

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHRISTIAN WOLFF,
Petitioner,

v.

BOARD OF PSYCHOLOGIST EXAMINERS,
Respondent.

Board of Psychologist Examiners
2012073

A156151

ORDER ALLOWING ATTORNEY FEES AND COSTS AND DISBURSEMENTS

Before Ortega, Presiding Judge; Lagesen, Judge; and Wilson, Senior Judge.

Petitioner seeks attorney fees of \$7,970.34 and costs of \$483.90 for his successful judicial review of the board's order that granted summary determination against him. He asserts that he is entitled to a discretionary attorney fee award under ORS 183.497(1)(a) because we reversed the board's order and because the relevant factors in ORS 20.075(1) cut in his favor.

In the underlying appeal, we concluded that the board erred in granting summary determination because there were genuine issues of material fact as to whether petitioner's use of the terms "PsyA," "Master of Arts Clinical Psychology," and "practicing psychology" were misleading or deceiving to the public. Therefore, we concluded that the board's conclusion that petitioner's behavior violated statutes governing the practice of psychology was premature at the summary determination stage.

ORS 183.497 provides, in relevant part:

"(1) In a judicial proceeding [seeking judicial review of a final order] the court:

"(a) May, in its discretion, allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner."

ORS 20.075 provides, in relevant part:

"(1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

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“(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

“(b) The objective reasonableness of the claims and defenses asserted by the parties.

“(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

“(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

“(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

“(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

“(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

“(h) Such other factors as the court may consider appropriate under the circumstances of the case.”

The general state of the law for discretionary attorney fee awards under ORS 183.497 is that “a governmental entity may take a position that a reviewing court later determines to be erroneous, but that alone does not make the entity's position objectively unreasonable.” *Clackamas County Assessor v. Village*, 352 Or 144, 153, 282 P3d 814 (2012) (emphasis added). Moreover, the objective reasonableness of an agency's action is a consideration that can “severely militate against an award of attorney fees under ORS 183.497(1)(a).” *G.A.S.P. v. Environmental Quality Commission*, 222 Or App 527, 195 P3d 66 (2008). That legal principle is based on the concern that discretionary attorney fee awards against agencies that have acted reasonably could “make administrative agencies timorous about pursuing reasonable positions as to what the law is or ought to be.” *McKean-Coffman v. Employment Div.*, 314 Or 645, 649-50, 842 P2d 380 (1992). In those circumstances, the public interest would be “ill-served.” *Id.* However, as we recognized in *G.A.S.P.*, that concern is not as strong when the agency's position does not involve an “erroneous interpretation of law” but instead, is based on whether there is substantial evidence to support an agency's finding of fact. 222 Or App at 546. Further, objectively reasonable actions by the agency do not necessarily preclude an award because our exercise of discretion depends on the totality of the criteria prescribed by ORS 20.075(1).

Here, petitioner mainly relies on ORS 20.075(1)(b), (c), and (d) to support his request. As to (b), he claims that his position--that there was no reasonable likelihood that his conduct would have misled or endangered the public--received “significant support” in our opinion. As for (c) and (d), he claims that awarding attorney fees “would

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encourage other highly regulated professionals to challenge erroneous grants of summary determination by their regulatory agencies, but would be unlikely to prevent agencies from exercising the broad powers granted them by the Legislature to oversee professions and protect the public.” As for the remaining factors in (a), (e), (f), (g), and (h), he maintains that they do not cut in favor of either party.

The board objects to the petition, asserting that a discretionary attorney fee award is not appropriate in this case because it acted in good faith and simply granted summary determination under OAR 137-003-0580 based on a record that we determined could support a conclusion that differed from the conclusion reached by the board. Accordingly, the board argues that, given that its conduct was objectively reasonable, factor (a) militates against an award in this case. The board also disputes petitioner's contention that (c) and (d) favor an award. According to the board, awarding petitioner fees would not deter meritless claims by state agencies “because the board's claims in this case were not meritless” and because petitioner acknowledges that the board did not behave “unreasonably” in the litigation.

In the event we exercise our discretion to award fees, the board asks us to reduce the amount from \$7,970.34 to \$7,575.00 because the petition includes “expenses” in his request for fees that are not recoverable.

We conclude that, after considering the totality of the criteria in ORS 20.075(1), it is appropriate to exercise our discretion to award petitioner attorney fees in the amount of \$7,575.00. To begin, we conclude that the factors in ORS 20.075(1)(a), (b), (d), (e), (f), and (g) do not favor either party. There is no indication that either party acted in bad faith, both parties took objectively reasonable positions and acted objectively reasonably during the proceedings, an award of fees would not deter others from asserting meritless claims and defenses, the amount of the prevailing party fee under ORS 20.190 is irrelevant, and there is no record of the parties' actions in pursuing settlement.

As for the factor in ORS 20.075(1)(c), given the circumstances, we do not see how an award of attorney fees would preclude the board from asserting good faith claims or defenses in similar cases. That is so because our decision to reverse and remand the board's order was not based on an erroneous interpretation of law, so much as it was based on a determination that summary determination was premature given that issues of fact remained. Put another way, we simply concluded that summary determination was inappropriate and petitioner was entitled to a hearing. We do not believe that that conclusion will preclude the board from asserting a good faith claim in other cases that summary determination is appropriate when it is in fact appropriate.

That leaves the factor in ORS 20.075(h) – “such other factors as the court may consider appropriate under the circumstances of the case.” Here, we conclude that that factor weighs in favor of an attorney fee award. In short, the board's premature grant of summary determination prevented petitioner from receiving the hearing that he was

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entitled to under the Oregon Administrative Procedures Act. Given that his professional license was at stake, we conclude that he should be entitled to attorney fees for his effort to secure the right to which he was entitled.

We also conclude that petitioner's fee request should be reduced to \$7,575.00 because the request includes sums paid for numerous motions for extension of time, which is not recoverable as attorney fees. Further, those filing fees are also not recoverable as costs. See *Chou v. Farmers Ins. Exchange*, 260 Or App 564, 320 P3d 608 (2014).

Attorney fee petition granted; attorney fees in an amount of \$7,575.00 and costs in an amount of \$483.90 awarded to petitioner.



08/09/2017
8:37 AM

DARLEEN ORTEGA
PRESIDING JUDGE, COURT OF APPEALS

c: Bear Wilner-Nugent
Inge D Wells
Keith L Kutler

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