

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

COMMUNITY HEALTH CHARITIES OF )  
FLORIDA, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 08-3546F  
 )  
DEPARTMENT OF MANAGEMENT )  
SERVICES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

This cause came on for final hearing, pursuant to appropriate notice, on a Motion by Petitioner, Community Health Charities of Florida, and 27 other Petitioners for attorney's fees and costs in accordance with Section 57.111, Florida Statutes (2008). The cause came before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted on November 7, 2008, and the appearances are as follows:

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, Community Health Charities of Florida (CHC), is entitled to an award of attorney's fees and costs as a "prevailing small business party" pursuant to Section 57.111, Florida Statutes (2008), by being a prevailing small business party in the underlying case of Community Health Charities of Florida, et. al v. Florida Department of Management Services, DOAH Case No. 07-3547, Recommended Order February 29, 2008; Final Order May 29, 2008. Also, at issue is whether the Respondent Agency's actions, with regard to the underlying case, were substantially justified or whether special circumstances exist which would render an award of attorney's fees and costs unjust.

PRELIMINARY STATEMENT

Case History

This case arose upon the filing of a Motion by the Petitioner, CHC and 27 named charitable health organizations

(Charities), as Co-Petitioners, on July 22, 2008. The Petitioner, CHC, seeks to recover attorney's fees and costs incurred in the underlying case cited above. That case progressed through the filing of a Recommended Order, a Final Order by the above-named Respondent Agency, and the matter was then appealed to the First District Court of Appeal. The status and nature of that appeal, as related to the question of the Petitioner being a "prevailing party" for purposes of Section 57.111, Florida Statutes, is addressed below.

The Final Order in the underlying case awarded certain undesignated funds from the 2006 Florida State Employee's Charitable Campaign "fiscal agent areas," to the Charities, by finding that they provided "direct services" in certain areas for which they had applied. The Steering Committee, under the auspices of the Respondent, had originally made a finding that the Charities had provided "direct services" in merely 18 percent of the areas in which they applied. The Petitioner maintains that it achieved success before the Administrative Law Judge, and in the Final Order, by securing a ruling that the Petitioners provided "direct services" in 77 percent of the areas in which they applied, and that the Administrative Law Judge had added further success to the Charities when he issued a Recommended Order that added areas in which three additional Petitioners had applied. In its Final Order the Respondent Agency adopted the Administrative Law Judge's Recommended Order and thereafter the Petitioners appealed that Final Order.

The issues preserved for that appeal are co-extensive with their exceptions to the Recommended Order. None of those exceptions, nor the issues on appeal, take issue with the favorable findings and rulings for the Petitioners, made in the Recommended and Final Orders. Rather, the Petitioners appealed that portion of the Final Order that denied discrete claims arising under Section 120.56(4), Florida Statutes. This posture of the issues on the appeal was stated at the hearing held by Administrative Law Judge Wetherell (previously assigned this case) concerning the response to his Order to Show Cause. After showing that the issues on appeal did not relate to the portion of the Final Order determining the undesignated funds distribution for the Charities, the parties stipulated that this attorney fee claim could proceed, notwithstanding the pending appeal from the same Final Order on the rule validity-related issues.

#### The Parties' Positions

The Petitioner, CHC, maintains that it is a "prevailing party" for purposes of Section 57.111, Florida Statutes. It contends that when the Department and the Steering Committee refused to change their decision concerning distribution of "undesignated funds" (funds contributed by a state employee without specifying a particular charity to receive the funds) that the CHC filed a Petition for formal hearing. The Department refused to refer the matter to DOAH and a Petition for Writ of Mandamus was filed by CHC in the First District Court of Appeal. That court ordered that the Department provide an administrative

hearing for CHC and ordered the Department to pay CHC's appellate attorney's fees and costs. Community Health Charities of Florida v. State of Florida, Department of Management Services, 961 So. 2d 372 (Fla. 1st DCA 2007).

Upon the case being referred to DOAH for formal proceeding, the Department and Committee became motivated to reconsider the decision regarding distribution of undesignated funds. Thereafter, after an additional meeting in September 2007, the Department and Committee decided to increase the award of undesignated funds to Member Charities from 18 percent direct services in fiscal agent areas to 77 percent of the areas in which the Charities applied. The Petitioner, CHC, maintains that when the number of affiliated charities awarded undesignated funds was also increased by the Administrative Law Judge, to award undesignated funds to an additional three member charities, that a substantial benefit was thus gained for the affiliated Charities by CHC's Petition and litigation of that claim. CHC thus maintains that it is entitled to recover attorney's fees and costs under the above statutory section because it is a "prevailing small business party." It maintains that it is a small business party because it has less than 25 full-time employees and less than 2 million dollars in net worth.

The Respondent Department contends that the true prevailing parties in the underlying case, concerning the distribution of undesignated funds, were really the 27 charities. They were all Petitioners in the underlying proceeding as well as CHC. In fact, all 27 of those charities also are named Petitioners in the

attorney's fee and cost motion in this cause. They were all Petitioners in this fee proceeding, until the entry of Judge Wetherell's Order of August 11, 2008 (discussed infra). The Respondent contends that CHC is "an umbrella organization" for those 27 or so affiliated charities, and that CHC and its affiliates are part of a network of corporations, affiliated by various agreements to share contributions and expenses. The Respondent contends that the Final Order in the underlying proceeding awarded the funds to the various charities named in the Petition in that case, but awarded nothing to CHC. While CHC stands to gain a 25 percent fee by its agreement with those charities, as a portion of funds awarded to the Charities, that benefit to CHC did not come as a proximate result of prosecuting the underlying litigation.

The Respondent likewise contends that while CHC may be obligated to the affiliated charities to bear the burden of attorney's fees and costs for that proceeding, that is a matter of private agreement between CHC and those charities. It argues that such does not accord CHC standing to litigate and receive an award of attorney's fees and costs in this proceeding, based upon purportedly being a "prevailing small business party" in the underlying case.

The Respondent also maintains that special circumstances exist to make an award of attorney's fees and costs to CHC unjust, for purposes of Section 57.111, Florida Statutes, because of the lack of a funding source, other than the charitable contributions themselves, to pay the attorney's fees and costs.

This is purportedly because of the significant budget reductions the Department has suffered from 2006 forward, and because the affiliation agreements between CHC and the several dozen Petitioners would allegedly render a \$50,000.00 attorney fee and cost award to CHC unjust.

In this connection, the Respondent maintains that CHC might have agreements with the Charities, to the effect that it would bear the attorney's fees and costs related to the underlying litigation, and contends that it is a prevailing small business party because it has fewer than 25 employees and less than \$2,000,000.00 dollars net worth. However, if those facts resulted in its being deemed a "prevailing party," an unjust result would be imposed because the 27 affiliated charities who actually prevailed and received the benefits awarded in the underlying proceeding, in some cases, singly have more than two million dollars net worth, but if one aggregated them together, as prevailing parties, would clearly have many more than 25 employees and much more than two million dollars net worth. For this additional reason, the Respondent maintains that to single out CHC as a prevailing party, and award attorney's fees and costs under those circumstances, would be unjust.

#### The Hearing and the Record

The cause came on for hearing as noticed, the case having been transferred to the undersigned from Judge Wetherell. At the hearing the Petitioner, CHC, presented the testimony of witness Gwen Cooper. CHC did not present any exhibits or documentary evidence.

The Respondent presented the testimony of witnesses Nancy Kelly, Director of Administration of the Florida Department of Revenue and a member of the Steering Committee; Debra Forbess, Director of Administration, Florida Department of Management Services; and Murphy Chandler, Para-legal for the Office of the Florida Attorney General. The Respondent offered nine exhibits. The Respondent's Exhibits Two, Three, Five, Six, Seven, and Eight were admitted into evidence. Additionally, the parties stipulated that official recognition be taken of the Transcript and evidence in the underlying proceeding in DOAH Case No. 07-3547. A copy of the record on appeal has been filed as a Joint Exhibit in this proceeding, on November 25, 2008.

After the hearing the Respondent filed a Motion to Supplement the Hearing Record, seeking to admit Respondent's Composite Exhibit One. The Motion was opposed on the basis that no authority had been cited by the Respondent authorizing introduction of evidence after the close of hearing; because the exhibit was not properly authenticated, was irrelevant; and constituted uncorroborative hearsay. The Motion was denied by Order of December 19, 2008.

Upon conclusion of the hearing, the parties elected to have it transcribed and to submit proposed final orders. The Proposed Final Orders have been considered in the rendition of this Final Order.

#### FINDINGS OF FACT

1. This cause arose upon the filing of a motion or petition for attorney's fees and costs on July 22, 2008, by the



Petitioners, CHC and the Charities (the American Liver Foundation, Cystic Fibrosis Foundation, Crohn's and Colitis Foundation, Prevent Blindness Florida, Children's Tumor Foundation, March of Dimes, Lupus Foundation of America, Florida Chapter, Florida Hospices and Palliative Care, Hemophilia Foundation of Greater Florida, National Parkinson Foundation, American Diabetes Association, Leukemia and Lymphoma Society, American Lung Association, ALS Association, Alzheimer's Association, Juvenile Diabetes Research Foundation, Arthritis Foundation, Florida SIDS Alliance, Sickle Cell Disease Association of Florida, Easter Seals Florida, St. Jude Children's Research Hospital, Muscular Dystrophy Association, Nami Florida, National Kidney Foundation, National Multiple Sclerosis Foundation, Huntington's Disease Society of America, and Association for Retarded Citizens). This attorney fee and cost motion was filed in connection with the above Charities having received distribution of undesignated contributions from the 2006 Florida State Employees' Charitable Campaign (FSECC). The Charities made application for the funds and then contested the initial decision of the Steering Committee charged with determining distribution of undesignated contributions (by fiscal agent area). Ultimately, after obtaining a Writ of Mandamus from the First District Court of Appeal, requiring an administrative proceeding and hearing before the Division of

Administrative Hearings on the contested claims, the Charities received additional distribution of undesignated contributions. Those additional distributions represent an additional benefit the Charities received upon the entry of the Recommended Order and the Final Order in the underlying proceeding. Therefore, one Petitioner, CHC, in the motion for attorney's fees and costs asserts that it is thus a prevailing party and a small business for purposes of Section 57.111, Florida Statutes, and is entitled to an award of attorney's fees and costs.

2. The Respondent is an Agency of the State of Florida with authority to establish and maintain the FSECC.<sup>1/</sup> It administers the decision-making process involving distribution of undesignated funds and issued the Final Order in the original proceeding.

3. The attorney fee and cost proceeding was initially assigned to Administrative Law Judge Charles Adams. Thereafter the case was re-assigned to Administrative Law Judge T. Kent Wetherell, II. He issued an Order, sua sponte, on July 29, 2008, instructing the Petitioners to show cause why the case should not be held in abeyance pending disposition of the appeal of the Final Order in Community Health Charities of Florida v. State of Florida, Department of Management Services, 1D08-3126, the appeal before the First District Court of Appeal. The Petitioners filed a response to the Order to Show Cause stating,

in essence, that the issues preserved for appeal involved discreet claims under Section 120.56(4), Florida Statutes. The parties agreed that the portions of the Final Order in the underlying proceeding which granted undesignated fund distributions to the Charities were separable, and not the subject of the appeal to the First District Court of Appeal in the above-cited case. The parties thus stipulated that the case could proceed on the matter of fees and costs, notwithstanding the pending appeal.

4. An Order was entered by Judge Wetherell on August 11, 2008, based upon the responses to the Order to Show Cause. The Order references the parties' agreement that the case could go forward notwithstanding the pending appeal of the Final Order in the underlying case and then, significantly, Judge Wetherell made the following finding: "a closer review of the motion [the motion seeking the award of attorney's fees and costs] reflects that the only Petitioner alleged to be a prevailing small business party entitled to an award of fees under that statute [Section 57.111, Florida Statutes] is Community Health Charities of Florida." Judge Wetherell thereupon proceeded to order that the case style be amended to identify Community Health Charities of Florida (CHC), as the "only Petitioner in this fee case."

5. The Petitioner, CHC, is a Florida non-profit corporation that employs less than 25 full-time employees and

has a net worth of less than two million dollars. It is a "federation" under the FSECC Act. A "federation" is defined as an umbrella agency that supplies "common fund raising, administrative and management services to . . . charitable constituent member organizations. . . ." Fla. Admin. Code R. 60L-39.0015(1)(j). Federations were required to file with the Committee (the Steering Committee) a Direct Local Certification Form, describing the direct services that each member charity provided in the various fiscal agent areas. In this capacity, the Petitioner CHC represented 27 member charities in the 2006 charitable campaign.

6. Charitable organizations that provide "direct services in a local fiscal agent's area" are entitled to receive "the same percentage of undesignated funds as the percentage of designated funds they receive." § 110.181(2)(e), Fla. Stat. (2006). CHC is not a provider of services or direct services. Therefore, it, itself, did not receive any undesignated funds. The charitable organizations named above, are the entities which received undesignated funds related to direct services they provided in local fiscal agents' areas. Some received them through the initial decision of the subject Steering Committee, and some after the underlying administrative proceeding was litigated through Final Order.

7. On February 28, 2007, the Steering Committee, under the Respondent's auspices, conducted a public meeting in which it found the charities named above provided direct services in 18 percent of the fiscal agent areas in which they had applied. The Committee therefore denied Charities their share of undesignated funds in the remaining fiscal agent areas. That Committee decision was announced by memorandum of March 12, 2007, which provided the Petitioners with a point of entry to dispute the initial decision in an administrative proceeding.

8. On March 30, 2007, the Petitioners filed an Amended Petition which alleged that they had provided direct services in all the fiscal agent areas in which they applied for undesignated funds, and identified alleged deficiencies in the Committee's decision-making process. That Amended Petition was ultimately referred to the Division of Administrative Hearings for conduct of a formal proceeding, by Order of the First District Court of Appeal, requiring the Agency to refer the Amended Petition to the Division of Administrative Hearings.

9. With the Amended Petition pending before the Division of Administrative Hearings, the Steering Committee called an unscheduled meeting on September 10, 2007, to further address the Petitioners' claims and re-visit the earlier decision denying some applications for undesignated funds. Thereafter, the Respondent changed its initial decision by increasing the

percentages of fiscal agent areas where direct services were provided and undesignated funds awarded to the Petitioners, the Charities, as a result of the September 10, 2007, meeting. This percentage thus increased from 18 percent to 77 percent as a result of "additional review of material provided by Petitioners." The Respondent Agency ultimately rendered a Final Order that adopted the decision of the Statewide Steering Committee, approving 77 percent of the Petitioners' previous submittals, as well as the finding of the Administrative Law Judge with regard to the three additional member charities.

10. The Respondent had maintained in the original proceeding that the Committee must limit its consideration to the Direct Local Certification Form. The Petitioners, on the other hand, argued that they were entitled to a de novo review of the Agency action before the Division of Administrative Hearings. Reserving ruling on that matter, Judge Adams permitted the Petitioners, at the Final Hearing, to introduce additional evidence of direct services provided in those fiscal agent areas in which their applications had been denied by the Committee. The issue of direct services was considered de novo before the Division. The judge considered not only the direct local services certification form, but also supporting evidence of direct services introduced by the Petitioners at the Final Hearing. On considering that evidence, the Administrative Law

Judge found that three additional member charities, not previously approved by the Committee, had provided direct services, which entitled them to receive undesignated funds.

11. The Final Order entered by the Respondent Agency adopted the Administrative Law Judge's ruling. No exceptions were filed to that Recommended Order, thus the Agency waived its appellate rights with respect to any issue it might have raised, and the Charities prevailed as to the relief they sought in the Amended Petition.

12. In their affidavits filed with the Motion for Attorney's Fees and Costs on July 22, 2008, the attorneys Byrne and Hawkins, for the above-named Petitioners, stated that they were "retained" by those Petitioners, meaning all the above-named charities and also the Petitioner CHC. In the affidavits they stated that those Petitioners "incurred" the attorney's fees and costs to which the affidavits relate. As stated above, the attorney's fee Motion was filed and joined-in by all the above-named charities and CHC.

13. The Petitioners in the underlying case, which was appealed to the First District Court of Appeal, were all the above-named charities and CHC. Nonetheless, the Petitioner CHC took the position at the hearing in this proceeding that an agreement or understanding existed with the affiliate charities,

whereby CHC would bear the attorney's fees and costs on behalf of all the affiliate charities.

14. CHC has an agreement concerning how revenue it receives is shared with its national office and member charities. CHC pays its national office a percentage of revenue. It sends money to the national office and the national office also sends an allocation of funds to CHC. CHC is a member of the Arlington, Virginia-based Community Health Charities of America. For the fiscal year beginning July 1, 2006, CHC withheld 25 percent of charitable donations from Florida employees to its affiliated charities as its fee. This is the maximum amount authorized by Florida law in order for it to participate in the FSECC. § 110.181(1)(h)1., Fla. Stat. (2006).

15. In the 2006 campaign at issue, CHC did not file an application in its own name to the Steering Committee for receipt of undesignated funds. As Ms. Cooper testified "we did not apply." CHC received no allocation or award of undesignated funds either in the initial Steering Committee consideration process or as a result of the underlying proceeding through the Agency's Final Order. All the undesignated fund distributions were made to the charities themselves, who were the entities who filed applications to the Steering Committee seeking receipt of undesignated funds.



16. The Steering Committee, which made the initial decisions about distribution of undesignated funds is composed of appointed volunteers. The members of the committee are not compensated and do not have support staff to assist them in their fact-finding review of applications concerning receipt of undesignated funds. The committee members personally review all applications. Review of the applications takes many hours by each member of the committee, much more time than is spent in actual committee meetings.

17. The combined net worth and number of employees of some or all of the Charities, was not established. It was not established that the net worth of one or more of the charities filing this Motion for Attorney's Fees and participating as Petitioners in the underlying case, is less than two million dollars, nor that one or more of them have less than 25 employees.

18. The legislature appropriated \$17,000.00 dollars to DMS to administer the FSECC for 2006. Substantially more than that appropriated sum has been expended by DMS to administer the campaign. DMS has no insurance coverage which would pay attorney's fees and costs if they were awarded. DMS is also subject to at least a four percent budget "hold back" for the current fiscal year and is contemplating laying off employees in January 2009, due to budget reductions. If DMS is ordered to

pay attorney's fees and costs to CHC, DMS will bill the fiscal agent, United Way, for payment of those amounts from the FSECC charitable contributions.

19. Contrary to the situation with the Petitioner Charities, who made the original filing of the Amended Petition in the underlying case and were named as parties in the filing of the Motion for Attorney's Fees at issue in this case, CHC did offer evidence that its net worth was less than two million dollars and that it had less than 25 employees. Thus, it established this threshold for being considered a small business party. It is also true, however, that the Recommended Order from the Administrative Law Judge and the Final Order from the Agency in the underlying proceeding specifically make no mention of CHC as a prevailing party and award nothing of benefit to CHC, as opposed to the other actual charities, who filed the subject applications.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

21. Section 57.111(2), Florida Statutes (2008), the "Florida Equal Access to Justice Act" (FEAJA) provides as follows:

The legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs.

22. Section 57.111(4)(a), Florida Statutes (2008), proceeds to provide:

Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120 initiated by a state agency . . . (Emphasis supplied).

23. The term "small business party" includes a "corporation . . . , which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than two million dollars." § 57.111(3)(d)1.b., Fla. Stat. (2008). A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

§ 57.111(3)(c), Fla. Stat. (2008).

24. An award under Section 57.111, Florida Statutes, shall be made to a prevailing small business party "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust." § 57.111(4)(a), Fla. Stat. (2008).

25. The initial burden rests on the movant in the Motion for Attorney's Fees and Costs to establish that it was a "small business party" and that it "prevailed" in the underlying proceeding. After that burden is satisfied, the burden shifts to the Agency to show that it was "substantially justified" or that special circumstances exist which would make an award of attorney's fees and costs unjust. See Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

26. CHC has adduced evidence in this proceeding that it is a party having less than 25 full-time employees and a net worth of less than two million dollars. That evidence is not refuted by evidence adduced by the Respondents. Thus, it has been

established that the Petitioner CHC is a "small business party" for purposes of the above-referenced statutory provision.

27. The Petitioner CHC also maintains that it was a prevailing small business party in the underlying proceeding. The Motion for Attorney's Fees in this case was filed by not only CHC, but all of the Petitioner charities in the underlying litigation, some 27 of them. However, in the Order based upon the responses to his Order to Show Cause, Judge Wetherell determined that "a closer review of the Motion reflects that the only Petitioner alleged to be a prevailing small business party entitled to an award of fees under that statute is Community Health Charities of Florida." Accordingly, Judge Wetherell ordered that the case style in this attorney fee proceeding be amended to identify CHC as the only Petitioner in this fee case.

28. In light of this determination, if there is a prevailing small business party in this fee case, then CHC must show that it prevailed in the underlying proceeding. CHC maintained that it did so by achieving the relief sought in the Amended Petition. That Petition objected to the manner in which the Respondent proposed to distribute the undesignated funds and requested a de novo proceeding before DOAH. That de novo proceeding was initially denied and the Petitioners in that proceeding, all the charities and CHC, secured a Writ of Mandamus from the First District Court of Appeal requiring a

DOAH proceeding, which was done. The Petitioner, CHC, then contends that, by the Recommended Order and the Final Order, additional distribution of undesignated funds in the manner referenced in the Findings of Fact was granted. Thus CHC maintains that it achieved a substantial increase in the direct services determined to have been provided by the Petitioner Charities and achieved the conduct of a de novo proceeding before DOAH. It thus maintains that it prevailed on both issues in the Final Order, the germane portions of which were not appealed.

29. It has been held that the test for determining a prevailing party is whether the party "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807, 809-810 (Fla. 1992) (quoting Hensley v. Eckerhart, 103 S. Ct. 1933, 1939. The Petitioner relies on the federal "catalyst test," recognized in decisional interpretations of the Federal Equal Access to Justice Act. It asserts that Section 57.111, Florida Statutes, is patterned after the Federal Equal Access to Justice Act and is to be construed in an identical fashion. Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989). The Petitioner argues that the catalyst test demands only "that

practicable relief has been obtained that is factually a causal result of the law suit." Fields v. City of Tarpon Springs, Florida, 721 F.2d 318, 321 (11th Cir. 1983). It maintains, then, that CHC was the catalyst that caused the reversal of the Agency's position in the Petitioners' favor. CHC's point is that, but for the lawsuit, the Respondent Agency would not have increased the award of undesignated funds to member charities.

30. The problem with CHC's argument is that it was not the only Petitioner in the underlying "lawsuit." The 27 named charities, as well as CHC, were the named party "Petitioners" in that case. Indeed, and somewhat parenthetically, it might be argued that had it been the only Petitioner party in that proceeding, CHC would not have had standing to seek the adjustment in the distribution of the undesignated funds. Be that as it may, it was the presence of the Charities themselves, as participating parties in that underlying litigation, and the evidence they could bring forth, that caused the Respondent Agency "to substantially change its distribution of undesignated funds and award substantially more of the portion claimed by the member charities . . . ." Those undesignated funds were, and could only have been, distributed to those charities, not to CHC. Thus, CHC did not, as a Petitioner party, in its own right, win any "significant benefit" resulting from the Final

Order in that proceeding. The award of the disputed fund distribution was, in fact, to the Charities, not to CHC.

31. CHC also contends that CHC benefited directly from the funds received by the member charities based upon the agreement between it and the Charities. Pursuant to that agreement it receives 25 percent of all donations received by the Charities, the statutory maximum fee. See § 110.181(1)(h)1., Fla. Stat. (2006). Thus the Petitioner contends that it directly benefited from the increase in distribution of undesignated funds to the Charities.

32. That argument loses sight of the fact, however, that it did not receive any such funds as a direct benefit resulting from its party status, in relation to the award made by the Final Order to the Charities. Rather, any benefit resulting in an increase in the value of the 25 percent fee the Petitioner was to receive from the charitable campaign that year, caused by the increase in the distribution to the Charities, was the proximate result of the contract it had with those charities, not as a direct result of the Final Order. Benefits that it received as a result of that contract are a collateral matter and not a result of CHC's participation in the underlying proceeding.

33. Accordingly, it must be determined, under the preponderant, persuasive evidence received, that the Petitioner



Charities prevailed on the relief sought and gained by the Amended Petition in the underlying proceeding. The Petitioner CHC has not been established to be a prevailing party for the reasons delineated above.

34. CHC demonstrated that it is a small business, for purposes of the above-referenced statutory provision, by having less than 25 employees and less than two million dollars of net worth attributable to its Florida entity or organization. If, however, the Petitioner Charities had remained active Petitioners in this proceeding, (without Judge Wetherell's August 11, 2008, Order) it should be pointed out that there is no persuasive evidence to show what those charities' net worth or number of employees is, or was, at times relevant hereto. Thus, if they were considered to remain as Petitioners in this fee proceeding, as being prevailing parties on the relief gained by the Amended Petition in the underlying proceeding, the evidence would not support them being prevailing small business parties in this fee proceeding.

35. Inasmuch as the movant failed to satisfy its initial burden to prove that it is a prevailing small business party, the attorney's fee and cost claim must fail. Moreover, the persuasive evidence adduced by the Respondent, as well as, to some extent, undisputed facts, show that the \$17,000.00 budget allocation from the legislature for the FSECC costs was expended

before the underlying proceeding occurred; that the Respondent agency is in a serious budget reduction posture; that any fees and costs would have to be paid from charitable donation funds themselves, and that CHC already, by contract, receives a management or administration fee of 25 percent of charitable donations. In consideration of these special circumstances, an award of attorney's fees and costs would be manifestly unjust.

ORDER

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

ORDERED: That the motion for attorney's fees and costs be and the same is hereby denied.

DONE AND ORDERED this 9th day of March, 2009, in Tallahassee, Leon County, Florida.



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P. MICHAEL RUFF  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with Clerk of the  
Division of Administrative Hearings  
this 9th day of March, 2009.

ENDNOTE

<sup>1/</sup> § 110.181(1)(a), Fla. Stat. (2006).

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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.