STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

E. S.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-6262F
	)	
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, this matter came on for hearing in Tallahassee, Florida, before the Division of Administrative Hearings by its duly designated Hearing Officer, Diane Cleavinger, on November 15, 1989.

APPEARANCES

The parties are represented as follows:

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For Respondent: John R. Perry, Esquire
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Department of Health and
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STATEMENT OF THE ISSUES

The issue addressed in this proceeding is whether Petitioner is entitled to attorney's fees pursuant to Section 120.57(1)(b)5, Florida Statutes.

PRELIMINARY STATEMENT

The parties filed proposed orders on March 16, 1990. The parties' Proposed Findings of Fact have been utilized in the preparation of this Final Order. Specific rulings on the parties' proposed Findings of Fact are included in the Appendix to this Final Order.

FINDINGS OF FACT

1. On or about April 7, 1989, a report of child abuse was received by the Florida Protective Services System alleging that E.S. had injured two children enrolled at the Gladys Morris Elementary School, Taylor County, Florida.

2. On April 10, 1989, the HRS Protective Services Investigator, Linda Douglass, conducted an investigation of the circumstances. The investigation revealed that E.S. had removed C. from her third grade classroom. She held him by the scruff of his neck and his arm. During the process of removal, E.S. accidentally ran C. into a wall or door frame. No physical or mental injuries were sustained by C. as a result of E.S.'s actions. Likewise, no harm appeared to be threatened by E.S.'s method of removing C. from her classroom. No investigation was conducted to determine why C. was being removed or how much resistance C. had undertaken to avoid his removal. The second incident involved a student named D. When D. got up to sharpen her pencil without permission, E.S. shook D by the shoulder. During the shaking, D.'s nose began to bleed. D. was given some paper towels to put on her nose and was sent to the infirmary.No investigation was conducted to determine whether the nose bleed was caused by the shaking or how hard the shaking action had been. After the case had been forwarded for a formal hearing, it was discovered that the nose bleed was unrelated to D. being shaken. Other than the nose bleed, there was no physical or mental injury caused or threatened by E.S.'s actions. On April 20, 1989, the report of abuse was classified as "confirmed." In both instances, the actual abuse found was categorized under "other physical injury" and "excessive corporal punishment/beatings." The narrative in the child abuse report states:

> (E.S.) was observed dragging the C. child from the classroom by an arm and the back of his neck. She then ran the child's face into a brick wall. The child was crying.
>
> The teacher has shaked a child named D. until her nose bled. The children in her third grade room at Gladys Morse Elementary School are "out of control, they cut up each other's shoes," and (E.S.) -"can't control the class so she starts slapping them around and things". This has been going on for years and nobody does anything about it.

3. Following an internal review, the data entry was completed on April 24, 1989 and the investigatory process was closed.

4. Because of the unusual statutory process established in Chapter 415, Florida Statutes, E.S. was listed as an abuser of children on the Florida Child Abuse Registry upon confirmation of the abuse report. Her job as a teacher was thereby placed in jeopardy and she was suspended with pay. Her name would remain on the Abuse Registry for the next fifty years unless E.S. won an expunction of her record through the administrative process.

5. On April 26, 1989, formal notification was provided to E.S. by letter notifying her that she had been "confirmed" as a child abuser and advising her that she had a right to request the amendment or expunction of the confirmed report by making a request for such within thirty days of the date of the notice.

6. On May 18, 1989, E.S., through her counsel, requested that the record be amended and expunged since there was no evidence that any injury had occurred to the alleged victims and that the evidence was wholly insufficient to establish any wrongdoing on the part of E.S.. Although not specifically

mentioned, this letter places HRS on notice that it may be facing charges of frivolousness should this matter not be resolved during the agency's review process.

7. By letter dated May 18, 1989, the Department of Health and Rehabilitative Services confirmed receipt of Petitioner's request to expunge the confirmed report.

8. On May 31, 1989, the Petitioner through her counsel, supplemented the request for expunction. Based upon a complete review of the HRS file, the supplement again pointed to the absence of any injury or "harm" to the children involved in the alleged abuse. Again, HRS was placed on notice of a potential claim of frivolousness should a formal proceeding be required.

9. When more than the thirty days provided for review by the Secretary of an expunction request elapsed, the Petitioner on July 7, 1989, requested a formal administrative hearing to challenge the finding of "confirmed" abuse. This letter initiated the formal proceedings contemplated under Section 120.57(1), Florida Statutes.

10. When an additional six week period passed without response to the first hearing request, the Petitioner made a second request for hearing on August 24, 1989. The August 24th letter to Secretary Gregory L. Coler pointed out that the Administrative Procedure Act requires a hearing request be granted or denied within fifteen days of the request's receipt.

11. On September 12, 1989, a third request for hearing was made to the Department of Health and Rehabilitative Services. The September 12th letter outlined this proceeding's history of delay and the non-responsiveness of HRS. 1/

12. By letter dated September 18, 1989, counsel for the Petitioner received notification from the Department of Health and Rehabilitative Services that her request for expunction was, on that date, being denied and that if the Petitioner wished to have a hearing still another request for hearing was necessary. The letter was signed by a representative of HRS and was filed in the formal administrative proceeding by HRS. This letter constituted the action which should have been taken by HRS within 30 days of Petitioner's first request for amendment or expunction of the report. The agency's action was three months late.

13. A fourth demand for formal hearing was made by letter dated September 25, 1989.

14. Referral of the expunction request was forwarded to the Division of Administrative Hearings and a hearing was scheduled to be held on November 15, 1989.

15. Prior to hearing, the parties prepared and filed an undated prehearing stipulation outlining the issues which remained for resolution. The stipulation established the following issues for resolution at the hearing:

> 7. Issues of Fact to be Litigated -
> (a) Whether the Respondent engaged in any activity which caused "harm" [as defined in Chapter 415] to any child over which she exercised control;

(b) Whether any child was injured as a result of the actions or inactions of the Respondent;

(c) The Respondent asserts whether information deemed confidential by Section 415.51, Florida Statutes (1988), was disclosed to unauthorized recipients is an issue; the Petitioner disagrees; and,

(d) Whether there is competent and substantial evidence to retain a confirmed abuse finding on the Florida Protective Services System.

16. On November 6, 1989, the deposition of Linda Douglass was taken by Petitioner, E.S., in preparation for the November 15, 1989, hearing. The deposition was filed at the evidentiary hearing on Petitioner's Motion For Attorney's Fees. Since a Section 120.57(1)(b)5., Florida Statutes, motion is part of the original child abuse action, Ms. Douglass' deposition was filed in the initial proceeding for purposes of a motion for attorney's fees under this section.

17. Ms. Douglass' deposition constitutes the primary evidence in this case and comprises the entire investigation of this matter by HRS. After a review of this deposition, there can be no question that this case was poorly investigated with very important and essential facts not looked into; facts made essential because they are required by the statute in order to make a "confirmed" finding of child abuse. Essential facts not investigated were the connection between any alleged injuries and Petitioner's actions, whether there was any significant emotional harm to the alleged victims resulting from the alleged abuse, or, in the case involving C., what C. was being disciplined for and whether such "punishment" was excessive. 2/ See B.B. v. Department of Health and Rehabilitative Services, 542 So.2d 1362 (Fla. 3d DCA 1989). Failure to investigate such essential facts constitutes a failure to conduct a reasonable inquiry. On the facts revealed in the deposition, which were not materially different from the investigative report, this case should never have been confirmed. The evidence necessary to support a case of confirmed child abuse was never developed or investigated. Of greater concern, however, is that this case was confirmed for reasons other than the criteria contained in Chapter 415, Florida Statutes. One such reason, apparent from the deposition, was that Ms. Douglass did not think Petitioner should be teaching and did not want to chance her daughter being taught by Petitioner. In other words, this case was confirmed in order to affect Petitioner's future employment with the school or any other school because there was a very real difference in philosophy between Ms. Douglass and Petitioner on how to handle the children in her class. Such a confirmation is completely improper. However, the evidence does not demonstrate that the agency was aware of its investigator's motives until her deposition testimony. What the agency should have been aware of was the obvious lack of any substantial evidence on the statutorily required areas noted above. Failing to adduce such evidence and rubber-stamping its investigator's confirmation, thereby forcing a formal hearing, when the statute affords an agency a second chance to review the merits of its case needlessly increases the cost of litigation and is a failure to conduct a reasonable into the matter at hand. The foregoing is especially true when the statute specifically provides HRS with an abuse classification which covers situations in which abuse is indicated but cannot be confirmed with substative evidence. The classification is known as an

indicated abuse report. The report is maintained in the Abuse Registry for seven years. There is no right to a formal administrative hearing when a report is classified as "indicated."

18. On November 8, 1989, counsel for the Department of Health and Rehabilitative Services notified counsel for the Petitioner that the Department had determined to reclassify the "confirmed" report as "indicated" and therefore moved to dismiss the pending proceedings. The main proceeding was dismissed with jurisdiction reserved on the issue of attorney's fees.

19. On these facts, Petitioner would ordinarily be entitled to an award of attorney's fees pursuant to Section 120.57(1) (b)5. However, in addition to demonstrating that there was no reasonable inquiry, Petitioner has the burden to show that the Department's case was totally without merit, both legally and factually. In this case, there was some, although highly tenuous, evidence present that supported the Department's allegations under Chapter 415. Having some basis in fact for the continued maintenance of its case, the Department's pursuit of this matter to the point at which it reclassified the report cannot be said to be totally without merit and Petitioner is not entitled to an award of attorney's fees and costs.

CONCLUSIONS OF LAW

20. The Petitioner seeks an award of attorney's fees and costs pursuant to the provisions of Section 120.57(1)(b)5, which provides as follows:

> 5. All pleadings, motions, or other papers filed in the proceeding must be signed by a party, the party's attorney, or the party's qualified representative. The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other papers, including a reasonable attorney's fees. (Emphasis supplied.)

21. In this case, on April 26, 1989, HRS notified the Petitioner pursuant to Section 415.504(4)(c) of the completion of its investigation and that it was classifying the report as "confirmed." That notice, pursuant to Section 415.504(4)(d)3,f provided that in the event the Petitioner did not ask for amendment or expunction of the report, such inaction would be deemed an admission of the correctness of the classification. Accordingly, the notice did more than serve as a precondition to obtaining a point of entry to challenge the classification; it began a process which required an affirmative response from the Petitioner within thirty days or else the Petitioner would suffer the consequence of having been deemed, as a matter of law, to have admitted the underlying facts. Thus, an informal free-form
filing of the notice that the abuse had been confirmed.

22. Only after completion of the agency level expunction process, either through decision or the running of time, is an accused perpetrator entitled to a Section 120.57(1) hearing with its formal record. Only in a Section 120.57(1) hearing does Section 120.57(1)(b)5 come into play. Section 120.57(1)(b)5 is not available to parties in an informal setting. However, even though not available to parties in an informal setting, the "proceeding" referred to in Section 120.57(1)(b)5 must be viewed in light of the statutory process established under Chapter 415, Florida Statutes. 3/ Under Chapter 415, the expunction proceeding, whether formal or informal remains the same throughout the statutory process. The only thing which may change during the 415 expunction process is the formality of the proceeding. Therefore, the "proceeding" referred to in Section 120.57(1)(b)5 is the proceeding which is begun with the issuance of the first notice of confirmation to the alleged perpetrator. If the informal proceeding turns into a formal proceeding, sanctions can be imposed if no reasonable inquiry was made prior to institution of the formal proceeding and the case turns out to be meritless both factually and legally.

23. In this case, the formal hearing process was triggered with the running of the thirty (30) day decision time and Petitioner's demand for a formal hearing on July 7, 1989. Because of the statutory scheme for processing abuse cases, it is irrelevant that HRS did not officially file the action with the Division of Administrative Hearings. The demand was filed with HRS and should have been acted upon. From July 7, 1989, forward HRS runs the risk of incurring the imposition of sanctions under Section 120.57(1)(b)5., Florida Statutes should it have failed to make a reasonable inquiry into the merits of its case and that case is in fact meritless.

24. Section 120.57(1)(b)5, Florida Statutes (1989), applies to a broad range of documents filed in an administrative proceeding. Thus, if a "pleading, motion or other paper" is filed by the agency, the "party, the party's attorney or the party's qualified representative" must make reasonable inquiry to determine that the document is not interposed for any improper purposes such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation.

25. It is obvious that the party in these proceedings, HRS, filed "other papers" in the administrative review proceedings. 4/ Petitioner's Exhibit 1 is the notice given to the Petitioner on April 26, 1989, notifying her that she had been confirmed as a child abuser and advising her that if she did not come forward and take affirmative action she would be deemed to admit the classification. Petitioner's Exhibit 1 is signed by a qualified representative of HRS.

26. Petitioner's Exhibit 9 was a letter from HRS, dated September 18, 1989, denying the Petitioner's request for expunction. The letter's tardiness does not change the fact that this letter constitutes an "other paper" within the meaning of Section 120.57(1)(b)5. It was signed by a qualified representative of HRS.

27. On September 14, 1989, counsel for HRS filed a formal "pleading" transferring the matter to the Division of Administrative Hearings for a formal hearing. Such referral notice was signed by a "party's attorney" and constituted a "pleading" within the meaning of Section 120.57(1) (b)5.

28. Section 120.57(1)(b)5 was added to Chapter 120 in the 1986 session of the Florida Legislature with the enactment of Chapter 86-108 adopting House Bill 792. The staff analysis to the legislation confirmed that the intent of the amendment was to adopt the concepts expressed in Rule 11, Federal Rules of Civil Procedure, providing for similar sanctions when legal pleadings, motions, or other papers are signed by a party or his attorney for an improper purpose. Thus, resort to precedent in construing the terms of Rule 11 is instructive in interpreting the scope of the statute. Mercedes Lighting and Electrical Supply, Inc. v. Department of General Services, et al., 15 F.L.W. D1033 (1st DCA Opinion filed April 16, 1990).

29. The main purpose behind the statute and Rule 11 is one of prevention. The statute requires that an agency conduct a reasonable inquiry into the background of a case to certify that the action is not interposed for an improper purpose. Such an improper purpose can be the filing of an action which is known or should have been known to be frivolous. Section 120.57(1)(b)5., Florida Statues and Mercedes, supra. Accord, Department of Health and Rehabilitative Services v. L.M., Case No. 89-2605C (Final Order filed January 24, 1990), where the Hearing Officer concluded, after a formal hearing, that an HRS pleading was frivolous since it "presented no justifiable question for resolution and it was without basis in fact or in law." The Hearing Officer, sua sponte, made an award of attorney's fees pursuant to the statute.

30. Because the statute's goal is one of prevention, Section 120.57(1) (b)5. explicitly and unambiguously imposes an affirmative duty to conduct a reasonable inquiry into the viability of a pleading, motion or other paper before it is signed. Cf., Erie Conduit Corporation v. Metropolitan Asphalt Paving Association, 106 F.R.D. 451 (E.D. NY, 1985). The purpose of sanctions is to protect against ill-considered proceedings. See, Silverman v. Ehrlich Beer Corp., 687 F.Supp. 67 (S.D. NY 1987), holding that "the absence of any real investigation doomed the proceeding." Id at p. 70. A failure to conduct a reasonableinquiry can lead to a needless increase in the cost of litigation. See, Great Hawaiian Financial Corp. v. AIU, 116 FRD 612 (D.C. Hawaii, 1987), noting "whether or not counsel intended to cause delay, the fact that he filed a frivolous motion, to which his opponents had to respond, justifies the imposition of sanctions." Id at p. 618.

31. The fact that HRS finally did the right thing and reclassified the abuse report from "confirmed" to "indicated" does not change the question of sanctions in this case. 5/ The reclassification occurred only after a lengthy delay in the statutory process, and after two opportunities to make reasonable inquiry had passed, thereby forcing this matter to a formal hearing for which there was substantial preparation required. Stated differently, the Department of Health and Rehabilitative Services reached a "confirmed" finding of abuse on April 26, 1989, and did not remove it from the registry until a period of nearly seven months had elapsed, notwithstanding the multiple and zealous efforts of

E.S. to require HRS to abide by the statutory time limits imposed upon it and during which it had the opportunity to again make reasonable inquiry into the circumstances of this case. In the end analysis, the evidence which HRS relied upon in reclassifying the abuse was the same evidence it had from the day the abuse was improperly classified, to-wit: the report of Linda Douglass, the Protective Services Investigator. That investigation was not a reasonable inquiry into the alleged abuse and resulted in a confirmed abuse report for reasons outside Chapter 415, Florida Statutes.

32. It was not until November 6, 1989, when the Petitioner (not the agency) explored with the protective intake investigator the absence of any underlying support for the confirmed finding of abuse that HRS took note of the actual facts. Finally, the agency concluded that the Petitioner's position was the appropriate one and two days later on November 8, 1989, the Department reclassified the abuse report to "indicated" thereby terminating any further proceedings. However, the Petitioner should not have been required to force the "reasonable inquiry" required by the statute. The party possessing the duty to conduct a "reasonable inquiry" but who fails to do so with the resulting increase in the cost of litigation, should ordinarily be taxed fees and costs. This is especially true when the wrongful party is a governmental agency. HRS has economic power beyond that of an individual citizen such as the Petitioner, E.S. The fact that the exercise of that power caused Petitioner to be suspended from her job is evidence of the potential effects of such power. The reckless exercise of such power can wreak total financial devastation upon an average citizen. Silverman, supra at p. 70. However, in addition to demonstrating that the Department did not conduct a reasonable inquiry, Petitioner must show that the Department's claim of abuse was both factually and legally without merit. The reason for such a showing is that Section 120.57(1)(b)5. is not intended to prevent an agency from pursuing hard or close cases. In this case, there was some evidence to support the Department's claim.

33. Therefore, even though, Petitioner remained on the abuse registry in the confirmed category for a period in excess of six months despite her every attempt to bring the inaccuracies to the attention of HRS, and even though the statutory time frames as well as the Chapter's substantive language were ignored, and that various and qualified agents of HRS signed "pleadings, motions and other papers" at various times through the proceeding without having fulfilled their affirmative duty to conduct reasonable inquiry as to the merits of the positions being taken, the Department's case cannot be said to be totally without merit. Petitioner is not entitled to attorney's fees and costs pursuant to Section 120.57(1)(b)5.

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

ORDERED that the Petitioner's Motion for Attorney's Fees and Costs be denied.

DONE and ORDERED this 10th day of July, 1990, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 1990.

ENDNOTES

1/ The delay in this case is important since these incidents precipitated Petitioner's suspension from her employment as a teacher in the Taylor County school system. Petitioner's reasons for a quick resolution in this case were obvious. Petitioner's employment situation was brought to the attention of HRS.

2/ The evidence available at the motion hearing indicated that the third grade students in Petitioner's class were children who were consistently troublemakers and cut-ups. Judging from some of the anecdotal material in the exhibits, these children did not significantly feel threatened by Petitioner given their perdurable propensity for engaging in such "bad behavior."

3/ The "proceeding" referred to in Section 120.57(1)(b)5 may be different for other types of agency action taken under other Florida Statutes. The foregoing is especially true in cases where the Division's role is more in the nature of helping to formulate agency policy rather than its quasi-judicial role.

4/ It is irrelevant, given the facts of this case and the statutory process, that part of the record is filed or begins at the agency level as opposed to the Division of Administrative Hearings. The "papers" are all part of the same process and constitute one record irrespective of the fact that part of the record is created during the informal part of the statutory process. However, sanctions cannot be imposed unless the formal part of the process is reached.

5/ The Petitioner does not contend that the agency acted improperly on November 8, 1989, when, after being forced by the Petitioner to make reasonable inquiry into the circumstances, it reclassified the abuse report and terminated further legal proceedings. The point is that that same decision should have been reached on April 26, 1989, and at a number of subsequent intervals prior to November 8, 1989, without the Petitioner being forced to the expense of fruitless attempts for expunction and hearing, discovery and trial preparations. However, such action `nay go to mitigate the type or amount of sanctions imposed.

APPENDIX

1. The facts contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of Petitioner's Proposed Findings of Fact are adopted in substance, in so far as material.

2. The facts contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of Respondent's Proposed Findings of Fact are adopted in substance, in so far as material.

3. The facts contained in paragraph 9 of Respondent's Proposed Findings of Fact are subordinate.

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.