STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY DEE THOMAS, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4843F
	)	
DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
	)	
Respondent.	)	
	)	
LARRY DEE THOMAS, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4844F
	)	
DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, a formal hearing was scheduled to be held in these cases on April 14, 2003, via teleconference between Tallahassee, Florida, and Jacksonville, Florida, before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings. However, the parties agreed to forgo a formal hearing and to file joint exhibits and proposed final orders in these cases for consideration.

APPEARANCES

For Petitioner: William R. Huseman, Esquire
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For Respondent: Richard J. Shoop, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner, as a prevailing small business party in an adjudicatory proceeding initiated by a state agency, should be awarded attorney's fees and costs pursuant to the Florida Equal Access to Justice Act, Subsection 57.111(4)(a), Florida Statutes, in these two cases.

PRELIMINARY STATEMENT

As to Both Cases

On May 10, 1999, the Agency for Health Care Administration ("Agency"), on behalf of Respondent, filed an Administrative Complaint (DOAH Case No. 01-4406PL) against Petitioner, alleging that Petitioner had violated Subsection 458.331(1)(t), Florida Statutes, by failing to treat Patient D.J.P.'s preoperative coagulopathy and by failing to use an alternate vein that would have allowed visualization of the shunt placement thereby reducing the risk of causing a hemorrhage given the patient's preoperative history. Petitioner requested a formal hearing

before an Administrative Law Judge from the Division of Administrative Hearings.

On June 13, 2001, the Agency, on behalf of Respondent, filed a second Administrative Complaint (DOAH Case No. 01-4407PL) against Petitioner, alleging that Petitioner had violated Subsection 458.331(1)(t), Florida Statutes, by failing to adequately monitor Patient H.H. postoperatively given Patient H.H.'s high risk for distal emboli and/or due to evidence of tissue ischemia; by failing to clamp the arteries distally prior to manipulation of the aneurysm; and/or by failing to take adequate steps to prevent emboli, such as ensuring periodic monitoring of the patient's condition postoperatively for evidence of ischemia or other problems. Petitioner requested a formal hearing and these matters were consolidated for hearing. A formal hearing was held on May 1 through 3, 2002, in Winter Haven, Florida. On August 8, 2002, the Administrative Law Judge issued a Recommended Order recommending that Respondent dismiss each of the Administrative Complaints against Petitioner. On October 30, 2002, Respondent entered a Final Order dismissing the Administrative Complaints against Petitioner.

On December 13, 2002, Petitioner filed two Motions (Petitions) for Attorney's Fees and Costs under Section 57.111, Florida Statutes. On December 20, 2002, as to DOAH Case

No. 02-4844F, and December 30, 2002, as to DOAH Case No. 02-4843F, Respondent filed Motions to Dismiss, along with memoranda of law in support of the motions. On January 3, 2003, as to DOAH Case No. 02-4844F, and January 10, 2003, as to DOAH Case No. 02-4843F, Petitioner filed a Response to Respondent's Motions to Dismiss. On January 13, 2003, a hearing was held before this Administrative Law Judge on Respondent's Motions to Dismiss, which were denied on the basis that Petitioner qualified as a small business party under Section 57.111, Florida Statutes, as interpreted by Albert v. Department of Health, Board of Dentistry, 763 So. 2d 1130 (Fla. 4th DCA 1999). The Administrative Law Judge also rejected Respondent's argument that Petitioner was not entitled to attorney's fees for both cases because the underlying cases were consolidated and heard at the same time, ruling instead that they were clearly two separate cases and that the Recommended Order issued in the underlying cases had separate Findings of Fact and Conclusions of Law for each case. Those rulings are hereby incorporated in and made a part of this Final Order.

On January 14, 2003, an Order of Consolidation was issued, consolidating both cases for hearing. On January 16, 2003, a Notice of Hearing set a hearing date of March 4, 2003, for both cases on the issue of substantial justification. On February 4, 2003, Petitioner filed a Motion to Continue, which was granted,

and a new hearing date was set for April 14, 2003. On April 9, 2003, the parties filed a Joint Pre-Hearing Stipulation and Joint Exhibits. The parties agreed to forgo a formal hearing and instead proceed on the Stipulation and Joint Exhibits.

The parties filed the following Joint Exhibits with the Division of Administrative Hearings, as to DOAH Case No. 02-4843F:

> 1. Joint Exhibit A - an excerpt of the transcript of the May 5, 1999, meeting of the South Probable Cause Panel of the Board of Medicine where the underlying case against Petitioner was discussed; and
>
> 2. Joint Exhibit B - a copy of all the materials presented to the South Probable Cause Panel of the Board of Medicine by the Agency for Health Care Administration, acting on behalf of Respondent, which were reviewed and considered by the Panel in reaching their decision to find probable cause against Petitioner at their May 5, 1999, meeting.

The parties filed the following Joint Exhibits in two volumes with the Division of Administrative Hearings, as to DOAH Case No. 02-4844F:

> 1. Joint Exhibit A - an excerpt of the transcript of the June 8, 2001, meeting of the South Probable Cause Panel of the Board of Medicine where the underlying case against Petitioner was discussed; and
>
> 2. Joint Exhibit B - a copy of all the materials presented to the South Probable Cause Panel of the Board of Medicine by the Agency for Health Care Administration, acting on behalf of the Respondent, which

were reviewed and considered by the Panel in reaching their decision to find probable cause against Petitioner at their June 8, 2001, meeting.

The parties timely filed their Proposed Final Orders on or before April 24, 2003. The parties' proposals have been given careful consideration in the preparation of this Final Order.

FINDINGS OF FACT

As to Both Cases

1. Petitioner, Larry D. Thomas, M.D., is a licensed physician in the State of Florida, having been issued license number ME 036360.

2. Respondent, Department of Health, Board of Medicine, is the state agency charged with regulating the practice of medicine, pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes.

3. This matter was filed pursuant to Section 57.111, Florida Statutes. The actions in AHCA Case Nos. 1994-12341 and 1999-57795 were initiated by the Agency, an agent for the Department of Health, a state agency, and neither the Agency nor the Department of Health was a nominal party to the underlying actions. The attorney's fees sought by Petitioner are reasonable in the amount up to $15,000 for each case, and the statutory cap of $15,000 applies to each case separately. Petitioner prevailed in the underlying action, and there are no

special circumstances that exist that would make an award of attorney's fees and costs unjust in these cases.

4. Petitioner is a small business party within the meaning of Section 57.111, Florida Statutes, because he is a sole proprietor of an unincorporated professional practice, whose principal office is in this state, who is domiciled in this state, whose professional practice is in this state, and whose professional practice had, at the time the action was initiated by the state agency, not more than 25 full-time employees or did not have a net worth of more than $2 million, including both personal and business investments.

As to Case No. 02-4843F

5. In 1994, pursuant to Section 455.225, Florida Statutes (currently renumbered as Section 456.073, Florida Statutes), Petitioner was notified of the investigation by the Agency and invited to submit a response to the allegations. Petitioner, through his attorney, submitted a detailed response to the allegations, which included an expert opinion by William Yahr, M.D., and medical literature that discussed the risks of the procedure at issue in the case. The expert opinion of Dr. Yahr stated that Petitioner did not fall below the standard of care in this case and that the patient died of a predictable complication of the procedure at issue in the case.

6. The Administrative Complaint in the underlying case, DOAH Case No. 01-4406PL (AHCA Case No. 1994-12341), was filed on May 10, 1999, against Petitioner. The complaint alleged that Petitioner had violated Subsection 458.331(1)(t), Florida Statutes, by failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances; by failing to treat Patient D.J.P.'s preoperative coagulopathy; and by failing to use an alternate vein that would have allowed visualization of the shunt placement, thereby reducing the risk of causing hemorrhage given the patient's preoperative history.

7. As required by statute, the probable cause panel that considered this matter was composed of two physicians, who were or are Board of Medicine members, and a consumer member of the Board of Medicine. Present at the May 5, 1999, meeting of the South Probable Cause Panel of the Board of Medicine (Panel) were Panel members Margaret Skinner, M.D., Chairperson of the Panel; John Glasgoe, M.D.; and Becky Tierney. Also present at the meeting were Allen R. Grossman, Acting Board Counsel; Randy Collette, Senior Attorney for the Agency; Jim Cooksey of Agency Investigations; Larry McPherson, Senior Attorney for the Agency; and Susan Drake, M.D., Medical Consultant for the Agency.

8. Prior to the May 5, 1999, meeting, the members of the Panel received and reviewed the Agency's entire investigative file, including Petitioner's response and Dr. Yahr's opinion, and the expert opinions of Henry Black, M.D., and John Kilkenny, III, M.D.

9. The expert opinions available to the Panel were those completed in 1997 and 1999, respectively. Dr. Black opined that Petitioner met the standard of care in the case, but admitted that he did not perform the procedure at issue in the case; Dr. Kilkenny, who did perform the procedure at issue in the case, opined that Petitioner failed to meet the standard of care in the case; and Dr. Yahr opined in 1994 that there was no evidence that Petitioner failed to meet the standard of care in the case, but did not state whether he performed the procedure at issue in the case. In addition, the Panel had access to the written response to the investigation prepared by counsel on behalf of Petitioner, which was submitted on October 13, 1994.

10. Prior to consideration of the case, Mr. Grossman advised the Panel that any questions concerning interpretation of the law or rules, or what the Panel's duties were, should be directed to him. Mr. Grossman also advised the Panel that any questions they had regarding the materials that they received, the recommendations that had been made, or the investigation

that had been conducted should be directed to Mr. Collette, as the attorney for the Agency.

11. Mr. Collette then gave a summary of the complaint to the Panel members and recommended that an Administrative Complaint be filed in the case. The Panel discussed the complaint very briefly, asked no questions, and voted for a finding of probable cause for alleged violations of Subsection 458.331(1)(t), Florida Statutes.

12. The record in the underlying case does not demonstrate why there was an inordinate delay between the completion of the Agency's investigation in October 1994 and the Agency's retention of Dr. Black in 1997; why Dr. Kilkenny was retained in 1999 after Dr. Black had given his opinion on August 4, 1997, that there was no deviation from the standard of care by Petitioner; nor why Dr. Yahr's opinion was not given any consideration. While Dr. Black may not have had the appropriate qualifications to render an expert opinion in the case, both Dr. Kilkenny and Dr. Yahr did have sufficient qualifications to render an expert opinion in this matter. Further, there was no assertion by the prosecuting authority that any of the fact witnesses needed to prove this case were even available after five years of delay. Nor did the counsel for the Panel bring any special attention to the Panel members in regard to the

possible proof problems with this case caused by the inordinate delay in bringing the case before the Panel.

13. Finally, no explanation has been given for the delay in forwarding the Administrative Complaint, issued on May 10, 1999, to the Division of Administrative Hearings until October 15, 2001.

As to Case No. 02-4844F

14. The Administrative Complaint in the underlying case, DOAH Case No. 01-4407PL (AHCA Case No. 1999-57795) was filed on June 13, 2001, against Petitioner. The complaint alleged that Petitioner had violated Subsection 458.331(1)(t), Florida Statutes, by failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and circumstances; by failing to adequately monitor Patient H.H. post-operatively given Patient H.H.'s high risk for distal emboli and/or due to evidence of tissue ischemia; by failing to clamp the arteries distally prior to manipulation of the aneurysm; and/or by failing to take adequate steps to prevent emboli, such as ensuring periodic monitoring of the patient's condition post-operatively for evidence of ischemia or other problems.

15. Pursuant to Section 455.225, Florida Statutes (now at 456.073, Florida Statutes), Petitioner was notified of the

investigation by Respondent by letter dated November 12, 1999, and invited to submit a response to the allegations. Petitioner, through his attorney, submitted a detailed response to the allegations, denying that he violated the standard of care. The Investigative Report was issued on February 11, 2000.

16. The probable cause panel that considered this matter met on June 8, 2001, and was composed of two physicians, who were or are Board of Medicine members, and a consumer member of the Board of Medicine, as required by statute. However, the consumer member of the Panel was unavailable to attend the Panel meeting that day. Present at the June 8, 2001, meeting of the Panel were Panel members Fued Ashkar, M.D., Chairperson of the Panel, and Gustavo Leon, M.D. Also present at the meeting were Lee Ann Gustafson, Acting Board Counsel, and Randy Collette, Senior Attorney for the Agency.

17. Prior to the probable cause meeting, the members of the Panel received and reviewed what was purported to be the Agency's complete investigative file, including Petitioner's response, and the expert opinion of James Dennis, M.D.

18. The expert opinion available to the Panel was that of James Dennis, M.D., a board-certified vascular surgeon, who performed the procedure at issue in the case. Dr. Dennis opined that Petitioner failed to meet the standard of care in the case.

19. Prior to consideration of the case, Ms. Gustafson advised the Panel that any questions concerning interpretation of the law or rules, or what the Panel's duties were, should be directed to her. Ms. Gustafson also advised the Panel that any questions they had regarding the materials that they received, the recommendations that have been made, or the investigation that has been conducted should be direct to Mr. Collette, as the attorney for the Agency.

20. Mr. Collette then gave a summary of the complaint to the Panel members and recommended that an Administrative Complaint be filed in the case.

21. The Panel voted for a finding of probable cause for alleged violations of Subsection 458.331(1)(t), Florida Statutes. Following the filing of the Administrative Complaint, Petitioner timely filed a request for a formal hearing.

22. After probable cause was found in the underlying case, the matter was referred to the Division of Administrative Hearings, and shortly before the date of the scheduled formal hearing, the attorneys for Petitioner and Respondent discovered that Respondent's expert, Dr. Dennis had been retained by Petitioner's former attorneys, after probable cause had been found, to give an opinion on behalf of Petitioner in the underlying case. This resulted in the disqualification of Dr. Dennis' opinion.

23. The formal hearing was continued, and Respondent retained another expert, Kenneth Begelman, M.D. He opined that Petitioner fell below the standard of care in the case, and his testimony was used at the formal hearing. No reference to the opinion of Dr. Dennis was made or used at the formal hearing. Dr. Begelman's opinion was also not available to the Panel at the time that probable cause was found against Petitioner, nor did Respondent seek to return jurisdiction to the Panel for their reconsideration. Any objection to this procedure was waived by the parties.

24. At the formal hearing, a CT Scan of the patient in question and missing nurses' notes relating to Petitioner's postoperative monitoring were introduced into evidence.

25. Upon review of this new evidence and under cross-examination, Respondent's expert, Dr. Begelman, could not conclusively determine whether Petitioner's surgical and post-surgical treatment of Patient H.H. fell below the standard of care.

26. However, it is clear from the record in the underlying case that the evidence regarding Petitioner's performance of the procedure at issue in the case, as well as his postoperative care of the patient, was in dispute. The expert opinion of Dr. Dennis and Petitioner's response highlight this fact. The events involving Dr. Dennis, which occurred after the finding of

probable cause by the Panel, and Respondent's subsequent use of Dr. Begelman at the formal hearing are not relevant to the determination of whether Respondent was substantially justified in finding probable cause against Petitioner in the underlying case. And, while the underlying case was ultimately resolved in Petitioner's favor, there were disputes of fact in this case and the Agency and Respondent clearly were substantially justified to go forward with the underlying action. Therefore, Petitioner is not entitled to an award of attorney's fees and costs, as to DOAH Case No. 02-4844F.

CONCLUSIONS OF LAW

As to Both Cases

27. The Division of Administrative Hearings has original jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to Subsections 57.111(4)(b)1. and 120.57(1), Florida Statues.

28. The Florida Equal Access to Justice Act (FEAJA), Section 57.111, Florida Statutes, provides in pertinent part:

> (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.

29. The FEAJA, enacted by the Florida Legislature in 1984, is patterned after a federal law on the same subject -- The Federal Equal Access to Justice Act (the Federal Act), 5 U.S.C., Section 504. Enacted in 1981, the Federal Act provides in pertinent part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust . . .

30. The federal and state statutes use similar language, and the legislative history of the FEAJA shows that legislators were aware of the federal prototype. Gentele v. Department of Professional Regulation, 9 FALR 311 (DOAH June 20, 1996), citing Senate Staff Analysis and Economic Input Statements CS/SB 438 (5-2-84); and the record of the 5-2-84 meeting of the Senate Governmental Operations Committee, sponsor of the bill.

31. When, as in this case, a Florida Statute is patterned after a federal law on the same subject, it will take the same construction in the Florida courts as its prototype has been given in federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. Gentele v. Department of Professional Regulation, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

32. Section 57.111, Florida Statutes, provides for an award of attorney's fees from the state to a "small business party" under certain circumstances in order to diminish the detrimental effect of seeking review of, or defending against, governmental action. This section states in part:

> (3)(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, 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.

33. Petitioner established and the parties stipulated that he was a small business party within the contemplation of the statute in that:

> a) Petitioner was operating a professional practice as a sole proprietor at the time the action was initiated by Respondent.
>
> b) Petitioner's principal place of business was in the State of Florida, located in Winter Haven, Florida;
>
> c) Petitioner did not have more than 25 full-time employees; and
>
> d) Petitioner did not have a net worth of more than $2,000,000.

See generally Ann and Jan Retirement Villa v. Department of Health and Rehabilitative Services, 580 So. 2d 278 (Fla. 1st DCA 1991). Petitioner qualifies as a small business party under the FEAJA.

34. Next, a state agency must have initiated some action against a small business party. The recited purpose behind the establishment of Section 57.111, Florida Statutes, the FEAJA, is that "[t]he Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. . . . The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state." Subsection 57.111(3)(b) provides as follows: The term "initiated by a state agency" means that the state agency: . . . [w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

35. In the instant cases, Respondent issued two Administrative Complaints directed to Petitioner, charging him with certain violations of statutes enforced by the Board of Medicine. Petitioner denied the charges and requested a formal

hearing, pursuant to Chapter 120, Florida Statues. Therefore, this matter was initiated by a state agency.

36. Petitioner is a "prevailing small business party" since the Final Order has been entered in his favor in both cases. Subsection 57.111(3)(c)1., Florida Statues. Department of Professional Regulation v. Toledo Realty, 549 So. 2d 715, 717 (Fla. 1st DCA 1989). Once this showing is made, the burden shifts to Respondent to demonstrate that its actions were substantially justified or that special circumstances exist that would make the award unjust. Toledo Realty, supra.

37. Subsection 57.111(3)(e), Florida Statutes, states: A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. It is instructive to look to the decisions of federal courts which have construed the meaning of the language of the Federal Act. Structured Shelters Financial Management Inc. v. Department of Banking, 10 FALR 389, (DOAH 1987); Gentele v. Department of Professional Regulation, Board of Optometry, supra. In discussing the meaning of the term "substantially justified," the court in Ashburn v. U.S., 740 F.2d 843, 850 (11th Cir. 1984), said:

> The government bears the burden of showing that its position was substantially justified. (citation omitted) The standard is one of reasonableness; the government must show "that its case had a reasonable

> basis both in law and fact." (citation omitted)

Ashburn went on to say that the fact that the government lost its case does not raise a presumption that the government's position was not substantially justified. The government is not required to establish that the decision to litigate was based on a substantial probability of prevailing. White v. U.S., 740 F.2d 836 (11th Cir. 1984). Under Florida law, the "substantially justified" standard falls somewhere between the "no justiciable issue standard" of Section 57.105, Florida Statues, and an automatic award of fees to the prevailing party. Helmly v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998)

38. In order to determine whether Respondent's initiation of the underlying action against Petitioner was substantially justified, one must determine whether the agency had a reasonable basis in law and fact to allege that a violation had occurred. In order to sustain a finding of probable cause, it is necessary that there be "some evidence considered by the panel that would reasonably indicate that the violations alleged had indeed occurred." Kibler v. Department of Professional Regulation, 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982).

As to Case No. 02-4843F

39. In Case No. 02-4843F, it is presumed that the Panel reviewed and considered the Agency's complete investigative file, including Petitioner's response and the expert opinions of Dr. Black, Dr. Kilkenny, and Dr. Yahr. From those documents, the Panel concluded that a violation of Subsection 458.331(1)(t), Florida Statutes, had occurred.

40. However, Respondent did not satisfy its burden of proof. The decision to prosecute did not indicate that there was any consideration of the credibility or qualification of the expert witness, or the existence or non-existence of essential fact witnesses, after such an inordinate delay in bringing this matter before the Panel. The court in Department of Health & Rehabilitative Services v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993), cited the 7th Circuit in McDonald v. Schwellker, 726 F.2d 311 (7th Cir. 1983), in defining substantial justification as ". . . a solid though not necessarily correct basis in fact and law for the position that it took in the action." [emphasis added] 613 So. 2d at 1386. Substantial justification means "justified in substance or in the main -- that is, justified to a degree that could satisfy a reasonable person." Helmly, supra, at 368. The evidence submitted by Respondent could not satisfy a reasonable person. With respect to DOAH Case No. 02-4843F, three opinions were submitted by three medical doctors -

one stating that Petitioner failed to practice with the appropriate standard of care and two indicating that Petitioner practiced with the appropriate standard of care. The Panel did not discuss or consider the opinions by Dr. Black or Dr. Yahr. Clearly, review of only one opinion would not satisfy a reasonable person the Agency was justified in initiating its action against Petitioner.

As to Case No. 02-4844F

41. In order to sustain a finding of probable cause, it is necessary that there be "some evidence considered by the Panel that would reasonably indicate that the violations alleged had indeed occurred." Kibler v. Department of Professional Regulation, 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982). In DOAH Case No. 02-4844F, the Panel reviewed and considered the Agency's investigative file, including Petitioner's response and the expert opinion of Dr. Dennis. From those documents, it was reasonable for the Panel to conclude that a violation of Subsection 458.331(1)(t), Florida Statutes, had occurred.

42. In addition, even though the decision to prosecute essentially depended on a credibility assessment of the expert who reviewed the case, it did not mean that the Panel did not have a reasonable basis in law and fact. The Panel was simply making a decision on probable cause. It was not reaching a

conclusion about the guilt or innocence of Petitioner. Gentele, supra.

43. As stated in the recent case of Fish v. Department of Health, Board of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002), the evidence considered by the Panel "need not be as compelling as that which must be presented at the formal administrative hearing on the charges to support a finding of guilt and the imposition of sanctions." Petitioner's response to the complaint "disputed the allegations against him, but did not disprove or conclusively rebut those allegations. In fact, [Petitioner's] response highlighted the fact that there were disputed issues of fact as to the charges against him." (Id. at 423)

44. Petitioner's allegations about the events concerning Dr. Dennis and Respondent's subsequent use of Dr. Begelman at the formal hearing are irrelevant to the determination of substantial justification because they occurred after the finding of probable cause. The determination of substantial justification focuses on the initiation of the agency action, in this case the finding of probable cause. A review of the record demonstrates that there was clearly a dispute about the evidence in the case, and the Panel had a reasonable basis in both law and fact to find probable cause against Petitioner.

CONCLUSION

In these cases, Respondent initiated the action, and Petitioner was the prevailing party in the underlying action, and Petitioner is a "small business party" within the meaning of the Florida Equal Access to Justice Act.

In regard to DOAH Case No. 02-4843F, Respondent did not have a reasonable basis in law and fact for its actions and was not substantially justified in its position. In regard to DOAH Case No. 02-4844F, Respondent had a reasonable basis in both law and fact for its actions and was substantially justified in its position. Therefore, it is

ORDERED as follows:

1. As to DOAH Case No. 02-4843F, the Petition for Attorney's Fees and Costs up to the maximum allowable by law of $15,000 is GRANTED.

2. As to DOAH Case No. 02-4844F, the Petition for Attorney's Fees and Costs is DENIED.

DONE AND ORDERED this 20th day of May, 2003, in Tallahassee, Leon County, Florida.

_____

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 20th day of May, 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.