

**IN THE SUPREME COURT OF THE CHEROKEE NATION**

**IN THE MATTER OF THE APPEAL OF  
RACHEL MCALVAIN**

**CONSOLIDATED CASE  
NO. SC-12-02**

**CONSOLIDATED CASES:**

**IN THE MATTER OF THE APPEAL OF  
PAULA RAGSDALE**

**CASE No. SC-2012-04**

**IN THE MATTER OF THE APPEAL OF  
SAMMYE RUSCO**

**CASE No. SC-2012-05**

**IN THE MATTER OF THE APPEAL OF  
TAMYSE DREADFULWATER**

**CASE No. SC-2012-06**

## OPINION

**APPEAL FROM THE EMPLOYEE APEALS BOARD  
OF THE CHEROKEE NATION  
TAHLEQUAH, OKLAHOMA**

**EMPLOYEE ADMINISTRATIVE APPEAL 12-01**

**Rachel McAlvain, et. al.**  
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**Assistant Attorney General**

**Before:**

**Troy Wayne Poteete, Chief Justice**  
**John Garrett, Justice**  
**James G. Wilcoxon, Justice**

SC-12-02 consolidated

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### **Case History**

The related appeals have been consolidated for purposes of reviewing the hourly rate for the Appellant/Employees (hereafter Employees) attorney set by the Employee Appeals Board (EAB). Each of the employees appealed the decision of the EAB upholding their termination to this Court. In each case this Court overturned the decision of the EAB. The Employees now appeal the determination of the EAB that their attorney, the prevailing counsel, be awarded attorney fees at the rate of \$175 per hour while the several attorneys who represented the Cherokee Nation, the losing party, were compensated at the rate of \$250.00 per hour.

### **Issue**

The issue before us: Whether the EAB erred in setting the hourly rate for the attorney representing the prevailing party at \$175 when the attorneys representing the losing party were compensated at the rate of \$250 per hour.

### **Standard of Review**

The scope of our review is set out in **51 CNCA 1027(A)(5)** which provides that: “the Supreme Court may set aside, modify, reverse, and remand, orders of the EAB, if the Court determines that an employee’s rights have been prejudiced because the EAB’s findings, inferences, conclusions or decisions, are *clearly erroneous* in view of the reliable, material, probative, and substantial competent evidence... without substituting its judgment as to the weight of the evidence for that of the EAB.”

### Discussion

Cherokee Nation (hereafter “the Nation”) argues that the disparity in compensation is justified by the application of the Oklahoma Rules of Professional Conduct Rule 1.5 FEES (OK ST RPC Rule 1.5), which requires that a lawyer’s fees be reasonable and sets out factors for determining reasonableness. The crux of the argument hinges upon the application of OK ST RPC Rule 1.5(a) (3) which lists as a factor for determining reasonableness “the fee customarily charged in the locality for similar legal services”.

The Nation argues that the amount allowed to Employees’ attorney is reasonable because it is consistent with the “local attorney rate”; the rate paid to attorneys practicing in the Oklahoma District Courts in Cherokee County and Adair County.

Employees argue that a fee of \$175 an hour is not reasonable. Employees contend that “the fee customarily charged in the locality for similar services” is \$250 per hour as evidenced by the fees paid to five attorneys representing the Cherokee Nation in the instant cases; and as evidenced by the fees allowed to Employees’ attorney in two previous cases. We agree.

While the state courts are in the geographic locality of the tribal court house, the cases handled there are not “for similar services”, as contemplated by Rule 1.5 (a) (3).

It is undisputed that all the attorneys practicing before the EAB, excepting the Employees’ attorney, were allowed \$250 per hour in the instant cases. This group then represents the legal community practicing before the EAB.

The Nation argues that the relative overhead of the attorneys should be considered as a factor in determining the reasonableness of attorney fees. The Nation



argues that the choice to office and work in the big city, as opposed to in a rural county, were factors reasonably considered in determining that the prevailing attorney, who worked alone, is worth less per hour than attorneys who sometimes worked as a team. None of these considerations are factors set out in the Oklahoma Rules of Professional Conduct Rule 1.5 FEES (OK ST RPC Rule 1.5). Accordingly we reject these factors as justification for paying the prevailing attorney at a lesser rate than allowed the losing attorneys.

A review of the record and the pleadings reveals no evidence to support the contention that \$175 per hour is "the fee customarily charged for the same or similar services in the local", rather all the evidence indicates that the fee customarily charged for representation before the EAB and the Cherokee Nation Supreme Court for similar cases is \$250. Consideration of the prevailing rate for attorneys in nearby state courts is a misapplication of OK ST RPC Rule 1.5 (a).


Accordingly we find that the determination of the EAB that the amount of \$175 is reasonable compensation for the prevailing attorney in the subject cases is *clearly erroneous* in light of the uncontroverted evidence presented.

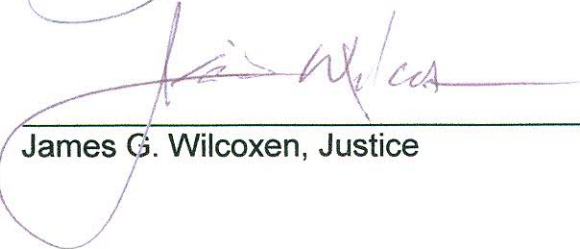
IT IS THEREFORE ORDERED that the Decision of the EAB dated February 25, 2015 is hereby vacated. Employee/Appellants attorney is hereby awarded attorney fees in amount of \$250.00 per hour consistent with the amount allowed to the attorneys for the Cherokee Nation.

IT IS SO ORDERED this 14th day of November, 2015.

  
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Troy Wayne Poteete, Chief Justice

Concurring:

  
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John C. Garrett, Justice

  
\_\_\_\_\_  
James G. Wilcoxon, Justice

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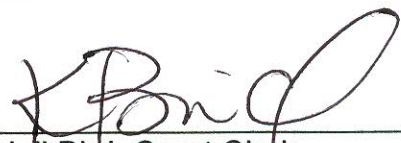
CERTIFICATION OF MAILING

I certify that a true and correct copy of the foregoing document was mailed and/or transmitted via facsimile on this 24<sup>th</sup> day of November, 2015 to the following:

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Kendall Bird, Court Clerk