STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CASA FEBE RTMT HOME, INC., d/b/a HOME IS WHERE THE HEART IS, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent.	)	Case No. 03-1955F

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on October 2 and November 17 and 19, 2003, in St. Petersburg, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Colleen O'Rourke, Esquire
The Strategic Counsel, L.C.
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For Respondent: Gerald L. Pickett, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to reasonable attorney's fees and costs (fees and costs), pursuant to

Section 57.111, Florida Statutes (2003), as the prevailing party in DOAH Case No. 02-1659.

PRELIMINARY STATEMENT

On May 22, 2003, Petitioner filed a letter and attorney's affidavit requesting fees and costs pursuant to Section 57.111, Florida Statutes (2003). Respondent answered the request on June 16, 2003, and the ALJ scheduled an administrative hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted five exhibits for admission into evidence. Respondent presented the telephonic testimony of one witness and submitted one exhibit.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript filed on October 20 and November 24, 2003. Respondent's witness did not complete his telephonic testimony on October 2, 2003. Construction noise in the building that began after direct examination prevented cross and redirect examination. The parties agreed to conclude the examination of the witness by telephonic hearing on November 17, 2003. After several unsuccessful attempts to correct technical problems in the telephone system, the parties agreed to complete the examination of the witness through live testimony on November 19, 2003. At the hearing conducted on November 19, 2003, counsel for Petitioner concluded cross-examination, and counsel for

Respondent conducted no redirect examination. Petitioner and Respondent timely filed their proposed final orders (PFOs) on December 4, 2003.

FINDINGS OF FACT

1. Sometime in February 2002, Respondent filed an Administrative Complaint against Petitioner. Petitioner requested an administrative hearing, and DOAH Case No. 02-1659 ensued (the underlying case).

2. Respondent admits that Petitioner was the prevailing party in the underlying case. The Recommended Order in the underlying case recommended that the agency enter a Final Order finding the facility not guilty of the violation alleged in the Administrative Complaint. The Final Order adopted the findings and conclusions in the Recommended Order.

3. Respondent does not contest that fees and costs in the amount of $10,889.00 are reasonable. Petitioner incurred fees of $6,890.00 and $3,760.00, respectively, in the underlying case and in this proceeding. Petitioner incurred costs of $239.00 in the underlying case. Petitioner submitted the only evidence concerning the amount of fees and costs and the reasonableness of that amount.

4. Respondent defends the request for fees and costs on two grounds. Respondent contends that Petitioner is not a small

business party and that the agency had substantial justification for initiating the underlying case.

5. Petitioner is a small business party within the meaning of Section 57.111, Florida Statutes (2003). Petitioner is a closely held corporation with its principal office in the state. The record in this proceeding and that in the underlying case clearly show that Petitioner has only one place of business. When the agency initiated the underlying case, the facility operated by Petitioner had no more than 25 full-time employees and had a net worth of less than $2 million.

6. The facility contained 34 beds and 17 residents in 2002. The fair market value on May 1, 2003, was $1,840,000. Thereafter, the facility expanded by eight rooms and 16 beds and has a projected fair market value of $2,150,000 in May 2004.

7. Contrary to the assertion in Respondent's PFO, the testimony of the sole shareholder is not the only evidence of the net worth of the facility. Documentary evidence includes two written appraisals and a federal income tax return for the 2002 tax year. The tax return reports total assets and liabilities, respectively, of $1,295,010 and $501,088.

8. Respondent was substantially justified in initiating the underlying case. Respondent had a solid basis in fact for the position that it took in the underlying case.

9. On June 27, 2002, the facility transferred a resident to a hospital for a urinary tract infection. The hospital treated the resident intravenously for five days with an antibiotic identified in the record as Tequin, until the resident was asymptomatic, and discharged the resident to the facility. The discharge summary directed the resident to continue Tequin orally, but the hospital did not issue a prescription slip for Tequin. The facility did not administer Tequin to the resident, the infection recurred, and the hospital readmitted the resident.

10. The allegations in the Administrative Complaint and survey findings did not state a legally correct basis for initiating the underlying case. The Administrative Complaint alleged, in relevant part, that the facility violated Florida Administrative Code Rule 58A-5.0185(7)(f) by failing to ensure that prescriptions are "refilled." It was undisputed in the underlying case that a prescription for Tequin did not exist before the date of discharge from the hospital. The agency alleged that the facility failed to "refill" the prescription either by overlooking the prescription slip provided by the hospital or by failing to review the discharge summary to determine that the hospital had failed to include a prescription slip for Tequin. The agency alleged that in either event the facility failed to "refill" an existing prescription.

11. The agency never produced the prescription slip for Tequin that the agency alleges the hospital included with other prescriptions on the date of discharge. The facility "filled" or "refilled" the other prescriptions provided by the hospital.

12. The absence of a prescription slip for Tequin raises an issue of whether the facility received adequate notice of its duty to "fill" or "refill" a prescription for Tequin. The agency's proposed resolution of the notice issue was legally incorrect. The agency alleged that the facility failed to note "either the Resident's discharge instructions or the prescription slip." In the absence of a prescription slip, the failure to note the discharge instructions may have violated a rule of the agency, but the failure to note the discharge summary did not violate the rule requiring Petitioner to take appropriate steps to "refill" a prescription.

13. Respondent's expert witness in this proceeding contradicted the charge in the underlying case that distinguished discharge instructions from a prescription slip. Respondent's expert testified that the agency was substantially justified in initiating the administrative action because the hospital "discharge instructions" constituted a "prescription." Respondent's expert attempted to explicate his administrative interpretation of the relevant rule by stating that the pharmacist would need to telephone the prescribing physician to

"verify the prescription" in the discharge summary, but would not need to do so if the hospital had issued a prescription slip.

14. The testimony of Respondent's expert conflicts with the statutory definition of a prescription in Section 893.02(20), Florida Statutes (2003), and is neither credible nor persuasive. The statute defines a prescription, in relevant part, to include a physician's order for drugs that is transmitted by telephone. A pharmacist that telephoned a physician to "verify a discharge summary" notation would actually fill the order for medication that the physician transmitted by telephone to the pharmacist.

15. For reasons stated in Findings 8 and 9, the agency was substantially justified in initiating the administrative action. However, the agency charged the facility with committing acts that, if proven, did not violate the rule cited in the Administrative Complaint.

16. For reasons stated in the Recommended Order in the underlying case, an agency cannot charge the facility with violating one rule and prove that the facility violated a rule not cited in the Administrative Complaint. To do so, would violate fundamental principles of due process as well as essential requirements of the Administrative Procedure Act.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the subject matter and parties in this proceeding. DOAH provided the parties with adequate notice of the hearing. §§ 57.111, 120.595, and 120.569, Fla. Stat. (2003).

18. Petitioner bears the initial burden of showing by a preponderance of the evidence that Petitioner was a prevailing small business party in the underlying case. Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Department of Professional Regulation v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989). For reasons stated in the Findings of Fact, Petitioner satisfied its burden of proof.

19. The burden of proof then shifts to Respondent to show by a preponderance of the evidence that Respondent was substantially justified in initiating the underlying case. Helmy, 707 So. 2d at 368; Toledo, 549 So. 2d at 717-718. The issue of whether an agency is substantially justified in initiating an administrative action is determined by the facts known to the agency at the time the agency initiated the administrative action. Department of Health, Board of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003). It is improper under Section 57.111, Florida Statutes (2003), for the ALJ to consider evidence presented at the

hearing that was discovered after the initiation of the administrative action. Cralle, 852 So. 2d at 932-933.

20. Respondent showed by the requisite standard of proof that the agency was substantially justified in initiating the underlying case. Respondent had "a reasonable basis in fact" for initiating the action. Respondent had a solid, although not necessarily legally correct, basis for the position that Respondent took. See McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983)(construing the term "substantially justified," in the Federal Equal Access to Justice Act, as requiring the government to "have a solid though not necessarily correct basis in fact and law for the position that it took.").

21. Petitioner relied solely on Section 57.111, Florida Statutes (2003), for an award of fees and costs incurred in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (2003). In doing so, Petitioner necessarily focused the fulcrum of decision in this proceeding on those facts known to the agency when the agency initiated the underlying case.

22. The focus of decision in Section 57.111, Florida Statutes (2003), is different from the focus of decision in a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes; including the underlying case. The statutory purpose for a proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (2003), is to "formulate final agency action,

not to review action taken earlier and preliminarily" when the agency initiated the action. McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

ORDER

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

ORDERED that Petitioner's application for an award of attorney's fees and costs is DENIED.

DONE AND ORDERED this 12th day of December, 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 12th day of December, 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 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.