

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPHINE KIMBALL,)
)
 Petitioner,)
)
 vs.) Case No. 03-2807F
)
 DEPARTMENT OF HEALTH,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case in Tampa, Florida, on August 19, 2004, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brandon L. Kolb, Esquire
Discovery Tours, Legal Department
35202 State Road 54
Zephyrhills, Florida 33541

For Respondent: Robert P. Daniti, Esquire
Department of Health
4052 Bald Cypress Way, BIN A02
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUES

The issues for consideration in this case are whether the Petitioner, Josephine Kimball, is entitled to an award of attorney fees from Respondent, Department of Health, as provided

in Section 120.595, Florida Statutes (2003), and, if so, in what amount.

PRELIMINARY STATEMENT

On July 28, 2003, Petitioner, Josephine Kimball ("Petitioner" or "Josephine Kimball"), filed a Petition for Award of Attorney Fees and Costs ("Petition" or "Petition for Attorney Fees") and the Affidavits of Rolando J. Santiago and Josephine Kimball in support of the Petition. Petitioner seeks attorney's fees pursuant to Section 120.595, Florida Statutes (2003), contending she is a prevailing party in the underlying administrative proceeding and that Respondent, Department of Health ("Department"), brought the case against her for an improper purpose. The underlying proceeding is Department of Health v. Discovery Experimental, et al., Case No. 93-6184 (DOAH April 18, 2003), which consolidated four cases, DOAH Case Nos. 93-6184, 95-2255, 97-3836, and 98-4364.

The Administrative Complaint filed by the Department in DOAH Case No. 97-3836 ("1997 Administrative Complaint" or "underlying proceeding") alleged that Josephine Kimball was "responsible for the accounting, check registers, books and other financial records" of each of the corporate Respondents; that Josephine Kimball was compensated for these services; and that through these and other activities, Josephine Kimball continuously participated in the manufacture, promotion,

advertisement, sale, and other distribution of unlawful drugs. After the conclusion of the final hearing in the underlying proceedings, a Recommended Order was issued, which recommended that the Department dismiss the Administrative Complaint against Josephine Kimball. The Department's Final Order, executed May 23, 2003, approved, adopted, and incorporated by reference, the Recommended Order.

On March 10, 2004, this case was consolidated with Discovery Tour Wholesalers, Inc. v. Department of Health, Case No. 03-2754 (DOAH January 5, 2005), and Global Health Information/Medical Research Institute, Inc. v. Department of Health, Case No. 03-2806 (DOAH January 3, 2005), solely for the purpose of the final hearing because the three cases involved identical witnesses and documentary evidence. However, the parties and the undersigned agreed that a separate final order would be issued in each case.

Prior to the evidentiary hearing in this case, the Department filed a Motion to Dismiss the Petition and a Motion for Summary Disposition Denying the Petition, and Petitioner filed a motion to amend her Petition. All three motions were denied.

The final hearing in this case was set for October 24, 2003, but was cancelled. Subsequently, the hearing was

rescheduled several times after the parties requested and were granted continuances before it was conducted, as noted above.

At hearing, Petitioner presented the testimony of five witnesses: Josephine Kimball; Toni Kimball; Joy Young; Rolando Santiago, Esquire; and Jon Pellet, Esquire. The Department stipulated that Mr. Pellett was an expert witness with regard to this type of proceeding. Petitioner offered and had ten exhibits received into evidence. The Department presented the testimony of two witnesses: Jerry Hill, R. Ph., Bureau Chief of Statewide Pharmaceutical Services; and Deborah Orr, a former drug agent and investigator with the Department. The Department offered and had 12 exhibits received into evidence. The parties had five joint exhibits received into evidence.^{1/}

A Transcript of the proceeding was filed on September 3, 2004. At the conclusion of the hearing, the time for filing proposed recommended orders was set for ten days from the filing of the Transcript. Prior to that date, upon motion filed by the Department, the time for filing proposed recommended orders was extended until September 23, 2004. On September 22, 2004, the parties filed an agreed motion to extend the time for filing proposed recommended orders. The agreed motion was granted and extended the time for filing proposed recommended orders until October 8, 2004.

The Department and Petitioner filed proposed orders on October 8, 2004, and October 12, 2004, respectively. Both proposed orders have been considered in preparation of this Recommended Order.

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 Department, through its Bureau of Statewide Pharmaceutical Services (formerly the Bureau of Pharmacy Services), is the state agency responsible for administering and enforcing the Florida Drug and Cosmetic Act, Chapter 499, Florida Statutes (1997), which includes the regulation of the manufacture, promotion, and distribution of prescription drugs.

2. The Department initiated an Administrative Complaint in August 1993 (1993 Administrative Complaint) while in the middle of an investigation and after participating in a federal and state force of agencies that executed a search and seizure of the business establishment and of the home of James T. Kimball and his wife, Josephine Kimball, both of which were located in Wesley Chapel, Florida. The Kimballs' business establishment was located at 29949 State Road 54 West in Wesley Chapel, Florida ("business establishment" or "29949 State Road 54

West"). The search and seizure took place on May 12, 1993, pursuant to federal warrants.

3. The 1993 Administrative Complaint was issued to Discovery Experimental and Development, Inc. ("DEDI"), located at 29949 State Road 54 West and related to that company's alleged sale of drugs that were not approved by the Federal Drug Administration (FDA). After the 1993 Administrative Complaint was filed, the Department continued to investigate the activities of DEDI.

4. Deborah Orr (Agent Orr) began working for the Department as a drug agent and investigator on or about 1993 and was assigned to investigate the underlying case until the case culminated.

5. During the investigation, Agent Orr and other Department agents, investigators, and officials reviewed documents and other evidence seized during the search of the business establishment and the home of the Kimballs that tied both James and Josephine Kimball to several corporations that appeared to be connected to the manufacture and sale of certain unapproved drugs.

6. Among the documents found and seized from the Kimballs' home, pursuant to the 1993 warrant and reviewed by Agent Orr, was the financial statement of James and Josephine Kimball dated April 14, 1992. According to that document, James and Josephine

Kimball were 90-percent owners of DEDI, which "develops pharmaceuticals and chemicals for manufacturing" and had an assessed value of \$1,000,000; James and Josephine Kimball were 90-percent owners of ASTAK, Inc. ("ASTAK"), a company that "manufactures custom order vitamins"; James T. Kimball was a 100-percent owner of Discovery Experimental and Development, Mexico N.A. (DEDI of Mexico), a company that "manufacture[s] pharmaceuticals" and ships to 12 countries; and James and Josephine Kimball were 83-percent owners of Discovery Tour Wholesalers, Inc. (Tours), which owned the real property located at 29949 State Road 54 West.

7. The Department's investigation indicated that several companies controlled by the Kimballs had separate and distinct functions related to the unlawful drug enterprise. For example, it appeared that one company manufactured the unlawful drugs, another took and filled orders from customers for the unlawful drugs, and another put out promotional information and literature about the unlawful drugs.

8. During the investigation, the Department determined that most of the corporations involved in the unlawful drug enterprise had common ownership and operated from 29949 State Road 54 West.

9. The Department's investigation revealed that Josephine Kimball provided administrative and secretarial services, as

well as "consultant services," for several corporations owned by her husband, James T. Kimball, and/or owned jointly by Mr. and Mrs. Kimball that were alleged and found to have been involved in unlawful drug activities.

10. Prior to 1997, Agent Orr received and reviewed several checks written to Tours by companies operating out of the 29949 State Road 54 West location, specifically DEDI and ASTAK, both of which were involved in the manufacture and distribution of drugs that were not approved by the FDA. From a review of these checks, it appeared that Mrs. Kimball, in her individual capacity or in connection with her role at Tours, had signature authority on those corporate bank accounts because some of the checks written to Tours by DEDI and by ASTAK, on their respective bank accounts, were actually signed by Josephine Kimball.

11. During the course of the Department's investigation, Agent Orr obtained and reviewed a letter and check which indicated that Josephine Kimball ordered and/or purchased self-inking signature stamps for "personal checks" for "R.R. Riot" and "R.C. Brown." The letter, which effectively placed the order for the self-inking signature stamps, was signed by Josephine Kimball, as the representative of "Discovery," and requested that the self-inking stamps be mailed to "Discovery, 29949 S.R. 54 West, Wesley Chapel, Florida." Moreover, the

self-inking stamps were paid for by check on the account of DEDI and bore the facsimile signature of "R.C. Brown" and the handwritten signature of Josephine Kimball.

12. The R.R. Riot and the R.C. Brown signature stamps were connected to DEDI of Mexico and B & B Freight Forwarding, Inc. (B & B Freight), respectively.

13. According to documents reviewed by the Department, the "R.R. Riot" signature stamp was used to establish a bank account for DEDI of Mexico. A resolution, executed by James T. Kimball, as secretary of DEDI of Mexico, authorized the bank at which that company's account was established, to honor all checks or drafts or other orders of payment drawn on the DEDI of Mexico account that bore or purported to bear only the facsimile signature of R.R. Riot.

14. The self-inking stamp for R.C. Brown was to include the facsimile signature of "R.C. Brown" and the following:

B & B Freight Forwarding
Pay to Order of Dis. Exp .& Dev. Inc.
For Deposit Only
Lloyd's Bank Acct. #12032151

15. During its investigation, the Department obtained bottles of liquid deprenyl from an individual in South Carolina who had ordered the product from Discovery of Mexico, c/o B & B Freight Forwarding" at 29949 State Road 54 West.

16. Both DEDI of Mexico and B & B Freight, which were Respondents in the underlying proceedings and alleged to have manufactured, sold, or otherwise distributed drugs that were not approved by the FDA, in violation of Chapter 499, Florida Statutes (1997). In that proceeding, B & B Freight was determined to have violated the provisions of Chapter 499, Florida Statutes (1997), as alleged in the Administrative Complaint.

17. Prior to issuance of the 1997 Administrative Complaint, Agent Orr wrote a report of her findings based on her multi-year investigation and sent them to her supervisor, who forwarded the report to Jerry Hill, R. Ph., Bureau Chief of the Department's Bureau of Statewide Pharmaceutical Services.

18. Mr. Hill reviewed Agent Orr's report and other information and evidence obtained during the investigation. He also talked to some of the Department agents and/or investigators who participated in the investigation at various times during the years the investigation was on-going.

19. Based on his review of Agent Orr's report and related information and evidence, Mr. Hill believed there were several companies involved in promoting and/or advertising, manufacturing, and distributing prescription drugs that were not approved by the FDA. The specific unapproved drugs were selegiline citrate (deprenyl) and some silvicidal products, some

of which had been found during inspections of the premises at 29949 State Road 54 West prior to issuance of the 1997 Administrative Complaint.

20. After reviewing all of the information and documents provided to him, Mr. Hill believed that some of the companies were more involved in the illegal drug operation than others. However, he also believed that all of the principals had some involvement in the illegal activity.

21. A review of the documentation, particularly certain checks, provided to Mr. Hill indicated that Josephine Kimball had full signature authority on the checking accounts of several of the corporations that the Department determined were involved in the illegal drug activity. Based on checks seized pursuant to the federal search warrants, Mr. Hill determined that checks from DEDI, written to Tours for consulting fees, were signed by Mrs. Kimball. There was also documentation that Mrs. Kimball signed checks from ASTAK that were written to Tours.

22. Based on the information and evidence Mr. Hill had received, he believed that the corporations that were engaging in the illegal drug activities involved two principal natural persons, James and Josephine Kimball.

23. Mr. Hill believed that he had sufficient evidence to tie Josephine Kimball and several of the companies, including DEDI, DEDI of Mexico, ASTAK, and Tours, together. Given the

companies' common ownership, and Josephine Kimball's involvement in those companies, Mr. Hill was concerned that if the Department did not prosecute all the entities and individuals involved in the operation, the illegal activity would continue and the unapproved drugs would get into commerce.

24. After careful consideration of all the information and evidence provided to him by Department investigators, agents, and other Department officials familiar with and involved in the investigation, Mr. Hill concluded that Josephine Kimball participated in the illegal drug enterprise and was, therefore, in violation of Chapter 499, Florida Statutes (1997).

25. The Department expanded its administrative enforcement action in the underlying case by the Administrative Complaint dated June 24, 1997, based on its on-going investigation of illegal activities taking place at the 29949 State Road 54 West. Mr. Hill, on behalf of the Department, issued the 1997 Administrative Complaint, and that case was later assigned DOAH Case No. 97-3836.

26. Pursuant to a Delegation of Authority dated February 19, 1997, Mr. Hill was authorized to initiate and pursue to conclusion any legal or administrative action authorized by Chapter 499, Florida Statutes (1997).

27. In the underlying administrative proceeding, after taking and considering testimony and documentary evidence, the

Administrative Law Judge issued a Recommended Order finding that the Department failed to prove the allegations against Josephine Kimball by clear and convincing evidence and recommending that the charges against her be dismissed. However, the Recommended Order made no finding that the Department participated in the underlying proceeding against Petitioner for an improper purpose.

28. With regard to the corporate Respondents in the underlying proceeding, the Recommended Order found that Discovery Distributing, Inc., DEDI, ASTAK, and B & B Freight, violated the provisions of Chapter 499, Florida Statutes (1997), as alleged in the underlying proceeding and recommended that those Respondents be fined a total of more than \$3.5 million dollars for the violations.

29. The Department adopted the Recommended Order in the underlying proceeding in its Final Order.

30. In this proceeding, Petitioner asserted that the Department brought the underlying proceeding against her for "personal" reasons. In support of this assertion, Petitioner presented the testimony of one witness, Petitioner's adult daughter, Toni Kimball, who was also a Respondent in the underlying proceeding. Toni Kimball testified that at some point, Agent Orr and/or counsel for the Department told her that the Department took the underlying action against Josephine

Kimball because of Mrs. Kimball's relationship with James T. Kimball and that the case was "no longer business," but was "personal."

31. Ms. Kimball's testimony is not credible or persuasive and is, therefore, rejected.

32. Clearly, at the time the Department initiated the underlying proceeding and participated in that proceeding, there was sufficient evidence of Josephine Kimball's connection and involvement with the companies engaged in the illegal drug activities to bring and pursue the administrative action against her. At the final hearing in the underlying proceeding, there was voluminous evidence that appeared to tie Petitioner to the corporate Respondents found to have engaged in the illegal drug activity with which they were charged and that implicated her in some of these activities.

33. Josephine Kimball and Tours, a company she operated, was represented by Elliot Dunn, Esquire, in the underlying proceeding, including and through the final hearing. Mr. Dunn withdrew from the case prior to Petitioner's filing her Proposed Recommended Order.

34. Mr. Dunn did not testify at this proceeding and no time records related to his representation of Josephine Kimball or any of the other Petitioners in the underlying proceeding were available for review, inspection, or consideration.

35. Josephine Kimball did not pay Mr. Dunn for the legal services that he provided. Instead, he was paid by ASTAK, one of the nonprevailing parties in the underlying proceeding and, later, by Strictly Supplements. There was never a contract between Josephine Kimball and Mr. Dunn that defined the terms and conditions of Mr. Dunn's legal representation on behalf of Josephine Kimball. However, during the time Mr. Dunn represented Josephine Kimball, he was in-house counsel for ASTAK and/or DEDI, a job for which his annual salary was about \$52,000.

36. Petitioner's expert witness opined that a reasonable hourly rate for an attorney representing each of the Petitioners, including Josephine Kimball was \$175 to \$350.

37. Petitioner's expert did not form an opinion as to the total number of hours reasonably spent by Mr. Dunn representing Josephine Kimball in the underlying proceeding. Rather, the expert testified that he utilized Rule Regulating Florida Bar 4-1.5, which deals with the reasonableness of fees. Based on the factors in that Rule, Petitioner's expert opined that reasonable attorney's fees incurred by Josephine Kimball in the defense of the underlying case are \$50,000, assuming the hourly rate of \$175.

38. Rolando J. Santiago, Esquire, provided legal services to Josephine Kimball in the post-hearing phase of the underlying

proceeding. Specifically, Mr. Santiago reviewed the case file and the record in the underlying case and prepared the Proposed Recommended Order and related pleadings for Josephine Kimball.

39. Mr. Santiago's hourly rate is \$175 and he spent 92 hours providing legal services to Josephine Kimball in the underlying proceeding. Therefore, Mr. Santiago's fee for the legal work he performed for Josephine Kimball is \$16,100.

40. In light of the findings and conclusions reached in this Recommended Order, no findings are made or necessary regarding issues related to the reasonableness of the attorney's fees, the quality of the evidence presented on that issue or any other issues related to attorney's fees.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 120.595 and 120.57, Fla. Stat. (2003).

42. Petitioner seeks an award of attorney fees against the Department under Section 120.595, Florida Statutes (2003), claiming that the Department participated in the underlying proceeding against her for an improper purpose.

43. Subsection 120.595(1), Florida Statutes (2003), provides in pertinent part the following:

(1) CHALLENGES TO AGENCY ACTION PURSUANT
TO SECTION 120.57(1).--

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

* * *

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

44. In order to prevail in this proceeding, Petitioner has the burden to establish the elements of Section 120.595, Florida Statutes (2003), by a preponderance of evidence.

45. Here, it is undisputed that Petitioner was the prevailing party in the underlying proceeding. Notwithstanding Petitioner's status as a prevailing party, she is entitled to reasonable attorney fees "only where the nonprevailing adverse party has been determined by the administrative law judge to

have participated in the proceeding for an improper purpose." See § 120.595(1), Fla. Stat. (2003).

46. Petitioner asserts that the Department's action in this matter was for an improper purpose and cites to the Department's initiating and/or participating in the underlying proceeding for "personal" reasons as proof of the improper purpose. However, given the evidence that established Petitioner's close ties to and involvement in the financial matters of corporations alleged and found to have been engaged in the unlawful advertisement, manufacture, and sale or distribution of drugs which were unapproved by FDA, it was reasonable for the Department to initiate and participate in the administrative proceeding against Petitioner.

47. The Findings of Fact set forth above make it clear that the Department acted reasonably in participating in the proceeding against Petitioner. The fact that the Recommended Order and Final Order in the underlying proceeding determined that the Department failed to prove the allegations against Josephine Kimball by clear and convincing evidence, does not establish that it acted improperly. To the contrary, the weight of credible evidence establishes that the Department's participation in the proceeding against Petitioner was reasonable.

48. Clearly, based on the outcome of the underlying proceeding, with respect to Petitioner, the Department was the losing party. However, simply being the losing party does not make one liable for payment of attorney fees and costs under Section 120.595, Florida Statutes (2003). Rather, to be liable for attorney fees, the party must be a "nonprevailing adverse party" within the meaning of Subsection 120.595(1)(e)3., Florida Statutes (2003).

49. "Nonprevailing adverse party" is defined to be a party that has failed to substantially change the outcome of the agency's proposed action. Therefore, the Department, by definition, cannot be a nonprevailing adverse party because it is the agency that is proposing to take action, not a party that is trying to change the proposed action. See Sellars v. Broward County School Board v. Department of Juvenile Justice, Case No. 97-0175F (DOAH July 3, 1997); Palacios v. Department of Business and Professional Regulation, Case Nos. 99-4163 and 99-4164 (DOAH November 20, 2000); HHCI Limited Partnership v. Agency for Health Care Administration, Case No. 02-1951 (DOAH November 21, 2002); and Crist, as Commissioner of Education v. Pringle, Case No. 02-4430 (DOAH November 6, 2003).

50. Based on the foregoing, the Department is not a "nonprevailing adverse party" within the meaning of Subsection 120.595(1), Florida Statutes (2003). Therefore, Petitioner

cannot recover attorney fees from the Department, regardless of the purposes for which it participated in the proceeding.

51. Assuming arguendo, that the Department is a "nonprevailing adverse party" within the meaning of Subsection 120.595(1)(e)3., Florida Statutes (2003), for reasons noted in the Findings of Fact above, the Department did not participate in the underlying administrative proceeding against Petitioner for improper purposes. Thus, Petitioner would still not be entitled to recover reasonable attorney fees and costs from the Department.

RECOMMENDATION

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

RECOMMENDED that Petitioner Josephine Kimball's Petition for Attorney Fees and Costs be DISMISSED.

DONE AND ENTERED this 25th day of January, 2005, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2005.

ENDNOTE

^{1/} The Transcript and exhibits in this case will be forwarded to the Department of Health along with this Recommended Order. The Transcript and exhibits also comprise the record in the previously-issued Final Order in Case Nos. 03-2754 and 03-2806.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.