

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF MANAGEMENT)
SERVICES, DIVISION OF)
RETIREMENT,)
)
Petitioner,)
)
vs.) Case No. 08-1770F
)
GEORGE TAMALAVICH,)
)
Respondent.)
_____)

FINAL ORDER

Petitioner, Department of Management Services, Division of Retirement, filed a Motion for Attorney's Fees on April 21, 2008. Respondent, George Tamalavich, filed a response on May 23, 2008. A hearing was held on June 4, 2008, by telephone before Eleanor M. Hunter, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Larry D. Scott, Esquire
Department of Management Services
4050 Esplanade Way, Suite 160
Tallahassee, Florida 32399-0950

For Respondent: Jane Letwin, Esquire
The Law Office of Jane Letwin
10540 La Placida Drive, North
Coral Springs, Florida 33065

STATEMENT OF THE ISSUE

Whether Respondent filed frivolous motions to introduce additional evidence after the final hearing and after proposed recommended orders had been filed that needlessly increased the cost of litigation, justifying the imposition of sanctions under Section 120.569(2)(e), Florida Statutes (2007).

PRELIMINARY STATEMENT

This case arose because jurisdiction was reserved over Respondent's Motion for Fees and Costs, filed in an earlier case styled George Tamalavich, Petitioner, vs. Department of Management Services, Division of Retirement, Respondent, DOAH Case No. 07-2759 (R.O. 4/8/08; F.O. 5/14/08). Mr. Tamalavich sought to have the Division of Retirement determine that he is eligible to receive service credit in the Florida Retirement System ("FRS") for a period of time that he worked for the Broward County School Board. The Division denied FRS service credit because Mr. Tamalavich was employed in a temporary position as an adult vocational education instructor. After the hearing and after the filing of proposed recommended orders in the case, Mr. Tamalavich's Counsel filed three motions to introduce additional evidence. In response, Counsel for the Division requested attorney's fees and costs. At the final hearing, he submitted only evidence related to fees, not costs.

The issue of the appropriateness of an award of attorney's fees, having been reserved, was docketed as a new case and assigned DOAH Case No. 08-1770F by the Clerk of the Division of Administrative Hearings ("DOAH"). The Clerk also amended the style to reflect the proper alignment of the parties in the fees case.

Following the final hearing on the issue of fees, on June 4, 2008, Respondent's Counsel announced that she would be ordering the transcript. Accordingly, a schedule was set for proposed final orders to be filed no later than 10 days after receipt of the transcript. On June 20, 2008, the court reporter indicated that the transcript had been prepared but not filed because his office had been unable to contact Respondent's Counsel. Another Order Setting Deadline for the Filing of Transcript and Proposed Final Orders was issued. The transcript filing deadline was set for June 26, 2008, and proposed final orders were due within 10 days of that date. On July 7, 2008, the transcript was filed. On July 8, 2008, an Order Granting Extension of Time, sua sponte, for an additional 10 days for the filing of proposed final orders, if any, was issued. On July 18, 2008, the Respondent's Counsel filed what was styled "Petitioner's Proposed Recommended Order On Respondent's Motion for Attorney's Fees."

FINDINGS OF FACT

1. The Petitioner, Department of Management Services, Division of Retirement ("Division") filed Petitioner's Motion for Attorney's Fees, on April 21, 2008. The Motion is as follows:

The Department of Management Services, Division of Retirement, by and through its undersigned counsel, requests the Administrative Law Judge to enter an order awarding the agency reasonable attorney's fees in this case and states:

1. The case was originally referred to the Division of Administrative Hearings on June 20, 2007. Pursuant to the Order of Pre-hearing Instructions and after extensive discovery, the Parties filed their respective exhibit list.⁽¹⁾ The Final Hearing was held on January 16, 2008. At the Final Hearing, the Administrative Law Judge ruled certain evidence would not be considered because it was not timely filed.

2. Counsel for Mr. Tamalavich, Ms. Jane Letwin, subsequent to the Final Hearing, filed three additional motions entitling the Division of Retirement to receive attorney's fees and costs. These motions were frivolous. Jurisdiction was specifically reserved within the Proposed Recommended Order to "consider Respondent's claim of entitlement to fees and costs." Each motion sought to supplement the record by introducing exhibits not timely filed. (See: Exhibit-1, dated March 4, 2008; Exhibit-2, dated March 14, 2008; Exhibit 3, dated March 21, 2008.)

3. The filing of the motions as described in paragraph two (2) above, constitute grounds for the imposition of attorney's fees and costs as set forth in Section

120.569(2)(e), Florida Statutes (2007),
which reads:

All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, 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.

4. An objection to each motion was filed by counsel for the agency, asserting the exhibits were outside the record in the case and would prejudice the agency. (See: Exhibit-4, dated March 5, 2008; Exhibit-5, dated March 14, 2008; Exhibit-6, dated March 24, 2008.) Counsel also requested attorney's fees and costs.

5. In support of this motion, counsel has attached affidavits as to attorney's fees with an activity record for the time spent responding to the motions. The amount totals \$915.00.

Footnote:

1. Respondent agreed to all of Petitioner's exhibits.

2. In response to the Motion for Attorney's Fees, the Respondent filed Petitioner's (sic) Response to Motion for Attorney's Fees (in which references to the parties are based on their status in the original retirement case, not the current fees case), stating that:

PETITIONER [sic] THROUGH UNDERSIGNED COUNSEL, files this Response to the Motion for Attorney's Fees pursuant to Fla. Stat. 120.569 (2) © [sic], Fla. Stats. 2007, and would state:

1. The initial Motion to Supplement the Record was filed in good faith as a response to the urging by the Administrative Law Judge who encouraged the efforts to locate the missing payroll record. The entire episode which occurred during the trial hearing is described in detail in the Motion and was filed in good faith. The goal was to ascertain the facts in the interests of justice, not for delay or bad faith.

2. The Motion to Take Notice was also filed in good faith based on the existence in the record of the documents which were the subject of the motion.

3. The Second Motion to Supplement the Record was also filed in good faith and in the interests of justice, as the very document found in another case with similar issues which involved the Respondent Division of Retirement was thought to be of great interest to the court. This document was probative of the very concepts proposed by Petitioner that the notice mandated by the governing rule had to be presented in writing to the employee upon his initial hiring in order to satisfy the requirements of the FRS' own rules and regulations.

This document was not prejudicial to the Respondent since it must have been aware of the document well before the hearing.

3. Proposed Recommended Orders were filed in the retirement case, DOAH Case No. 07-2759, on February 25, 2008.

4. Respondent filed the initial Motion to Supplement the Record on March 4, 2008. The Motion requested consideration of documents discovered by Mr. Tamalavich's wife after the hearing. Respondent's Counsel stated that questions raised at the hearing prompted the search for more documents and made her believe that she had been instructed to have her client do so. The specific questions related to whether or not Mr. Tamalavich worked during a certain month. The Division's witness testified that she had no way of knowing the answer from her records and that it would be best to ask Mr. Tamalavich. Respondent's Counsel did not explain her failure to ask her client to search for records to support his allegations prior to filing the case or during discovery. She also maintained that, as used in her motion, "[t]he terminology 'supplementing the record' was meant to be the equivalent to a motion to reopen the record." See Petitioner's Proposed Recommended Order on Respondent's Motion for Attorney's Fees, page 2.

5. In the second post-hearing pleading, Respondent's Counsel filed a Motion to Take Notice. Respondent's Counsel argued that the exhibit that was the subject of the Motion had

not been withdrawn during the hearing and that it was re-submitted after she checked the DOAH website and found that it had been logged in by the DOAH Clerk at 3:56 p.m. on the day before the hearing began. As explained in the Recommended Order:

That [tender] was untimely under the requirements of the pre-hearing order [that required submission of a list of exhibits no later than ten days prior to the date of the hearing]. In addition, when an objection to the introduction of the exhibit was raised at the hearing, the record reflects, on page 47, line 20 of the transcript, that the tender was withdrawn.

At the final hearing, Respondent's Counsel said she did not intend to have her words construed as withdrawing the tender of an exhibit because "I couldn't withdraw something that had been filed in the record." DOAH Case No. 08-1770F, transcript p. 12, lines 2 - 4.

5. The third pleading, the Second Motion to Supplement the Record, was filed to introduce an exhibit used in a DOAH case that was decided in January 2004. Respondent's Counsel conceded that she could have possibly requested and received the document while she was preparing her case, explaining, "[H]owever, notwithstanding, I certainly didn't file this motion to harass or delay." DOAH Case No. 08-1770F, transcript p. 23, lines 23 - 25. Petitioner asserted that the only effect of the motion was "to harass my client and take up additional, take up my time." DOAH Case No. 08-1770F, transcript p. 23, lines 8 - 9.

6. The Petitioner submitted an Affidavit As To Attorney's Fees from a 26-year member of The Florida Bar, attesting to the reasonableness of a fee of \$150.00 an hour for a total of 6.1 hours, or a total fee of \$915.00. According to the activity sheet, the attorney's reviewed each motion, consulted with the client on each, and prepared the three responses.

7. During the telephone final hearing, Respondent's Counsel suggested that the work performed should have taken no more than .5 hour because the responses to the three motions were essentially the same. She also asserted that the imposition of any sanction is improper due to her good faith, subjective belief that she was pursuing a just result for her client, and that the reasonable inquiry required, under Subsection 120.569(2)(e), was "not [whether] the motion is legally permissible," [b]ut whether or not the facts you are advancing in the motion are, indeed accurate." DOAH Case No. 08-1770F, transcript p. 44, lines 14 - 18.

8. The Division established that there was no legal justification for the three post-hearing/post-proposed recommended order motions filed in DOAH Case Number 07-2759.

9. There is no dispute that the three pleadings at issue were signed by Respondent's Counsel, not by the Respondent, nor by Respondent's co-counsel who entered a Notice of Appearance, but did not otherwise participate in the proceedings.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to 120.569, 120.57, and 120.569(2)(e), Florida Statutes (2007).

11. Section 120.569(2)(e), Florida Statutes (2007), provides, in relevant part that:

All pleadings, motions, or other papers filed in the proceeding must be signed by ... the party's attorney... The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, 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.

12. The burden of proving that sanctions should be imposed rests with the Division as the proponent of sanctions. Friends of Nassau County v. Nassau County, 752 So. 2d 42 (Fla. 1st DCA 2000). If any reasonably clear legal justification can be shown for the filing of a motion, improper purpose cannot be found and

sanctions are inappropriate. The determination of an improper purpose does not, as suggested by Respondent's Counsel, require a finding of bad faith or an inquiry into her motives or intent. Rather, an objective review of the significance or importance of the pleadings in the context of the administrative proceeding is required. Mercedes Lighting and Electrical Supply, Inc. v. State, Dept. of General Services, 560 So. 2d 272 (Fla. 1st DCA 1990); and Procacci Commercial Realty, Inc. v. State, Dep't of Health and Rehabilitative Services, 690 So. 2d 603 (Fla. 1st DCA 1997).

13. The Division responded that the motion to consider documents found subsequent to the hearing, reflected adversely on the pre-hearing preparation by Respondent's Counsel, as indicated by the fact that the case was referred to DOAH on June 20, 2007, but the final hearing was not held until January 16, 2008. The questioning that led to the search for additional documents was the type reasonably to have been included in depositions to prepare for the hearing. The documents submitted on behalf of Mr. Tamalavich and the request to direct the Division to draw certain conclusions from them reflected a lack of understanding of the limitations on the use of hearsay as the basis for a finding of fact in an administrative proceeding, as explained in the Uniform Rules of Procedure, specifically Florida Administrative Code Rule 28-106.213(3). No legal justification exists for not having the

client's wife search for additional records before rather than after the final hearing in the case has been held.

14. The second post-hearing pleading was an attempt to re-submit an exhibit without complying with the terms of the pre-hearing order. No legal justification was offered for the tender, except that Respondent's Counsel received it the day before the hearing, and found that it was faxed in time to be listed on the website that same day. The Division again noted that there had been ample time for discovery and that the record was closed.

15. Respondent's counsel was unable to give a legal justification for the delay in attempting to introduce, on March 21, 2008, almost a month after proposed recommended orders were filed, a document that was evidence in a case that was decided in January 2004.

16. In responding to the last motion to supplement, Petitioner's counsel noted, and it is undisputed, that Respondent's counsel ignored the provisions of Florida Administrative Code Rule 28-106.204(3), by failing to confer and failing to include in the first post-hearing motion a statement that she had conferred with opposing counsel. When she claimed to comply with the requirement to confer with opposing counsel, as with the 8:32 a.m., March 14, 2008, facsimile setting a 2:00 p.m. deadline to ". . .opposing counsel for his

input. . .," her actions were unreasonable and not made in good faith compliance with the rule.

17. Based on the provisions of the statutes and the standards established by cases, Petitioner has established its entitlement to attorney's fees, pursuant to Section 120.569(2)(e), Florida Statutes (2007).

18. The affidavit and time sheet submitted with Petitioner's Motion for Attorney's Fees support the conclusion that Petitioner's Counsel reasonably spent a total of 6.1 hours, including time reviewing the three pleadings, consulting with his client, and preparing responses. The affidavit contradicts Respondent's Counsel's assertion that the work could have been performed in .5 hour.

19. The affidavit supports a conclusion that a reasonable attorney's fee is \$150.00 an hour, or a total of \$915.00. There is no basis to adjust that "lodestar figure." See Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

20. Section 120.569(2)(e), Florida Statutes (2007), requires the presiding officer to impose sanctions on the person who signed the pleading that violates the statute, the represented party, or both. Considering the poor health of Respondent Tamalavich, as discussed in the earlier case when he was physically unable to attend most of the hearing, it is

reasonable to conclude that Respondent's Counsel made the decision to file the pleadings and that she alone should be sanctioned for being responsible for failing to make inquiry to determine whether the pleadings were proper.

21. A review of the transcript in DOAH Case No. 07-2759 shows that, although a member of The Florida Bar, Respondent's Counsel conducted the proceedings much like the description of the behavior of the non-lawyer representative in Burke v. Harbor Estates Associates, 591 So. 2d. 1034 (Fla. 1st DCA 1991).

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

Petitioner's Motion for Attorneys' Fees is granted. Respondent's counsel shall pay to Petitioner within 30 days of the date of this Final Order the sum of \$915.00 for attorneys' fees incurred as a result of the three post-hearing/post-proposed recommended order pleadings in DOAH Case No. 07-2759.

DONE AND ORDERED this 4th day of August, 2008, in
Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
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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 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.