STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARA FRENCH AND GAIL FRENCH, Petitioners, vs. AGENCY FOR PERSONS WITH DISABILITIES, Respondent.	)	Case No. 06-4565F

FINAL ORDER

A telephonic hearing was held in this case on January 10, 2007, by Administrative Law Judge T. Kent Wetherell, II.

APPEARANCES

For Petitioners: George F. Indest, III, Esquire
The Health Law Firm
220 East Central Parkway, Suite 2030
Altamonte Springs, Florida 32701

For Respondent: Gail Scott Hill, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to an award of attorney's fees, costs, and/or interest related to the hearing officer's award of corrective payments on remand after the decision in French v. Department of Children and Families, 920 So. 2d 671 (Fla. 5th DCA 2006).

PRELIMINARY STATEMENT

In French, the court quashed a Final Order entered by a Department of Children and Families (DCF) hearing officer and remanded the case to the hearing officer to make an award of corrective payments to Petitioner Sarah French (Sarah) for the period that she was wrongfully disenrolled from the Consumer Directed Care Plus (CDC+) program. The hearing officer accepted the remand in an Order dated April 7, 2006, and conducted further proceedings (hereafter "the Remand Proceedings"). On September 27, 2006, the hearing officer entered an Order re Retroactive Payment (hereafter "the Remand Order"), which awarded Sarah corrective payments in the amount of $105,420 and denied the request of Petitioner Gail French (Ms. French) for interest on the corrective payments.

On October 27, 2006, Petitioners filed with the Agency for Persons with Disabilities (Agency) a Petition for Attorney's Fees and Interest Relating to Hearing of July 16 [sic], 2006 (Petition). The Agency referred the Petition to the Division of Administrative Hearings (DOAH) on November 10, 2006, because according to the referral letter, "the Agency is without authority to determine or award attorney's fees available under Chapter 120, Florida Statutes."

A telephonic case management conference was held on November 20, 2006. An Initial Scheduling Order memorializing

the discussions at the case management conference was entered on November 21, 2006.

On December 4, 2006, the Agency filed its response to the Petition. The response included a motion for attorney's fees related to this DOAH proceeding. Petitioners filed a reply to the Agency's response on December 28, 2006. Petitioners' motion to strike portions of the Agency's response was denied in an Order entered January 11, 2007.

A telephonic hearing on the issues framed by the parties' filings was held on January 10, 2007, at which the parties agreed that an evidentiary hearing is not necessary, and that this case can be resolved based upon the parties' legal argument and a stipulated record consisting of the 24 exhibits attached to the Petition; the first three exhibits attached to Agency's response to the Petition; and the complete record in DOAH Case No. 06-1557F, which includes the record on appeal in French. See Order entered January 11, 2007.

The parties further agreed that a Final Order should be entered in this case even though it was referred to DOAH based upon a petition for administrative hearing filed with the Agency "pursuant to Sections 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code." On this issue, it is noted that a Final Order was entered in the related DOAH Case No. 06-1557F, and that Section 120.574, Florida Statutes,

authorizes the parties to agree to a summary hearing in which a Final Order is entered rather than a Recommended Order.

The transcript of the telephonic hearing was filed on February 5, 2007. The parties requested and were given an opportunity to file proposed orders. The Agency timely filed a Proposed Final Order (PFO) on March 14, 2007. Petitioners filed a PFO on March 15, 2007. The PFOs have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Sarah is almost 23 years old, and she is severely disabled. Her disabilities include quadriplegic cerebral palsy, developmental delay, severe osteoporosis, severe muscle spasms, scoliosis, incontinence, kidney stones, and frequent urinary tract infections. Sarah requires 24-hour assistance with all daily living functions, including bathing, feeding, dressing, brushing her teeth, and changing her diapers.

2. Ms. French is Sarah's mother. She is approved by the Agency to provide personal care assistance (PCA) services to Sarah under the CDC+ program.

3. The Agency has administered the CDC+ program since October 1, 2004. Prior to that, the program was administered by DCF.

B. Background

4. Sarah applied for the CDC+ program in July 2002, and was enrolled in the program in October 2002. Prior to that, Sarah was enrolled in the Home and Community Based Developmental Services (HCBS) program pursuant to which she received PCA services from outside providers, rather than her mother.

5. Sarah's initial support plan under the CDC+ program funded only six hours per day of PCA services. The plan was increased to 12 hours per day of PCA services in August 2003 after Sarah successfully appealed her initial support plan to a DCF hearing officer.

6. On October 31, 2003, DCF unilaterally disenrolled Sarah from the CDC+ program based upon its determination that Ms. French had a back condition that prevented her from providing PCA services to Sarah. Thereafter, Sarah was reenrolled in the HCBS program, which required her to hire someone other than her mother to provide her PCA services.

7. Ms. French was paid for the period of November 1-15, 2003, even though Sarah was no longer enrolled in the CDC+ program at the time. For that period, however, Ms. French was paid for only six hours per day of PCA services (at $17.50 per hour) rather than the 12 hours per day required by Sarah's support plan.

8. Ms. French stopped receiving payment under the CDC+ program on November 16, 2003. She began receiving payment again on April 1, 2005, when, as discussed below, Sarah was reenrolled in the CDC+ program. Ms. French has been paid for 12 hours per day of PCA services (at $17.50 per hour) since April 1, 2005.

9. Sarah timely filed an appeal of DCF's decision to disenroll her from the CDC+ program, but the appeal was not docketed and referred to a DCF hearing officer until January 2004.

10. The hearing officer held a hearing on the appeal over a period of eight days between March 22 and August 5, 2004. The length of the hearing was attributable, at least in part, to the fact that the hearing officer was not a lawyer, and she allowed both parties to present extensive testimony and evidence on matters seemingly unrelated to the central issue in the appeal, i.e., whether Ms. French had a back condition that prevented her from providing PCA services to Sarah.

11. The hearing officer's Final Order, dated November 22, 2004, concluded that Sarah should not have been disenrolled from the CDC+ program because DCF failed to prove that Ms. French had a back condition that prevented her from providing PCA services to Sarah. The Final Order did not award retroactive corrective payments to Sarah for the period that she was wrongfully

disenrolled from the CDC+ program, and it denied Sarah's request for an award of attorney's fees and costs.

12. Sarah appealed the Final Order to the Fifth District Court of Appeal. DCF did not cross-appeal.

13. Sarah was reenrolled in the CDC+ program on April 1, 2005, while the appeal was pending. The record does not reflect why Sarah was reenrolled on that date, which is more than four months after the hearing officer's Final Order.

14. The appellate court issued its opinion on January 6, 2006, and held that Sarah was entitled to corrective payments from DCF[1] retroactive to the date that she was disenrolled from the CDC+ program. The court remanded the case to the DCF hearing officer to determine the amount of corrective payments due to Sarah.

15. The court was clear as to the scope of the remand; it held:

> In summary, both [federal and state law] require remand for the hearing officer to order corrective payments retroactive to October 31, 2003. We believe the amount of corrective payments can be determined based upon the evidence provided at the original hearing, but the hearing officer may take additional evidence on the issue, if necessary. (Emphasis supplied)

16. The court also awarded attorney's fees against DCF for the appeal. The court remanded the issue of the amount of appellate fees, and the issue of Sarah's entitlement to

attorney's fees for the underlying DCF hearing, to DOAH for determination because, according to the court, the hearing officer did not have jurisdiction over those issues since the applicable attorney's fee statute refers only to Administrative Law Judges.

17. DCF filed a motion for rehearing, which was denied by the court on February 10, 2006. The mandate was issued by the court on March 1, 2006.

18. Sarah was the prevailing party in the proceedings that culminated in the appeal.

19. The Agency paid Sarah $129,595 in attorney's fees and costs related to the proceedings that culminated in the appeal.[2]

C. Remand Proceeding

20. On April 7, 2006, over a month after the mandate was issued by the appellate court, the DCF hearing officer entered an Order accepting the remand and directing the parties to advise her if the retroactive payments mandated by the court had been made.

21. The Order required Sarah to provide invoices to the Agency reflecting the monthly timesheets for the "retroactive periods," and required the Agency to respond to the invoices and identify any disputes. The Order stated that a hearing would be set if necessary to resolve any dispute regarding the amount of the retroactive payment.

22. On April 19, 2006, in compliance with the hearing officer's Order, Sarah filed monthly invoices and a demand for payment totaling $211,312.50, "exclusive of interest and attorney's fees."

23. The invoices sought payment for an additional six hours per day of PCA services from July 2002 (when Sarah applied for the CDC+ program) to November 15, 2003 (when Ms. French stopped receiving payment for six hours per day of services); payment for 12 hours per day of PCA services from November 16, 2003, to March 31, 2005 (the period during which Ms. French received no payment); and payment of half of those hours at the overtime rate of $26.25 per hour instead of the standard rate of $17.50 per hour.

24. The Agency responded to the demand for payment in a status report filed with the DCF hearing officer on May 26, 2006. In the status report, the Agency took the position that, consistent with the appellate court's decision, the amount of corrective payments owed to Sarah is limited to the period of disenrollment -- October 31, 2003 through March 31, 2005 -- and that the amount should be calculated based upon the approved hourly rate of $17.50 with no overtime pay. The Agency, therefore, requested the DCF hearing officer to "enter an order finding $97,230 as the appropriate amount of compensation due as

the corrective action ordered by the Fifth District Court of Appeal."

25. Sarah filed a reply to the Agency's filing on June 26, 2006, in which she continued to assert that the corrective payments were not limited to the disenrollment period and that overtime pay was due. The reply also claimed that the Agency "is proving itself to be the scofflaw that the general public believes it to be," and it requested imposition of attorney's fees against the Agency because of its "continued delays and its attempts to starve out Ms. French."

26. The hearing officer set the matter for hearing because the parties were not in agreement regarding the amount of corrective payments owed. The hearing was scheduled for and held on July 17, 2006.

27. The transcript of the July 17, 2006, hearing is not part of the record of this DOAH proceeding. Therefore, the record does not reflect the substance of the testimony presented or the nature of the evidence received at that hearing.

28. The hearing officer entered the Remand Order on September 29, 2006. The Remand Order rejected the argument that Sarah is entitled to corrective payments for periods prior to October 31, 2003; rejected the argument that Ms. French is entitled to overtime pay; implicitly rejected the argument that "prejudgment interest" is to be included as part of the

corrective payments to Sarah; concluded that DOAH (and not the DCF hearing officer) has jurisdiction to consider Ms. French's request for interest based upon "the failure of [DCF] to process payment in a timely manner"; and awarded $105,420 in corrective payments to Sarah.

29. The Remand Order was not appealed by either party.

30. It was not until entry of the Remand Order that the amount of corrective payments due to Sarah was established with certainty.

31. The Agency worked diligently after entry of the Remand Order to process the payment due to Sarah. The payment was made through a check dated November 8, 2006, which is 40 days after the date of the Remand Order.

32. Petitioners did not prevail in the Remand Proceeding because the hearing officer rejected each of the substantive arguments they presented in the Remand Proceeding.

33. The fact that the hearing officer awarded Sarah approximately $8,000 more than the Agency calculated that she was due in its pre-hearing status report does not make Sarah the prevailing party in the Remand Proceeding. The award was approximately half of what Sarah claimed she was due, and the difference in the amount calculated by the Agency ($97,230) and the amount awarded in the Remand Order ($105,420) was not the result of the hearing officer using the calculation methodology

advocated by Sarah. Instead, the difference resulted from the hearing officer using the actual number of calendar days that Sarah was disenrolled, rather than calculating the number of days by multiplying the number of months Sarah that was disenrolled by the 28 days of service per month that were approved in Sarah's support plan.

34. There is no persuasive evidence that the Agency participated in the Remand Proceeding for an improper purpose, as alleged by Petitioners. Indeed, the evidence establishes that the primary reason that it was necessary for an evidentiary hearing to be held in the Remand Proceeding was the excessive and unreasonable demand made by Sarah in her initial response to the hearing officer's Order accepting the remand from the appellate court. The Agency's refusal to pay that amount was clearly reasonable and appropriate under the circumstances.

35. To the extent that Petitioners are complaining about having to go through additional proceedings on remand at all when the appellate court observed that the amount of corrective payments could likely be determined based upon the evidence provided at the original hearing, that complaint focuses on the conduct of the DCF hearing officer, not the Agency. It is noted, however, that the appellate court stated that "the hearing officer may take additional evidence on the issue, if necessary."

D. This DOAH Proceeding

36. Petitioners initiated this proceeding by filing the Petition with the Agency. The Agency referred the Petition to DOAH because according to the referral letter, "the Agency is without authority to determine or award attorney's fees available under Chapter 120, Florida Statutes."

37. The Petition requests an award of attorney's fees and costs, both for the Remand Proceeding and for this DOAH proceeding. The Petition also requests an award of prejudgment interest as part of the corrective payments as well as post-judgment interest on the corrective payments ordered in the Remand Order.

38. The Agency disputes Petitioners' entitlement to attorney's fees and costs for this proceeding or the Remand Proceeding. The Agency also disputes Petitioners' entitlement to interest, either as part of or on the corrective payments.

39. There is no evidence that the Agency participated in this DOAH proceeding for an improper purpose. The Agency had a legitimate basis for its opposition to the Petition giving rise to this proceeding, as shown by the fact that the Agency prevailed in this proceeding.

40. The unreasonable demands made by Petitioners at the outset of the Remand Proceeding (and at the outset of the prior attorney's fee case, see Endnote 2) did little to bring the

litigation between the parties to an just and speedy end and, indeed, likely had the opposite effect.

41. That said, the evidence is not persuasive that Petitioners participated in this DOAH proceeding for an improper purpose.

CONCLUSIONS OF LAW

A. Jurisdiction, Burden of Proof, and DOAH Authority

42. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 120.595, Florida Statutes (2006).[3] See also French, 920 So. 2d 677-78.

43. Petitioners have the burden to prove their entitlement to an award of attorney's fees, costs, and/or interest. See generally Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (burden of proof is on the party asserting the affirmative of the issue).

44. Petitioners filings are somewhat difficult to follow due to the "shotgun approach" used to present their claims of entitlement to attorney's fees and costs for the Remand Proceeding and interest on the corrective payments ordered in the Remand Order. For example, Petitioners make passing claims of entitlement to fees and interest under a myriad state and federal statutes, the common law, and principles of equity.

See, e.g., Petition, at ¶ 10; Petitioners' PFO, at ¶¶ 87, 95, 110.

45. DOAH has no common law authority, and it is not a court of equity. DOAH's authority to award attorney's fees, costs and/or interest is prescribed by statute (e.g., §§ 57.105(5), 120.569(2)(e), 120.595, 215.422, Fla. Stat.), not the common law or principles of equity.

46. DOAH also has no authority to correct perceived errors in the Remand Order entered by the DCF hearing officer; that is the function of the appellate courts. Accordingly, the Remand Order is not subject to collateral attack in this DOAH proceeding.

B. Attorney's Fees and Costs for the Remand Proceeding

47. The only statutes that could potentially authorize DOAH to award attorney's fees against the Agency for the Remand Proceeding are Sections 120.569(2)(e), 120.595(1), and 57.105(5), Florida Statutes.

(1) Section 120.569(2)(e), Florida Statutes

48. In French, the court held that DCF hearing officers do not have authority to award attorney's fees and costs under Section 120.595, Florida Statutes. French, 920 So. 2d at 677-78. The court specifically did not address whether DCF hearing officers have authority to award attorney's fees and costs under Section 120.569(2)(e), Florida Statutes. See id. at 676-77.

49. Unlike Section 120.595, Florida Statutes, which refers to Administrative Law Judges, Section 120.569(2)(e), Florida Statutes, authorizes the "presiding officer" to sanction a party who files pleadings, motions, or papers for an improper purpose. See § 120.569(2)(e), Fla. Stat. ("If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose . . . an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." (Emphasis supplied)).

50. "Presiding officer" is defined to include "any other person authorized by law to conduct administrative hearings or proceedings who is qualified to resolve the legal issues and procedural questions that may arise." Fla. Admin. Code R. 28-106.102.

51. The DCF hearing officer was the presiding officer in the Remand Proceeding and, therefore, she had the authority under Section 120.569(2)(e), Florida Statutes, to sanction frivolous filings or other improper conduct in that proceeding. Thus, to the extent that Petitioners are seeking an award of attorney's fees under Section 120.569(2)(e), Florida Statutes, for particular filings and/or conduct of the Agency in the

Remand Proceeding, that request should have been directed to the DCF hearing officer during the course of the Remand Proceeding.

52. Accordingly, DOAH does not have jurisdiction to consider Petitioners' request for attorney's fees for the Remand Proceeding under Section 120.569(2)(e), Florida Statutes.

(2) Section 120.595(1), Florida Statutes

53. DOAH does, however, have jurisdiction to consider Petitioners' request for an award of prevailing party attorney's fees and costs pursuant to Section 120.595(1), Florida Statutes, for the Remand Proceeding even though that proceeding was conducted by a DCF hearing officer. See French, 920 So. 2d 677-78.

54. Section 120.595(1), Florida Statutes, provides:

> (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.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

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.

55. The relevant proceeding for determining whether Petitioners are prevailing parties is the Remand Proceeding, not the entire series of proceedings that began when the Petitioners challenged the Agency's decision to pay for only six hours per day of PCA services as part of Sarah's initial support plan in the CDC+ program. The Agency has already been required to pay Petitioners' attorney's fees and costs for its actions leading up to the Remand Proceeding. See French, 920 So. 2d at 679.

56. Sarah was not the prevailing party in the Remand Proceeding. The DCF hearing officer ruled against her on all of the issues that she raised in that proceeding, and awarded her approximately one-half of the amount that she demanded at the outset of that proceeding.

57. Ms. French was not a party to the Remand Proceeding; the only parties were Sarah and the Agency. Thus, Ms. French could not have been a prevailing party in the Remand Proceeding.

58. Even if Ms. French could somehow be considered a party to the Remand Proceeding based upon her request for interest in

that proceeding, she was not the prevailing party on that issue. The hearing officer did not award interest (or any other relief) to Ms. French in the Remand Order.

59. Even if Petitioners could somehow be considered the prevailing parties in the Remand Proceeding, the evidence fails to establish that the Agency participated in that proceeding for an improper purpose. To the contrary, as reflected in the hearing officer's rejection of all of Petitioners' arguments in the Remand Order, the Agency's defense in that proceeding was a reasonable and appropriate response to the excessive demand made by Petitioners at the outset of the Remand Proceeding.

(3) Section 57.105(5), Florida Statutes

60. Section 57.105(5), Florida Statutes provides in pertinent part:

> In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). . . . .

61. An award of attorney's fees and costs under Section 57.105, Florida Statutes, is final agency action subject to judicial review. See § 57.105(5), Fla. Stat.

62. Section 57.105(5), Florida Statutes, typically applies in proceedings heard on the merits by DOAH, as compared to

proceedings such as this which was heard on the merits by a DCF hearing officer. However, because Section 57.105(5), Florida Statutes, does not refer to hearing officers, it is concluded that DOAH has authority to make a fee award under the statute even though the underlying proceeding was heard by a DCF hearing officer. See French, 920 So. 2d at 677-78.

63. Section 57.105, Florida Statutes, sanctions the presentation of frivolous claims or defenses. See generally Wendy's of N.E. Florida v. Vandergriff, 865 So. 2d 520 (Fla. 1st DCA 2003).

64. Section 57.105(1), Florida Statutes, provides:

> Upon the [administrative law judge]'s initiative or motion of any party, the [administrative law judge] shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during [an administrative] proceeding or action in which the [administrative law judge] finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the [administrative law judge] or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
>
> However, the losing party's attorney is not personally responsible if he or she has

> acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the [administrative law judge] awards attorney's fees to a claimant pursuant to this subsection, the [administrative law judge] shall also award prejudgment interest.

65. A motion seeking an award of attorney's fees under Section 57.105, Florida Statutes, must be served on the opposing party at least 21 days before it is filed. See § 57.105(4), Fla. Stat. The purpose of that requirement is "to give a pleader a last clear chance to withdraw a frivolous claim or defense . . . or to reconsider a tactic taken primarily for the purpose of unreasonable delay . . . ." Maxwell Building Corp. v. Euro Concepts, LLC, 874 So. 2d 709. 711 (Fla. 4th DCA 2004).

66. The record does not reflect that Petitioners served their request for attorney's fees on the Agency at least 21 days before the Petition was filed with the Agency on October 27, 2006. Therefore, Petitioners' request for attorney's fees under Section 57.105(5), Florida Statutes, must be denied. See, e.g., Burgos v. Burgos, 32 Fla. L. Weekly D 472 (Fla. 4th DCA Feb. 14, 2007); Dept. of Transportation v. Megan South, Inc., DOAH Case No. 03-4258F (DOAH Dec. 17, 2003).

67. Denial of Petitioners' request for attorney's fees does not necessarily preclude an award of fees against the Agency under Section 57.105, Florida Statutes, because the

statute authorizes an award of fees on the Administrative Law Judge's own initiative. See § 57.105(1), Fla. Stat. The so-called "safe harbor" provision of Section 57.105(4), Florida Statutes, does not apply to such an award. See Schmigel v. Cumbie Concrete, 915 So. 2d 776 (Fla. 1st DCA 2005).

68. That said, there is no basis for such an award because, as discussed above, Petitioners did not prevail in the Remand Proceeding and the Agency's defense in that proceeding was not frivolous.

C. Interest on the Corrective Payments

69. In the Remand Order, the DCF hearing officer cited Section 215.422, Florida Statutes, for the proposition that she lacked jurisdiction to consider Ms. French's request for interest on the corrective payments. On that issue, the hearing officer stated:

> The above-cited statutes establish that any disputes regarding payments should be resolved by an administrative law judge of the Division of Administrative Hearings . . . . Therefore, the vendor [Ms. French] is referred to that court [sic] for a decision regarding interest on the corrective payments. (Emphasis supplied).

70. The DCF hearing officer suggested that DOAH has jurisdiction under Section 215.422(3)(b), Florida Statutes, to award interest to Ms. French for the Agency's alleged delay in paying the invoices that she submitted for the PCA services that

she provided to Sarah. Interestingly, Petitioners make only passing reference to that statute in their PFO. See Petitioners' PFO, at ¶¶ 62, 81.

71. Section 215.422(3)(b), Florida Statutes, provides in pertinent part:

> If a warrant in payment of an invoice is not issued within 40 days after receipt of the invoice . . ., the agency . . . shall pay to the vendor, in addition to the amount of the invoice, interest at a rate as established pursuant to s. 55.03(1) on the unpaid balance from the expiration of such 40-day period until such time as the warrant is issued to the vendor. Such interest shall be added to the invoice at the time of submission to the Chief Financial Officer for payment whenever possible. If addition of the interest penalty is not possible, the agency or judicial branch shall pay the interest penalty payment within 15 days after issuing the warrant. The provisions of this paragraph apply only to undisputed amounts for which payment has been authorized. Disputes shall be resolved in accordance with rules . . . adopted by the Department of Financial Services or in a formal administrative proceeding before an administrative law judge of the Division of Administrative Hearings for state agencies, provided that, for the purposes of ss. 120.569 and 120.57(1), no party to a dispute involving less than $1,000 in interest penalties shall be deemed to be substantially affected by the dispute or to have a substantial interest in the decision resolving the dispute . . . .

72. The rule adopted by the Department of Financial Services (DFS) to implement Section 215.422(3)(b), Florida

Statutes, is Florida Administrative Code Rule 69I-24.004, which is entitled "Interest Penalty Payments."

73. In essence, the statute and rule require an agency to pay interest as a penalty when it fails to pay a vendor's undisputed invoices within 40 days of receipt.

74. A claim for payment of an interest penalty may be made with DFS or the purchasing agency, which in this case is the Agency. See Fla. Admin. Code R. 69I-24.004(7)(a). However, even if the claim is made with the purchasing agency, the rule contemplates the referral of the dispute to DFS for determination in the first instance. See id. ("The vendor . . . making the claim and the agency against which the claim is made shall provide the Department sufficient information to identify the situation and the basis of the claim.").

75. It is the determination of the dispute by DFS that is the preliminary agency that is subject to review under Chapter 120, Florida Statutes. Specifically, the rule provides:

> (b) The Department shall review the representations of the vendor . . . which is making the claim and the agency against which the claim is made. If all parties agree to the relevant facts, then appropriate action will be taken to pay the interest penalty if any is due. If there is a disagreement between the parties and the amount of the interest penalty in dispute is less than $1000, the Department shall designate an employee to serve as the arbitrator for the purpose of resolving the dispute in a manner which affords the

> parties the Constitutional right of due process.
>
> (c) In the event that the interest penalty in dispute is $1000 or more, the Department shall send notice of its intended action to the parties. Such notice shall conform with the requirements of Chapter 120, F.S.

Fla. Admin. Code R. 69I-24.004(7)(b), (c).

76. Thus, it is premature for DOAH to consider Ms. French's entitlement of an award of interest on the corrective payments under Section 215.422(3)(b), Florida Statutes, because the procedure for formulating preliminary agency action on that issue has not been followed. See Fla. Admin. Code R. 69I-24.004. Ms. French's demand for interest on the corrective payment made by the Agency should have been referred to DFS for resolution in the first instance.

77. To the extent that the issue is properly before DOAH by virtue of the Petition filed by Ms. French with the Agency, the evidence fails to establish that any interest is due under Section 215.422(3)(b), Florida Statutes. Interest under that statute does not begin to accrue until the undisputed invoice is 40 days overdue, and the Agency paid Ms. French 40 days after the date of the Remand Order, which is the date that her invoices became undisputed for purposes of Section 215.422(3)(b), Florida Statutes.

78. Petitioners also contend that Sarah is entitled to "prejudgment interest" as part of the award of corrective payments because prejudgment interest is a mandatory component of damages. The cases and statutes cited by Petitioners for that proposition involve circuit court actions, not administrative proceedings such as this. Thus, the cases are distinguishable.

79. That said, there is some appeal to Petitioners' argument that the purpose of the corrective payments is to "make whole" the person wrongfully denied services and that an award of the equivalent of prejudgment interest as part of the corrective payments is necessary to make Petitioners whole.

80. The inclusion of "prejudgment interest" as part of the corrective payments is an issue that was before the DCF hearing officer in the Remand Proceeding. The Remand Order, which refused to award interest of any kind as part of the corrective payments was not appealed, and cannot be collaterally attacked in this proceeding.

81. An appeal of the Remand Order (not a separate DOAH proceeding) was the proper venue to correct any error in the hearing officer's implicit decision not to include "prejudgment interest" as part of the corrective payments due to Sarah for the period that she was wrongfully disenrolled from the CDC+ program.

82. The fact that Ms. French was not a party to the Remand Proceeding is immaterial. Her right to "prejudgment interest" as part of the corrective payments is derivative of Sarah's right to interest, and as such, her claim that "prejudgment interest" should have been paid as a component of the corrective payments is essentially a collateral attack on the Remand Order.

83. Even if this issue was properly before DOAH by virtue of the Petition filed by Ms. French with the Agency, there is no authority for the proposition that "prejudgment interest" is due as part of the corrective payments. Petitioners did not cite any relevant authority to support their argument on this issue, and the federal and state rules governing corrective payments are silent on the issue. See 42 CFR § 431.246; Fla. Admin. Code R. 65-2.066(6).

84. Ms. French also claims that she is entitled to interest on the corrective payments pursuant to the federal Fair Labor Standards Act (FLSA). This argument is rejected because it is essentially a collateral attack on the Remand Order, which refused to award any interest on or as part of the corrective payments; because neither the Agency nor DOAH has authority to enforce the FLSA; and because Ms. French's claim that she is entitled to interest on the corrective payments under the FLSA because she is an employee of the Agency and the corrective payments are essentially back wages was not persuasive.

85. In sum, to the extent that the issue is properly before DOAH, there is no legal basis for an award of interest to Sarah or Ms. French as part of the corrective payments ordered by the hearing officer in the Remand Order.

86. Petitioners also make a claim for post-judgment interest on the corrective payments from the date of the appellate court's decision. See Petitioner's PFO, at ¶¶ 99-102 (citing Section 55.03, Florida Statutes). That claim is without merit because the appellate court's decision was not a "judgment" and, assuming the Remand Order could be considered a judgment for purposes of Section 55.03, Florida Statutes, it was timely paid by the Agency for purposes of avoiding interest. See § 215.422(3)(b), Fla. Stat.

D. Attorney's Fees and Costs for this DOAH Proceeding

87. Both parties requested an award of attorney's fees for this DOAH proceeding. Petitioners argue that they are entitled to attorney's fees for this proceeding to prove their entitlement to fees for the Remand Proceeding, and that they are entitled to attorney's fees for this proceeding because the Agency's defenses are frivolous and/or interposed for an improper purpose. The Agency argues that it is entitled to attorney's fees for this proceeding because Petitioner's claims are frivolous and/or interposed for an improper purpose.

88. A party may recover attorney's fees and costs for proving entitlement to attorney's fees, but not for proving the amount of attorney's fees. See generally State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (Fla. 1993). However, because Petitioners failed to prove that they are entitled to an award of attorney's fees for the Remand Proceeding, they are not entitled to an award of the attorney's fees and costs incurred in this DOAH proceeding.

89. Similarly, Petitioners are not entitled to an award of prevailing party attorney's fees and costs for this DOAH proceeding under Sections 57.105 or 120.595(1), Florida Statutes, because they did not prevail in this proceeding.

90. The Agency requested an award of prevailing party attorney's fees for this DOAH proceeding under Section 120.595(1), Florida Statutes, based upon the argument that Petitioners participated in this proceeding for an improper purpose.

91. Section 120.595(1)(e)1., Florida Statutes, defines "improper purpose" to include, among other things, harassment and needlessly increasing the cost of litigation. An objective standard is to be used in evaluating improper purpose. See, e.g., Mercedes Lighting & Electrical Supply, Inc. v. Dept. of General Services, 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

92. It is a close question as to whether Petitioners participated in this proceeding for an improper purpose, particularly with respect to the claim for prevailing party attorney's fees for the Remand Proceeding.

93. On one hand, Petitioners should have known that they were not the prevailing parties in the Remand Proceeding because the Remand Order, which they did not appeal, rejected all of their arguments regarding the calculation of the corrective payments required by the appellate court. On the other hand, the Remand Order awarded Sarah approximately $8,000 more than the Agency claimed that she was due, which creates at least a colorable basis for Petitioners' claim for prevailing party attorney's fees; and the hearing officer suggested that Ms. French's claim for interest should be presented to DOAH.

94. On balance, it is concluded that the claims asserted by Petitioners in this proceeding are not objectively frivolous or otherwise sanctionable and, therefore, the Agency is not entitled to an award of attorney's fees and costs under Section 120.595(1), Florida Statutes, even though it prevailed in this proceeding.

95. The Agency also requested an award of attorney's fees and costs for this DOAH proceeding under Section 57.105(5), Florida Statutes.

96. The case file does not reflect that the Agency served its motion for attorney's fees on Petitioners at least 21 days before it was filed with DOAH on December 4, 2006. Therefore, the motion must be denied. See, e.g., Burgos v. Burgos, 32 Fla. L. Weekly D 472 (Fla. 4th DCA Feb. 14, 2007); Dept. of Transportation v. Megan South, Inc., DOAH Case No. 03-4258F (DOAH Dec. 17, 2003).

97. It is a close question as to whether attorney's fees should be awarded against Petitioners for this proceeding on the undersigned's own initiative because, as discussed above, the claims presented by Petitioners in this proceeding were extremely weak. However, because it cannot be said that the claims were completely lacking in merit or that they were presented for an improper purpose, it would be inappropriate to award fees against Petitioners under Section 57.105, Florida Statutes. See, e.g., Stagl v. Bridgers, 807 So. 2d 177 (Fla. 2d DCA 2002) ("An award of attorney's fees pursuant to section 57.105 is appropriate only when the action is so clearly devoid of merit both on the facts and the law as to be completely untenable.") (internal quotations omitted).

98. In sum, there is no basis to award attorney's fees to either party for this DOAH proceeding.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED that:

1. The Petition for Attorney's Fees and Interest Relating to Hearing of July 16, 2006 [sic] is denied.

2. The Agency's motion for attorney's fees is denied.

DONE AND ORDERED this 28th day of March, 2007, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
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 28th day of March, 2007.

ENDNOTES

[1]/ Apparently it was never brought to the court's attention that the Agency took over the administration of the CDC+ program from DCF on October 1, 2004, and, therefore, was the real party in interest after that date. See Ch. 2004-267, § 87(3), Laws of Fla.

[2]/ See French v. Agency for Persons with Disabilities, Case No. 06-1557F (DOAH Nov. 27, 2006). A Final Order was entered in that case closing DOAH's file pursuant to Section 120.57(4),

Florida Statutes, based upon the finding that the parties entered into a binding settlement as to the amount of attorney's fees and costs due for the appeal and the underlying DCF hearing. Id. The amount of the settlement -- $129,595 -- was significantly less than the amount demanded by Sarah -- more than $220,000 in attorney's fees, to be increased by a 2.5 multiplier, and more than $20,000 in costs -- at the outset of the case.

[3]/ All statutory references in this Final Order are to the 2006 version of the Florida Statutes.

COPIES FURNISHED:

Barney Ray, Interim Executive Director
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

John Newton, General Counsel
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

Gail Scott Hill, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

George F. Indest, III, Esquire
The Health Law Firm
220 East Central Parkway, Suite 2030
Altamonte Springs, Florida 32701

Michael McGuckin, Agency Clerk
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

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.