

V. CONCLUSION

A finding that Plaintiff abandoned his employment is not supported by substantial evidence. The attempt to dismiss Plaintiff on July 2, 2008 violated Plaintiff's right to due process and thus remains ineffective. Plaintiff is entitled to reinstatement and back pay from July 2, 2008 until he is reinstated. Such back pay shall be reduced by \$8,320, which is the highest estimate of his subsequent earnings, and income and social security taxes shall be withheld and remitted to the proper authorities. Plaintiff prevails on his allegations of a civil rights violation and is therefore awarded attorneys fees and costs which shall be submitted to the Court as directed above.

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FSM SUPREME COURT APPELLATE DIVISION

GINN P. NENA,)	APPEAL CASE NO. K7-2013
)	Civil Action No. 39-2013
Appellant,)	
)	
vs.)	
)	
HAMLIN SAIMON, JOSHAIA SAIMON,)	
and LENORA SIGRAH,)	
)	
Appellees.)	
_____)	

ORDER GRANTING \$91 IN COSTS

Martin G. Yinug
Chief Justice

Decided: May 7, 2014

APPEARANCES:

For the Appellant: Sasaki L. George, Esq.
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HEADNOTES

Costs – Procedure

A party who desires costs to be taxed in an appeal case shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. The appellate clerk will act on the bill of costs, at least when no opposition has been filed; when there is opposition, the matter is usually referred to the court or a judge thereof. Nena v. Saimon, 19 FSM R. 393, 394-95 (App. 2014).

Appellate Review

The court must first look to FSM sources of law and circumstances, but when it has not previously construed an aspect of an FSM appellate procedure rule that is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance in interpreting the rule. Nena v. Saimon, 19 FSM R. 393, 395 n.1 (App. 2014).

Appellate Review; Costs – Procedure

The appellate panel's presiding justice may consider a bill of costs. A single justice's action may be reviewed by the court. Nena v. Saimon, 19 FSM R. 393, 395 (App. 2014).

Attorney's Fees – Court-Awarded; Costs – Procedure

Even though no opposition was filed to an appellate bill of costs, it still must be considered by a judge when it asks for attorney's fees since attorney's fees can only be determined by a judge, not a clerk. Nena v. Saimon, 19 FSM R. 393, 395 (App. 2014).

Attorney's Fees – Court-Awarded; Costs – Disallowed

A request for attorney's fees sought as costs must be denied because attorney's fees are not recoverable as costs under Appellate Rule 39. Attorney's fees are traditionally not considered part of costs. Nena v. Saimon, 19 FSM R. 393, 395 (App. 2014).

Attorney's Fees – Court-Awarded; Costs – Disallowed

6 F.S.M.C. 1017 does not grant the court power to award attorney's fees. It only refers to court fees and the like. Nena v. Saimon, 19 FSM R. 393, 395 (App. 2014).

Costs – Disallowed

While, as a general rule, attorney's fees can be awarded as an element of costs only if it is shown that such fees were traceable to the opposing party's unreasonable or vexatious actions, even if attorney's fees could be awarded for vexatious actions during an appeal, an issue not decided, fees would not be awarded when, although much of the appellees' motion to dismiss was a petty attempt to avoid a ruling on the merits, the motion as a whole was not thoroughly unreasonable. Nena v. Saimon, 19 FSM R. 393, 395 (App. 2014).

Costs – Allowed

The clerk will tax costs of \$91 in expenses for reproducing and serving the prevailing appellant's briefs when that amount was verified and appears reasonable. Nena v. Saimon, 19 FSM R. 393, 395 (App. 2014).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

This comes before the court on appellant Ginn P. Nena's Bill of Costs, filed April 17, 2014. Nena asks that costs be taxed for him of \$91 for the expense of reproducing and serving the briefs and \$2,246 for his attorney's fees.

FSM Appellate Rule 39 governs the taxation award of costs in appeal cases. "A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. FSM App. R. 39(d). "The [appellate] clerk will act on the bill of costs, at least where no opposition has been filed;

where there is opposition, the matter is usually referred to the court or a judge thereof." 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3985.1, at 589 (4th ed. 2008).¹ The panel's presiding justice may therefore consider this bill of costs. "The action of a single justice may be reviewed by the court." FSM App. R. 27(c).

Although no opposition was filed to the bill of costs, it still must be considered by a judge since it asks for attorney's fees and attorney's fees can only be determined by a judge, not a clerk. FSM Social Sec. Admin. v. Lelu Town, 13 FSM Intrm. 60, 62 (Kos. 2004) (attorney's fees may only be awarded upon a judicial finding that the fees sought are reasonable); Bank of the FSM v. Bartolome, 4 FSM Intrm. 182, 184 (Pon. 1990).

The request for attorney's fees must be denied because attorney's fees cannot be awarded as costs. "Attorney's fees are not recoverable as costs under Appellate Rule 39." Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 307 (App. 2000). Attorney's fees are traditionally not considered part of costs. See Lewis v. Rudolph, 16 FSM Intrm. 278, 280 (Chk. S. Ct. App. 2009); Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 223 (Chk. S. Ct. App. 2001); DJ Store v. Joe, 14 FSM Intrm. 83, 86 (Kos. S. Ct. Tr. 2006). Furthermore, the statute the appellants refer to as allowing the court to grant fees to the prevailing party, 6 F.S.M.C. 1017, does not grant the court power to award attorney's fees. It only refers to court fees and the like and no court fees were imposed in this appeal.

As a general rule, attorney's fees can be awarded as an element of costs only if it is shown that such fees were traceable to unreasonable or vexatious actions of the opposing party. Salik v. U Corp., 4 FSM Intrm. 48, 49-50 (Pon. 1989). While much of the appellees' motion to dismiss that was denied on September 10, 2013, Nena v. Saimon, 19 FSM R. 136 (App. 2013), was a petty attempt to avoid a ruling on the merits, the motion as a whole was not thoroughly unreasonable. Thus, even if attorney's fees could be awarded for vexatious actions during an appeal, an issue not decided now, they would not be awarded here.

The \$91 in expenses for reproducing and serving Nena's briefs was verified and appears reasonable. Accordingly, the clerk shall tax costs in Ginn P. Nena's favor and against the appellees in the amount of \$91.

* * * *

¹ The court must first look to FSM sources of law and circumstances, but when it has not previously construed an aspect of an FSM appellate procedure rule that is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance in interpreting the rule. See, e.g., Kosrae v. Langu, 16 FSM Intrm. 83, 87 n.1 (App. 2008); Berman v. College of Micronesia-FSM, 15 FSM Intrm. 622, 624 n.1 (App. 2008). Whether a single justice can rule on a Rule 39 bill of costs has not been considered before.