STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD L. WINDSOR,)
)
Petitioner,)
)
vs.) Case No. 98-5073RU
)
DEPARTMENT OF INSURANCE,)
DIVISION OF RISK MANAGEMENT,)
)
Respondent.)
_____________________________)

FINAL ORDER

On December 23, 1998, a formal administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard L. Windsor, Esquire
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For Respondent: Edwin R. Hudson, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent, the Department of Insurance (the Department), has an unpromulgated agency rule not to reimburse routine defense fees at more than

$85 per hour when providing for the defense of civil actions against state employees.

PRELIMINARY STATEMENT

On November 13, 1998, the Petitioner, Richard L. Windsor (Windsor), filed a Petition to Determine the Invalidity of an Agency Statement Defined as a Rule. The case was assigned on November 23 and set for final hearing on December 23, 1998.

At final hearing, the Petitioner called R.J. Castellanos, who is the Director of the Department's Division of Risk Management (the Risk Management), and testified in his own behalf. Mr. Castellanos testified again in the Department's case-in-chief.

At final hearing, the Petitioner had Petitioner's Exhibits 1 through 3, and 5 through 16 admitted in evidence. Ruling was reserved on objections to Petitioner's Exhibits 4 and 17. It is now ruled that the hearsay objections to those exhibits are sustained. The Respondent had Respondent's Exhibits 1 through 3 admitted in evidence.

At the conclusion of the evidentiary presentations, the Respondent ordered a transcript of the final hearing, and the parties requested and were given 20 days from the filing of the transcript in which to file proposed final orders. The transcript was filed on January 25, 1999. On February 15, 1999, Windsor filed a Request for Extension of Time for Filing Proposed Final Order; the motion was not opposed, and it is granted. The

parties' proposed final orders have been considered.

FINDINGS OF FACT

1. The Petitioner, Richard L. Windsor (Windsor), was an attorney employed by the Department of Environmental Regulation (DER, now called the Department of Environmental Protection, or DEP) when he and another DER employee were named along with the DER as defendants in a counterclaim filed in 1995 in a lawsuit (the Coxwell case) that had been brought by DER, through Windsor as its attorney of record, in state circuit court in Okaloosa County to remedy alleged intentional violations of state environmental laws and regulations. The "counterclaim" initially was not served on Windsor, and DER declined Windsor's request to defend him at that time. Instead, it was decided to ignore the "counterclaim" against Windsor until it was served on him.

2. In 1996, after Windsor terminated his employment with DEP, the "counterclaim" was served on him. Windsor requested that DEP defend him, and DEP agreed to refer the matter to Risk Management. Risk Management agreed to defend Windsor and in September 1996 assigned the defense to an Okaloosa County attorney named Jim Barth, who agreed to an hourly rate of $75.

3. Barth telephoned Windsor to discuss the case, and Windsor suggested that Barth investigate an out-of-state property rights organization Windsor said was sponsoring and financing the claim against him and the other DEP employee. Barth rejected

Windsor's suggestion. Windsor was discomforted from Barth's decision but decided not to press the issue.

4. In a subsequent meeting with Barth, Windsor suggested that Barth should assert the government employee defense of qualified immunity from suit. It seemed to Windsor that Barth accepted the idea.

5. In May 1997, with trial set for July, Barth telephoned Windsor to tell him that trial was set for July 1997, and a court-ordered mediation conference was scheduled for June 1997. Windsor asked about the immunity defense and felt that Barth tried to avoid answering the question.

6. At the mediation conference in June 1997, Barth and Risk Management made a nominal settlement offer, while DEP's lawyer refused to make any offer of settlement on the ground that the counterclaim was frivolous. Although Barth's settlement offer was rejected, Windsor became very concerned about the quality of Barth's representation. He also established through conversation during the course of the day that Barth had not asserted the immunity defense on his behalf.

7. With trial set for July 1997, Windsor decided that he no longer could rely on Barth but would have to raise the defense on his own. Windsor consulted Davisson F. Dunlap, Jr., a Tallahassee attorney with the Carlton Fields law firm. Windsor knew Dunlap from Dunlap's representation of another DER employee who had been named along with DER as a defendant in a

counterclaim filed in a previous lawsuit that had been brought by DER, through Windsor as its attorney of record (the Dockery case). Windsor was impressed with Dunlap's work on the Dockery case, including his filing of a motion for summary judgment on behalf of his client on the defense of qualified governmental immunity. Dunlap explained that his hourly rate at Carlton Fields was $175, and Windsor agreed to hire Dunlap at that rate to help get Windsor's defense where Windsor and Dunlap thought it should be. Based on this understanding, Dunlap immediately began preparing a motion for summary judgment.

8. At Windsor's request, Dunlap presented his work product to Barth, who agreed to use it to file a motion for summary judgment. When Windsor learned that Barth missed the court's deadline for filing motions, Windsor became completely dissatisfied with Barth and eventually requested that Risk Management reassign his case from Barth to Dunlap.

9. Risk Management agreed, contacted Dunlap, and entered into a Legal Services Contract with Dunlap's new law firm at the same $85 hourly rate in the Pennington law firm's contract. At some point (probably before Dunlap and the Carlton firm actually entered into the Legal Services Contract with Risk Management), Dunlap reported to Windsor that the contract would be for $85 an hour and that the Carlton firm would not allow Dunlap to undertake representation at that rate of pay. Windsor, who was happy just to have gotten Dunlap substituted for Barth, assured

Dunlap that Dunlap would receive his full $175 an hour, as initially agreed between them, and that Windsor would pay Dunlap the difference of $90 an hour after payment of $85 an hour from Risk Management under the Legal Services Contract.

10. Neither Dunlap nor Windsor advised Risk Management of the agreement for the payment of Dunlap's full $175-an-hour fee after Risk Management's Legal Services Contract with the Carlton firm at $85 an hour. However, Windsor had in mind that, at some point in the future, he would raise the issue and be able to persuade Risk Management to contribute more towards the payment of Dunlap's $175-an-hour fee.

11. In October 1997, Windsor began an exchange of correspondence with Risk Management that went on for several months. While touching on a number of different topics, Windsor's primary initial concern in this correspondence was the payment of Dunlap's fees for work done on Windsor's case before Dunlap's Legal Services Contract with Risk Management. Risk Management agreed without much question (notwithstanding Windsor having retained Dunlap without notice to Risk Management), since Risk Management determined that Dunlap's work did not duplicate much of Barth's. When Risk Management indicated its intent to pay Dunlap for the work at the contract rate of $85 an hour, Windsor advised Risk Management for the first time that Windsor was obligated to pay Dunlap for the work at the rate of $175 an hour; Windsor requested that Risk Management "make him whole" by

paying Dunlap's full fee of $175 an hour. However, Windsor did not make it clear to Risk Management in this correspondence that he also wanted Risk Management to pay Dunlap $175 an hour for work done <u>after</u> Dunlap's Legal Services Contract with Risk Management. Neither Windsor nor Dunlap made it clear to Risk Management either that Dunlap also had a contract with Windsor, in addition to the Legal Services Contract, for work done by Dunlap <u>after</u> Dunlap's Legal Services Contract with Risk Management, or that the additional contract was for $175 an hour, which obligated Windsor to pay Dunlap the difference of $90 an hour after payment of $85 an hour from Risk Management under the Legal Services Contract.

12. By letter dated July 1, 1998, Risk Management's Director, R.J. Castellanos, advised Windsor that Risk Management would not pay Dunlap more than $85 an hour for the work done before the Legal Services Contract. The letter explained that review did not disclose support for Windsor's contention in correspondence that Risk Management was negligent, requiring Windsor to retain Dunlap at $175 an hour prior to the Legal Services Contract. It pointed out that Windsor retained Dunlap at the time without any notice to Risk Management and that Risk Management was "deprived of any opportunity to contract with a firm at a negotiated rate" for those services (as it was able to do for subsequent services when it entered into the Legal Services Contract with Dunlap's firm). For those reasons, the

letter explained, Risk Management "reimbursed you at an $85.00 rate, which is the maximum amount we pay as routine defense fees." Windsor contends that the latter quotation is, or is evidence of, an unpromulgated Division rule.

13. The intent of the statement in Castellanos' letter was to explain why, under the circumstances, Risk Management would not reimburse Windsor more than $85 an hour for the fees he incurred for work Dunlap did before the Legal Services Contract; it was not intended to even address Dunlap's fees after the Legal Services Contract. At the time the statement was made, Castellanos did not realize there was any issue as to payment of Dunlap's fees for work done after the Legal Services Contract.

14. The statement in Castellanos' letter was not a statement of general applicability. Risk Management generally does not reimburse defense fees; rather, it negotiates contracts directly with lawyers to provide those services and pays the fees directly to the lawyer under contract. Rather, the statement in Castellanos' letter was intended to explain that, under the circumstances, Risk Management was not going to reimburse more than maximum amount it pays attorneys with whom Risk Management contracts directly. As a matter of fact, Risk Management has approximately 250 open-ended contracts for legal services with law firms all over Florida. (It is not clear from the evidence when these contracts were negotiated, or which are still in use.) The hourly rates for those contracts range from a low of $65 an

hour to a high (in approximately five or six of the 250 contracts) of $85 an hour for routine defense cases. (Hourly rates for trademark and copyright specialties are $150 an hour.) These included the $85-an-hour legal services contracts with Dunlap, once as a member of the Pennington firm and again as a member of the Carlton Fields firm.

15. The evidence also did not prove that Risk Management has an unpromulgated rule not to exceed a fee of $85 an hour in negotiating directly with attorneys for legal services contracts for routine defense cases. The evidence was that Risk Management considers itself to be bound by Section 287.059(7), Florida Statutes (1997), and Florida Administrative Code Rule Chapter 2-37 when contracting with attorneys for legal services. The maximum fees allowed by the statute and those rules exceed $85 an hour for routine defense cases. In addition, the statute and rules allow agencies such as Risk Management to exceed the maximum standard fees under certain circumstances. See Conclusion of Law 21, infra.

16. Risk Management interprets Section 287.059(7), Florida Statutes (1997), and Florida Administrative Code Rule Chapter 2-37 to require it to negotiate fees below the maximum standard fees. Id. When negotiating with a lawyer or law firm, Risk Management attempts to utilize the leverage it enjoys from the ability to offer lawyers an open-ended contract with the possibility of volume business contract to negotiate for the

lowest possible fee for quality services. To date, these legal services contracts have been for $85-an-hour or less for routine defense cases. But it was not proven that Risk Management has established an $85-an-hour maximum for routine defense in conflict with the maximum standard fees established in Rule Chapter 2-37.

17. Windsor seems to make a vague argument that Section 111.07, Florida Statutes (1997), which requires an agency such as Risk Management to reimburse a prevailing employee a "reasonable" attorney fee when the agency declines to provide legal representation to defend the employee, and common law (which Windsor does not elaborate), requires Risk Management to reimburse him for Dunlap's services and that such reimbursement is not limited by Section 287.059(7), Florida Statutes (1997), and Florida Administrative Code Rule Chapter 2-37. Windsor seems to further argue that the statement in Castellanos' letter was generally applicable to establish the amount of reasonable attorney fees reimbursable under Windsor's legal arguments. But it was not apparent that Windsor was making these arguments until post-hearing submissions in this case. Clearly, Risk Management does not agree with Windsor's arguments (the merits of which are not subject to determination in this proceeding); more germane to this proceeding, Risk Management never understood or considered such arguments at the time of the statement in Castellanos' letter, and Castellanos clearly did not intend the statement in

his letter to be generally applicable to establish the amount of reasonable attorney fees reimbursable under Windsor's legal arguments.

CONCLUSIONS OF LAW

18. The law is clear that: "Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section [120.54, Florida Statutes] as soon as feasible and practicable." Section 120.54(1)(a), Florida Statutes (Supp. 1998). "Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.541(1)(a)." Section 120.56(2), Florida Statutes (1997). The statement in Castellanos' July 1, 1998, letter substantially affected Windsor in that it was part of the explanation why Risk Management would not reimburse Windsor for some of Dunlap's fees for services rendered before the Legal Services Contract between Dunlap and Risk Management.

19. Section 120.52(15), Florida Statutes (Supp. 1998), provides in pertinent part:

> (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

Under this definition, the statement in Castellanos' July 1, 1998, letter is not a rule. *See* Finding of Fact 14, *supra*.

20. The statement in Castellanos' July 1, 1998, letter also

does not reflect an unpromulgated rule not to exceed a fee of $85 an hour in negotiating directly with attorneys for legal services contracts for routine defense cases. Rather, the evidence was that Risk Management uses its bargaining power to negotiate the lowest possible fee for quality representation in accordance with applicable statutes and rules. See Finding of Fact 16, supra.

21. Florida Administrative Code Rule 2-37.030, promulgated by the Florida Attorney General under the authority of Section 287.059(6), Florida Statutes (1997), establishes a standard attorney fee schedule, and subsection (7) of the statute requires all agencies, including Risk Management, to comply with them. See also Florida Administrative Code Rule 2-37.020. (Subsection (2) exempts Risk Management from the requirement to notify the Attorney General when it contracts for legal services, but there is no exemption from the standard fee schedule under subsections (6)-(7).) Florida Administrative Code Rule 2-37.030(2) establishes $125 an hour as the maximum standard attorney fee for legal services other than certain specialties. Under section (1) of the rule, the maximum standard fee for the specialties (including trademark

and copyright, among others) is $175 an hour. Under Rule 2-37.020, these maximum fees

> are intended only as a cap and not as the standard fee for any particular type of attorney services. Good fiscal management requires agencies to negotiate fees below the maximum allowed in the standard fee schedule whenever possible.

Under certain circumstances, the maximum standard fees can be exceeded. See Section 287.059(7), Florida Statutes (1997); Florida Administrative Code Rule 2-37.040. But the evidence was that Risk Management has had no occasion to exceed the maximum standard fees; Risk Management has been able to negotiate fees below the maximum.

22. Finally, regardless of the merits of Windsor's arguments under Section 111.07, Florida Statutes (1997), or under common law, it is clear that Risk Management has no rule as to what would constitute a "reasonable" fee under that statute or under common law. See Finding of Fact 17, supra.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, Windsor's Petition to Determine the Invalidity of an Agency Statement Defined as a Rule is denied.

DONE AND ORDERED this 1st day of March, 1999, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
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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 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.