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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAUL ROMAGUERA, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 87-3604F
	)	
DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICAL EXAMINERS,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a formal hearing in the above matter was held before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on December 1, 1987, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Charles C. Powers, Esquire
Michael S. Smith, Esquire
Post Office Box 15021
West Palm Beach, Florida 33409

For Respondent: Stephanie A. Daniel, Esquire
130 North Monroe Street
Tallahassee, Florida 32399-0750

BACKGROUND

By petition filed on August 18, 1987, petitioner, Raul Romaguera, M.D., seeks an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes (1985). The petition was filed after respondent, Department of Professional Regulation, Board of Medical Examiners, entered a Final Order on June 19, 1987 in Case No. 86-4887 dismissing with prejudice an administrative complaint filed against petitioner for allegedly violating Chapter 458, Florida Statutes.

By agreement of the parties, a final hearing on the petition was held on December 1, 1987 in West Palm Beach, Florida. At

hearing, petitioner presented the testimony of Michael S. Smith and offered petitioner's exhibit 1 which was received in evidence. Respondent offered respondent's exhibit 1 which was received in evidence. That exhibit is the record of DOAH Case No. 86-4887.

The transcript of hearing was filed on December 14, 1987. Proposed findings of fact and conclusions of law were filed by petitioner on December 24, 1987. None were filed by respondent. A ruling on each proposed finding of fact is made in the Appendix attached to this Final Order.

At hearing, the parties stipulated that petitioner is a prevailing small business party within the meaning of Subsection 57.111(3), Florida Statutes (1985), and that petitioner has incurred costs and fees of at least $10,000 in defending this action. The only issue, then, is whether the actions of respondent were substantially justified in initiating its complaint, or whether other special circumstances exist which would make an award of fees and costs unjust.

Based upon all of the evidence, and the stipulation of counsel, the following findings of fact are deermined:

FINDINGS OF FACT

1. Petitioner, Raul Romaguera, is a small business party within the meaning of Subsection 57.111(3)(d), Florida Statutes (1985). When the underlying action herein occurred, he was licensed as a medical doctor by respondent, Department of Professional Regulation, Board of Medical Examiners (Board).

2. On October 27, 1986, respondent filed an administrative complaint against Dr. Romaguera alleging that he had violated Subsection 458.331(1)(t), Florida Statutes (1985), by committing gross malpractice or failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The alleged violation related to Dr. Romaguera's inspection and diagnosis of a patient's tissue in December, 1980 while supervising a pathology department at a Lake Worth hospital. After an evidentiary hearing was conducted on March 24 and 25, 1987, a Recommended Order was entered by the undersigned on May 12, 1987, finding that the charge was unsubstantiated and recommending that the complaint be dismissed. The Recommended Order was adopted by the Board in its entirety by Final Order dated June 19, 1987. A timely petition for attorney's fees and costs was thereafter filed by petitioner on August 18, 1987.

3. The parties have stipulated that, as a result of the Board's Final Order, Dr. Romaguera is a prevailing small business party within the meaning of Section 57.111, Florida Statutes (1985). They have also stipulated that, in order to defend against the agency's action, Dr. Romaguera incurred at least $15,000 in attorney's fees and costs.

4. There is no evidence as to what information, oral or written, the probable cause panel had before it when voting to initiate this action. The agency does stipulate that, at some point in the probable cause phase of the proceeding, the panel requested more information on the matter before taking a vote. This is corroborated by an agency memorandum dated April 8, 1986 and introduced into evidence as petitioner's exhibit 1.

5. At the final hearing on the merits of the administrative complaint, the agency presented a number of expert witnesses who concurred in the Board's assessment that Dr. Romaguera had failed to practice medicine with that level of care, skill and treatment required of a reasonably prudent similar practicing physician in the Lake Worth area. Doctor Romaguera also presented the testimony of an expert who disagreed with this assessment. Hence, the validity of the charges turned on the credibility and weight to be given the various experts by the undersigned.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes (Supp. 1986).

7. Initially, some comment is necessary with respect to the burden of proof in this type of proceeding. As the petitioner, Dr. Romaguera bears the burden of proving that he is a small business party and that he prevailed in the action. Once this showing is made, the burden shifts to the agency to demonstrate that its actions were substantially justified or that special circumstances exist which would make an award unjust. As succinctly stated in Gentele v. Department of Professional Regulation, Board of Optometry, 9 FALR 310, 327 (DOAH June 20, 1986)

> The conclusion that the agency must prove its actions were substantially justified, or that special circumstances exist which would make an award unjust, is buttressed by the plain language of the statute. In mandatory language, Section 57.111(4)(a) declares the general rule -- that fees and costs "shall" be awarded to a prevailing small business

> party. Then, following a comma, the Act creates two exceptions (actions substantially justified or special circumstances make an award unjust) which, if proven, make the general rule inapplicable. The agency is the best party to know the factual and legal basis of its prior actions, and whether special circumstances exist which would make an award unjust. Hence, it is the agency which must affirmatively raise and prove the exception.

This allocation of proof is consistent with federal decisions interpreting an almost identical provision in Section 504(a)(1) of the Federal Equal Access to Justice Act (5 U.S.C., s. 504 et seq.), upon which the state law is patterned. 1/ Therefore, if petitioner establishes he is a prevailing small business party, the agency must then prove the exception.

8. The parties have stipulated that Dr. Romaguera is a prevailing small business party and that he incurred at least $15,000 in attorney's fees and costs in defending this action. This being so, it is concluded petitioner has established a prima facie case for entitlement to an award of fees and costs.

9. The parties disagree on the required showing to demonstrate that a proceeding is substantially justified. By way of argument at hearing, the Board takes the position that the entire record, as defined in Subsection 120.57(1)(b)6., Florida Statutes (Supp. 1986), must be reviewed in order to fairly assess the legitimacy of the proceeding. Conversely, Dr. Romaguera contends the inquiry is limited to the probable cause phase of the proceeding, a matter not normally a part of the above record unless produced by the agency pursuant to a request of the licensee.

10. As an instructive aid in determining whether an action was substantially justified, Subsection 57.111(3)(c) provides that "(a) proceeding is 'substantially justified' if it had a reasonable basis in fact and law at the time it was initiated by a state agency." (Emphasis added) In clear terms, then, the legislature has directed the trier of fact to determine what data or advice the agency relied upon when it initiated a proceeding against a licensee, and whether this determination constituted a reasonable basis in fact and law for initiating an action. Under the existing statutory scheme An Section 455.225, Florida Statutes (Supp. 1986), and as codified in Rule 21N-18.006, Florida Administrative Code (1987), a probable cause panel, made up of three members of the Board, has the statutory duty of examining complaints brought to its attention and determining

whether they warrant a finding of probable cause against a licensee. 2/ Therefore, it is this phase of a Board proceeding, and not the final hearing on the merits, that Subsection 57.111(3)(c) mandates be reviewed in order to adjudicate a claim for attorney's fees and costs. In construing the statute in this manner, the undersigned has given primary consideration to the plain meaning of the statutory language itself and avoided an interpretation that would lead to an absurd result. 3/

11. The evidence does not disclose whether the panel had a reasonable basis in fact or law to find probable cause. Indeed, the record is void as to what information, if any, the panel considered in reaching its decision. Likewise, in the present state of the record, the undersigned cannot determine if a "meaningful" probable cause inquiry was conducted by the panel as required by law. See, for example, Kibler v. Department of Professional Regulation, 418 So.2d 1081 (Fla. 4th DCA 1982). Given this lack of evidence, it cannot be said that respondent has sustained its burden of proving that the action was "substantially justified." Neither has respondent shown the existence of other "special circumstances" that would make an award of fees and costs unjust. This being so, Dr. Romaguera's petition should be granted. 4/

12. In reaching the above conclusion, the undersigned has considered the agency's submission of petitioner's exhibit 1, which is the record in Case No. 86-4887 after it was initiated by the Board. It is true, as the exhibit suggests, that the merits of the charges in Case No. 86-4887 turned on a credibility assessment by the undersigned of various expert witnesses tendered by the respective parties at final hearing. However, the fact that, after the proceeding was initiated, the agency was able to procure expert witnesses to support its position does not sanitize its failure here to document the probable cause phase (initiation) of the proceeding. 5/ Therefore, the case of Gentele v. Department of Professional Regulation, Board of Optometry, 513 So.2d 672 (Fla. 1st DCA 1987), is distinguishable since in Gentele the agency's initiation of an action was founded on a credibility assessment by the probable cause panel (and not a hearing officer), and as such, had a reasonable basis in fact and law. Here there is no evidence upon which to make a similar determination.

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that Dr. Romaguera's petition for attorney's fees and costs be GRANTED and that the Board of Medical Examiners pay

petitioner $15,000 in attorney's fees and costs within thirty days from date of this order as required by Subsection 57.111(5), Florida Statutes (1985).

DONE AND ORDERED this 4th day of January, 1988, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of January, 1988.

ENDNOTES

1/ See, for example, Derickson v. National Labor Relations Board, 774 F.2d 229 (8th Cir. 1985); Temp Tech Industries, Inc. v. National Labor Relations Board, 756 F.2d 586 (7th Cir. 1985); Charter Management, Inc. v. National Labor Relations Board, 768 F.2d 1299 (11th Cir. 1985); Ashburn v. United States of America, 740 P.2d 843 (11th Cir. 1984); Enerhaul, Inc. v. National Labor Relations Board, 710 F.2d 748 (11th Cir. 1983).

2/ It is noted that if the panel makes a finding of probable cause, DPR must follow this determination since Subsection 455.225(3), Florida Statutes (Supp. 1986), provides that, after such a finding is made, DPR "shall file a formal complaint" against the licensee. (Emphasis added)

3/ If the agency's position was adopted, the Board could justify the initiation of any action by merely producing a witness at final hearing who supported the allegations in the complaint.

4/ At hearing respondent suggested that petitioner had waived his right to challenge any aspect of the probable cause phase of the proceeding since he had not timely done so in Case No. 86-4887. This contention is rejected since (a) it is the respondent, and not petitioner, that must affirmatively raise and prove the exception, and (b) there is nothing in Section 57.111 that bars a party from utilizing its provisions unless it

previously sought a dismissal of the administrative complaint on the ground the agency had not satisfied all procedural requirements in Section 455.225.

5/ This proposition works both ways. If, for whatever reason, the agency produced little or no evidence at final hearing on the merits of the complaint, but could show the probable cause panel was substantially justified in its decision to initiate the matter, the Board would be statutorily insulated against a claim for fees and costs.

APPENDIX TO FINAL ORDER, CASE NO. 87-3604

Petitioner:

1. Covered in finding of fact 1.
2. Covered in finding of fact 3.
3. Covered in finding of fact 3.
4. Partially covered in finding of fact 4. The remainder is irrelevant.
5. Rejected as being irrelevant.
6. Rejected as being irrelevant.
7. Covered in finding of fact 4.
8. Covered in finding of fact 4.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.