

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAYMOND H. CRALLE,)
)
 Petitioner,)
)
 vs.) Case No. 01-4832F
)
 DEPARTMENT OF HEALTH, BOARD OF)
 PHYSICAL THERAPY PRACTICE,)
)
 Respondent.)
 _____)

FINAL ORDER

This matter is before the undersigned upon Petitioner's Amended Motion to Tax Costs and Attorney's Fees.

APPEARANCES

For Petitioner: Richard Willits, Esquire
2290 10th Avenue, North, Suite 404
Lake Worth, Florida 33461

For Respondent: Mary Denise O'Brien, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 39
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Petitioner should be awarded attorney's fees and costs pursuant to the Florida Equal Access to Justice Act (the Act), Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner Raymond H. Cralle (Petitioner or Cralle) timely filed his Amended Motion to Tax Costs and Fees. Respondent Department of Health, Board of Physical Therapy Practice (Respondent or Board) waived hearing and stipulated that Petitioner is the prevailing small business party.

FINDINGS OF FACT

1. These proceedings arise out of DOAH Case No. 01-2928, Department of Health, Board of Physical Therapy v. Raymond H. Cralle. There, a Recommended Order was entered on November 27, 2001, which recommended entry of a final order dismissing all charges against Petitioner.

2. On February 8, 2002, Respondent filed with the Division of Administrative Hearings a final order of dismissal in that case.

3. Petitioner, the prevailing small business party within the meaning of Section 57.111, Florida Statutes, timely filed his request for fees and costs pursuant to the Act.

4. Respondent does not dispute the reasonableness of the attorney's fees claimed in the total amount of \$10,050.00, nor does it dispute that costs in the amount of \$2,655.95 were incurred by Cralle in the underlying case.

5. The entire record in this case, which includes a transcript of the probable cause hearing, considered in light of

the entire record in Case No. 01-2928, establishes that the total amount of fees and costs claimed here were necessarily and reasonably incurred in the successful defense of the administrative charges.

6. In opposition to Cralle's request for reimbursement pursuant to the provisions of the Act, Respondent argues that the case falls within an exception for proceedings which were "substantially justified" at the time the charges were brought.

7. The crux of Respondent's argument is that "[the] Administrative Law Judge decided the case primarily on the basis that, in her belief, based on the demeanor of the complainant, [Respondent] was more credible than the complainant."

8. Respondent's argument requires that material facts be ignored. In the underlying case, Respondent had the burden to prove the administrative charges by clear and convincing evidence. Yet its factual case was based exclusively upon the testimony of Helen Mesa (Mesa). Mesa's demeanor was just one of several things noted in the Recommended Order which cast doubt upon her credibility.

9. At the time of the probable cause hearing, it was known, or at least knowable, that Mesa fit the profile of the stereotypical "disgruntled former employee."

10. At least a half dozen witnesses could have been expected to corroborate Mesa's testimony, and at the probable

cause stage of the proceedings, Respondent's own expert recommended that at least some of these individuals be found and interviewed.

11. With this red flag flying, and Cralle's attorney protesting that Mesa's story should be corroborated in some fashion before the litigation process was set in motion, Respondent elected to proceed on a needlessly thin investigation.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Sections 57.111 and 120.57, Florida Statutes.

13. Section 57.111(4), Florida Statutes, mandates an award of attorney's fees and costs to a prevailing small business party 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.

14. Section 57.111(3)(e), Florida Statutes, defines the term "substantially justified" as follows:

(3)(e) A proceeding is "substantially justified" if it had a reasonable basis in

law and fact at the time it was initiated by the state agency.

15. The Act does not specify what constitutes "a reasonable basis in law and fact at the time [proceedings were] initiated by the state agency." In this case, the totality of the record supports the conclusion that Respondent was not substantially justified in bringing administrative charges against Petitioner based upon the information available at the time the probable cause determination was made.

16. The Respondent's burden of proof at the final hearing would be a heavy one. With a comparatively small expenditure of time and effort, its investigators could have learned how weak its evidence was. Instead, at much greater expense to the state and to Cralle, Respondent elected to proceed without taking the basic investigative actions recommended by its own expert.

17. Cralle's claim, the reasonableness of which is both undisputed and independently established as reasonable, falls within the parameters of the mandatory language of the Act.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Amended Motion to Tax Costs and Attorney's Fees is GRANTED.

DONE AND ORDERED this 10th day of June, 2002, in
Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of June, 2002.

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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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.