

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEALTH CARE CENTER OF NAPLES,)
d/b/a THE ARISTOCRAT,)
)
Petitioner,)
)
vs.) Case No. 03-1446F
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on September 12, 2003, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael S. Howard, Esquire
Thomas Caufman, Esquire
Gallagher & Howard, P.A.
Post Office Box 2722
Tampa, Florida 33602-2722

For Respondent: Gerald L. Pickett, Esquire
Agency for Health Care Administration
Sebring Building, Suite 330K
525 Mirror Lake Drive, North
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On April 21, 2003, Petitioner, Health Care Center of Naples, d/b/a The Aristocrat (Petitioner/Health Care Center of Naples, Inc.), filed a Petition for Award of Attorney's Fees and Costs and two affidavits, the Affidavit of Derick Deeter and the Affidavit as to Attorney's Fees pursuant to Section 57.111 and Subsection 120.569(2)(e), Florida Statutes. The Petition for Award of Attorney's Fees and Costs requests attorney's fees and costs incurred by Petitioner in litigating the case styled, Health Case Center of Naples d/b/a The Aristocrat v. Agency for Health Care Administration, Case No. 02-0049 (DOAH February 21, 2003).

On May 13, 2003, Respondent, the Agency for Health Care Administration (Agency), filed a response to the Petition for an Award of Attorney's Fees, which did not dispute that Petitioner was the prevailing party for the purpose of Section 57.111, Florida Statutes. However, in the response, Respondent contended that Petitioner was not a "small business party" with a net worth of less than \$2,000,000 and that the Agency for Health Care Administration was substantially justified in filing a notice of intent to assign a conditional licensure status to Petitioner.

Because of the disputed issues raised in the Petition for Attorney's Fees and Costs and the Agency's response, by notice

issued May 5, 2003, the hearing in the matter was set for June 6, 2003. On May 16, 2003, prior to the scheduled hearing date, Petitioner filed an unopposed Motion for Continuance. In an Order issued May 16, 2003, Petitioner's Motion for Continuance was granted and the hearing was rescheduled for July 8, 2003. Respondent filed an unopposed Motion for Continuance on July 3, 2003. Pursuant to an Order issued July 8, 2003, Respondent's Motion for Continuance was granted and the hearing was rescheduled for September 12, 2003.

At the outset of the hearing, the undersigned granted the Agency's request that the undersigned take official recognition of the records, including the Transcript of the underlying case, in DOAH Case No. 02-0049, referenced above. Also, there were three motions heard: the Agency's Motion for Continuance filed September 11, 2003; the Agency's Motion to Compel Discovery filed September 11, 2003; and Petitioner's Motion to Strike Agency for Health Care Administration's Witnesses and Exhibits (Motion to Strike) filed September 11, 2003. Petitioner withdrew its Motion to Strike. After oral argument from counsel, the undersigned denied the Agency's Motion to Compel Discovery and the Agency's Motion for Continuance.

Prior to the evidentiary portion of the hearing, the parties stipulated to certain facts that required no proof at hearing. The parties also stipulated to the version of law that

was applicable to this proceeding. The stipulations are as follows: (1) The formula for determining net worth is assets minus liabilities; (2) Petitioner was the prevailing party in DOAH Case No. 02-0049, AHCA Case No. 2001071241, AHCA Rendition No. 03-0119-FOF-OLC; (3) The Agency is the responsible entity for regulating nursing homes; (4) the Agency was not a minimal party in the underlying proceeding; (5) the 2001 version of Subsection 57.111(3), Florida Statutes, is the correct statute under which to proceed (the maximum attorney fees permitted is \$15,000); and (6) the hourly attorney's rates of \$125.00 and \$150.00 are reasonable.

At the final hearing, Petitioner presented the testimony of Derek Deeter and offered and had two exhibits admitted into evidence. The Agency presented the testimony of one witness, Ann Sarantos, and offered no exhibits into evidence.

A Transcript of the proceeding was filed on September 29, 2003. The Agency's Proposed Final Order was filed on October 9, 2003, and Petitioner's Proposed Findings of Fact and Conclusions of Law was filed on October 14, 2003. The parties' post-hearing submittals have been carefully considered in preparation of this Final Order.

Unless otherwise indicated, all statutory references in this Final Order are to the 2001 version of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at hearing and on the entire record of this proceeding, the following Findings of Fact are made.

1. The Agency is authorized to license nursing home facilities in the State of Florida and, pursuant to Chapter 400, Part II, to evaluate nursing facilities and assign ratings.

2. The Agency conducted a survey of Petitioner's facility from October 8 through 10, 2001. As a result of the survey, the Agency cited Petitioner for "fail[ing] to adequately assess and develop a plan of care to maintain acceptable parameters for a resident resulting in significant weight loss," and issued a Notice of Intent to change its licensure status to conditional.

3. Petitioner timely challenged the conditional rating and filed a Petition for Formal Hearing. Pursuant thereto, a formal hearing was held on March 28 and 29, 2002.

4. The Recommended Order, which was issued on August 14, 2002, recommended that the Agency enter a final order issuing a standard licensure rating to Petitioner and rescinding the conditional licensure rating. On February 18, 2003, AHCA issued a Final Order adopting the Findings of Fact and Conclusions of Law in the Recommended Order, ordering that a standard licensure rating be issued to replace the previously-issued conditional licensure rating, and rescinding the conditional licensure

rating. As such, Petitioner was the prevailing party in the underlying case, DOAH Case No. 02-0049, AHCA 2001-071241.

5. No appeal of the Final Order in the underlying proceeding was filed.

6. On April 21, 2003, Petitioner filed a Petition for an Award of Attorney's Fees and Costs (Petition) with supporting affidavits.

7. In the Petition, Petitioner sought relief under both the Florida Equal Access to Justice Act, Section 57.111, as well as pursuant to Subsection 120.569(2)(e). The Agency opposed the Petition.

8. Although Petitioner requested an award of attorney fees under Subsection 120.569(2)(e), it presented no evidence that the Agency had filed any pleadings, motions, or other papers not properly signed or that any were interposed for any improper purpose. Accordingly, the undersigned will not consider an award of attorney fee's under Subsection 120.569(2)(e), and the focus of the evidence presented will be as to Section 57.111.

9. The parties stipulated as to the reasonableness and amounts of the attorneys fees and costs. Reasonable attorney's fees are \$21,547.50. The reasonable amount of costs is \$4,183.82. The amount of attorney's fees and costs that may be awarded is limited to \$15,000.00, based upon

Subsection 57.111(3)(d)(2), which the parties agree is applicable to this proceeding.

10. The Health Care Center of Naples, Inc., is a corporation with its principal office in Florida. At the time the underlying action was initiated by the Agency in October 2001, the Health Care Center of Naples, Inc., had a net worth of not more than \$2 million. The net worth of Health Care Center of Naples, Inc., on October 31, 2001, was \$158,048.65. The net worth of Health Care Center of Naples, Inc., for September 2001 was \$190,829.22. The net worth of Health Care Center of Naples, Inc., for November 2001 was \$171,726.44.

11. The Administrative Complaint in the underlying proceeding, DOAH Case No. 02-0049, alleged that Petitioner failed to ensure that a resident maintained acceptable parameters of nutritional status. The basis of this allegation was the result of a survey which found that a resident had a significant weight loss from the period between July 30, 2001, to August 11, 2001. The Agency's Final Order, adopting the Recommended Order in Case No. 02-0049, found that the patient's weight loss was expected due to edema or third space fluid, resulting from the patient's being over-dehydrated before her recent surgery. Moreover, in the underlying proceeding, it was found that in determining that the resident had a significant weight loss, "the Agency surveyors based their calculations on

an inaccurate usual body weight for the resident." As a result of these and other findings, the Agency's decision to change the status of Petitioner's licensure rating to conditional was rescinded.

12. Although the Agency did not prevail in the underlying proceeding, the surveyors were substantially justified in citing Petitioner for the alleged deficiency, and the Agency was substantially justified in initiating the action. The Final Order found that the usual body weight relied upon by the surveyors in determining that the resident had a significant weight loss was obtained from the records of Petitioner. Also, the record in the underlying proceeding found that many of Petitioner's staff members were concerned about the resident's weight loss and did not consider that the weight loss was caused by edema. Finally, there is no indication in the record that at the time of the survey, Petitioner's staff gave the Agency surveyors any reasonable explanation for the resident's alleged significant weight loss.

13. The evidence, which was the basis of the findings in the Final Order in the underlying proceeding, while available at the time of the survey, was not discovered or known to the surveyors and, to some extent, to Petitioner's staff.

CONCLUSIONS OF LAW

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

15. Attorney's fees and costs have been sought by Petitioner in this matter pursuant to Section 57.111, the "Equal Access to Justice Act."

16. The legislative intent for enacting the Equal Access to Justice Act is provided in Subsection 57.111(2), which provides the following:

(2) The 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. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. 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.

17. In pertinent part, Subsection 57.111(4)(a) provides the following:

(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.

18. Subsection 57.111(3)(d)1.b. defines a small business party, in pertinent part, as follows:

(d) The term "small business party" means:

* * *

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; or

19. Subsection 57.111(3)(c) defines a "prevailing small business party" as follows:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

20. The Department does not dispute that Petitioner prevailed in the underlying proceeding.

21. The term "substantially justified" is defined in Subsection 57.111(3)(e) as follows:

(e) 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.

22. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, 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 action and that it was a small business party at the time the action was initiated. Once the party requesting the award has met this burden, the burden shifts to the agency to establish that it was substantially justified in initiating the disciplinary action.

23. Petitioner proved that it is a small business party within the meaning of Subsection 57.111(3)(d)1.b. Furthermore, the parties stipulated that Petitioner is a prevailing party and that the underlying action was initiated by the Agency. Therefore, Petitioner has met its burden of establishing that it is a prevailing small business party.

24. Having established that Petitioner is a prevailing small business party, the burden shifts to the Agency to show that it was substantially justified in initiating the underlying action.

25. The action of the Agency in the underlying cause was based upon the information known to them at the time. None of Petitioner's staff provided additional information or explanations regarding the reasons for the resident's alleged significant weight loss. Had the explanations Petitioner provided at the hearing in the underlying proceeding been provided at the time of the survey, perhaps the matter would have been resolved. It was reasonable that Agency surveyors would be concerned when a resident of a nursing home facility appeared to have an unexplained significant weight loss.

26. Considering the record in the underlying proceeding, the Agency's actions were substantially justified.

ORDER

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

ORDERED that the Health Care Center of Naples, d/b/a The Aristocrat's Petition for Award of Attorney's Fees and Costs is DENIED.

DONE AND ORDERED this 31st day of October, 2003, in
Tallahassee, Leon County, Florida.

S

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2003.

COPIES FURNISHED:

Michael S. Howard, Esquire
Thomas Kaufman, Esquire
Gallagher & Howard, P.A.
Post Office Box 2722
Tampa, Florida 33602-2722

Gerald L. Pickett, Esquire
Agency for Health Care Administration
Sebring Building, Suite 330K
525 Mirror Lake Drive, North
St. Petersburg, Florida 33701

Lealand McCharen, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Valda Clark Christian, General Counsel
Agency for Health Care Administration
2727 Mahan Drive
Fort Knox Building, Suite 3431
Tallahassee, Florida 32308

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 agency 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.