

NOT FOR OFFICIAL PUBLICATION

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
APR 6 2001
JAMES W. PATTERSON
CLERK

STATE ex rel. OKLAHOMA DEPARTMENT OF )  
TRANSPORTATION and ROBERT HALE, )

Appellants, )

vs. )

Case No. 94,561

OKLAHOMA MERIT PROTECTION COMMISSION, )  
JOHN DOUGHERTY, JUNIOR JACKSON, )  
CHARLES A. LUNG, CLYDE W. THOMAS )  
and BILLY D. COLE, )

Appellees. )

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CAROLYN R. RICKS, JUDGE

**AFFIRMED**

David W. Lee,  
Oklahoma City, Oklahoma,  
and  
Norman Hill,  
Tamar Graham Scott,  
Oklahoma City, Oklahoma,

For Appellant, Oklahoma  
Department of Transportation,

Verner W. Hayhurst, Jr.,  
Oklahoma City, Oklahoma.

For Appellant, Robert Hale,

Daniel J. Gamino,  
Oklahoma City, Oklahoma.

For Appellees, John Dougherty, Junior  
Jackson, Charles A. Lung, Clyde W.  
Thomas and Billy D. Cole.

Joseph L. McCormick, IV,  
Oklahoma City, Oklahoma,

For Appellee, Oklahoma Merit Protection  
Protection Commission.

### OPINION

Carl B. Jones, Judge:

¶1 Appellants, Oklahoma Department of Transportation (ODOT) and Robert Hale (Hale), appeal from a ruling of the Alternative Dispute Resolution Panel (ADRP) which was affirmed by the Oklahoma Merit Protection Commission (OMPC) and affirmed by the district court. The ADRP set aside a promotion given to Hale by ODOT and awarded attorney fees and costs to Appellees, John Dougherty, Junior Jackson, Charles A. Lung, Clyde W. Thomas, and Billy D. Cole (the five applicants).

¶2 A vacancy announcement for Division Manager, Office Services Division of ODOT was posted and opened on February 26, 1996. The announcement provided that Mike Mayberry would be conducting the interviews. No additional factors were listed from which the selection would be made. Mayberry chose five people to screen and interview the applicants. Mayberry also provided a list of special qualifications that he was looking for in the new Division Manager. The screening committee decided to interview 15 of the 27 applicants. None of the five applicants were interviewed although they were determined to be qualified for the position by the Office of Personnel Management. Robert Hale was selected as the Division Manager.

¶3 The five applicants filed an internal grievance with ODOT. The grievance reviewer, an employee of ODOT, found that the failure to list the special qualifications was a violation of the Merit Protection Rules and ODOT policy and the committee selected gave the appearance of bias and conflict-of-interest. The grievance reviewer recommended the position be vacated and readvertised. The Director of ODOT did not follow this recommendation as he found there was no finding of fact documenting a serious error in the process which would justify such action.

¶14 The five applicants appealed to the OMPC. The Executive Director of OMPC determined the five applicants had provided sufficient evidence that the grievance resolution decision made by the Director of ODOT was not correct. The parties were scheduled for a negotiation conference and if no settlement was reached then the matter would be scheduled for the Alternative Dispute Resolution Program. No settlement was reached and the matter was scheduled for a binding arbitration conference before a three-person panel. A three-day hearing was held. The ADRP found ODOT failed to comply with 74 O.S. §840-4.16(2) and Merit Rules 530:10-9-3, 530:10-11-51(b)(6) and 530:10-17-31(d). The ADRP directed ODOT to vacate the position of Division Manager and to reannounce the position as well as selecting a new screening committee for the promotion process.

¶15 ODOT filed a petition for reconsideration with the OMPC which affirmed the ADRP's decision. ODOT then appealed to the district court which again affirmed the ADRP's decision. ODOT appeals to this Court.

¶16 The issues on appeal are: 1) Whether the proceedings before the ADRP and the OMPC were fair and impartial; 2) whether the members of the ADRP were qualified to conduct a three-day hearing on this matter and did those members have the statutory authority to overrule the Director of ODOT's decision; 3) whether the affirmance by the OMPC without reviewing a transcript of the hearing before the ADRP violated state law; 3) whether the ADRP and the OMPC violated the Administrative Procedures Act and the Open Meeting Act; 4) whether the ADRP erred in its findings of fact and conclusion that Merit Protection Rules were violated in the selection of the division manager; and 5) whether the award of attorney fees and costs was supported by the evidence. Pursuant to 74 O.S. Supp. 1994 §840-6, the ADRP's decision is appealed to the OMPC and then to the district court for review. The district court and this Court apply the same standard when reviewing an administrative record. When an administrative order is appealed, the courts

review the entire record made before the administrative agency acting in its adjudicatory capacity to determine whether the findings and conclusions set forth in the agency order are supported by the evidence. The agency's order will be affirmed on appeal if the record contains substantial evidence in support of the facts upon which the decision is based and the order is otherwise free of error. *City of Hugo v. Public Emp. Relations Bd.*, 1994 OK 134, 886 P.2d 485, 490.

17 ODOT contends the ADRP was prejudiced because: 1) it would not allow ODOT's representative to be present at the discovery depositions in violation of 12 O.S. Supp. 1993 §2615, 2) the office of the OMPC allegedly closed early on the day a filing by ODOT was due, 3) the imposition of excessive attorney fees and costs against ODOT, 4) the Chair of OMPC allegedly made insulting and unprofessional remarks about the Director of ODOT, 5) the ADRP considered sanctions as a result of ODOT's alleged actions which had caused a delay in these proceedings, and 6) the refusal by the ADRP to correct a mistake in its findings.

118 The first assertion of prejudice is the refusal by the ADRP to allow a representative of ODOT to be present at the discovery depositions. ODOT had chosen Mr. Hazeldine as their representative. The five applicants filed a motion to prohibit Mr. Hazeldine from participating in any of the depositions except in his own. Additionally, the five applicants requested Mr. Hazeldine not be the representative because he was a central witness and his position and longevity at ODOT would intimidate employees who would be giving depositions in this matter. The five applicants argued no prejudice would occur to ODOT as there were other employees equally qualified to be ODOT's representative. The ADRP granted this motion. At the hearing, ODOT argued it was allowed a representative at the depositions. However, ODOT never addressed why it would be prejudiced if another employee served as ODOT's representative. The ADRP did not prevent a representative from ODOT attending the depositions as the order expressly addressed and prevented only Mr. Hazeldine from being the representative at the

depositions, not that ODOT was precluded from another representative being present at the depositions. Accordingly, we find neither a violation of 12 O.S. Supp. 1993 §2615, nor a violation of due process rights by the ADR Panel's decision to preclude Mr. Hazeldine from acting as ODOT's representative at the depositions.

19           The second alleged showing of prejudice was the closing of OMPC's office early on the day ODOT's Response to the Proposed Order of the ADRP was due. The record indicates the ADRP agreed to accept the late filing and considered the filing. ODOT argues because the ADRP did not change its Proposed Order after considering ODOT's Response is evidence of impartiality. If a preliminary ruling is based on law or fact, the decision cannot be used as a basis for bias. *Oklahoma County v. O'Neil*, 1968 OK 63, 440 P.2d 978, 989. We do not see any evidence of bias as the ADRP allowed the late filing and considered it even though the Response did not persuade the ADRP to change its original decision in this matter.

110           ODOT asserts the award of attorney fees and costs also establish prejudice by the ADRP because the award was excessive and showed a desire by the ADRP to punish ODOT. Whether attorney fees and costs should have been assessed in this matter will be discussed later in this opinion. On this allegation of prejudice by the ADRP, 74 O.S. Supp. 1995 §840.6.8 allows the ADRP to assess attorney fees and costs if the ADRP finds the position of the nonprevailing party was without reasonable basis or was frivolous. In its order awarding attorney fees, the ADRP set forth the requirements as specified in Merit Rule 455:10-15-1 and made specific findings that ODOT's position in this matter was without reasonable basis. It is apparent the ADRP reviewed the documents submitted by the five applicants in their request for attorney fees as the ADRP disallowed specific hours ruling the hours were duplicative. The award of attorney fees, in and of itself, does not demonstrate prejudice by the ADRP. *Oklahoma County v. O'Neil, supra*.

¶11 ODOT contends the OMPC was biased as well because at the hearing on ODOT's Motion to Reconsider, the Chair allegedly made inappropriate comments. Specifically, ODOT asserts the Chair stated: "he's not the Pope" and "is a fine individual despite his unfortunate party affiliation" when referring to the Director of ODOT. ODOT also references inferences made by the Chair regarding exchanges between the OMPC staff and ODOT during these proceedings. We have reviewed in its entirety the record and in particular the comments made by the Chair at the hearing. The record shows that this matter was tried with vigor by competent counsel representing both ODOT and the applicants. It appears the Chair when referring to the exchanges between the OMPC staff and ODOT, was attempting to keep the hearing on the issues rather than on personality conflicts that occurred while the matter was before the ADRP. Regarding the comments made about the Director of ODOT, the Chair appeared to be attempting levity regarding the political affiliation of the Director and also to make a point that it is possible for the Director of ODOT to make a mistake. These comments do not rise to the level of reversible error. *American Fertilizer Specialists, Inc. v. Wood*. 1981 OK 116, 635 P.2d 592, 597.

¶12 ODOT asserts because the ADRP found ODOT had delayed the proceedings for approximately four months by its actions, shows bias. Interestingly, the ADRP concluded the actions did not rise to the level necessary to impose sanctions. We do not see any bias when the ADR panel ruled in favor of ODOT on the issue of the imposition of sanctions. *Oklahoma County v. O'Neil, supra*.

¶13 Finally, ODOT argues it is apparent the ADR panel was biased because it refused to correct a mistake in its findings of fact regarding whether some or all of the Employee Service Evaluations (ESE) were reviewed by the screening committee. ODOT contends its witness testified that all of the ESEs were reviewed. However, after reviewing the record in its entirety, it becomes apparent the testimony of the witness on this issue was conflicting. The ADRP does

conclude at least one ESE was not reviewed as it was not prepared until after the selection of interviewees. We find the refusal by the ADR Panel to edit its findings of fact to conform to ODOT's recollection of the evidence does not demonstrate bias when the record supports the finding of fact utilized by the ADR Panel. *City of Hugo v. Public Emp. Relations Bd.*, *supra*.

¶14 Agency administrators are presumed to be capable of judging a particular controversy fairly, on the basis of its own circumstances. However, a person appearing before such an agency has a right to a fair and impartial hearing. *Wilson v. Oklahoma Horse Racing Comm.*, 1996 OK 3, 910 P.2d 1020, 1023. After reviewing the record, we find the proceedings were fair and impartial.

¶15 ODOT argues the ADRP was not qualified to function in the capacity of conducting a hearing and as such exceeded its authority and violated the Oklahoma Constitution, art 7, §1. We disagree. The Oklahoma Legislature created the Alternative Dispute Resolution Program and directed the OMPC to adopt and promulgate rules to implement the program. 74 O.S. Supp. 1994 §840-6.1. The OMPC promulgated the rules which are contained in Merit Rules 455:10-17-1 *et seq.* Those rules set forth the particular conferences available and the procedural rules applicable to that type of conference. The conferences available are negotiation conference, the preparation conference, the summary conference, the binding arbitration conference, the non-binding arbitration conference, and voluntary mediation. The rules provide that any party may request the appeal be resolved through Alternative Dispute Resolution and may request the particular procedure to be used. The ultimate decision regarding which method should be used is made by the Executive Director of the OMPC. Merit Rule 455:10-17-1. After reviewing the procedures outlined in the binding arbitration conference rule, we do not find the ADR panel violated any rule promulgated by the OMPC.

¶16 The elected Legislature makes public policy for the State and it is within the Legislature's prerogative to change the common law to reflect a change of time and circumstances. *Rollings v. Thermodyne Industries, Inc.*, 1996 OK 6, 910 P.2d 1030, 1036. The Legislature has authorized disputes to be resolved through the Alternative Dispute Resolution Program and once that process has been completed, the Legislature has provided that the decision rendered is appealable to the OMPC, the district court and then the appellate court. We find no violation of art 7, §1 of the Oklahoma Constitution as that provision authorizes commissions established by statute to exercise adjudicative authority or render decisions in individual proceedings.

¶17 ODOT argues that the appeal to the OMPC was flawed because the OMPC did not review the transcript of the hearing conducted before the ADRP. The procedure for a motion to reconsider, which is the proper format to have the OMPC review an adverse final decision, requires only two documents be filed, a motion to reconsider and a response. Merit Rule 455: 10-3-20. Title 75 O.S. Supp. 1992 §317 sets forth the grounds upon which a motion will be granted: 1) newly discovered evidence, 2) need for additional evidence to adequately develop necessary facts, 3) probable error committed in the proceeding, 4) need for further consideration and evidence in the public interest, and 5) showing that issues not previously considered ought to be examined. The OMPC may permit oral argument or ask questions of the parties. Merit Rule 455:10-3-20. In this case, the OMPC noted that it had the applicants' original notice of appeal to the Commission with supporting documents, the various determinations made during the process, the motion for reconsideration, the response, and all of the material the parties had appended in support of their position on the motion to reconsider. In particular, ODOT's motion to reconsider was 28 pages long with approximately 15 exhibits. This motion to reconsider contained a lengthy discussion of the evidence presented as well as ODOT's legal position. Again, we find no violation by the OMPC in its review pursuant to §317.

¶18 ODOT argues the OMPC violated the Administrative Procedures Act and the Open Meeting Act by *denying oral argument and then deliberating in executive session on the motion to reconsider*. Title 25 O.S. Supp. 1999 §307 allows executive session when a public body is engaging in deliberations or rendering either a final or intermediate decision in an individual proceeding subject to Article II of the Administrative Procedures Act. Clearly, the OMPC was engaging in deliberations contemplated by §307. ODOT argues the OMPC violated 75 O.S. Supp. 1994 §309 by not allowing oral argument which prevented ODOT from being heard on all the issues. However, ODOT was pursuing a motion to reconsider after a three-day hearing by the ADRP in which ODOT presented evidence and argument on all of the issues presented even though the ADRP is not subject to Article II of the Administrative Procedures Act. 74 O.S. Supp. 1994 §840-6.10. We find no violation of the Open Meeting Act or the Administrative Procedures Act.

¶19 ODOT contends *no Merit Rules were violated by ODOT in the selection of its division manager*. The ADRP found ODOT had violated Merit Rules 530:10-9-3 (uniform and equal treatment in all phases of the examination procedure) 530:11-11-51(b)(6) (the posting shall include any additional factors which the appointing authority will consider) and 530:10-17-31(d) (the agency shall use the service ratings of employees in decisions regarding promotions). The members of the screening committee testified that there was no uniform procedure in determining who would be interviewed. A review of the posting of the division manager position contained *no additional factors*, however, members of the screening committee testified that they were provided with *additional factors by Mr. Mayberry* and these factors were to be considered by the screening panel in choosing the next division manager. There was evidence that not every applicant's packet contained the service ratings of the employee. The evidence supports the ADR panel's finding ODOT violated Merit Rules in the selection of its division manager.

¶20 The final issue to be considered is whether attorney fees and costs properly were awarded to the five applicants. Title 74 O.S. Supp. 1995 §840-6.8 allows attorney fees if the ADR panel determines the nonprevailing party was without reasonable basis or was frivolous. The applicants based their request for attorney fees on this ground: when the grievance reviewer for ODOT set forth the violations and recommendations, the Director of ODOT agreed with everything except the vacation and readvertisement of the position because there was no *serious* error in the process. Pursuant to Merit Rule 455:10-15-1(d), the ADR Panel considered the factors enunciated for determining whether a nonprevailing party's actions were without reasonable basis or frivolous. Those standards are, but are not limited to: 1) where the nonprevailing party's action is clearly without merit or unfounded; 2) where the nonprevailing party initiated an action in bad faith, including actions 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 it would not prevail on the merits.

¶21 ODOT's position was not clearly without merit as the ADRP ruled in ODOT's favor when the ADRP found no disability discrimination present in the selection process. Although there were allegations of intimidation by ODOT, the ADRP did not make any specific finding of intimidation. The ADRP did find ODOT had engaged in conduct which delayed the binding arbitration process by approximately four months. The record contains evidence that the five applicants encountered significant difficulty in obtaining discovery documents prior to the actual proceedings and numerous discovery hearings and postponements occurred due to ODOT's actions. ODOT's conduct was contrary to the express purpose of the ADR panel which is to provide a hearing process that is faster and less costly. Merit Rule 455:10-17-1. We find the

ADRP's award of attorney fees and costs is supported by the evidence. *City of Hugo v. Public Emp. Relations Bd., supra*. Accordingly, the trial court's decision is affirmed.

¶22

AFFIRMED.

ADAMS, P.J., and JOPLIN, J., concur.