

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES R. PIERCE,)
)
 Petitioner,)
)
vs.) Case No. 98-5480F
)
DEPARTMENT OF CHILDREN)
AND FAMILY SERVICES,)
)
 Respondent.)
_____)

FINAL ORDER

A formal hearing in this case was held on January 25, 1999, in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Charles R. Pierce, pro se
2910 Jim Lee Road
Tallahassee, Florida 32301

For Respondent: John R. Perry, Esquire
Department of Children
and Family Services
2639 North Monroe Street, Suite 252A
Tallahassee, Florida 32399-2949

STATEMENT OF THE ISSUES

The issues are whether Petitioner was a prevailing small business party in Division of Administrative Hearings Case No. 98-2043, and if so, whether he is entitled to reimbursement of attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On December 14, 1998, Petitioner Charles R. Pierce (Petitioner) filed a Request for Reimbursement of Attorney's Fees and Costs pursuant to Section 57.111, Florida Statutes. Said request sought reimbursement of attorney's fees and costs relative to Division of Administrative Hearings (DOAH) Case No. 98-2043. Petitioner alleged that action by Respondent Department of Children and Family Services (Respondent) in that case was unreasonable and unwarranted because Petitioner did not have a foster care license to revoke.

DOAH issued an Initial Order on December 18, 1998. The Initial Order required Respondent to file a written statement, setting forth its written defenses to the petition, within twenty days of the date of said order. Accordingly, Respondent's written statement was not due until January 7, 1999.

Respondent filed a Motion for Extension of Time to File Written Defenses to Petitioner's Request for Reimbursement of Attorney's Fees and Cost on December 29, 1998. Said motion requested the extension of time on grounds that Respondent's counsel, who was most familiar with the case, would be out of town until January 4, 1999.

Petitioner filed responses in opposition to Respondent's Motion for Extension of Time to File Written Defenses to Petitioner's Request for Reimbursement of Attorney's Fees on December 31, 1998, and January 4, 1999. In both responses,

Petitioner incorrectly argued that the subject motion was untimely and without justification on its merits.

On January 5, 1999, Respondent filed a Motion for Order Compelling Signature of Releases and a Motion for Summary Final Order. Petitioner filed responses in opposition to these motions that same day.

On January 6, 1999, Respondent filed a Motion to Strike Petitioner's Request for Reimbursement of Attorney's Fees and Costs. Petitioner also filed a timely Response to Initial Order on January 6, 1999.

On or about January 7, 1999, the undersigned held a telephone conference with the parties. After hearing oral argument, the undersigned determined that an evidentiary hearing was necessary to determine whether Petitioner was a prevailing small business party pursuant to Section 57.111, Florida Statutes.

On January 7, 1999, Petitioner filed a composite exhibit consisting of numerous documents. Petitioner did not serve Respondent with copies of said documents. The undersigned issued an Order Publishing Ex Parte Communication on January 11, 1999.

On January 11, 1999, the undersigned issued an Order denying, without prejudice, Respondent's Motion for Summary Final Order and Respondent's Motion to Strike Petitioner's Request for Attorney's Fees and Costs. The undersigned also reserved ruling

on Respondent's Motion for Order Compelling Signature of Releases. These motions are hereby denied.

On January 11, 1999, the undersigned issued a Notice of Hearing, which scheduled this case for hearing on January 25,

1999. This notice states that the issue was whether Petitioner is a prevailing small business party pursuant to Section 57.111, Florida Statutes.

On January 11, 1999, Respondent filed a Motion for Official Recognition. Copies of certain pleadings in DOAH Case No 98-2043 were attached to the motion. This motion was granted ore tenus during the formal hearing.

On January 13, 1999, Petitioner filed a Motion for Official Recognition. Copies of certain pleadings and discovery responses in DOAH Case No. 98-2043 were attached to the motion. This motion was granted ore tenus during the formal hearing.

On January 19, 1999, Petitioner filed a Motion for Ruling as a Prevailing Small Business. This motion is hereby denied for the reasons set forth below in the Findings of Fact and Conclusions of Law.

On January 25, 1999, Respondent filed a Motion for Costs and Attorney's Fees. Petitioner filed a response in opposition to this motion that same day. This motion is hereby denied for the reasons set forth below in the Findings of Fact and Conclusions of Law.

During the hearing, Petitioner testified on his own behalf. Petitioner's testimony incorporated the facts alleged and arguments presented in his Motion for Ruling as a Prevailing Small Business Party dated January 19, 1999.

Respondent presented the testimony of three witnesses. Respondent offered five exhibits, which were accepted into evidence.

The parties did not file a transcript of the proceeding. They filed their proposed recommended order on February 4, 1999.

FINDINGS OF FACT

1. On April 3, 1996, Respondent issued Petitioner a provisional license to operate a foster home. This license was effective until August 3, 1996.

2. On August 3, 1996, Respondent lifted the provisional license and issued Petitioner a regular foster home. The latter was effective through March 31, 1997.

3. On March 31, 1997, Respondent again issued Petitioner a provisional license. This provisional license was effective until July 31, 1997.

4. On July 31, 1997, Respondent issued Petitioner a regular foster home license. This license was effective until March 31, 1998.

5. On February 27, 1998, Respondent issued an Administrative Complaint seeking to revoke Petitioner's foster home license. Said complaint gave Petitioner the right to request an administrative hearing to contest the factual allegations contained within the complaint.

6. Petitioner's counsel filed an Answer to Administrative Complaint dated March 27, 1998. Said answer requested a formal

administrative hearing to contest the factual allegations contained within the complaint.

7. Respondent referred Petitioner's request for a formal hearing to the DOAH on May 4, 1998. DOAH assigned Case No. 98-2043 to this matter.

8. On October 16, 1998, Petitioner's counsel filed a Motion for Summary Judgment and/or Motion to Dismiss in DOAH Case No. 98-2043. Said motion asserted that the Administrative Complaint should be dismissed because Petitioner had never had foster children placed in his home. The motion also references, among other things, the "denial and suspension" of Petitioner's foster home license and the "subsequent denial of re-licensing in April 1998." The motion does not argue that Petitioner's current license had expired, rendering the issue of revocation moot. The motion was denied by order dated October 22, 1998.

9. On October 27, 1998, Petitioner's counsel filed a Notice of Withdrawal of Request for Hearing in DOAH Case No. 98-2043. A telephone conference on the motion was held that same day.

10. On October 28, 1998, an Order Closing File was entered in DOAH Case No. 98-2043. This order cancelled the formal hearing scheduled for November 2-3, 1998, and relinquished jurisdiction to Respondent.

11. On December 4, 1998, Respondent entered a Final Order in DOAH Case No. 98-2043, revoking Petitioner's foster home

license. Petitioner did not appeal the Final Order and the time for an appeal has expired.

12. At the hearing on the instant case, Petitioner presented no evidence that he prevailed in DOAH Case No. 98-2043. The pleadings and orders entered in that case conclusively establish that he did not prevail.

13. Likewise, Petitioner presented no evidence that he was a small business party. Family foster homes are distinct from larger operations, such as residential child-care facilities, which might under some circumstances be construed as businesses.

14. A foster home license is not a permit to engage in a business activity for profit. Instead, foster home parents act as temporary surrogate parents. Payments to foster parents are reimbursements for moneys advanced by the parents for the care of children placed in their care. The payments are not fees for services rendered. They are not taxable as income.

15. Through out the proceedings in the instant case, Petitioner maintained that he never authorized his attorney to withdraw his request for formal hearing in DOAH Case No. 98-2043 as to the merits of that case. He did not personally receive a copy of his counsel's Notice of Withdrawal of Request for Hearing, the Order Closing File, or the Final Order until sometime after January 5, 1999. Therefore, Petitioner filed his request for fees and costs in the instant case on December 14, 1998, believing that he had prevailed as a small business party

in DOAH Case No. 98-2043. He was under the mistaken impression that his counsel's withdrawal of his request for hearing and the subsequent Order Closing File in DOAH Case No. 98-2043 deprived Respondent, as well as DOAH, of jurisdiction in that case.

16. Even after receiving copies of the above referenced pleading and orders, Petitioner maintained a good faith belief that because his foster home license expired on March 31, 1998, there was no license for Respondent to revoke in its Final Order dated December 7, 1998. Petitioner mistakenly believed that the

Final Order was a "nullity" because Respondent had not amended the Administrative Complaint to deny his March 1998 request for re-licensure.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding pursuant to Section 57.111(4)(b), Florida Statutes, also known as the Florida Equal Access to Justice Act.

18. Section 57.111 (4)(a), Florida Statutes, states as follows:

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

Petitioner has the burden of proving that he is a prevailing small business party. He has not met that burden.

19. Section 57.111(3)(d), Florida Statutes, defines a small business party, in pertinent part, as follows:

(d) The term "small business party" means:
1.a A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments; or

b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees.

20. Section 57.111(3)(c), Florida Statutes, defines "prevailing small business party" as follows:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal of the time for seeking judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

21. Petitioner is not entitled to attorney's fees and costs as a prevailing small business party. He did not prevail in DOAH Case No. 98-2043. His possession of a foster home license from April 3, 1996, through March 31, 1998 did not constitute a small business. Therefore, it is unnecessary to determine whether Respondent's Administrative Complaint was substantially justified.

22. If a party participates in an administrative proceeding, or files any pleading, motion, or other paper in such a pleading, for an improper purpose, such as to harass, cause unnecessary delay, needlessly increase the cost of the litigation or for any other frivolous purpose, the Administrative Law Judge

may order the offending party to pay the reasonable costs and attorney's fees of the other party. Sections 120.569(2)(c) and 120.595(1), Florida Statutes.

23. In this case, Petitioner filed his request for fees and costs with a good faith belief that he was a prevailing small business party and that the agency's action was not substantially justified. As the case proceeded to hearing, he incorrectly believed that he had prevailed in DOAH Case No. 98-2043 despite the issuance of the Final Order because his license expired on March 31, 1998. He also mistakenly believed that holding a foster home license qualified him as a small business party. There is no persuasive evidence that Petitioner filed his claim and maintained the instant case for an improper purpose. Accordingly, Respondent's Motion for Costs and Attorney's Fees pursuant to Sections 120.569(2)(c) and 120.595(1), Florida Statutes, is denied.

ORDER

Based on the above reference Findings of Fact and Conclusions of Law, Petitioner's Request for Attorney's Fees and Costs pursuant to Section 57.111, Florida Statutes, is dismissed.

DONE AND ORDERED this 15th day of March, 1999, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of March, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO APPEAL

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 the 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.