

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SERVICE INSURANCE COMPANY,)
)
 Petitioner,)
)
vs.) Case No. 09-3042RX
)
OFFICE OF INSURANCE REGULATION)
AND FINANCIAL SERVICES)
COMMISSION,)
)
 Respondents.)

)

SUPPLEMENTAL FINAL ORDER

Pursuant to notice, the attorney's fees and costs portion of this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on February 22, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Richard J. Santurri, Esquire
 Mang Law Firm, P.A.
 660 East Jefferson Street
 Post Office Box 11127
 Tallahassee, Florida 32302

For Respondents: Elenita Gomez, Esquire
 S. Marc Herskovitz, Esquire
 Office of Insurance Regulation
 200 East Gaines Street
 Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner is entitled to an award of reasonable attorney's fees and costs from Respondents

in this rule challenge proceeding, pursuant to Section 120.595(3), Florida Statutes.

PRELIMINARY STATEMENT

By Final Order entered October 22, 2009, Florida Administrative Code Rule 690-170.105(1)(d) was held to be an invalid exercise of delegated legislative authority. That Final Order reserved jurisdiction as to all issues involving the amount of reasonable attorney's fees and costs to be awarded to Petitioner.

On November 19, 2009, Petitioner filed its Motion to Set the Amount of Attorney's Fees and Costs, which was accompanied by an affidavit and itemized billing and costs records. Respondents' Motion for Stay Pending Review, filed November 30, 2009, was denied by Order on Pending Motions Regarding Attorney's Fees and Costs entered December 16, 2009. Respondents' Motion for Review of that Order filed in the Florida District Court of Appeal, First District, on December 28, 2009, was granted by that Court on February 3, 2010, but Respondents' request that this proceeding be stayed was denied.

Petitioner's unopposed Motion to Amend Petitioner's Motion to Set Attorney's Fees and Costs, together with Petitioner's First Amended Motion to Set the Amount of Attorney's Fees and

Costs, were filed on February 4, 2010. On February 5, 2010, an Order Granting Motion to Amend was entered.

At the final hearing on the issue of Petitioner's entitlement to attorney's fees and costs, Petitioner offered no witnesses, but Petitioner's Exhibits numbered A-1 and A-2 were admitted in evidence. Robert Prentiss testified on behalf of Respondents, and Respondents were afforded the opportunity to file post-hearing portions of the rulemaking record to be marked as Respondents' composite exhibit numbered 1. On February 25, 2010, Respondents filed documents which were and were not part of the rulemaking record, and Respondents filed an additional document on March 26. Since both filings represent that Petitioner had no objection thereto, those documents filed on both dates are admitted as Respondents' Exhibit numbered 1.

During the final hearing, Respondents stipulated that the attorney's fee sought by Petitioner in the amount of \$30,717.50 is a reasonable amount if Petitioner is entitled to an award of attorney's fees. By Case Status Report filed February 23, 2010, the parties stipulated that the amount of \$199.75 is a reasonable amount for costs to be reimbursed to Petitioner if Petitioner is entitled to an award of costs.

SUPPLEMENTAL FINDINGS OF FACT

The Findings of Fact numbered 1 through 16 contained within the Final Order entered on October 22, 2009, are adopted and incorporated herein.

Respondents' actions are not substantially justified because there was no reasonable basis in law and in fact for adopting the subject rule or for Respondents to continue reliance on the rule.

There are no special circumstances which would make the award of attorney's fees and costs to Petitioner unjust.

SUPPLEMENTAL CONCLUSIONS OF LAW

The Conclusions of Law numbered 17 through 37 contained within the Final Order entered on October 22, 2009, are adopted and incorporated herein.

Section 120.595(3), Florida Statutes, provides that if a rule is declared invalid, an 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.

Section 627.062(6), Florida Statutes (1996), was the authorizing statute for Florida Administrative Code Rule 690-

170.105(1)(d), the rule determined to be invalid in this proceeding. The statute authorized the Department of Insurance to promulgate arbitration rules for rate filings but specifically prohibited those arbitration rules from being inconsistent with the arbitration rules of the American Arbitration Association as of January 1, 1996. The rule challenged in this proceeding begins with the words:

"Notwithstanding anything to the contrary . . . in the AAA Rules" The opening language of the Rule almost blatantly advises the reader that the Rule is likely to be inconsistent with the AAA Rules, and the Final Order entered in this cause explains how the Rule is inconsistent. Accordingly, there was no reasonable basis in law and fact for the promulgation of the Rule.

Respondents argue herein that special circumstances exist which would make an award of attorney's fees and costs unjust because Respondents did not promulgate the Rule; they simply "inherited" it from the Department of Insurance. Respondents' argument is not persuasive.

Section 20.121(5), Florida Statutes (2002), transferred the existing rules of the Department of Banking and Finance and of the Department of Insurance to the Department of Financial Services or the Financial Services Commission in accordance with "the corresponding regulatory or constitutional function" of

each of those new entities, effective January 7, 2003. As testified to by the Respondents' witness in this portion of the final hearing, all the rules of the former entities had to be analyzed as to which entity would "inherit" which rules, and the rules had to be re-numbered for the entity to which they were assigned. According to that witness, "it was a big involved project as to who got what rules." Transcript, p. 44. It is not credible, therefore, that Respondents would not have considered the Rule's contents contrasted with its enabling statute when it was being "analyzed" at that time.

Further, since 1996 Section 120.74, Florida Statutes, has required that each agency, as often as necessary, review its rules and revise them to ensure that they comply with statutory requirements. Additionally, Subsection (1) requires each agency to conduct a formal review of its rules every two years to identify and correct deficiencies in the rules. Lastly, Subsection (2) requires each agency to report in writing to the Legislature and the Administrative Procedures Committee by October 1 of each odd-numbered year that the agency has complied with the statutory requirements to review its rules to ensure they comply with statutory requirements. The statute contains no exception for an agency whose rules were transferred to it.

Essentially, Respondents wish to take advantage of the challenged rule, accepting its benefits, but avoiding its

liabilities. As explained in the Final Order entered in this cause, Respondents wish to apply the subject Rule to Petitioner and even take disciplinary action against Petitioner for not complying with the Rule. Under the facts of this case, special circumstances exist which would make unjust a failure to award attorney's fees and costs to Petitioner.

It is, therefore,

ORDERED that Respondents shall pay to Petitioner the amount of \$30,717.50 as a reasonable attorney's fee plus the amount of \$199.75 as reasonable costs.

DONE AND ORDERED this 7th day of April, 2010, in Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2010.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.