

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STACY LEWIS,)
)
 Petitioner,)
)
 vs.) Case No. 07-4191FC
)
 JIM HORNE, AS COMMISSIONER OF)
 EDUCATION,)
)
 Respondent.)
 _____)

ORDER ON REMAND

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing in this proceeding for the Division of Administrative Hearings (DOAH), on April 7, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Anthony D. Demma, Esquire
Meyer and Brooks, P.A.
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For Respondent: Todd Resavage, Esquire
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STATEMENT OF THE ISSUE

The issue is the amount of attorney's fees and costs to which Petitioner is entitled by Order of the appellate court pursuant to Subsection 120.595(5), Florida Statutes (2007).¹

PRELIMINARY STATEMENT

This proceeding has an extensive procedural history that is discussed further in the Findings of Fact. Suffice it to say for now that the reviewing court reversed the Final Order entered by Respondent against Petitioner, granted Petitioner's motion for attorney's fees, and remanded the case to DOAH to determine the amount of fees to be awarded.²

At the final hearing in this fee case, 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 no exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are recorded in the one-volume Transcript of the hearing filed with DOAH on April 22, 2008. The undersigned granted the parties' request for an extension of time to file proposed recommended orders (PROs), and the parties timely filed their respective PROs on May 12, 2008.

FINDINGS OF FACT

1. On February 9, 2005, the Commissioner of Education (the Commissioner) filed an Administrative Complaint against Ms. Stacy Stinson, now Ms. Stacy Lewis. Ms. Stinson requested an administrative hearing pursuant to Subsection 120.57(1) (a 120.57 proceeding).

2. The Commissioner referred the matter to DOAH to conduct the 120.57 proceeding. DOAH opened the 120.57 proceeding as Jim Horne, as Commissioner of Education v. Stacy Stinson, Case No. 05-0504PL (DOAH August 11, 2005) (the underlying proceeding).

3. The Recommended Order in the underlying proceeding recommended the entry of a final order finding the respondent in the underlying proceeding not guilty of the charges against her and imposing no penalty against her teaching certificate. On January 5, 2006, the Educational Practices Commission (EPC) entered a Final Order rejecting or modifying some findings of fact in the Recommended Order, reprimanding the respondent, imposing a two-week suspension of her teaching certificate, and placing her on probation for three years.

4. On January 5, 2006, the respondent in the underlying proceeding filed a notice of administrative appeal to the First District Court of Appeal. The initial brief was filed on March 16, 2006. The answer was filed on May 1, 2006. On May 15, 2006, the respondent filed a reply brief, motion for attorney's fees, and request for oral argument.

5. On August 22, 2006, the appellate court issued its order in Stinson v. Winn, 938 So. 2d 554 (Fla. 1st DCA 2006). The appellate court concluded that the EPC improperly rejected or modified factual findings and legal conclusions of the ALJ

and remanded the matter for entry of a final order dismissing the Administrative Complaint and finding the respondent in the underlying proceeding not guilty of the allegations, consistent with the Recommended Order.

6. The appellate court also granted the motion for attorney's fees, pursuant to Subsection 120.595(5), and remanded the case to DOAH to determine the amount of fees. The instant proceeding ensued.

7. Respondent does not contest the reasonableness of costs in the amount of \$3,484.95. Petitioner seeks an award of costs in the amount of \$3,954.95. Petitioner is entitled to costs in the amount of \$3,484.95.

8. Petitioner seeks attorney's fees for the underlying proceeding and the appellate proceeding in the amount of \$94,104.45, plus interest. The amount of fees is based on 360.6 hours at an hourly rate of \$250.00.

9. Respondent claims the correct amount of attorney's fees is \$22,680.00. The amount of fees is based on 252 hours at an hourly rate of \$90.00.

10. An hourly rate of \$90.00 is reasonable. The \$90.00-rate is the rate established in the fee agreement reached between Petitioner and her attorney. Judicial decisions discussed in the Conclusions of Law hold that in no case should

the court-awarded fee exceed the fee agreement reached by the attorney and her client.

11. The number of hours reasonably expended is 283.15 hours. The hours claimed by Petitioner in the amount of 360.6 should be reduced by 62.8 hours based on credible and persuasive testimony of Respondent's expert.

12. The subtotal of 297.8 hours includes 34.9 hours billed, from June 6 through July 5, 2005, to prepare the PRO in the underlying proceeding. The total time billed for preparing the PRO includes 19.2 hours for what is labeled, in part, as research undertaken to prepare the PRO. The 2.7 hours for research pertaining to penalties, bearing an entry date of June 27, 2005, is reasonable because the research is reflected in the PRO.

13. The remaining legal research undertaken to prepare the PRO is not reflected in the PRO. The amount billed for preparation of the PRO is reduced from 34.9 hours to 20.25 hours, a reduction of 14.65 hours.

14. The Conclusions of Law in the PRO consist of 33 paragraphs numbered 17 through 49. Apart from administrative proceedings pertaining to penalties, the 33 paragraphs cite three appellate decisions, one of which may be fairly characterized as a "boiler-plate" citation for the burden of

proof. The remainder of the 33 paragraphs consists of naked argument.

15. A principal purpose of a PRO is to inform the ALJ of relevant judicial decisions, to distinguish between supporting and contradicting decisions, and to explain why, in the context of the facts at issue, the supporting decisions seize the day for the client. That is the proper role of an attorney in the adversarial process at the trial level. The PRO does not reflect that effort.³

16. Economic reality is not lost on the fact-finder. It may be that the fee-sensitivity of a client in a particular case precludes an attorney from fully researching and discussing a relevant legal issue. In the instant case, however, the attorney billed 34.9 hours for a PRO with two citations to appellate decisions beyond the burden of proof.

17. Novel and difficult questions of fact and law were present in the underlying proceeding. The factual issues involved a so-called trial by deposition in a penal proceeding. The legal issues involved a literal conflict between a so-called adopted rule and a statute in a 120.57 proceeding. However, the PRO filed in the underlying proceeding provided no legal research concerning either novel question.

18. Judicial decisions discussed in the Conclusions of Law hold that reasonable attorney's fees are determined by

multiplying the number of hours reasonably expended by a reasonable hourly rate. The mathematical product is the lodestar. The lodestar in this proceeding is \$25,483.50, determined by multiplying 283.15 hours by an hourly rate of \$90.00.

19. The lodestar is not increased or decreased by the results obtained or risk factor. There is no evidence of a "risk factor" attributable to contingency or other factors. There is no increase for the results obtained. Although the results were favorable, the favorable results turned principally on issues of fact and law for which relevant judicial decisions exist and were found through independent research by the ALJ without any assistance from legal research evidenced in the PRO.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter and parties of record. § 120.595(5). DOAH provided the parties with adequate notice of the final hearing.

21. Petitioner stipulates she has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence the amount of fees and costs that should be awarded. See Department of Transportation v. J.W.C., Co., 396 So. 2d 778 (Fla. 1st DCA 1981)(party asserting affirmative of the issue bears the burden of proof).

22. The Order of the Court, dated August 22, 2006, states, in relevant part, "The cause is remanded to the trial court to assess the amount." DOAH is the "trial court" in a 120.57 proceeding. There is no express legislative intent in Subsection 120.595(5) that explains whether the order on remand is a recommended order or a final order. Therefore, this order is styled as an Order on Remand.⁴

23. Subsection 120.595(1) authorizes an award of fees and costs only if the adverse party is a "nonprevailing adverse party" defined in Subsection 120.595(1)(e)3. A nonprevailing adverse party is statutorily defined to mean a party that has failed to substantially change the outcome of proposed agency action. If an agency were to fail to substantially change the outcome of proposed agency action in a 120.57 proceeding, the agency would be the prevailing adverse party rather than the nonprevailing adverse party. For that reason, the express legislative definition of a nonprevailing adverse party precludes a recommended order requiring an agency to pay attorney fees and costs pursuant to Subsection 120.595(1).

24. This proceeding is conducted pursuant to authority in Subsection 120.595(5). A determination of the amount of reasonable attorney's fees in this proceeding must be made in accordance with the federal lodestar approach approved by the Florida Supreme Court in Florida Patient's Compensation Fund v.

Rowe, 472 So. 2d 1145, 1151 (Fla. 1985). The lodestar is the mathematical product of the number of hours reasonably expended multiplied by the reasonable hourly rate. Id.

25. A determination of reasonable attorney's fees pursuant to Subsection 120.595(5) must be made in accordance with the lodestar approach approved in Rowe. Board of Regents and The University of South Florida v. Winters, 918 So. 2d 313, 315 (Fla. 2d DCA 2005). The lodestar approach applies to both contingency fee agreements and fixed fee agreements. Perez-Borroto v. Brea, 544 So. 2d 1022, 1023 (Fla. 1989).

26. The lodestar approach considers numerous factors in determining the reasonable number of hours expended and the reasonable hourly rate, in regard to which the parties submitted a plethora of evidence in this proceeding. However, in no case may the court-awarded fee exceed the fee agreement reached by the attorney and his or her client. Rowe, 472 So. 2d at 1151. Accord Lane v. Head, 566 So. 2d 508, 512 (Fla. 1990); Brea, 544 So. 2d at 1023; Nelson v. The Marine Group of Palm Beach, Inc., 677 So. 2d 998, 1000 (Fla. 4th DCA 1996).

27. It is undisputed that the fee agreement between Petitioner and her attorney contemplated an hourly rate of \$90.00. The only variable is the reasonable number of hours expended.

28. The object of the relevant statutory requirement for attorney's fees is to make Petitioner whole. Nothing in the text of Subsection 120.595(5) supports a conclusion that the Legislature intends the fee provisions to be applied in a punitive manner. Winters, 918 So. 2d at 315. Otherwise, courts may become instruments for awarding excessive fees against third parties such as Respondent. Rowe, 472 So. 2d at 1151.


29. Petitioner correctly points out that interest on judgments generally accrues at the statutory rates prescribed by Florida's chief financial officer. However, the interest rates on an award of attorney's fees and costs accrues from the date the judgment becomes final.

ORDER

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

ORDERED that attorney's fees and costs are assessed in the respective amounts of \$25,483.50 and \$3,484.95.

DONE AND ORDERED this 5th day of June, 2008, 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 5th day of June, 2008.

ENDNOTES

- ^{1/} References to subsections, sections, and chapters are to Florida Statutes (2007), unless otherwise stated.
- ^{2/} The Order of the reviewing court grants the motion for "attorney's fees" and is silent with respect to costs. However, the parties agree that the issue of the amount of costs is properly before DOAH.
- ^{3/} The evidence does not disclose fee-sensitivity as a factor that influenced the PRO. Nor does the PRO state that the attorney's research was unable to discover relevant appellate decisions.
- ^{4/} Subsection 120.595(1) authorizes an ALJ to enter a recommended order. Subsections 120.595(2) and (3) pertain to rule challenges not relevant to this proceeding. Subsections 120.595(2) and (3), in relevant part, require an ALJ to issue an "order" but do not reveal whether the order is a recommended order issued pursuant to Section 120.595 or a final order issued pursuant to Subsection 120.56(2). If the agency prevails, the two subsections require the ALJ to "award" fees and costs but do not prescribe whether the award is to be made in a recommended

order or a final order. Subsection 120.595(4) also pertains to rule challenges and requires the ALJ to award reasonable fees and costs in a final order issued pursuant to Subsection 120.56(4).

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.