

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIPUL PATEL,)
)
 Petitioner,)
)
 vs.) Case No. 08-2728RX
)
 BOARD OF PHARMACY,)
)
 Respondent.)
)
 _____)
 MIRIAM L. HERNANDEZ,)
)
 Petitioner,)
)
 vs.) Case No. 08-2729RX
)
 BOARD OF PHARMACY,)
)
 Respondent.)
)
 _____)
 MIRLEY ALEMAN-ALEJO,)
)
 Petitioner,)
)
 vs.) Case No. 08-2730RX
)
 BOARD OF PHARMACY,)
)
 Respondent.)
)
 _____)
 VALLIAMMAI NATARAJAN,)
)
 Petitioner,)
)
 vs.) Case No. 08-2731RX
)
 BOARD OF PHARMACY,)
)
 Respondent.)
)
 _____)

JOHN H. NEAMATALLA,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-2732RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
)	
<hr/> SAMAD MRIDHA,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-2733RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
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<hr/> SE YOUNG YOON,)	
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Petitioner,)	
)	
vs.)	Case No. 08-2734RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
)	
<hr/> SAURIN MODI,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-2821RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
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DEEPAKKUMAR SHAH, M.PH.,)	
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Petitioner,)	
)	
vs.)	Case No. 08-2823RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
)	
<hr/> MIJEONG CHANG,)	
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Petitioner,)	
)	
vs.)	Case No. 08-2824RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
)	
<hr/> NABIL KHALIL,)	
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Petitioner,)	
)	
vs.)	Case No. 08-3298RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
)	
<hr/> HADYA ALAMEDDINE,)	
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Petitioner,)	
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vs.)	Case No. 08-3347RX
)	
BOARD OF PHARMACY,)	
)	
Respondent.)	
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BALAJI LAKSHMINARAYANAN,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-3488RX
)	
BOARD OF PHARMACY,)	
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Respondent.)	
)	
<hr/> ANAND NARAYANAN,)	
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Petitioner,)	
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vs.)	Case No. 08-3510RX
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BOARD OF PHARMACY,)	
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Respondent.)	
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FINAL ORDER ON ATTORNEY'S FEES

Pursuant to notice, a final hearing was held in this case on April 16, 2009, in Orlando, Florida, on Petitioners' motions for attorney's fees and costs before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners:	George F. Indest, III, Esquire Matthew R. Gross, Esquire Michael L. Smith, Esquire The Health Law Firm 1101 Douglas Avenue Altamonte Springs, Florida 32714
For Respondent:	Deborah B. Loucks, Esquire Office of the Attorney General The Capitol, Plaza Level 01 Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues in this case are the amount of attorney's fees and costs to be awarded to Petitioners pursuant to Section 120.595, Florida Statutes (2007);¹ whether Petitioners are entitled to fees and costs pursuant to Subsections 57.105(5), 120.569(2)(e), and 120.595(4), Florida Statutes; and, if so, what amount should be awarded.

PRELIMINARY STATEMENT

On October 16, 2008, a Partial Final Order was entered in this case on a portion of the merits of the rule challenge. Portions of the petitions were placed in abeyance pending the outcome of the rulemaking process. The Partial Final Order held that Petitioners, Vipul Patel; Miriam L. Hernandez; Mirley Aleman-Alejo; Valliammai Natarajan; John H. Neamatalla; Samad Mridha; Se Young Yoon; Saurin Modi; Deepakkumar Shah, M.PH.; Mijeong Chang; Nabil Khalil; Hadya Alameddine; Balaji Lakshminarayanan; and Anand Narayanan, were entitled to attorney's fees and costs pursuant to Subsection 120.595(3), Florida Statutes, and jurisdiction was retained to determine the amount of attorney's fees and costs. Petitioners filed motions to determine whether fees could be awarded pursuant to other statutes and to determine the amount of attorney's fees and costs to be awarded.

The final hearing was scheduled for February 19, 2009. The parties filed a joint motion for a continuance. The final hearing was re-scheduled for April 16, 2009.

The parties entered into a Joint Pre-hearing Stipulation and agreed to certain facts contained in Section E of the Joint Pre-hearing Stipulation. To the extent relevant, those facts have been incorporated into this Final Order on Attorney's Fees.

At the final hearing, Petitioners called the following witnesses: Matthew Gross, George F. Indest, and Sandra K. Ambrose. Petitioners' Exhibits 1 through 6 and 9 through 75 were admitted in evidence.

Respondent, Board of Pharmacy, called Edwin A. Bayo as its witness. Respondent's Exhibit 1 was admitted in evidence.

The Transcript was filed on April 29, 2009. The parties filed their Proposed Final Orders on May 12, 2009.

FINDINGS OF FACT

1. Each of the 14 Petitioners filed separate rule challenges, challenging the validity of Florida Administrative Code Rule 64B16-26.2031 and challenging eight statements of policy of the Board of Pharmacy, which statements had not been adopted as rules.

2. Prior to the filing of his or her rule challenge, each Petitioner had graduated from a pharmacy school located outside the United States and had taken and passed the Foreign Pharmacy

Graduate Equivalency Examination, the Test of Spoken English, and the Test of English as a Foreign Language. Petitioners had been issued Intern Registrations by the Board of Pharmacy. All but two of the Petitioners had submitted an application to be admitted to the professional licensure examination. Those applications had been denied. All Petitioners, including the two Petitioners who had not submitted an application, had applied to the Board of Pharmacy for a variance or waiver to allow them to sit for the professional licensure examination. The Board of Pharmacy denied each Petitioner's application for a variance or waiver. Each Petitioner had been represented by The Health Law Firm in their applications for a variance or waiver and wanted The Health Law Firm to continue to represent them in the rule challenge. When asked why the Petitioners had contacted The Health Law Firm to represent them, an attorney for The Health Law Firm stated:

I think they have a network where word just gets around. And they--I believe they even had some sort of list serve or Web site where they had all noted that they were being treated unfairly, and so they knew each other. And maybe our name got out on that or something. But they--they all seemed to know each other--seemed to know each other.

Additionally, The Health Law Firm had sent out letters soliciting the foreign pharmacy graduates to join the rule challenge. An attorney for The Health Law Firm was not sure whether the letter

had been posted on the web site for the foreign pharmacy graduates.

3. In several of the invoices submitted by The Health Law Firm, there was a charge of \$20.00 for a "[t]elephone conference with client's colleagues who are in the same situation and interested in filing petitions for waivers and joining the rule challenge."² Thus, the circumstances surrounding the representation of Petitioners by The Health Law Firm do not demonstrate that it was a coincidence that Petitioners just happened to pick The Health Law Firm to represent them in the rule challenges.

4. The Health Law Firm decided to file 14 separate petitions instead of one petition with 14 petitioners. The reason for the filing of the separate petitions was to increase the amount of attorney's fees which could be awarded. Given the inexperience of attorneys at The Health Law Firm with rule challenges and the difficulty in understanding the speech of Petitioners, who received their pharmacy training in countries other than the United States, The Health Law Firm felt that it was not economically feasible to pursue the rule challenge for \$15,000.00.

5. Petitioners had a common goal, i.e. to be allowed to sit for the professional licensure examination. The wording of each of the petitions was essentially the same except for the names of

the individual Petitioners. Because the issues were the same for all the rule challenges, the rule challenges were consolidated for final hearing.

6. No final hearing was held in the consolidated cases. The parties agreed that, based on the parties' Joint Pre-hearing Stipulation, there were no disputed issues of material fact and agreed to file proposed final orders addressing each party's position regarding the application of the law to the stipulated facts. The Board of Pharmacy conceded that Florida Administrative Code Rule 64B16-26.2031 was an invalid exercise of delegated legislative authority, and Petitioners were determined to prevail on the issue of the invalidity of the existing rule.

7. On the challenge to the Board of Pharmacy's policy statements, four statements were determined to meet the definition of a rule. The Board of Pharmacy conceded in the parties' pre-hearing stipulation that the instructions in the Foreign Pharmacy Graduate Application for Licensure by Examination, directing applicants not to apply prior to obtaining all the required internship hours, constituted a non-rule policy. On August 1, 2008, in response to its concession that some of the statements or policies at issue were invalid non-rule policies, the Board of Pharmacy had published, in the Florida Administrative Law Weekly, a Notice of Rule Development for Florida Administrative Code

Rule 64B16-26.2031. On August 21, 2008, the Board of Pharmacy approved changes to Florida Administrative Code Rule 64B16-26.2031, eliminating the Foreign Pharmacy Graduate Examination Committee (FPGEC) requirement, incorporating by reference the Foreign Graduate Examination Application, and stating the time frames for the application of Florida Administrative Code Rule 64B16-26.2031. Pursuant to Subsection 120.56(4)(e), Florida Statutes, the portion of the petitions dealing with the statements on which the Board of Pharmacy did not prevail was abated pending the rulemaking process.

8. Petitioners did not prevail on four of the policy statements they challenged. These were the policy statements which the Board of Pharmacy contested.

9. Based on the invoices submitted, the parties attempted to settle the case. Essentially, the Board of Pharmacy had started rule development which eliminated the requirement in the existing rule which caused it to be invalid and which dealt with the unpromulgated rule issues that the Board of Pharmacy had conceded in the Joint Pre-hearing Stipulation.

10. Petitioners wanted to be able to sit for the National Association of Pharmacy Licensure Examination (NAPLEX) and the Multistate Pharmacy Jurisprudence Examination (MPJE). All Petitioners who had a Foreign Pharmacy Graduate Application for Licensure by Examination pending on August 21, 2008, were

approved by the Board of Pharmacy to sit for the NAPLEX and the Florida version of the MPJE. Thus, by August 21, 2008, those Petitioners had reached their goal.

11. The impediment to settling the cases was the amount of attorney's fees that should be awarded to Petitioners. There was no undue delay by the Board of Pharmacy or anything which could be attributed to the Board of Pharmacy as needlessly increasing the cost of litigation. The Board of Pharmacy correctly contended that the amount of fees requested by Petitioners was unreasonable.

12. The Partial Final Order entered in the underlying rule challenges held that Petitioners are entitled to an award of attorney's fees and costs pursuant to Subsection 120.595(3), Florida Statutes. The Board of Pharmacy was not substantially justified in promulgating the challenged rule in the underlying case and did not demonstrate that special circumstances existed to warrant the promulgation of the challenged rule.

13. The Board of Pharmacy did not demonstrate that the statements which constituted unpromulgated rules are required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

14. Each Petitioner entered into a contingency fee contract³ with The Health Law Firm to represent him or her in a rule

challenge. The parties have agreed that the hourly rate of \$350.00 per hour for the services of George F. Indest, III, Esquire, is reasonable and fair under the circumstances. The parties have agreed that some of the hourly rates being claimed for the other attorneys and employees of The Health Law Firm are reasonable and fair under the circumstances. Those fees are \$200.00 and \$150.00 per hour for the associate attorneys, \$80.00 per hour for the paralegals, and \$70.00 per hour for the legal assistants. There were a few entries in the invoices made by senior attorneys for whom the rate charged is \$300.00 per hour. Based on the rates charged for the senior partner and the associate attorneys, an hourly rate of \$300.00 for a senior attorney is reasonable.

15. The names of the attorneys and staff and the respective hourly rate amount for each are listed below. In discussing the reasonableness of the fees claimed in the various invoices, the attorneys and staff will be referred to by their initials as listed in the invoices.

<u>Initials</u>	<u>Name</u>	<u>Hourly Rate</u>
GFI	George F. Indest, III, Senior Partner	\$350.00
MLS	Michael L. Smith, Senior Attorney	\$300.00
JK	Joanne Kenna, Senior Attorney	\$300.00
TJJ	Teresa J. James, Attorney	\$200.00
MRG	Matthew R. Gross, Attorney	\$150.00
JP	Justin Patrou, Law Clerk	\$100.00
GJ	Gail Joshua, Senior Paralegal	\$80.00
PD	Pamela Dumas, Litigation Clerk	\$80.00
SF	Sandra Faiella, Paralegal	\$80.00
RS	Rebecca Simmons, Paralegal	\$80.00

AE	Alexa Eastwood, Legal Assistant	\$70.00
SE	Shelly Estes, Legal Assistant	\$70.00

16. The amount of fees claimed by each Petitioner for representation by The Health Law Firm for the rule challenge is listed below. These amounts are based on the individual invoices and the first consolidated invoice:⁴

<u>Name</u>	<u>Amount</u>
Vipul Patel	\$15,212.36
Miriam Hernandez	\$15,683.36
Mirley Aleman-Alejo	\$11,469.36
Valliammai Natarajan	\$5,074.36
John H. Neamatalla	\$11,215.36
Samad Mridha	\$13,650.36
Se Young Yoon	\$12,292.36
Saurin Modi	\$10,093.36
Deepakkumar Shah, M.Ph.	\$11,764.36
Mijeong Chang	\$12,528.36
Nabil Khalil	\$10,272.36
Hadya Alameddine	\$5,313.36
Balaji Lakshminarayanan	\$4,585.36
Anand Narayanan	\$4,218.36
<u>Total</u>	<u>\$143,372.04</u>

17. Sandra Ambrose testified as an expert witness on behalf of Petitioners. Her opinion is that the amounts claimed are based on a reasonable number of hours expended in the litigation of the rule challenge. However, Ms. Ambrose has never represented a client in a rule challenge. It was Ms. Ambrose's opinion that the difficulty in the cases was a result of the number of Petitioners not the issues to be litigated. Having reviewed all the invoices submitted in these cases, the

undersigned cannot credit Ms. Ambrose's testimony that the fees are reasonable.

18. The Board of Pharmacy argues that the amount of fees and costs should be limited to the amount expended in the petition brought by the first Petitioner, Vipul Patel. The expert who testified for the Board of Pharmacy did not give a definite amount that he considered to be a reasonable fee in these cases.

19. Prior to the final consolidation of all 14 rule challenges, The Health Law Firm invoiced for its services and costs by individual Petitioner. After all 14 rule challenges were consolidated, The Health Law Firm invoiced for its time and costs via a consolidated invoice. The undersigned has painstakingly reviewed all the invoices that were submitted to support Petitioners' claims for fees and costs in the rule challenges and finds the fees requested are not reasonable.

20. On May 15, 2008, the invoices for Case Nos. 08-2733RX contained the following entry for MRG. "Review/analyze final order. Strategize regarding final order." The final order appears to be related to a petition⁵ for a waiver or variance before the Board of Pharmacy, and the entry is deleted. This conclusion is supported by the entry in the invoice dated May 29, 2008, relating to a telephone conference with the client relating to a re-petition for waiver.

21. In Case No. 08-2730RX, there is an entry on May 27, 2008, for .10 hours for MRG, but no service is listed. That entry is deleted.

22. On June 6, 2008, MRG entered .50 hours each in Case Nos. 08-2728RX, 08-2729RX, 08-2732RX, 08-2733RX, 08-2734RX, 08-2821RX, 08-2823RX, 08-2824RX, and 08-3298RX. The entry stated: "Continue preparing rule challenge and waiver." The Health Law Firm represented the Petitioners in four of these cases before the Board of Pharmacy on June 10, 2008, on their petitions for a wavier or variance. The invoice does not delineate the amount of time that was spent on the rule challenge and the amount of time that was spent on the waiver cases. Therefore, the time is divided equally and .25 hours in each case is charged toward the rule challenge.

23. On June 9, 2008, in Case Nos. 08-2733RX, 08-2730RX, 08-2731RX, 08-2734RX, 08-2729RX, and 08-2732RX, the senior partner of The Health Law Firm entered .30 hours for each case, which stated: "Prepare letter to Division of Administrative Hearings forwarding Petition for Rule Challenge to be filed." The letter which accompanied the petitions in these cases stated:

Dear Clerk:

Attached for filing, please find a separate Petition to Determine the Invalidity of an Existing Agency Rule and the Invalidity of Agency Policy and Statements defined as

Rules, for each of the individuals listed below:

Miriam L. Hernandez
Mirley Aleman-Alejo
Se Young Yoon
John H. Neamatalla
Valliammai Natarajan
Md. A. Samad Mridha

Thank you for your assistance in this matter.

For this letter, Petitioners are claiming 1.8 hours or \$630.00.

This is not reasonable. On the same date, GFI prepared a similar transmittal letter in Case No. 08-2728RX and listed .3 hours, which is a reasonable amount for the preparation of such a letter. Thus, the preparation of the transmittal letter on June 9th for Case Nos. 08-2733RX, 08-2730RX, 08-2731RX, 08-2734RX, 08-2729RX, and 08-2732RX is reduced to .3 hours, which is prorated to .05 hours for those cases.

24. The senior partner in The Health Law Firm claims 23.6 hours during June 3 through 5, 2008, for the following service which was entered on the invoices for Case Nos. 08-2730RX, 08-2729RX, 08-2731RX, 08-2823RX, 08-3298RX, 08-2821RX, 08-2728RX, 08-2734RX, 08-2733RX, and 08-2824RX.

Conduct legal research, review statutes, cases (approximately 28 cases reviewed and analyzed) and two (2) different Florida Administrative Law legal treatises regarding rule challenges and challenging agency statements not adopted as rules, in order to properly prepare Petition for Formal Rule Challenge in case. Research legal issues including administrative agency rules

exceeding authority granted in statutes, retroactive applications of agency rules, adding requirements to licensure requirements through administrative rules when those requirements are not contained in the statute. Review Rules of Procedure and Chapter 120 to determine contents of Rule Challenge Petition. Begin reviewing and revising draft for Rule Challenge in case. (Note: Only pro-rata portion of this time charged to each case.)

The total amount of fees claimed for this research is \$8,260.00.

GFI testified that he had never done a rule challenge prior to filing the petitions in the instant cases. His fees for research due to his lack of knowledge of the basics of a rule challenge should not be assessed against the Board of Pharmacy. A reasonable amount of time for his research is four hours. Thus, the amount for this legal research prorated among the ten cases for which it was listed is .4 hours.

25. On July 19, 2008, the senior partner of The Health Law Firm entered .60 hours in ten of the rule challenges for reviewing the Transcripts of the Board of Pharmacy meetings for February 8 and April 5, 2008, and preparing a notice of filing the Transcripts with the Division of Administrative Hearings. Six hours to review the Transcripts and prepare a notice of filing is not reasonable. Three hours is determined to be a reasonable amount of time for this task, and that amount is prorated among the ten cases in which the charge was made.

26. On June 10, 2008, members of The Health Law Firm attended a Board of Pharmacy meeting at which they represented foreign pharmacy graduates who had petitioned the Board of Pharmacy for a waiver or variance. In Case Nos. 08-2821RX, 08-3298RX, and 08-2733RX, the senior partner listed .90 hours for each case for preparation for the June 10th Board of Pharmacy meeting. The preparation related to the petitions for variances or waivers and should not be assessed for the instant cases.

27. For June 10, 2008, JP listed .70 hours each in Case Nos. 08-2823RX, 08-2732RX, 08-2821RX, and 08-2733RX for attendance at the Board of Pharmacy meeting. For June 10, 2008, GFI entered 1.4 hours for attendance at the Board of Pharmacy meeting. The entries for attending the Board of Pharmacy meeting related to the petitions for waivers and should not be assessed in the instant cases.

28. For June 19, 2008, the senior partner made the following entry in the invoices for Case Nos. 08-2728RX, 08-2729RX, 08-2732RX, 08-2733RX, 08-2734RX, 08-2821RX, 08-2823RX, and 08-2824RX:

Travel to Boca Raton to meet with other health care lawyers and discuss issues in common on these cases and others. Discuss legal strategies that worked in the past and legal strategies to be avoided. Return from Boca Raton.

Each entry was for one hour, for a total of eight hours claimed for a trip to Boca Raton, which equates to \$2,880.00. Based on the entry, it seems that the trip included discussions of other cases that The Health Law Firm was handling or that other attorneys were handling. Additionally, there was no rationale for having to travel to Boca Raton to discuss the issues, and fees for such travel should not be awarded. A reasonable amount of time for discussion of the case with other attorneys by telephone would be .80 hours. The prorated amount of time for each case listed is .10 hours.

29. On May 27, 2008, SF made a .30-hour entry in Case No. 08-2824RX for reviewing the agenda of the June 10th Board of Pharmacy meeting as it related to the client in Case No. 08-2824RX. The entry related to the client's petition for a waiver, which was heard at the June 10th meeting and should be deleted.

30. On May 30, 2008, in Case No. 08-2824RX, SF made a .40-hour entry for drafting a letter to client with retainer agreement. The entry is clerical and should be deleted.

31. On June 18, 2008, an entry was made in the invoice in Case No. 08-2731RX, which stated: "Telephone call from husband of our client indicating that they want us to close this matter and that they do not wish to pursue it any further; follow-up memorandum to Mr. Indest regarding this." Charges continued to

be made to the client through July 16, 2008. Based on the entry to the invoice on June 18, 2008, no further charges should have been made to the client except for the filing of a voluntary dismissal of the rule challenge for the client. However, no voluntary dismissal was filed. Based on the absence of any further charges to the client after July 18, 2008, it is concluded that the client did wish not to proceed with her rule challenge. Any charges by The Health Law Firm after June 18, 2008, in Case No. 08-2731RX will not be assessed against the Board of Pharmacy as it relates to the rule challenge.

32. On June 19, 2008, TJJ made the following .10-hour entry in ten of the cases: "Review June 10, 2008, Board of Pharmacy Agenda. Telephone conference with Court Reporter, Ms. Green, ordering transcript of the June 10, 2008, meeting." An hour for reviewing an agenda and ordering a transcript is not reasonable. A reasonable amount of time is .40 hours, and such time is prorated to the ten cases in which it is charged.

33. On June 20, 2008, in Case Nos. 08-2823RX and 08-2824RX, TJJ made a .80-hour entry which stated: "Prepare draft motion for consolidation." No motion was ever filed and would not have been necessary since the parties had agreed at the pre-hearing conference that the rule challenges would be consolidated. The time for this service should be deleted.

34. On July 10, 2008, TJJ made the following .10-hour entry in several of the cases: "Review prehearing instruction orders and amended orders to determine respondent's deadline to serve discovery responses." The entry is duplicative of services provided by MRG on July 8, 2008, and should be deleted.

35. On July 15, 2008, in Case Nos. 08-2729RX, 08-2728RX, 08-2730RX, 08-2732RX, 08-2733RX, 08-2734RX, 08-2821RX, 08-2823RX, 08-2824RX, and 08-3298RX, TJJ had .40 hours for a total of 4.00 hours for the following entry:

Prepare Petitioners' Motion to Compel Discovery and assemble and copy documents to be attached to Motion. Prepare facsimile coversheets and transmit the Motion to the attorney for the Board of Pharmacy, Ms. Loucks, and to the clerk for the Division of Administrative Hearings.

The copying, preparing facsimile coversheets, and transmitting the motion are clerical tasks. The entries are reduced to .20 hours due to the clerical nature of the tasks, which leaves a total of two hours for preparing a simple motion to compel. The time for the preparation of the motion to compel is not reasonable and is reduced to .10-hour for each entry.

36. On July 22, 2008, the last Order consolidating all the cases was filed. The Order consisted of four paragraphs. On July 29, 2008, TJJ entered .10 hours in Case Nos. 08-2733RX, 08-2730RX, 08-2734RX, 08-2728RX, 08-2729RX, 08-2732RX, 08-2824RX, 08-3510RX, 08-3488RX, 08-3347RX, 08-2823RX, 08-3298RX, and 08-

2821RX, and each entry stated: "Review order of consolidation filed on July 22, 2008, for common information needed for all cases." Thus, Petitioners are claiming a total of 1.3 hours or \$260.00 to review a four-paragraph Order of Consolidation. This claim is not reasonable. A reasonable amount of time to review the Order was .10 hours, and the time shall be prorated among the 13 cases for which it was claimed at .08 hours each.

37. On July 24, 2008, TJJ made an entry of .10 hours in ten of the cases which stated:

Telephone conference with the clerk of the District Court of Appeal, First District to find out the start time of oral arguments on Custom Mobility (rule challenge case). Request information from clerk regarding how to listen to oral arguments online. Observing this oral argument will allow us to better prepare our case for possible appeal.

First, a one-hour telephone conversation with the Clerk of District Court of Appeal to ascertain the time for an oral argument and to learn how to listen to oral arguments online is not reasonable. Second, it is not reasonable to charge the Board of Pharmacy with a call to the District Court of Appeal in the instant cases, even if the amount of time for the call had been reasonable. The one-hour charge for \$200.00 for a telephone call is deleted.

38. On July 30, 2008, TJJ made an entry of .10 hours in 13 of the rule challenges. The entry stated: "Listen to oral

arguments presented before District Court of Appeals, First District, in Custom Mobility case (rule challenge case)." The oral argument was not related to the instant rule challenges and should not be charged to the Board of Pharmacy. The 1.3 hours or \$260.00 claim for listening to an oral argument is deleted.

39. On August 4, 2008, TJJ made the following .10-hour entry in 13 of the cases: "Review Joint Motion for Abeyance and Order Canceling Hearing and Placing Cases in Abeyance. Calendar deadlines regarding same." The time of 1.3 hours for reviewing the simple motion and Order is not reasonable. Calendaring is a clerical task. The time for this service is reduced to .01 hours for each entry.

40. On August 5, 2008, TJJ made the following .10-hour entry in 13 of the cases: "Review Respondent's Objections and Responses to Petitioners' Second Set of Interrogatories and Respondent's Objections to Petitioners' Second Set of Requests for Admissions." The objections were that the interrogatories and requests for admissions exceeded 30. The time of 1.3 hours for reviewing the pleadings is not reasonable. The time for this service is reduced to .04 for each entry.

41. Petitioners had scheduled the depositions of Rebecca Poston and Daisy King for July 18, 2008. On July 17, 2008, Petitioners filed notices canceling the depositions. On July 17,

2008, PD entered .10 hours in ten of the rule challenges for the following entry:

Telephone conference with Accurate Stenotype Reporters regarding cancellation of depositions of Daisy King and Rebecca Poston on July 18, 2008 and delay transcription of depositions of Erika Lilja and Elizabeth Ranne due to potential settlement.

It is not reasonable to charge an hour to cancel depositions with the court reporter. A reasonable amount of time would be .10 hours, which is prorated to the ten cases to which it is charged.

42. PD prepared the notice of the canceling of the deposition of Ms. Poston and the notice of the canceling of the deposition of Ms. King. Entries were made in ten of the cases for time for preparing the notices. The total time for preparing the two notices by PD was 1.45 hours. The time is not reasonable. A reasonable time to prepare two notices of canceling depositions would be .40 hours, which is prorated among the ten cases in which it was charged.

43. One of the issues on which Petitioners did not prevail in the rule challenges was the issue of retroactive application of the rule. There are entries totaling 3.4 hours for JP for preparation of a memorandum dealing with the retroactive application of a rule issue. GFI entered .30 hours for the same issue. The time relating to the retroactive application issue is

deleted. On April 19, 2008, MRG entered .20 hours each in several cases, which related to the rule challenge and retroactive application issue. That time is reduced by half. On May 6, 2008, MRG made .60-hour entries in Case Nos. 08-2728RX, 08-2729RX, 08-2730RX, 08-2732RX, 08-2733RX, 08-2734RX, 08-2821RX, 08-2823RX, 08-2824RX, and 08-3298RX, which showed the preparation of three sections of the petition. One of the sections dealt with the retroactive application issue, and the entries are reduced by .20 hours for that issue.

44. The invoices demonstrated that a considerable amount of time was charged for legal assistants and paralegals. Much of this time was for clerical tasks.

45. SE is identified in Petitioners' exhibits as a legal assistant. The majority of the entries by SE dealt with the photocopying, labeling, organizing, indexing, and filing documents. These services performed by SE are clerical and, as such, cannot be included in an award of attorney's fees.

46. RS is identified in Petitioners' exhibits as a paralegal/legal assistant. The majority of the entries in the invoices for RS deal with receiving, reviewing, labeling, indexing, scanning, summarizing, and calendaring pleadings and orders that were received in the cases. These services are clerical and, as such, cannot be included in an award of attorney's fees.

47. Petitioners in Case Nos. 08-2728RX, 08-2732RX, and 08-2733RX each claimed .30 hours for RS for the following service on April 30, 2008:

Received and reviewed letter from Department of Health regarding our Public Records Request dated April 28, 2008 relating to client's case. Index document for filing and scanning for use of attorneys at hearing.

However, .90 hours for reviewing and indexing a letter is not reasonable and is clerical in nature.

48. On June 17, 2008, in Case No. 08-2730RX, RS entered .60 hours for preparing, copying, and sending a letter to the client forwarding a copy of the Order of Assignment. That entry is reduced to .30 hours, since at least half of the time appeared to be for clerical tasks.

49. AE, who is identified as a legal assistant in Petitioners' exhibits, has numerous entries in the invoices for receiving, indexing, filing, calendaring, and providing pleadings and orders to clients. Those services are clerical and, as such, cannot be included in an award of attorney's fees.

50. In Case No. 08-2728RX, PD, identified in Petitioners' exhibits as a paralegal, made entries on June 16 and June 25, 2008, for .30 hours each. These entries were to update the litigation schedule with the hearing date. The entry is clerical and, as such, cannot be included in an award of attorney's fees.

51. SF, who is identified in Petitioners' exhibits as a paralegal/legal assistant, made an entry for .30 hours in Case No. 08-2728RX on June 26, 2008, and in Case No. 08-2732RX on June 11, 2008, for forwarding orders to the client. An entry was made on July 10, 2008, in Case No. 08-2728RX and on June 18, 2008, in Case No. 08-2730RX for .30 hours for processing the retainer package. Additionally, SF had entries for organizing and filing transcripts and orders. Such services are clerical and, as such, cannot be included in an award of attorney's fees.

52. In Case No. 08-3488RX, SF made a .30-hour entry on June 30, 2008, for updating the parties list and document file and a .50-hour entry on June 26, 2008, for completing opening procedures. In the same case, SF made two entries on July 7, 2008, for a total of 1.5 hours for preparing a retainer package and sending it to the client. These tasks are clerical.

53. On June 24, 2008, SF made the following .30-hour entry in 11 of the cases: "Finalize and forward Joint Motion for Continuance of Final Hearing to client in this matter." These entries are deleted; as they represent clerical tasks and an unreasonable amount of time to finalize a motion for continuance for which GFI had charged 1.1 hours for preparing the motion.

54. In several cases JP, identified as a law clerk, made entries on July 15, 2008, for .30-hour for creating, numbering, and copying exhibits. Such service is clerical.

55. On July 30, 2008, PD made the following .20-hour entry in 13 of the cases:

Prepare Petitioners' Notice of Service of Second Set of Interrogatories and Certificate of Filing and Service. Prepare correspondence to Debra Loucks, attorney for Board of Pharmacy regarding filing and Service of Petitioners' Fourth Set of Request to Produce and Second Set of Interrogatories.

However, 2.6 hours is not a reasonable amount of time to prepare a notice of service of discovery and a transmittal letter to opposing counsel. A reasonable amount of time to prepare such documents is .50 hours, and the time is prorated among the 13 cases.

56. On July 28, 2008, PD made the following .10-hour entry in 13 of the cases:

Prepare Notice of Filing Videotaped Depositions of Elizabeth Ranne and Erika Lilja. Prepare draft of Notice of Filing Deposition Transcript of Elizabeth Ranne.

However, 1.3 hours is an unreasonable amount of time to prepare two notices of filing depositions. A reasonable amount of time is .40 hours, and that amount is prorated among the 13 cases.

57. On June 17, 2008, PD made the following .20-hour entry in each of the 11 cases:

Prepare Petitioners' Notice of Service of First Set of Interrogatories to Respondent and Certificate of Filing and Service. Prepare correspondence to Debra Loucks, attorney for Board of Pharmacy, regarding filing and service of Petitioners' First Set

of Request to Produce, Petitioners' First Set
of Request for Admissions and Petitioners'
First Set of Interrogatories.

However, 2.2 hours is an unreasonable amount of time to prepare a notice of service of discovery and a transmittal letter to opposing counsel. A reasonable amount of time is .50, which is prorated among the 11 cases.

58. On June 21, 2008, in Case Nos. 08-2821RX, 08-2823RX, and 08-2824RX, there is a .30-hour entry for SF for finalizing and forwarding a petition for formal hearing to the Department of Health for filing. This entry does not appear to be related to the rule challenges and is deleted.

59. In Case No. 08-3298RX, MRG made an entry of .50 hours for a telephone conference regarding the date of rule challenge and petition for rehearing. The petition for rehearing dealt with the client's petition for waiver and should not be included. Thus, the entry is reduced to .25 hours.

60. After all the cases were consolidated The Health Law Firm began to make entries for all cases in the first consolidated invoice. On July 28, 2008, GFI made an entry of 2.8 hours, which related exclusively to the issue of retroactive application of the rule. This entry is deleted.

61. RS made entries in the first consolidated invoice for August 12, 14, 28, and 29, 2008, and September 2, 5, 10, and 18, 2008, relating to filing, indexing, copying, and forwarding

documents. There are similar entries for SF on August 26, 2008, and September 4 and 9, 2008, and for AE on September 8, 2008. Those entries are for clerical tasks.

62. PD had entries for reviewing, organizing, and indexing documents on September 4, 8, 11, and 17, 2008, and October 8, 2008. Those entries are for clerical tasks.

63. There were numerous entries in August 2008 relating to a Board of Pharmacy meeting on August 21, 2008, in which the Board of Pharmacy heard motions for reconsideration of orders denying Petitioners' petitions for waivers. Those entries are related to the petitions for waiver and not to the rule challenges. Although, The Health Law Firm makes reference to a settlement agreement in which the Board of Pharmacy agreed to grant the waivers, there was no settlement agreement of the rule challenges because the parties proceeded to litigate the issues by summary disposition. Thus, the references to attending and preparing for the August 21, 2008, Board of Pharmacy meeting as well as advising the clients of the outcome of the meeting on August 20 and 21, 2008, are deleted. Additionally, an entry by MRG on August 20, 2008, which included reviewing the August 21st agenda is reduced to .75 hours.

64. On August 25, 2008, MRG made an entry which included a telephone conference with Mr. Bui and a telephone conference with Ms. Ranne regarding Mr. Bui. Mr. Bui is not a Petitioner, and

the entry is reduced to .55 hours. Based on the invoices, it appears that Mr. Bui and Ms. Ranne were also foreign pharmacy graduates seeking waivers from the Board of Pharmacy. On August 29, 2008, MRG made another entry which included the preparation of an e-mail to Mr. Bui. The entry is reduced to two hours.

65. On August 6, 2008, MRG made a 1.80-hour entry which included preparing e-mail to Mr. Bui and a telephone conference with Mr. Sokkan regarding the rule challenge and settlement negotiations. Neither of these persons is a Petitioner; thus, the entry is reduced to .60 hours.

66. On August 28, 2008, TJJ made a 3.60-hour entry for researching and preparing Petitioners' second motion to compel discovery. No such motion was filed. Thus, the entry is deleted. Another entry was made on September 2, 2008, which included, among other things, the revision of the motion to compel. That entry is reduced to .80 hours.

67. On August 8, 2008, MRG made a 1.00-hour entry which included a telephone conference with Ms. Alameddine regarding her passing the MPJE and being licensed in Michigan. Those issues relate to the petition for reconsideration of the waiver. The entry is reduced to .50 hours.

68. On September 4, 2008, TJJ made a .80-hour entry for preparing a letter to Mr. Modi regarding his approval to take the

examination, a 1.00-hour entry dealing with Mr. Lakshminarary's application, a .90-hour entry dealing with Petitioner Narayanan's application, a .70-hour entry dealing with Mr. Shah's application, and a .60-hour entry dealing with Ms. Hernandez's application. The entries deal with the petitions for a waiver and are deleted.

69. On September 4, 2008, MRG made an entry which included, among other tasks, time for determining if the Board of Pharmacy had sufficient funds to pay Petitioners' attorney's fees. This entry is reduced to two hours.

70. On October 10, 2008, MRG made a 1.20-hour entry which included, among other things, analyzing pleadings to determine if persons who were not Petitioners should file petitions for attorney's fees. The entry is reduced to .60 hours.

71. On July 16, 2008, MRG and JP made entries in ten of the cases for traveling to Tallahassee and attending the depositions of Elizabeth Ranne and Erika Lilja. The total hours for MRG was 16.9 hours and for JP the total was 17 hours. These total hours are reduced by ten hours each for travel time.

72. On August 12 and 13, 2008, MRG made entries which included travel time to attend Board of Pharmacy meetings.⁶ Those entries are reduced each by one hour to account for travel time.

73. The following is a listing of the amount of hours and dollar amount for fees, which are considered to be reasonable for the rule challenges.

Individual and First Consolidated Invoice

	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
GFI	146.10	\$350.00	\$51,135.00
MLS	3.70	\$300.00	\$1,110.00
JK	1.40	\$300.00	\$420.00
TJJ	80.13	\$200.00	\$16,026.00
MRG	210.16	\$150.00	\$31,824.00
JP	37.80	\$100.00	\$3,780.00
PD	39.053	\$80.00	\$3,124.24
SF	16.80	\$80.00	\$1,344.00
GJ	.40	\$80.00	\$32.00
RS	1.3	\$80.00	\$104.00
			<hr/>
			\$108,899.24

74. The Partial Final Order found that Petitioners were entitled to an award of attorney's fees pursuant to Subsection 120.595(3), Florida Statutes. Thus, the issue of entitlement to fees and costs pursuant to Subsection 120.595(3), Florida Statutes, was not an issue that was litigated in the instant fee cases. The issue of whether Petitioners were entitled to fees and costs pursuant to Subsections 57.105(5), 120.569(2)(e), and 120.595(4), Florida Statutes, were entitlement issues which were litigated in the instant fee cases.⁷ Most of the charges dealing with the petitions for fees and costs are related to the amount of fees that are to be awarded and not to the entitlement to fees.

75. In Petitioners' second consolidated invoice (Petitioners' Exhibit 4), there is a two-hour entry by MLS on November 3, 2008, for research of entitlement to fees pursuant to Subsection 120.595(3), Florida Statutes. This entry is deleted since the issue of entitlement to fees pursuant to Subsection 120.595(3), Florida Statutes, had already been determined.

76. The following entries in the second consolidated invoice relate to the litigation of the amount of fees to be awarded and are deleted:

11-5-08	GFI	6.90 hours
11-6-08	SF	7.00 hours
11-6-08	GFI	7.40 hours
11-7-08	SF	7.00 hours
11-7-08	MLS	1.00 hour
11-7-08	JCP	7.00 hours
11-8-08	JCP	1.00 hours
11-8-08	GFI	7.10 hours
1-26-09	GFI	1.00 hour
2-9-09	GFI	.60 hours
2-10-09	GFI	.30 hours
2-12-09	GFI	.60 hours
2-17-09	GFI	.30 hours
2-17-09	GFI	.60 hours
2-19-09	GFI	.60 hours

77. The following entries were made in the second consolidated invoice for clerical tasks performed by paralegals and legal assistants:

11-3-08	RAS	.30 hours
2-9-09	RAS	.30 hours
2-10-09	RAS	.30 hours
2-12-09	ACE	.40 hours

78. The issue of entitlement to fees pursuant to statutes other than Subsection 120.595(3), Florida Statutes, was a small portion of the litigation relating to attorney's fees and costs. The major areas of litigation dealt with the amount of fees and costs that should be awarded. The invoices do not specifically set forth the amount of time that was spent on the issue of entitlement to fees on statutes other than Subsection 120.595(3), Florida Statutes. Based on a review of the pleadings in these fee cases and a review of the invoices submitted for litigation of attorney's fees and costs, it is concluded that ten percent of the time should be allocated to the issue of entitlement to fees. The percentage is applied to the fees after the fees listed in paragraphs 76, 77, and 78, above, have been deleted. Thus, the following entries in the second consolidated invoice are reduced to the following amount of hours:

11-1-08	JCP	.26 hours
11-3-08	MLS	.10 hours
11-4-08	MLS	.40 hours
11-8-08	JCP	.32 hours
12-22-08	GFI	.04 hours
12-30-08	MLS	.03 hours
1-7-09	GFI	.02 hours
1-14-09	GFI	.04 hours
1-15-09	GFI	.07 hours

79. In the third consolidated invoice (Petitioners' Exhibit 5), the following entries relate to the amount of fees to be awarded and are deleted:

3-4-09	SME	4.80 hours
3-4-09	GFI	1.20 hours
4-3-09	GFI	3.20 hours
4-7-09	GFI	.50 hours
4-7-09	GFI	.60 hours
4-7-09	GFI	.30 hours
4-8-09	GFI	4.20 hours
4-8-09	GFI	1.00 hour
4-9-09	MRG	1.50 hours
4-9-09	GFI	3.20 hours
4-11-09	GFI	.60 hours
4-15-09	GFI	4.40 hours

80. On April 14, 2009, GFI made an entry which included time for travel to the expert witness' office. The entry is reduced by .75 hours for travel time. Ten percent of the time not excluded or reduced above related to the issue of entitlement of fees pursuant to statutes other than Subsection 120.595(3), Florida Statutes. The following entries are reduced to that percentage:

3-31-09	GFI	.05 hours
4-1-09	GFI	.20 hours
4-6-09	GFI	.19 hours
4-6-09	GFI	.03 hours
4-7-09	MRG	.05 hours
4-7-09	GFI	.07 hours
4-7-09	GFI	.19 hours
4-7-09	GFI	.27 hours
4-9-09	GFI	.10 hours
4-13-09	GFI	.50 hours
4-14-09	GFI	.48 hours
4-14-09	GFI	.275 hours

81. The following is a list of the fees in the second and third consolidated invoices which are related to entitlement of

fees pursuant to Florida Statutes other than Subsection 120.595(3), Florida Statutes.

Second and Third Consolidated Invoice

	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
GFI	2.525	\$350.00	\$883.75
MLS	.43	\$300.00	\$129.00
MRG	.05	\$150.00	\$7.50
JCP	.32	\$100.00	\$32.00
			<u>\$1,052.25</u>

82. With the exception of the costs related to the Transcripts of the Board of Pharmacy meetings of April 8 and 9, 2008, and June 10, 2008, Respondent, as stipulated in the parties' Joint Pre-hearing Stipulation, does not dispute that the amounts of costs set forth in the invoices submitted by Petitioners are fair and reasonable.⁸ The cost of the Transcripts of the Board of Pharmacy meetings on April 8 and 9, 2008, was \$1,476.00. The cost of the Transcript of the Board of Pharmacy meeting on June 10, 2008, was \$524.00. At the final hearing, the Board of Pharmacy's objection appeared to be based on the timing of the payment of the court reporter's fees related to the transcribing of those meetings. The Transcripts were filed with the Division of Administrative Hearings prior to the issuance of the Partial Final Order. Thus, the costs of the transcribing of the Board of Pharmacy meetings are properly included in the amount of costs to be awarded to Petitioners. The amounts of the

costs claimed for the rule challenges in the individual and first consolidated invoice are reasonable.

83. The costs incurred by Petitioners for the rule challenges as set forth in the individual and first consolidated invoices are listed below:

<u>Name</u>	<u>Amount</u>
Vipul Patel	\$1,773.62
Miriam Hernandez	\$1,801.41
Mirley Aleman-Alejo	\$1,213.80
Valliammai Natarajan	\$321.17 ^[9]
John H. Neamatalla	\$1,118.72
Samad Mridha	\$975.12
Se Young Yoon	\$1,097.07
Saurin Modi	\$1,168.75
Deepakkumar Shah, M.Ph.	\$1,119.24
Mijeong Chang	\$1,213.16
Nabil Khalil	\$961.32
Hadya Alameddine	\$464.60
Balaji Lakshminarayanan	\$509.71
Anand Narayanan	\$461.87

84. The total amount of costs to be awarded for the challenge to the existing rule and to the policy statements is \$14,199.56.

85. The parties stipulated to the reasonableness of the costs contained in the second consolidated invoice. The second consolidated invoice lists the total costs as \$2,096.12. Therefore, the costs for the second consolidated invoice are reduced to \$209.61,¹⁰ which represents the amount attributable to litigation of entitlement of fees, ten percent of the total costs.

86. The parties stipulated to the reasonableness of the costs contained in the third consolidated invoice. The third consolidated invoice lists the total costs as \$580.62. Therefore, the costs for the third consolidated invoice are reduced to \$58.06,¹¹ which represents the amount attributable to litigating the entitlement of fees, ten percent of the total costs.

87. Petitioners incurred costs in the litigation of the amount of attorney's fees to be awarded. Petitioners retained an expert witness, Sandra Ambrose, Esquire. Ms. Ambrose's fee relating to the issue of attorney's fees is \$5,200.00. Her fee is reasonable; however, Ms. Ambrose's testimony was related to the amount of the fees not to the entitlement to fees and are, therefore, not awarded as part of the costs.

88. The total costs to be awarded for the litigation of the fees is \$267.67.

CONCLUSIONS OF LAW

89. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.57, 57.105(5), 120.569(e), and 120.595, Fla. Stat. (2008).

90. Subsection 120.595(3), Florida Statutes, provides:

(3) If the court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3), a judgment or order

shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$15,000.

91. Each Petitioner is seeking fees for his or her specific case, which would equal to each Petitioner receiving up to a maximum of \$15,000.00 in fees. The Board of Pharmacy contends that fees should be awarded for only one Petitioner. The basis for this argument is that all 14 Petitioners could have filed one rule challenge and gained the same results that were gained by the filing of 14 separate petitions. Petitioners conceded at the final hearing that the reason for filing 14 separate petitions was to increase the amount of attorney's fees which could be awarded. The cases were taken on a contingency fee basis, principally because Petitioners could not afford to pay on an hourly basis. The statutory limit on the amount of attorney's fees that can be awarded pursuant to Subsection 120.595(3), Florida Statutes, is \$15,000.00.

92. Petitioners rely on the Final Order entered in Anderson Columbia Company, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, Case Nos. 00-0754F, 00-0755F, 00-0756F, 00-0757F, and 00-0828F (DOAH July 18, 2000), per curiam aff'd Bd. of Trustees of the Internal Improvement Trust Fund v. Anderson Columbia, et al., 796 So. 2d 1176 (Fla. 1st DCA 2001), to support their position that each Petitioner is entitled to receive attorney's fees. In Anderson Columbia, the Administrative Law Judge found that the petitioners in a rule challenge to a proposed rule were entitled to the maximum allowed pursuant to Subsection 120.595(2), Florida Statutes, for each petition filed. Three of the petitioners were corporations, one petitioner was a limited partnership, and one petitioner consisted of a group of individuals and corporations. In rejecting the respondent's contention that the fees should be reimbursed on per case client basis, the Administrative Law Judge stated:

Support Terminals and Commodores Point were unrelated clients who happened to choose the same counsel; they were not a "shared venture." Each brought a different perspective to the case since Commodores Point had already received a disclaimer with no reversionary interest on June 26, 1997. The latter event ultimately precipitated this matter and led to the proposed rulemaking. Likewise, in the case of Anderson Columbia and Panhandle Land, one was a land owner while the other was a tenant, and they also happened to choose the same attorney to represent them. For the sake of convenience and economy, the underlying cases were

consolidated and the matters joined for hearing.

Anderson Columbia, Final Order, pages 6-7.

93. In the instant cases, the Petitioners are not bringing different perspectives to the cases. Each Petitioner graduated from a pharmacy school located outside the United States and had taken and passed the Foreign Pharmacy Graduate Equivalency Examination, the Test of Spoken English, and the Test of English as a Foreign Language. Petitioners had been issued Intern Registrations by the Board of Pharmacy. All but two of the Petitioners had submitted applications to sit for the licensure examination and had their applications denied. All Petitioners had sought a variance or waiver of the FPGEC certification requirement and had been denied a variance or waiver. Essentially, the Petitioners were all in the same boat. It is true that the hardships that Petitioners may have had because they were not allowed to sit for the licensure examination differed; the hardships were irrelevant to the issue of whether the rule was invalid or whether the challenged statements constituted rules.

94. The facts in these cases do not demonstrate that Petitioners just happened to choose the same law firm to represent them. The Health Law Firm had represented the Petitioners in their petitions to the Board of Pharmacy for a

variance or waiver. The Health Law Firm acknowledged that the reason that 14 petitions were filed was to increase the amount of attorney's fees which could be claimed. The Health Law Firm sent out letters soliciting clients to join in the rule challenge. All the Petitioners knew each other and had a web site for the foreign pharmacy graduates.

95. Notwithstanding the reference to these cases as separate, supra, it is concluded that the 14 challenges to the existing rule should be treated as one case and that the amount of fees to be awarded to Petitioners for the challenge to the existing rule is the statutory limit of \$15,000.00.

96. Petitioners' rule challenge included a challenge to eight statements which had not been promulgated as rules. Petitioners were not successful on four of the statements and prevailed on the other statements. Subsection 120.595(4), Florida Statutes, provides for the award of reasonable costs and attorney's fees upon the entry of a final order that all or part of an agency statement meets the definition of a rule and has not been promulgated as a rule. Subsection 120.595(4), Florida Statutes, states:

(4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).--

(a) Upon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable

attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to payment of an award or reimbursement for payment of an award under any provision of law.

97. The Board of Pharmacy has not demonstrated that the statements and policies which were deemed to be rules were required to implement or retain a federal program or that the statements or policies were necessary to meet conditions for the receipt of federal funds. Thus, Petitioners are entitled to an award of attorney's fees pursuant to Subsection 120.595(4), Florida Statutes. Unlike Subsection 120.595(3), Florida Statutes, Subsection 120.595(4), Florida Statutes, does not contain a limit on the amount of attorney's fees which are to be awarded except that the fees must be reasonable. As with the portion of the challenges to the existing rule, the portion of the challenges dealing with the non-rule policy are treated as one case.

98. Ms. Ambrose testified on behalf of Petitioners that the fees charged by The Health Law Firm were reasonable. However, Ms. Ambrose has never litigated a rule challenge before. A

review of the invoices for the rule challenges show that many of the entries are for time which is unreasonable or which should not be awarded.

99. Many of the entries are for clerical tasks performed by legal assistants, paralegals, or a law clerk. Section 57.104, Florida Statutes, is instructive on the types of services that can be included for legal assistants and paralegals in an award of attorney's fees and provides:

In any action in which attorneys' fees are to be determined or awarded by the court, the court shall consider, among other things, time and labor of any legal assistants who contributed nonclerical, meaningful legal support to the matter involved and who are working under the supervision of an attorney. For purposes of this section "legal assistant" means a person, who under the supervision and direction of a licensed attorney engages in legal research, and case development or planning in relation to modifications or initial proceedings, services, processes, or applications; or who prepares or interprets legal documents or selects, compiles, and uses technical information from references such as digests, encyclopedias, or practice manuals and analyzes and follows procedural problems that involve independent decisions.

100. The court in Dayco Products v. McLane, 690 So. 2d 654 (Fla. 1st DCA 1977), held that fees for clerical tasks could not be awarded pursuant to Section 57.104, Florida Statutes. The entries for clerical tasks performed in the rule challenges are not included in the award of fees.

101. An attorney's travel time is not to be included in a fee award. See C.B.T. Realty Corporation v. St. Andrews Cove I Condominium Assoc., 508 So. 2d 409 (Fla. 1st DCA 1987). The entries for travel are deleted.

102. The Health Law Firm represented the Petitioners before the Board of Pharmacy on their petitions for a waiver and their petitions for reconsideration on the denial of their waivers. Some of the entries related to the petitions for waivers, which are separate cases from the rule challenges. The time related to the waivers is not compensable in the rule challenge cases.

103. At first blush, many of the entries on the individual invoices appear to be reasonable. However, when the time is multiplied by ten or 14, for performing a single task, the time becomes unreasonable. Entries have been reduced where the time was excessive for the task performed.

104. In Case No. 08-2731RX, the client indicated that she no longer wished to pursue the case, and The Health Law Firm continued to bill for services after she so indicated. It is unknown why no voluntary dismissal was filed in this case. In any case, no entries after the client advised that she no longer wished to proceed are included in the award of attorney's fees.

105. Petitioners did not prevail on the issue of retroactive application of the rule in the rule challenge. To the extent that the invoice entries specifically state that the

time relates to the retroactive application issue, that time is deleted or reduced if other tasks are included in the entry.

106. The rule challenge petitions dealt with two distinct types of challenges. One was for an existing rule, and the other was for policy statements which were alleged to meet the definition of a rule but were not promulgated as rules. The invoices do not delineate the time that was spent on the challenge to the existing rule and the time that was spent on the nonpromulgated rules, except for the retroactive application issue. The reasonable time and charges for both aspects of the rule challenges are stated in paragraph 73, above, with a total of \$108,899.24. This amount is divided equally between the challenge to the existing rule and the challenge to the agency policy statements. Because Subsection 120.595(3), Florida Statutes, limits the amount of fees to be awarded to \$15,000.00, Petitioners are awarded a total of \$15,000.00 for the challenge to the existing rule. The Petitioners are awarded \$54,449.62 for the challenge to the unpromulgated agency statements.

107. Petitioners seek a lodestar multiplier of 1.5 as an enhancement of the fees being claimed. In Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), the Florida Supreme Court set forth guidelines in determining reasonable attorney's fees. The criteria set forth in Rules Regulating the Florida Bar, Rule 4-1.5(b)(1), which provides:

(1) Factors to be considered as guides in determining a reasonable fee include:

- (A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
- (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
- (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
- (F) the nature and length of the professional relationship with the client;
- (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services, and
- (H) whether the fee is fixed or contingent, and, if fixed as to the amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

108. The first step is to determine the lodestar, which is the number of reasonable hours expended in the litigation multiplied by the reasonable hourly rate. The parties have stipulated that the hourly rates charged are reasonable. Petitioners have not demonstrated that the number of hours claimed in the litigation is reasonable. The invoice entries for

the rule challenges have been reduced as set forth in the Findings of Fact.

109. Thus, the lodestar is the amount of fees set forth in paragraph 73, above, which is \$108,899.24.

110. Petitioners contend that a lodestar multiplier should be applied in determining reasonable attorney's fees.

Petitioners have not demonstrated that either the issues of law or fact were novel, complex, or difficult. Although counsel for Petitioners testified that a rule challenge was novel to him because he had never litigated a rule challenge, the legal and factual issues were fairly clear cut. The inexperience of the attorney does not mean that the questions involved in the case were novel.

111. The representation of Petitioners was taken on a contingency fee basis; however, the likelihood of success on at least a portion of the statement or policies challenged was very high. Counsel for Petitioners made a conscious decision to file 14 separate petitions in order to increase the amount of attorney's fees which could be awarded. Additionally, a multiplier is not mandatory in a contingency fee situation. Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990).

112. One of the factors to be considered is the time constraints placed on the attorneys by the circumstances or the

clients. Pursuant to Subsection 120.56(1)(c), Florida Statutes, the final hearing in a rule challenge is to be held within 30 days of receipt of the petition by the Division of Administrative Hearings, and a final order is to be issued within 30 days of the final hearing. In the instant rule challenge, the final hearing was scheduled to be held within 30 days of the receipt of the first rule challenge filed by Petitioner Patel. The final hearing was continued at the request of the parties, and the parties eventually agreed to have the issue determined by summary disposition. Additionally, by August 21, 2008, each of the Petitioners who had filed an application was granted a waiver or variance that would allow them to sit for the licensure examination, which was their ultimate goal.

113. Another factor to be considered is the result obtained. There were eight statements or policies that Petitioners were challenging as constituting rules which were unpromulgated. Petitioners failed to establish that three of the statements or policies constituted rules and failed to establish that one alleged policy or statement actually existed. The four remaining statements or policies challenged by the Petitioners were deemed to meet the definition of a rule. Three of the remaining policies or statements that were found to constitute rules dealt with petitions for waivers or variances. The Board of Pharmacy had taken the position that one who petitioned for a

variance or waiver prior to submitting an application did not have standing to request a variance or waiver from Florida Administrative Code Rule 64B16-26.2031. This position was premised on the underlying policy that applications could not be accepted until the applicant complied with Florida Administrative Code Rule 64B16-26.2031. The Board of Pharmacy conceded that the underlying policy was an invalid non-rule policy. Each of the Petitioners who requested a variance or waiver had been given a hearing and granted a variance or waiver, prior to the issuance of the Partial Final Order.

114. The fourth policy statement deemed to constitute a rule dealt with the statements found on the application forms for taking the licensure examination. The Board of Pharmacy conceded that the statements at issue were invalid non-rule policies. On August 1, 2008, the Board of Pharmacy began the rulemaking process to address the issues raised by the invalid non-rule policies. Additionally, by August 21, 2008, all of the Petitioners who had submitted an application were granted a variance or waiver.

115. It cannot be concluded that prevailing on half of the issues alleged in the challenge to statements or policies which constituted rules would require the application of a multiplier.

116. Another factor to be considered in determining whether a multiplier is applicable is the skill and experience of the

attorneys and the effort and efficiency of the attorneys in providing the legal services. The attorneys who represented the Petitioners were skilled litigators, but had no previous experience in rule challenges. As discussed in the Findings of Fact, there were many areas in which the attorneys did not demonstrate efficiency in the provision of the legal services. Thus, this factor does not warrant the application of a multiplier.

117. Petitioners contend that it was difficult for them to retain the services of an attorney to represent them, and that is a factor which should be considered in determining the use of a multiplier in determining the amount of fees to be awarded. This argument is disingenuous since The Health Law Firm had represented each of the Petitioners in his/her petitions before the Board of Pharmacy for a variance or waiver. No evidence was presented that any of the Petitioners had sought legal representation for the rule challenge from any other law firm other than The Health Law Firm.

118. The Health Law Firm had represented the Petitioners in their petitions for waivers before the Board of Pharmacy before and after the rule challenges were filed. The professional relationship between the Petitioners and The Health Law Firm does not warrant the use of a multiplier.

119. Based on the factors set forth in Florida Patient's Compensation Fund v. Rowe, Petitioners are not entitled to a lodestar multiplier.

120. Petitioners contend that they are entitled to be reimbursed for attorney's fees and costs related to the litigation to determine the amount of fees to be awarded. In State Farm Fire & Casualty Co. v. Palma, 629 So. 2d 830 (1993), the Florida Supreme Court determined attorney's fees for litigating the amount of attorney's fees to be awarded is not recoverable unless the statute which provides for the award of attorney's fees to a prevailing party specifically provides for an award of attorney's fees for litigating the amount of the attorney's fees. In Palma, the court was dealing specifically with Section 627.428, Florida Statutes, and stated:

[T]he terms of section 627.428 are an implicit part of every insurance policy issued in Florida. When an insured is compelled to sue to enforce an insurance contract because the insurance company has contested a valid claim, the relief sought is both the policy proceeds and attorney's fees pursuant to section 627.428. the language of subsection (3), which provides that "compensation or fees of the attorney shall be included in the judgment or decree rendered in the case[,]" also supports this conclusion. §627.428(3), Fla. Stat. (1983).

Thus, if an insurer loses such a suit but contests the insured's entitlement to attorney's fees, this is still a claim under the policy and within the scope of section 627.428. Because such services are rendered

in procuring full payment of the judgment, the insured does not have an interest in the fee recovered. Accordingly, we hold that attorney's fees may be awarded under section 627.428 for litigating the issue of entitlement to attorney's fees.

However, we do not agree with the district court below that attorney's fees may be awarded for litigating the amount of attorney's fees. The language of the statute does not support such a conclusion. Such work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment. (Emphasis in the original)

Id. at 832-833.

121. The court in Palma recognized that federal courts had not distinguished between entitlement to attorney's fees and the amount of attorney's fees when awarded fees for litigating fees and disagreed with the federal view:

Florida courts, including this Court, have consistently held that the purpose of section 627.428 is "to discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts." Lexow, 602 So. 2d at 531. Our conclusion that statutory fees may be awarded for litigating the issue of entitlement to attorney's fees but not the amount of attorney's fees comports with the purpose of section 627.428 and with the plain language of the statute. If the scope of section 627.428 is to be expanded to include time spent litigating the amount of attorney's fees, then the Legislature, rather than this Court, is the proper party to do so.

Id. at 833.

122. In Agency for Health Care Administration v. HHCI Limited Partnership, 865 So. 2d 593 (Fla. 1st DCA 2004), the court specifically dealt with whether attorney's fees could be recovered for litigating the amount of attorney's fees to be awarded pursuant to Subsection 120.595(4), Florida Statutes. The court followed Palma in concluding that the Administrative Law Judge must exclude from the fee award any fees expended in attempting to prove the amount of the fees.

123. The issue of entitlement to fees is limited to whether fees can be recoverable under a statute other than Subsection 120.595(3), Florida Statutes. Most of the time spent in the litigation of the fees dealt with the issue of the amount of the fees to be awarded not with whether Petitioners were entitled to fees. Based on a review of the pleadings filed and the invoices submitted, it is determined that ten percent of the fee litigation involved litigation of entitlement of fees. Thus, the invoice entries in the second and third consolidated invoices which dealt specifically with the issue of the amount of fees and costs is deleted. In the entries in which it could not be determined the amount of time pertaining to amount or entitlement, the entry is reduced to ten percent for the entitlement issue. Petitioners are awarded \$1,052.25 for litigating fees.

124. Subsections 120.595(3) and 120.595(4), Florida Statutes, provide that costs are to be awarded to the prevailing party in rule challenges. The only limit on the amount of costs that may be awarded to the prevailing party is that the costs must be reasonable. The parties have stipulated that the costs are reasonable with the exception of the transcript costs of the Board of Pharmacy meetings. The stipulation is binding. See Palm Beach Community College v. Department of Administration, 579 So. 2d 300, 302 (Fla. 4th DCA 1991) ("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist."). The transcript costs, which are in dispute, are reasonable. The amount of costs awarded for the rule challenge is \$14,199.56. The amount of costs awarded for the litigation of entitlement of fees is \$580.62.

125. Petitioners also contend that fees should be awarded pursuant to Subsection 120.569(2)(e), Florida Statutes, which provides:

(e) 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.

126. Petitioners have not demonstrated that Respondent filed any pleading, motion, or other paper for any improper purpose, for a frivolous purpose, or to needlessly increase the cost of litigation. Respondent conceded the issues of law on which it did not prevail in the rule challenge prior to the submission of the case for summary disposition. The Board of Pharmacy granted Petitioners waivers prior to the submission of the case for summary disposition. Respondent was successful on the portion of the rule challenge that it did not concede. Petitioners are not entitled to an award of fees pursuant to Subsection 120.569(2)(e), Florida Statutes.

127. Petitioners contend they are entitled to fees and prejudgment interest pursuant to Subsection 57.105(5), Florida Statutes, which provides that fees shall be awarded in an administrative proceeding when the prevailing party demonstrates that the non-prevailing party raised unsupported claims or defenses or that any pleading filed or response to discovery was

made to unnecessarily delay litigation. For the reasons set forth for denial of Petitioners' claim pursuant to Subsection 120.569(2)(e), Florida Statutes, Petitioners are not entitled to fees pursuant to Subsection 57.105(5), Florida Statutes.

128. Neither Subsection 120.595(3) nor Subsection 120.595(4), Florida Statutes, authorizes prejudgment interest. Therefore, Petitioners' claim for prejudgment interest is denied.

ORDER

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

1. Petitioners are awarded a total of \$15,000.00 for the attorney's fees pursuant to Subsection 120.595(3), Florida Statutes. The \$15,000.00 is to be prorated among the 14 Petitioners.

2. Petitioners are awarded a total of \$54,449.62 pursuant to Subsection 120.595(4), Florida Statutes. This amount is to be prorated among the 14 Petitioners.

3. Petitioners are awarded a total of \$14,199.56 for costs as prevailing parties in the rule challenges. This amount is to be prorated among the 14 Petitioners.

4. Petitioners are awarded a total of \$1,052.25 for the litigation of entitlement to fees. This amount is prorated among the 14 Petitioners.

5. Petitioners are awarded a total of \$580.62 for costs for the litigation of entitlement to fees.

6. Pursuant to Subsection 120.595(4), Florida Statutes, the fee amount of \$54,449.62 and half of the costs of the rule challenges, \$7,099.78, are to be paid from the budget entity of the executive director of the Board of Pharmacy.

DONE AND ORDERED this 30th day of July, 2009, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of July, 2009.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2007 codification.

^{2/} The parties agreed to delete this charge from the fees claimed by Petitioners.

^{3/} The Florida Supreme Court found in Standard Guaranty Insurance Co., 555 So. 2d 828 (Fla. 1990), that a contract between an attorney and a client in which the attorney agrees to represent the client if they prevail based on a statutory provision

awarding attorney's fees to be determined by a court is a contingency fee contract.

^{4/} Petitioners submitted three consolidated invoices. The first invoice related to the fees and costs for the rule challenge. The second and third invoices related to the litigation of the fees.

^{5/} The Health Law Firm represented Petitioners on their petitions to the Board of Pharmacy for a variance or waiver, which are separate cases from the rule challenges.

^{6/} It is not clear from the invoices the purpose of attending the Board of Pharmacy meetings on these dates.

^{7/} In the Joint Pre-hearing Stipulation, the parties stated: Respondent contends that Petitioners are not entitled to any fees or costs for the non-rule policy challenges on which Respondent prevailed." One of the issues of law listed to be litigated was "Whether Petitioners are entitled to attorney's fees and costs pursuant to a different section of Florida Statutes other than Section 120.595(3), Florida Statutes."

^{8/} Although the parties have agreed that the costs other than for the Transcripts of the Board of Pharmacy meetings on April 8 and 9, and June 10, 2008, are fair and reasonable, a review of the costs does show that many of the costs were not reasonable and would not have been allowed pursuant to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions and case law. In Department of Transportation v. Skidmore, 720 So. 2d 1125, 1130 (Fla. 4th DCA 1998), the court held "postage, long distance calls, fax transmissions, and delivery services are office expenses that should not have been taxed." The Uniform Guidelines for Taxation of Costs in Civil Actions provides that travel expenses of attorneys should not be taxed as costs.

In Case No. 08-2728RX, \$566.30 is claimed for costs related to office expenses and travel expenses, which includes \$412.30 for costs to deliver documents to the Division of Administrative Hearings on June 9, 2008. In Case No. 08-2728RX, \$122.84 is claimed for office and travel expenses. In Case No. 08-2730RX, \$148.98 is claimed for office and travel expenses. In Case No. 08-2731RX, \$42.84 is claimed for office expenses. In Case No. 08-2732RX, \$113.40 is claimed for office and travel expenses. In Case No. 08-2733RX, \$107.55 is claimed for office and travel expenses. In Case No. 08-2734RX, \$124.98 is claimed for office and travel expenses. In Case No. 08-2821RX, \$108.43 was claimed

for office and travel expenses. In Case No. 08-2823RX, \$123.17 is claimed for office and travel expenses. In Case No. 08-2824RX, \$123.59 is claimed for office and travel expenses. In Case No. 08-3298RX, \$113.95 is claimed for office and travel expenses. In Case No. 08-3347RX, \$23.08 is claimed for office expenses. In Case No. 08-3488RX, \$65.44 is claimed for office expenses. In Case 08-3510RX, \$49.83 is claimed for office expenses. In the first consolidated invoice \$370.00 is claimed for office and travel expenses. Because the parties have stipulated to the reasonableness of these costs, they are determined to be reasonable. See Boyette v. Reliable Finance Co., 184 So. 2d 200, 202 (Fla. 2d DCA 1966), in which the court opined that a stipulation could form the basis for a finding that attorney's fees are reasonable.

^{9/} Costs listed after June 18, 2008, the date which the client indicated that she no longer wished to continue with the case, are not included.

^{10/} Again, a review of the costs in the second consolidated invoice shows costs for office expenses totaling \$159.37. Additionally, there is a charge of \$1,895.75 for photocopies, which appears to be excessive.

^{11/} A review of the costs in the third consolidated invoice shows costs for office expenses totaling \$54.37 and a charge of \$526.25 for photocopies, which again appears to be excessive.

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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.