STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VIPUL PATEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-8955F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
DEEPPAKKUMAR SHAH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9631F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
MIJEONG CHANG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9633F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
SAURIN C. MODI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9635F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	

MIRIAM L. HERNANDEZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9636F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
MIRLEY ALEMAN-ALEJO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9637F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
SE YOUNG YOON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9639F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
JOHN H. NEAMATALLA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9645F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	

VALLIAMMAI NATARAJAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9646F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
RAVICHANDRAN SOKKAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9647F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	
MD. A. SAMAD MRIDHA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-9648F
	)	
BOARD OF PHARMACY,	)	
	)	
Respondent.	)	
	)	

PARTIAL FINAL ORDER

An evidentiary hearing was not conducted in this case. The parties submitted documentary evidence to support their respective positions in the cause. The parties have been represented by counsel and have elected to bifurcate the proceeding to first resolve the underlying questions of law upon which the entitlement to attorneys' fees rests. The case was

transferred to J. D. Parrish, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), to review the evidence, the parties' proposed orders, and to enter this Partial Final Order.

APPEARANCES

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For Respondent: Allison Dudley
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STATEMENT OF THE ISSUE

Whether Petitioners are entitled to attorneys' fees and costs.

PRELIMINARY STATEMENT

Petitioners sought a variance from or waiver of Florida Administrative Code R. 64B16-26.2031. Respondent denied each request. Thereafter, Petitioners filed petitions to challenge the denials and hired counsel of record in this case to represent them. Ultimately, Petitioners prevailed and were granted variances. These cases ensued because as prevailing parties, Petitioners claim they are entitled to their attorneys' fees and costs. Petitioners base their claims on sections 57.105, 120.569(2)(e), and 120.595, Florida Statutes (2009).

Unless, otherwise, stated all references to statutes will be to Florida Statutes (2009).

In December 2010, the parties submitted documentary evidence and proposed orders to address the questions of law. This Partial Final Order is entered to resolve the ultimate issue of whether Petitioners are entitled to recover their fees and costs.

FINDINGS OF FACT

1. The following facts are taken verbatim from the parties' Joint Pre-Hearing Stipulation (JPS):

> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Vipul Patel's Petition for Variance from or Waiver of Rule 64B16-26.2031, F.A.C. (hereinafter Petition for Variance).
>
> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Se Young Yoon's Petition for Variance.
>
> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Miriam L. Hernandez's Petition for Variance.
>
> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Mirley Aleman-Alejo's Petition for Variance.
>
> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied John H. Neamatalla's Petition for Variance.

> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Md. A. Samad Mridha's Petition for Variance.
>
> On or about April 8, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Valliammai Natarajan's Petition for Variance.

2. For convenience sake, the foregoing-named Petitioners are referred to as "Group 1."

3. Petitioners' "Group 2" are identified in paragraphs 38 through 41 of the JPS:

> On or about June 10, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Saurin Modi's Petition for Variance.
>
> On or about June 10, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Deepakkumar Shah's Petition for Variance.
>
> On or about June 10, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Ravichandran Sokkan's Petition for Variance.
>
> On or about June 10, 2008, at a regularly scheduled Board of Pharmacy meeting, Respondent denied Mijeong Chang's Petition for Variance.

4. Respondent issued orders denying the Petitions for Variance for Group 1 Petitioners on or about May 9, 2008.

5. Respondent issued orders denying the Petitions for Variance for Group 2 Petitioners on or about July 3, 2008.

6. Subsequent to the entry of the orders denying their variances, each of Group 1 Petitioners retained counsel and filed petitions to challenge the denial of their variances.

7. Subsequent to the entry of the orders denying their variances, each of Group 2 Petitioners retained counsel and filed petitions to challenge the denial of their variances.

8. All petitions were filed within 21 days of the entry of the orders that denied the variance. Respondent did not dispute the timeliness of the petitions, but took no action on the petitions.

9. Instead, on or about August 21, 2008, Respondent reconsidered the petitions for variance, and granted all of the Petitioners' requests. Respondent did not take action on the requests to challenge the original variance denials, did not refer the cases for formal proceedings, and did not re-visit Petitioners' claims until August 21, 2008.

10. On or about September 5, 2008, Respondent entered orders granting Petitioners' variances.

11. Group 1 Petitioners waited approximately five months to obtain approval of their variances. In the meanwhile, they had retained counsel and filed petitions to challenge the denials. Group 2 Petitioners waited approximately three months for their variances to be approved. They, too, retained counsel to protect their rights.

12. In October 2008, Petitioners filed Petitions for Attorneys' Fees and Costs with Respondent. Respondent did not grant, deny, or refer those petitions to DOAH.

13. On or about November 24, 2008, Petitioners filed a Verified Writ of Mandamus, in the Eighteenth Judicial Circuit Court, Seminole County, Florida, requesting that the court require Respondent to either grant or deny the petitions for attorneys' fees and costs.

14. On or about December 2, 2008, Petitioners served on Rebecca Poston, executive director of the Board of Pharmacy, a summons with petition for writ of mandamus.

15. On or about February 16, 2009, Petitioners filed a Motion for Entry of Clerk's Default for Failure of Respondent to file a Response to the writ.

16. The case was transferred to the Second Judicial Circuit, Leon County, Florida.

17. On or about June 4, 2010, the Second Judicial Circuit, Leon County, Florida, issued an Order to Show Cause on Respondent.

18. Ultimately, the court denied the writ and dismissed the Order to Show Cause.

19. Petitioners then filed Petitions for Attorneys' Fees and Costs with DOAH and the cases were consolidated for hearing.

20. The parties agreed to bifurcate the issues and resolve the issue of whether Petitioners are entitled to attorneys' fees and costs, before addressing the remaining question of the amount of fees and costs, if appropriate to award them.

21. Petitioners were the prevailing parties in the underlying matter, since the variances were granted.

22. On August 1, 2008, Respondent issued a Notice of Proposed Rule Development for Florida Administrative Code Rule 64B16-26.2031.

23. On August 1, 2008, A Notice of Proposed Rule for rule 64B16-26.2031 was published in the Florida Administrative Weekly.

24. On August 13, 2008, approximately eight days before the variances were approved, Respondent decided to amend rule 64B16-26.2031. Implicit in this amendment, is the concession that the former version of the rule exceeded Respondent's statutory authority.

25. Respondent approved the amended rule 64B16-26.2031, on or about June 10, 2009.

26. Petitioners maintain that Respondent acted with an improper purpose when it denied Petitioners' initial applications and subsequent petitions for variance. Petitioners assert that Respondent caused undue delay, by failing to timely grant or deny Petitioners' petitions to challenge the variance

denials, and that Respondent's failure to grant, deny, or forward the petitions to DOAH, was an abuse of the agency's discretion. Further, Petitioners claim that Respondent should have acted on the petitions for attorneys' fees and costs, or referred them to DOAH.

27. Respondent maintains it acted appropriately and in good faith, because its actions were substantially justified and in accordance with law.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 57.105, 120.569, and 120.595, Fla. Stat.

29. Petitioners have the burden to prove that attorneys' fees and costs should be awarded under sections 57.105, 120.569, and 120.595.

30. Section 57.105, provides, in part:

> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the

> administrative law judge of jurisdiction to make the award described in this subsection.

31. The standards for an award provided in section 57.105, (1)-(4), specify that the losing party knew or should have known that its position was not supported by the material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts. Second, a claim for sanctions would not apply if it is determined that the claim or defense was presented by the losing party in good faith, with a reasonable expectation of success. Third, if it is determined that the actions of the losing party were taken primarily for the purpose of unreasonable delay, attorneys' fees may be imposed. And, fourth, a claim for sanctions must be timely presented.

32. In Boca Burger, Inc. v. Richard Forum, 912 So. 2d 561 (Fla. 2005), the court recognized that section 57.105, authorizes an expansion of the historical standard for the imposition of sanctions, such as attorneys' fees and costs. Parties in Florida, must now recognize that positions taken that are not supported in fact or law may result in the imposition of sanctions. In this case, Respondent presented no credible explanation as to why the agency did not take prompt action on Petitioners' petitions to challenge the denials of their variances.

33. Section 120.569, provides, in part:

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1). Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

(b) All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. The notice shall include:

1. A statement of the time, place, and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully

review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable. This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the petition is in substantial compliance with the requirements of paragraph (c).

(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.

34. Before imposing sanctions under section 120.569, case law requires that an objective standard be used to determine whether an action was taken for an improper purpose. First, an inquiry into the pertinent facts and applicable law must be made. Second, in the absence of direct evidence of the party's state of mind regarding the motivation for its action, circumstantial evidence may be considered. See Friends of Nassau Cnty., Inc. v. Nassau Cnty., 752 So. 2d 42 (Fla. 1st DCA 2000).

35. In this case, the facts are uncontested: Respondent did not take action on the petitions challenging the denials of the variances; Respondent recognized that the rule it relied upon to deny the variances needed to be amended; Respondent initiated steps to amend the rule; and, ultimately, after a delay of months, the variances were granted. It is concluded that the law applicable to the petitions did not support Respondent's position. Finally, in the absence of direct evidence regarding the party's state of mind, it is concluded that the uncontested fact that Respondent took steps to amend the rule, supports the conclusion that it knew the law did not support its position. There is no evidence that delaying the approvals served a legitimate purpose. There is no evidence

that Respondent had a legal basis for not timely acting on Petitioners' petitions. As a matter of law, Respondent was required to approve, deny, or refer the petitions for an appropriate hearing.

36. Respondent's behavior unnecessarily delayed the administrative process in two ways. First, Respondent relied upon a rule in the denials of the variances that it recognized required amendment. Second, Respondent failed to timely address the petitions challenging the denials. Both actions were contrary to law. The goal of streamlining litigation to avoid unnecessary pleadings and posturing was defeated by Respondent's behavior. The delay in awarding Petitioners' their remedy was unnecessary and contrary to the spirit of the statute.

37. Section 120.595, provides in part:

> (1)CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—
>
> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney’s fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the

administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that

> a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.
>
> * * *
>
> (6) OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney's fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney's fees and costs as provided in those sections.

38. This case did not evolve as administrative causes are designed to proceed. Typically, agency decisions that affect substantial interests of a party are challenged by timely filed petitions. § 120.569(2)(a), Fla. Stat. Such petitions challenge the validity of the decision and the parties are provided a "point of entry" to seek administrative review. In this case, although Respondent took action adverse to Petitioners' interests and petitions were filed to challenge those decisions, Respondent did not forward the cases to DOAH for formal proceedings. Id. Also, Respondent did not proceed with informal resolution of the cases assuming, arguendo, that the parties could agree there were no disputed issues of

material fact to litigate. Instead, Respondent did nothing to expedite the decisions requested by Petitioners. As stated repetitively herein, Respondent's failure to act on the petitions was not in accordance with law.

39. In Ft. Myers Real Estate Holdings, LLC v. Department. of Business & Professional. Regulation, Division of Pari-Mutuel Wagering, 53 So. 3d 1158 (Fla. 1st DCA 2011), the court reiterated the precept that a person whose substantial interests are determined by an agency is entitled to some kind of hearing, either formal or informal, to challenge the agency's decision once the agency's decision-making process is complete. In this case, Respondent was required to either grant or deny the Petitioners' petitions challenging the variance denials. Thereafter, the cases should have been forwarded to DOAH for further proceedings or, if there were no issues of material fact, Respondent should have scheduled the cases for informal hearings so that the question of law controlling the cases could be addressed. See § 120.57(2), Fla. Stat. Instead, Petitioners were required to wait an inordinate amount of time before their variance requests were granted.

40. The position taken by Respondent in this case is contrary to the fundamental principles of administrative law. Respondent's position in failing to render a decision on the petitions is not supported in law or fact. In this regard,

Petitioners are entitled to attorneys' fees and costs, in accordance with Salam v. Board of Professional Engineers, 946 So. 2d 48 (Fla. 1st DCA 2006) and Residential Plaza at Blue Lagoon, Inc. v. Agency for Health Care Administration, 891 So. 2d 604 (Fla. 1st DCA 2005).

41. It is concluded that Petitioners are entitled to attorneys' fees and costs for the proceedings made necessary by Respondent's conduct. More specifically, it is concluded that Respondent's conduct was not substantially supported by law. Respondent's conduct caused an unnecessary delay, as it knew or should have known (based upon the timing of the amendment to the rule), that Petitioners were entitled to approval. To delay the approvals until September 5, 2008, was unconscionable. This abuse of authority justifies an award of fees and costs. Although Respondent contested the award of fees in general, it also noted that fees incurred for the circuit court proceedings (Writ of Mandamus Action) should not be awarded. In ruling on the writ, the circuit court found: "The Petition for Writ of Mandamus is denied, as Respondent has now done what Petitioners requested in their Petition by submitting the petitions for attorneys fees to the Division of Administrative Hearings."

42. The Petitioners prevailed in the writ proceedings, because the court recognized that Respondent ultimately agreed

to comply with the law. Thus, Petitioners are entitled to fees and costs for that portion of the proceeding.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioners are entitled to attorneys' fees and costs. Jurisdiction in this matter is reserved for the entry of an order to specifying the amounts owed. The parties are directed to confer and attempt to resolve this issue. Should the parties fail to agree on the amounts owed, the parties are directed to file proposed dates for the scheduling of an evidentiary hearing to resolve the matter. The report required by this Order must be filed no later than 5:00 p.m., May 29, 2011.

DONE AND ORDERED this 29th day of April, 2011, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 29th day of April, 2011.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Partial 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.