

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL MCMILLAN, D.M.D.,)
)
Petitioner,)
)
vs.) Case No. 02-2156F
)
DEPARTMENT OF HEALTH, BOARD OF)
DENTISTRY,)
)
Respondent.)
_____)

FINAL ORDER

The parties waived the administrative hearing of this case and jointly stipulated to placing documents in the record and presenting arguments in their proposed orders.

APPEARANCES

For Petitioner: William M. Powell, Esquire
Powell & Steinberg, P.A.
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Waterside Plaza, Suite 101
Cape Coral, Florida 33904

For Respondent: Trisha D. Bowles, Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent was substantially justified, within the meaning of Section 57.111, Florida Statutes (2002), in initiating disciplinary proceedings

against Petitioner, a licensed dentist, in Division of Administrative Hearings (DOAH) Case Number 01-3509PL (the underlying case). (All statutory references are to Florida Statutes (2002) unless otherwise stated.)

PRELIMINARY STATEMENT

Respondent filed an Administrative Complaint against Petitioner on July 23, 2001, alleging that Petitioner violated Section 466.028(1)(x) by failing to refer a patient to a specialist for lingual nerve damage that occurred when Petitioner extracted the patient's wisdom teeth. Petitioner timely requested an administrative hearing. The undersigned conducted an administrative hearing of the case on November 6, 2001, and issued a Recommended Order on December 17, 2001.

The Recommended Order recommended that the Board of Dentistry dismiss the Administrative Complaint. The Board of Dentistry adopted the Recommended Order at its Board Meeting on March 1, 2002. On March 29, 2002, the Board filed its Final Order.

On or about May 23, 2002, Petitioner filed a Petition for Attorney's Fees and Costs (fees and costs) pursuant to Section 57.111. On July 9, 2002, Respondent filed a Motion to Dismiss. On July 16, 2002, the ALJ entered an order denying Respondent's Motion to Dismiss. On December 19, 2002, the parties filed a joint request to cancel the administrative

hearing and a motion to submit argument to the ALJ in the form of proposed final orders. The joint stipulation provided that the proposed final orders would be filed by January 31, 2003.

The parties agreed to the following Joint Exhibits:

- (1) Documents presented to the Probable Cause Panel;
- (2) Probable Cause Panel Meeting Transcript; (3) Memorandum of Finding of Probable Cause; and (4) Administrative Complaint.

FINDINGS OF FACT

1. Petitioner is a licensed dentist in the State of Florida pursuant to license number DN9676. Respondent is the state agency charged with regulating the practice of dentistry pursuant to Section 20.43, Chapter 456, and Chapter 466.

2. Several facts are not disputed by the parties. Petitioner filed this proceeding pursuant to Section 57.111. Respondent initiated the underlying case. Respondent is not a nominal party. Petitioner is a "prevailing small business party." The attorney's fees sought by Petitioner are reasonable in an amount up to \$15,000.00. The statutory cap of \$15,000.00 applies in this case.

3. At the Probable Cause meeting of June 12, 2001, the members of the Probable Cause Panel had probable cause to believe that Petitioner violated applicable law by failing to refer his patient to a specialist for lingual nerve damage suffered by the patient when Petitioner extracted the patient's

wisdom teeth. At the Probable Cause meeting, the Panel received the entire investigative file, including all medical records, a statement and expert opinion submitted on the behalf of Petitioner by his attorney, and the expert opinion of Nidal Elias, D.D.S. M.S., submitted by Respondent.

4. Dr. Elias reviewed the medical records and rendered an expert opinion that the medical records submitted by Petitioner did not contain an indication that Petitioner referred his patient to a specialist. The medical records failed to reveal that the Petitioner referred the patient to a specialist.

5. The medical records did not contain an express notation that Petitioner referred the patient to a specialist and did not contain a referral form. The Probable Cause Panel correctly determined probable cause existed for initiating disciplinary action against Petitioner.

6. The Administrative Complaint filed in the underlying case alleged that Petitioner failed to refer his patient to a specialist. However, counsel for Respondent attempted to prove that Petitioner failed to refer his patient in a timely manner. The ALJ excluded any evidence of the untimely nature of a referral to a specialist because the Administrative Complaint did not allege that Petitioner failed to refer his patient in a timely manner. The ALJ found the evidence to be less than clear

and convincing that Petitioner failed to refer his patient to a specialist.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties and subject matter of this proceeding. Section 57.111.

8. Petitioner bears the initial burden of proving that he was a small business party at the time of the underlying case and that he prevailed in that case. It is not disputed that Petitioner is a prevailing party and was a small business party at the time that Respondent filed an administrative complaint against Petitioner.

9. The burden shifts to Respondent to demonstrate that its actions were substantially justified or that special circumstances exist, which would make an award of fees and costs unjust. Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715 (Fla. 1st DCA 1989). Section 57.111(4) (a) provides, in relevant part, that unless the actions of Respondent were substantially justified or there are special circumstances that would make an award unjust, an award of fees and costs shall be made to Petitioner. Statutes authorizing an award of fees are in derogation of common law and should be strictly construed. Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501 (Fla. 1982); Kittel v. Kittel, 210 So. 2d 1 (Fla. 1967); Jory v. Department

of Professional Regulation, 583 So. 2d 1075 (Fla. 1st DCA 1991); and Piancone v. Engineering Design, 534 So. 2d 896 (Fla. 5th DCA 1988).

10. Respondent was substantially justified in initiating disciplinary action against Petitioner. At the time Respondent initiated disciplinary action against Petitioner, Respondent had a reasonable basis in law and fact to believe that Petitioner violated the applicable law by failing to refer his patient to a specialist or by failing to do so in a timely manner. Kibler v. Department of Professional Regulation, 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982).

11. The purpose of Section 57.111 is to diminish the deterrent effect of defending against unreasonable governmental action because of the expense of civil actions and administrative proceedings. Respondent satisfied its burden of showing that the governmental action against Petitioner was not unreasonable at the time Respondent initiated the action.

12. The fact that Respondent failed to prove the allegations in the Administrative Complaint by clear and convincing evidence does not raise a presumption that the Respondent was not substantially justified in initiating disciplinary action against Petitioner. There is a significant difference between probable cause and clear and convincing evidence.

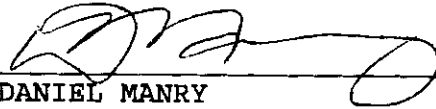
13. The Administrative Complaint did not allege that Petitioner failed to refer the patient to a specialist in a timely manner. Respondent sought to prove at the administrative hearing allegations not contained in the Administrative Complaint.

FINAL ORDER

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

ORDERED that Petitioner's Application for Award of Attorney's Fees and Costs be DISMISSED.

DONE AND ORDERED this 25th day of April, 2003, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2003.

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.