pursuing attorney fees and resolving issues relating to the execution of the Order entered in this matter. The 7.8 hours of time spent in pursuing attorney fees is reasonable and is allowed in the amount of \$1,755. There is insufficient evidence that the 9.65 hours spent by counsel concerning the execution of the Order are reasonable hours devoted to the appeal, and \$2,171.25 for such time will be disallowed.

### **Costs**

Appellants have revised their costs to deduct costs incurred in filing the civil action. Appellee also objects to \$41 of costs incurred in obtaining records from the OESC. However, Appellants have indicated that such records were obtained in preparation for depositions and proceedings in this matter. As such, these costs are not unreasonable, and are allowable.

### **CONCLUSIONS OF LAW**

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled cause.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-15-1(c) states in relevant part:

**Showing of Proof.** To be entitled to an award of attorney fees and costs, the prevailing party shall be deemed to have prevailed if he or she received all or a significant part of the relief sought through the appeal.

Appellant received all or a significant part of the relief sought through the appeal and was the prevailing party in this action, as contemplated by Merit Rule 455:10-15-1 (c).

4. Merit Rule 455:10-15-1(d) states in relevant part:

**Standards.** The without reasonable basis or frivolous standard includes, but is not limited to:

- (1) where the non-prevailing 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.

After a review of the entire record, and applying the above standards, the undersigned finds that the facts are sufficient to support the conclusion that the position of Appellee was wholly unfounded and without merit, and Appellee should have known that it would not prevail on the merits.

5. Merit Rule 455:10-15-3, **Reasonable Attorney Fees** states that reasonable attorney fees shall be determined primarily through the analysis of the number of hours devoted to the appeal multiplied by a reasonable hourly billing rate. Hours spent on criminal matters and unemployment matters before a different tribunal are not hours "devoted to the appeal."

6. Merit Rule 455:10-15-4(2) provides that the application for attorney fees must be accompanied by:

- (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 . . .
- (C) the attorney's customary billing rate for any 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.

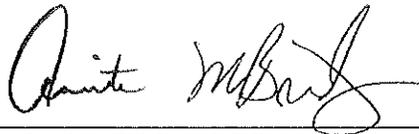
Appellant has provided the documentation required by Merit Rule 455:10-15-4(2).

7. After a review of the entire record, the facts are sufficient to support the amount of \$67,331.50 as reasonable fees, based upon the hours worked and the prevailing community standards, and the amount of \$3,165.94 as reasonable costs incurred.

### ORDER

***IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED*** by the undersigned Administrative Law Judge, that Appellants' Motion for Attorney Fees and Costs is **Granted in part**, in the amount of \$70,497.44.

Dated this 12<sup>th</sup> day of March, 2015.



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Annita M. Bridges, OBA # 1119  
Administrative Law Judge  
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