STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EQUITY CORP. HOLDINGS, INC.; MORTGAGE REDUCTION SYSTEMS EQUITY CORPORATION; RUSSELL A. WHITNEY; AND JOHN KANE,	)	
Petitioners,	)	
vs.	)	Case No. 01-1032F
DEPARTMENT OF BANKING AND FINANCE, DIVISION OF FINANCE,	)	
Respondent.	)	

FINAL ORDER

A formal hearing was conducted in this case on May 23, 2001, in Tallahassee, Florida, before the Division of Administrative Hearings, by its Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Bruce Culpepper, Esquire
Akerman, Senterfitt & Eidson, P.A.
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For Respondent: Diane E. Leeds, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Petitioners collectively meet the definition of a prevailing small business party, and, if so, whether Respondent's actions were substantially justified or whether special circumstances exist which would make an award of attorney's fees and costs unjust.

PRELIMINARY STATEMENT

On or about January 23, 2001, Petitioners Equity Corporation Holdings, Inc., and Mortgage Reduction Systems Equity Corporation (hereinafter collectively referred to as "Petitioner") filed a Petition for Costs and Attorney's Fees pursuant to Section 57.111, Florida Statutes. Petitioner also filed an Affidavit of Petitioners' Attorneys' Fees and Costs, together with supporting documentation. Said petition and affidavit were filed with Respondent Department of Banking and Finance, Division of Finance (hereinafter referred to as "Respondent").

On or about February 19, 2001, Respondent filed a Response in Opposition to Petition for Cost and Attorney's Fees. The response requested an evidentiary hearing before the Division of Administrative Hearings.

The case was referred to the Division of Administrative Hearings on March 14, 2001. A Notice of Hearing dated March 29, 2001, scheduled the case for hearing on May 23, 2001.

Respondent filed a Response to Initial Order on April 5, 2001.

The undersigned conducted a telephone conference with the parties on April 26, 2001. As requested during that conference, Petitioner filed a Report on Attorney Pre-Hearing Conference on May 11, 2001.

The parties filed a Joint Pre-Hearing Stipulation on May 18, 2001.

During the hearing, Petitioner presented the testimony of one witness and offered five exhibits, which were accepted into evidence. Respondent presented the testimony of four witnesses and offered three exhibits which were accepted into evidence.

On June 4, 2001, the parties filed an Agreed Motion for Extension of Time to File Proposed Recommended Orders. This motion was granted by Order dated June 6, 2001.

The parties did not file a copy of the transcript. Petitioner filed a Proposed Recommended Order on June 4, 2001. Respondent filed its Proposed Recommended Order on June 11, 2001.

FINDINGS OF FACT

1. The parties stipulated to the following facts in their Joint Prehearing Stipulation:

> A. The Department initiated the underlying action on July 2, 1996, by filing an Administrative Complaint for Imposition of

Sanctions and Notice of Rights ("Complaint") against the Petitioners. (See Administrative Proceeding Case Nos.: 0034-I-4/96, 0035a-I-4/96, 0035B-I-4/96, 0035c-I-4/96) The Complaint sought a Cease and Desist Order as well as administrative penalties and fines against each of the Petitioners based upon alleged violations of Florida law. The Department alleged that the Petitioners' business activities constituted "servicing of mortgage loans" which required licensure under Chapter 494, Florida Statutes.

B. In response to the Complaint, Petitioners filed a Petition for Formal Hearing on July 11, 1996. The petition was denied on July 26, 1996, due to a lack of disputed issues of material fact, and an informal hearing was ordered under § 120.57(2), Fla. Stat.

C. The informal administrative hearing was held on October 15, 1998. The Department rendered its Final Order on August 18, 1999. The Department determined that Petitioners acted as mortgage lenders as defined by §§ 494.001(3) and 494.001(20), Fla. Stat. (1997). Therefore, Petitioners were operating without the required mortgage lenders license. The Department ordered that: 1) Petitioners cease and desist from operation of the suspect activity until they applied for and obtained a license as a mortgage lender pursuant to Chapter 494, and 2) Petitioners pay a $5,000 administrative fine.

D. Petitioners appealed the Department's Final Order to the First District Court of Appeal. On December 1, 2000, the First District Court of Appeal issued a ruling in favor of Petitioners. The Court rejected the Department's interpretation of §§ 494.001(20) and 494.0025(1), Fla. Stat., because it was "inconsistent with the statute's plain meaning." See Equity Corp.

Holdings, Inc., et al. v. Department of Banking and Finance, Division of Finance, 772 So. 2d 588 (Fla. 1st DCA 2000). The court reversed the Final Order and remanded the case back to the Department to enter an order consistent with the opinion. The court issued the Mandate regarding its opinion on December 19, 2000.

E. On December 6, 2000, pursuant to the opinion of the First District Court of Appeal, the Department issued an Amended Final Order dismissing all charges against Petitioners in the administrative case.

F. In defending the underlying action, Petitioner incurred attorney's fees in excess of $15,000. (An affidavit itemizing these costs and fees is attached to the Petition.)

2. Petitioner incurred attorney's fees and costs in excess of $15,000 in defending the underlying action. Petitioner was the prevailing party in that case.

3. When Respondent initiated the underlying action, Petitioner was authorized to do business in Florida, with its principal office located in this state. At that time, Petitioner had no more than 25 full-time employees. Its net worth did not exceed $2,000,000.

4. Petitioner submitted its petition for fees and costs on January 23, 2001. Therefore, its application for an award was made within 60 days after the date that Respondent filed its Amended Final Order.

5. When Respondent filed its Administrative Complaint on July 2, 1996, Petitioner was not licensed pursuant to Chapter 494, Florida Statutes, and claimed no exemptions therefrom. From the beginning, Petitioner took the position that it was not required to be licensed as a mortgage lender. Even before Respondent filed the complaint, Petitioner informed Respondent of its position in a letter prepared by Petitioner's counsel.

6. Petitioner's business involved the marketing of a financial services product called the Mortgage Payoff Acceleration Program (MPAP). Petitioner offered the MPAP to prospective clients who were interested in accelerating the payoff of their existing mortgage loans. Petitioner structured the program to serve as an automatic payment system whereby the clients could make the equivalent of 13 monthly mortgage payments per year to their mortgage lenders. The objective of the plan was for the clients to pay off their mortgage loans faster and reduce the ultimate interest owed over the life of the loan.

7. When clients enrolled in MPAP, they entered into a contract with Petitioner. Under the contract, the client authorized Petitioner to establish a regular checking account at a bank in the client's name. The client also authorized Petitioner to transfer monies into this account from the

client's primary bank. Lastly, the client authorized Petitioner to make monthly mortgage payments on the client's behalf from the funds in the new account.

8. Prior to initiating the initial complaint, Respondent thoroughly investigated Petitioner's MPAP activities. Petitioner gave Respondent its full cooperation.

9. John Willard was Respondent's Area Financial Manager and lead investigator in the underlying case. Mr. Willard began the investigation after receiving inquiries about the program from the public.

10. Respondent's investigation revealed that Petitioner originated its clients' mortgage payment transfers to the mortgage lender through the use of a designated bank and check drafting business.

11. The bank could not initiate a transfer without instructions from Petitioner. Because the transaction was electronic, no one at the bank read the instructions from Petitioner. The bank did not review Petitioner's instructions except to confirm that the dollar amount received coincided with the dollar amount provided by Petitioner. The bank, which was not liable to Petitioner's clients, could not change the destination of transfers.

12. Under MPAP, there was nothing to stop Petitioner from transferring mortgage payments into Petitioner's own checking

Medicaid as reimbursement for medically necessary services rendered to the foster children. Mrs. Sampson was a designated Medicaid provider from April 1992 through March 1997.

18. Mrs. Sampson contended that these Medicaid payments were for the nursing services she provided to the children, just as physicians receive Medicaid payments for treatment of eligible patients. However, medical foster parents are not required to be licensed medical professionals. Mrs. Sampson offered no evidence that the Medicaid payments were for her services as an LPN, or that private, residential LPN services even qualify for Medicaid reimbursement absent prior authorization. CMS-administered medical foster care services are authorized for Medicaid reimbursement, and the best evidence is that Mrs. Sampson was reimbursed as a medical foster care provider, not as an LPN.

19. The Department established that Mrs. Sampson did not hold herself out as running a business, nor did she report as income on her federal tax return the payments received in connection with providing foster care. Mrs. Sampson testified that she hired part-time employees to assist her in caring for the children, but she did not withhold federal income tax or Social Security taxes from their pay and did not file W-2 wage statements for them.

20. Mrs. Sampson explained her failure to report her board payments as income by reference to 26 U.S.C s. 131, which excludes foster care payments from reportable gross income. This citation justifies her failure to report, but also supports the Department's contention that foster care payments should not be considered business income.

21. Mrs. Sampson implicitly conceded that her foster home did not possess any of the common indicia of a business. Her chief contention was that from 1970 to 1990, she worked as an LPN through nursing agencies, caring for sick children in hospitals or in their homes, and that from 1990 to 1997, she worked as an LPN caring for medical foster children in her own home. In other words, Mrs. Sampson contended that by operating the foster home, she was continuing to practice her profession in a different setting. She gave up the income from her practice as an LPN through nursing agencies in favor of the income she received as an LPN acting as a medical foster parent.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

23. Section 57.111, Florida Statutes (2000), the Florida Equal Access to Justice Act, provides in pertinent part 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.

24. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying disciplinary action and that it was a small business party at the time the disciplinary action was initiated. Once the party requesting the award has met this burden, the burden of proof shifts to the agency to establish that it was substantially justified in initiating the disciplinary action. See Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc. and Ramiro Alfert, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

25. The Department conceded at the hearing that Mrs. Sampson prevailed in the underlying proceeding. Subsection 57.111(3)(c)3, Florida Statutes.

26. The issue for decision in this phase of the bifurcated proceeding is whether Mrs. Sampson was a "small business party" as contemplated by Subsection 57.111(3)(d), Florida Statutes, which provides in relevant 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 that 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 or a net worth of not more than $2 million. . . .

27. Mrs. Sampson contended that, as a provider of medical foster home services, she was the sole proprietor of an unincorporated business. Mrs. Sampson also contended that she was engaged in professional practice as an LPN by providing medical foster home services.

meaning." Id. at 590. In a footnote, the court stated as follows:

> A reviewing court may set aside agency action where "[t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." §120.68(7)(d), Fla. Stat. However, this court is not required to adhere to the agency's statutory interpretation where it contravenes the statute's plain meaning. See Werner v. Department of Ins. & Treasurer, 689 So. 2d 1211, 1214 (Fla. 1st DCA 1997) (citing PAC for Equality v. Department of State, Fla. Elections Comm'n, 542 So. 2d 459, 460 (Fla. 2d DCA 1989)), rev. denied, 698 So. 2d 849 (Fla. 1997).

Equity Corporation Holdings, Inc., 772 at 590, n.4.

26. In Philippine Cultural Foundation Inc., v. State of Florida, Department of Revenue, 26 Fla. L. Weekly D1081 (Fla. 1st DCA April 25, 2001), the court cited Fort Pierce Utils. Auth. V. Fla. Pub. Serv. Comm'n, 388 So. 2d 1031, 1035 (Fla. 1980), for the proposition that "administrative construction of a statute by the agency or body charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous." Applying that standard to the First District Court of Appeal's review of Respondent's actions in the present case, it is concluded that Respondent's decision to file a complaint against Petitioner was clearly erroneous. Respondent was not substantially justified in bringing an action based upon clearly erroneous interpretations of law. In fact,

there was no reasonable basis in law to take action against Petitioner.

27. Additionally, Respondent did not have a substantial factual justification for bringing the underlying action. Petitioner had not lost or misdirected any funds of its clients. While it was possible for Petitioners to divert MPAP clients' funds, such conjecture is insufficient to justify Respondent's action.

28. Respondent was attempting to be diligent in its efforts to protect the public. Nevertheless, it must "at the very least, have a working knowledge of the applicable statutes under which it is proceeding." Department of Insurance v. Florida Bankers Association, 764 So. 2d 660, 662 (Fla. 1st DCA 2000), quoting Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 370 (Fla. 1st DCA 1998). In this case, Respondent's reliance on the opinions of its own experienced staff and the opinions of expert outside consultants was misplaced to the extent that those opinions ran contrary to the plain meaning of the statute. Respondent has not shown that special circumstances exist, which would make an award unjust.

29. Petitioner is entitled to an award of attorney's fees and costs in the amount of $15,000.

ORDER

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

ORDERED:

That Respondent shall pay Petitioner an award of attorney's fees and costs in the amount of $15,000.

DONE AND ORDERED this 19th day of June, 2001, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2001.

COPIES FURNISHED:

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