

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASSOCIATED MARINE INSTITUTES,)
INC.,)
Petitioner,)
vs.) Case No. 99-4165F
DEPARTMENT OF REVENUE,)
Respondent.)
_____)

FINAL ORDER

Petitioner has presented this case to Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, through a Motion for Attorneys' Fees and Costs filed on October 1, 1999.

APPEARANCES

For Petitioner: Emily S. Waugh
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Post Office Box 391
Tallahassee, Florida 32302-0391

For Respondent: Kevin J. ODonnell
Ruth Ann Smith
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to its attorneys' fees and costs associated with this case and an associated case, DOAH Case No. 99-1679RX, in which Petitioner

obtained a final order from the same Administrative Law Judge invalidating two rules promulgated by Respondent.

PRELIMINARY STATEMENT

After prevailing in a rule challenge, Petitioner has commenced the present proceeding for attorneys' fees and costs under Section 120.595(3), Florida Statutes. The final order invalidating the challenged rules determined that the rules, which provided an exemption from the sales and use tax, were invalid exercises of delegated legislative authority because the exemption rules were narrower than the exemption statute on which they were based.

Petitioner has requested a hearing, but only for the purpose of presenting "oral argument." Respondent has not requested a hearing of any sort. The parties do not dispute the basic facts of the case. Although they dispute the ultimate facts and inferences to be drawn from the basic facts, the parties have not requested an evidentiary hearing, evidently in recognition of the fact that such a hearing would serve no useful purpose. The parties have filed a motion, response, and reply concerning the claim for attorneys' fees and costs. Concluding that a hearing for the presentation of legal argument is unnecessary, the Administrative Law Judge denies Petitioner's request for such a hearing.

FINDINGS OF FACT

1. Petitioner was the prevailing party in DOAH Case No. 99-1679RX. In that case, Petitioner proved that Rules 12A-1.001(3)(b) and 12A-1.001(3)(q), Florida Administrative Code, which provided an exemption from the sales and use tax for certain organizations providing certain services to minors (Minor Organizations), were an invalid exercise of delegated legislative authority because the exemption in the rule covered only purchases by Minor Organizations and the exemption in the statutes covered purchases and sales by Minor Organizations.

2. The sole issue in this case is whether Respondent's position in defending the challenged rules was substantially justified. Among other things, Respondent has conceded that Petitioner's claim exceeds \$15,000.

3. In the rule challenge, the Administrative Law Judge reviewed the language chosen by the legislature to create exemptions based on a sale, a purchase, the identity of the purchaser, the identity of the seller, and the identity of the item purchased or sold. The Administrative Law Judge concluded that the "plain meaning" of the statute was to exempt purchases and sales by Minor Organizations.

4. As Petitioner notes in its motion, Respondent had already promulgated a rule conferring the broader exemption for purchases and sales by certain nursing homes, which were the

beneficiary of a statutory exemption stated in the same language as that applying to Minor Organizations.

5. However, several other rules, construing the same statutory language governing other types of entities, recognized only the narrower exemption extended to Minor Organizations.

6. In one instance, the legislature exempted the purchases and sales by one type of entity in different, arguably stronger language. Additionally, Respondent defended its interpretation in the rule challenge largely in reliance upon legislative history, which, at least by negative implication, was not inconsistent with Respondent's position.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter. Sections 120.57(1) and 120.595(3), Florida Statutes. (All references to Sections are to Florida Statutes.)

8. Petitioner is entitled to its attorneys' fees and costs, pursuant to Section 120.595(3), unless Respondent can show that its actions were "substantially justified." Respondent has made such a showing in this case, so Petitioner is not entitled to its attorneys' fees and costs.

9. Recent case law rejecting defenses of substantial justification involve agency action much less justifiable than Respondent's action in the rule challenge. In Helmy v. Department of Business and Professional Regulation, 707 So. 2d

366 (Fla. 1st DCA 1998), which is cited by Petitioner, the probable cause panel of the Board of Veterinary Medicine found probable cause against a veterinarian who was working at a veterinarian's office while his license was suspended. In a discussion that the court labeled "cursory" and demonstrating "no meaningful inquiry into the applicable facts and law," the panel inexplicably omitted any mention of the statutory definition of "immediate supervision" or the effect of the presence of a licensed veterinarian on the same premises. In rejecting the agency's substantial justification defense, the court noted the evident preoccupation of the panel with the appropriate penalty, at the expense of any consideration of liability.

10. In Department of Health and Rehabilitative Services v. South Beach Pharmacy, Inc., 635 So. 2d 117 (Fla. 1st DCA 1994), the agency prosecuted a Medicaid reimbursement case against a pharmacy in reliance upon the findings of an independent auditor, but without first confirming with a single Medicaid patient if the medication had been dispensed or with a single physician if the medication had been prescribed. The court also rejected this agency's substantial justification defense.

11. The cited cases involve facts that do not rise to substantial justification. The facts in this case involve not merely much greater justification than the facts in the cited decisions, but they reveal substantial justification because

Respondent defended its rules with a reasonable basis in fact and law.

12. Petitioner's argument in reliance upon the "plain meaning" language in the final order invalidating the rules overlooks the judicial rule of statutory construction favoring legislative intent over plain meaning. In Dreason v. Florida Department of Corrections, 705 So. 2d 1374 (Fla. 1998), the Florida Supreme Court recently expressed this rule of construction as follows:

the primary and overriding consideration in statutory interpretation is that a statute should be construed and applied so as to give effect to the evident intent of the legislature regardless of whether such construction varies from the statute's literal meaning.

13. Thus, the "plain meaning" of the statutory exemption did not necessarily deprive Respondent of substantial justification for its position, especially given the previously mentioned legislative history. In addition to this legislative history and the other textual reasons already noted in support of Respondent's position, the language of the statutory exemptions in the exemption subsection at issue resists easy interpretation at times. Reflective of the patchwork quality of the draftsmanship that has evolved over 50 years of legislative additions, deletions, and modifications to the Florida Revenue Act of 1949, especially awkward features of the statutory exemptions to the sales and use tax are their haphazard

organization and use of different language to confer the same type of exemption to different entities or items.

14. Based on all of the circumstances, Respondent had substantial justification to construe the statute so as not to extend the exemption to sales by Minor Organizations.

15. This order is not intended to provide Respondent with future immunity from claims for attorneys' fees and costs following unsuccessful attempts to defend similar exemption rules that invalidly restrict similar exemption statutes. Absent judicial intervention to reverse erroneous administrative determinations of the invalidity of particular exemption rules or legislative intervention to restore the narrower scope of specific exemptions, Respondent's future defense of such exemption rules may or may not be substantially justified, depending upon consideration of all relevant circumstances, including what may reasonably be expected in terms of Respondent's evolving understanding of the scope of specific exemption statutes.

ORDER

It is

ORDERED that the Motion for Attorneys' Fees and Costs is denied and the case is dismissed.

DONE AND ORDERED this 28th day of October, 1999, in
Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT OF JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review. 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.