STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SMITH CHILD CARE CENTER AND S. S.,	)	
Petitioners,	)	
vs.	)	Case No. 11-2432F
DEPARTMENT OF CHILDEN AND FAMILIES,	)	
Respondent.	)	

FINAL ORDER

This matter came on for determination by Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings, on the parties' written submissions, after the parties waived an evidentiary hearing.

APPEARANCES

For Petitioner: Robert H. Grizzard, II, Esquire
Robert H. Grizzard, II, P.A.
Post Office Box 992
Lakeland, Florida 33802-0992

For Respondent: T. Shane DeBoard, Esquire
Department of Children and Families
400 West Robinson Street, Suite S-1129
Orlando, Florida 32801-1782

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioners, Smith Child Care Center and Sarah Smith (Petitioners),[1/] are entitled to an award of attorney's fees and costs to be paid by Respondent,

Department of Children and Families (Respondent or the Department), pursuant to section 57.111, Florida Statutes (2009).[2/]

PRELIMINARY STATEMENT

On March 11, 2011, the Department rendered a Final Order adopting recommended Findings of Fact and Conclusions of Law, concluding that Petitioners violated specified child care facility licensure rules and imposing disciplinary action based on those violations. The underlying facts forming the basis of the Final Order are described in the Recommended Order in Department of Children and Families v. Smith Child Care Center and S. S., Case No. 10-0985 (Fla. DOAH Dec. 30, 2010) (the underlying proceeding). The Final Order was not appealed.

On May 12, 2011, Petitioners, who were Respondents in the underlying proceeding, filed a petition for attorney's fees and costs pursuant to section 57.111. The petition asserted that Petitioners were "prevailing parties" in the underlying proceeding. Attached was an affidavit of attorney's fees and costs by Petitioners' attorney.

An Initial Order established the framework for this proceeding. First, Respondent was required to submit a written response setting forth defenses to the petition, specifying whether Respondent disputed the component issues to be determined under section 57.111, stating the particular grounds

for any such disputes, and requesting or waiving an evidentiary hearing. Petitioners were then given a specified time period to respond to disputed issues raised by Respondent and to request an evidentiary hearing.

After an unopposed extension of time, Respondent filed its written response with exhibits. Respondent acknowledged that the following points were not in dispute: Petitioners were small business parties; the attorney's fees and costs enumerated in Petitioners' affidavit were reasonable in amount; and Respondent was not a nominal party in the underlying proceeding. Remaining for resolution under section 57.111 were the following disputed issues: whether Petitioners were "prevailing parties" in the underlying proceeding within the meaning of section 57.111; whether Respondent's actions were substantially justified; and whether circumstances exist that would make an award unjust. Respondent's written response expressly waived an evidentiary hearing on these questions.

In addition to filing a written response, Respondent also served, and later filed, its own motion for attorney's fees and costs against Petitioners and their attorney, pursuant to section 57.105, Florida Statutes (2010). The motion asserted that Petitioners' section 57.111 petition was unsupported by facts or law and, therefore, was subject to sanctions in the form of reasonable attorney's fees and costs paid to Respondent.

Attached to the motion was an affidavit attesting to the attorney time spent responding to the section 57.111 petition.

After an unopposed extension of time, Petitioners submitted a reply to Respondent's arguments regarding the section 57.111 petition. Petitioners did not take the opportunity offered in the Initial Order to request an evidentiary hearing in their reply. Petitioners also filed a response to Respondent's motion for sanctions pursuant to section 57.105, in which Petitioners disputed the basis for and reasonableness of the claim for attorney's fees. Petitioners did not submit an affidavit to support their challenge to the reasonableness of Respondent's claimed fees.

Since the parties did not timely request an evidentiary hearing in accordance with the Initial Order, an evidentiary hearing was deemed waived, and the undersigned has proceeded to "decide for or against the award and the amount, if any, on the basis of the pleadings, the supporting documents, and the file of the Division of Administrative Hearings in the underlying proceeding."

FINDINGS OF FACT

1. As fully described in the underlying proceeding, the disciplinary action against Petitioners arose primarily from an incident occurring on September 4, 2009, involving two licensed child care facilities owned and operated by Petitioner Sarah

Smith--Petitioner Smith Child Care Center and another facility called Heaven's Little Angels. Events at the two facilities were inexorably intertwined, with Ms. Smith serving as the common denominator. As an abbreviated summary of the September 4, 2009, incident, Ms. Smith had been found to be out of compliance with square footage requirements for the number of children at Smith Child Care Center. To rectify that problem, she caused many more problems by having a young child transported from Smith Child Care Center, where the child was registered and where his file remained, to Ms. Smith's other facility, Heaven's Little Angels. The child was sick and became unresponsive while at Heaven's Little Angels, but the other facility did not have his file and did not even know his name. Emergency responders were called and had to deal with the sick child without his file and without any information about his medical history. Ms. Smith was called at Smith Child Care Center to come to Heaven's Little Angels with the file, but she brought the wrong file and had to go back for the correct file. The child ultimately recovered after being taken to the hospital, but the situation led to investigations at both facilities and to the disciplinary action litigated in the underlying proceeding.

2. At the time of the September 4, 2009, incident, Ms. Smith's license to operate Smith Child Care Center was

approaching its expiration, requiring an application by Ms. Smith for license renewal. On January 22, 2010, the Department issued a notice of intent to deny Ms. Smith's application for renewal of the license to operate Smith Child Care Center. As set forth in the notice, the proposed denial was predicated on charges of alleged violations of licensure rules, most of which stemmed from the Department's investigation of the September 4, 2009, incident. The notice was self-described as an Administrative Complaint, because the denial of the renewal application was a disciplinary action.

3. On February 11, 2010, Petitioners filed a request for an administrative hearing to challenge the proposed agency action.

4. On May 28, 2010, the Department moved to amend its notice of denial, which served as the charging document, and that motion was granted. The amended notice of denial was similar to the initial notice, except that it revised a charge of failure to respond to the emergency needs of a child, which was factually directed to Heaven's Little Angels. Instead, the charge predicated on the same incident was recast as a failure to adequately supervise a child in the care of Smith Child Care Center by transporting the child to the other facility (Heaven's Little Angels) without parental permission or knowledge and without the child's file.[3/]

5. Both the original charging document and the revised charging document included other charges arising from the same September 4, 2009, incident, the most serious of which was the alleged failure to transport the child in an appropriate child safety seat, a Class I violation presenting a serious risk of imminent harm to the child. Petitioners were also charged with violating the licensure rule requirements for maintaining transportation logs. Among other alleged deficiencies, the charging documents alleged that the transportation logs failed to reflect the transport of the child involved in the September 4, 2009, incident from Smith Child Care Center to Ms. Smith's other child care facility. In addition, both charging documents alleged a violation of the square footage requirements at Smith Child Care Center.

6. The information on which the Department predicated its charges in both the original and the amended charging document is found in reports of inspections and investigations contemporaneously prepared by the Department staff who conducted the inspections and investigations.

7. For the violations alleged, both the original and amended charging document proposed denial of the Smith Child Care Center renewal license.

8. At some point before the final hearing in the underlying proceeding, Ms. Smith's other child care facility,

Heaven's Little Angels, was closed. The circumstances of the closure were not established in the record. However, Petitioners acknowledged in their reply to the Department's response[4/] that the former director of Heaven's Little Angels was disciplined for her role in the September 4, 2009, incident.

9. The final hearing in the underlying proceeding was initially scheduled in early July 2010, but Petitioners sought and obtained an unopposed continuance, and the hearing was ultimately held on October 21 and 22, 2010. In the interim, Ms. Smith was allowed to continue to operate Smith Child Care Center, subject to frequent inspection monitoring by the Department. In an inspection conducted in December 2009, the Department inspector found only one noncompliance issue on a minor item. In two subsequent inspections conducted in 2010, no violations were found.

10. The Department took into account the frequent inspections in the interim leading up to the final hearing in the underlying proceeding. Department witnesses attested to the increasing comfort they had with Ms. Smith operating Smith Child Care Center because of the recent track record of improved performance over time. In part, the improvement was attributed to the closure of Heaven's Little Angels, allowing Ms. Smith to focus her time and attention on ensuring regulatory compliance at a single facility. As a result, the Department announced at

the beginning of the final hearing that it was changing the proposed penalty it would advocate for the alleged violations from denial of license renewal to granting the renewal application, but imposing conditions and other discipline as penalties.

11. As detailed in the Recommended and Final Orders in the underlying proceeding, the Department proved by clear and convincing evidence the factual predicate for substantially all of its charges. The inspection reports in evidence were largely corroborated by the Department staff who conducted the inspections and who testified at the final hearing. The material allegations regarding the September 4, 2009, incident were established as charged; the serious Class I violation of failure to transport a child in an appropriate child safety seat was established as charged; the failure to adequately supervise the child who was inappropriately sent to Ms. Smith's other facility without his file and without his parent's permission or knowledge was established as charged; and the numerous defects in Smith Child Care Center's transportation logs were established as charged.

12. Although the Department chose to remove from its charging document the charges directed at Ms. Smith's other child care facility, the record evidence showed the factual and legal support for those charges against Ms. Smith as the owner

and operator of the other facility, the now-closed Heaven's Little Angels. Rather than drop those charges outright, the Department could have sought to amend the charging document to name Heaven's Little Angels as an additional Respondent, or the Department could have issued a second administrative complaint against Ms. Smith and Heaven's Little Angels, and then moved to consolidate the two related proceedings. There can be no doubt from the evidence in the underlying proceeding that the two facilities, linked by the common owner and licensee, were inexorably intertwined, particularly with respect to the September 4, 2009, incident. The record in the underlying proceeding does not support an inference that the Department did not pursue additional charges against Ms. Smith and the now-closed Heaven's Little Angels based on any perceived infirmity in the merits of such charges.

13. The Department also chose to not pursue the charges against Smith Child Care Center for violating square footage requirements. However, Ms. Smith essentially admitted that this violation occurred and, indeed, it was the impetus for her decision to have a child transported (improperly, without child safety seat and without his file) to her other facility, Heaven's Little Angels. Ms. Smith had to reduce the number of children at Smith Child Care Center so that facility would comply with the square footage rule, which requires a certain

number of square feet per child. Fla. Admin. Code R. 65C-22.02(3)(a). Given Ms. Smith's admission, it cannot be inferred that the Department chose to not pursue this charge based on a perceived lack of merits.

14. One alleged violation that was actually litigated to final resolution and that was found not proven by clear and convincing evidence was the charge that Petitioners were transporting too many children at once, exceeding the maximum capacity of Petitioners' van. However, the failure of proof on this charge was due to another violation that was proven. Petitioners' transportation logs were in such disarray that they provided both reasonable cause to believe that the van's capacity was regularly exceeded and doubt to clearly establish that that was, in fact, the case.

15. The only other charge that was actually litigated and that was not proven by clear and convincing evidence was the allegation that Petitioners twice violated the rule requiring that cleaning supplies be kept inaccessible to children. The Department established the first violation of the cleaning supply rule, but was unable to prove the second alleged violation, which was cited in the September 4, 2009, inspection report. The Department staff person who conducted the September 4, 2009, inspection testified that she prepared the inspection report contemporaneously with conducting the

inspection and that she made the finding that cleaning supplies were accessible to children; however, more than one year later, she was unable to specifically recall what cleaning supplies she discovered or where exactly they were. At the final hearing, Ms. Smith denied that there was any such violation on September 4, 2009. The inspection report prepared by the inspector during her inspection on September 4, 2009, was adequate to provide a reasonable basis for this alleged violation, although it was not sufficiently specific and detailed to meet the exacting standard of clear and convincing proof, when coupled with Ms. Smith's contrary testimony.

16. The section 57.111 petition seeks attorney's fees and costs for having to defend against the denial of Ms. Smith's license renewal for Smith Child Care Center. Petitioners acknowledge they did not prevail on all issues, but claim they prevailed on "significant issues." According to Petitioners, they prevailed because Ms. Smith was able to keep her license, and because the Department abandoned its charge of child abuse and neglect when it amended the charging document in May 2010. (See footnote 3 for a discussion of the child abuse and neglect reference in the charging documents, which was not dropped.)

17. The affidavit of Petitioners' counsel includes time entries back to October 8, 2009, predating the initiation of the underlying proceeding by three and one-half months.

18. The substantial majority of time entries and the substantial majority of fees sought were incurred after May 28, 2010, which was when the Department moved to amend the charging document to delete the count against Ms. Smith that was factually related to her other child care facility.

19. Petitioners did not attempt to allocate the total fees and costs claimed to apportion the total between issues on which Petitioners argue they prevailed and issues on which Petitioners admit they did not prevail. Instead, Petitioners' request for attorney's fees and costs was expressly for the entire amount, including those incurred before the underlying proceeding was even initiated and those incurred in litigating issues as to which Petitioners admittedly did not prevail.[5/]

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

Petitioners' Section 57.111 Petition

21. Petitioners initiated this action by filing a petition for attorney's fees and costs pursuant to section 57.111, claiming that in the underlying proceeding, Petitioners were prevailing small business parties entitled to recover the full amount of attorney's fees and costs set forth in their supporting affidavit.

22. The disputed issues with regard to Petitioners' section 57.111 petition are: (1) whether Petitioners were "prevailing parties" in the underlying proceeding; (2) whether Respondent's disciplinary action was "substantially justified" when initiated; and (3) whether "special circumstances exist which would make the award unjust." § 57.111(4)(a).

23. Petitioners have the burden of proving by a preponderance of the evidence that they were prevailing parties in the underlying proceeding within the meaning of section 57.111. If Petitioners meet their burden, then Respondent has the burden of proving by a preponderance of the evidence that its disciplinary action was substantially justified when initiated or that circumstances exist that would make an award unjust. Dep't of Prof'l Reg., Div. of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

"Prevailing Small Business Party"

24. Petitioners claim to be prevailing small business parties without analyzing whether or how they might fit within the statutory definition of this critical phrase which is codified in section 57.111. The Legislature crafted the following definition of "prevailing small business party" for the specific purpose of applying section 57.111:

> 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).

25. The underlying proceeding was resolved by final order for which the time to appeal has expired, and, thus, the first test for prevailing party status applies. The underlying proceeding was not resolved by settlement, or by Respondent's voluntary dismissal of its complaint, and, thus, neither the second, nor the third test for prevailing party status applies.

26. Petitioners' argument for prevailing party status is based on a blend of bits and pieces from each of the distinct statutory tests for "prevailing small business party." In essence, Petitioners claim prevailing party status if a final order is entered in favor of a party (from subparagraph (3)(c)1.) on a majority of issues (from subparagraph (3)(c)2.), counting as issues in a party's favor those subparts of a complaint that are voluntarily dismissed as if the entire complaint were dismissed (from subparagraph (3)(c)3.).

27. Instead, adhering to the statute as written, the test is whether a final order was entered in favor of Petitioners, not whether the final order was substantially in favor of Petitioners and not whether the final order was in favor of Petitioners on a majority of issues. Moreover, by its terms, the statutory test focuses on issues actually decided in the final order, as opposed to those issues that are not addressed in the final order, because the issues pertain to charges in the original administrative complaint that were voluntarily dismissed.

28. Judged by the plain meaning of the applicable statutory test, Petitioners were not prevailing small business parties in the underlying proceeding. The Final Order was not entered in Petitioners' favor; instead, the Final Order was adverse to Petitioners because it determined that Petitioners violated several licensure rules and imposed disciplinary action accordingly.

29. Petitioners argue that the standard for prevailing party status is whether they were "substantially" prevailing parties. The statute uses no such language. Petitioners offer as supporting authority cases that interpret different statutes that use, but do not define, the phrase "prevailing party." Petitioners have offered no legal authority under section 57.111 to support their position.

30. Thomas E. Kehoe d/b/a Kehoe on the Bay v. Department of Health & Rehabilitative Services, Case No. 90-3236F (Fla. DOAH April 5, 1991), was a section 57.111 proceeding similar to the case at bar. The underlying proceeding in Kehoe was a disciplinary action against an assisted living facility based on four allegations of deficiencies in an inspection of the facility. The agency dismissed one of the allegations at the outset of the final hearing and proceeded to hearing on the remaining three alleged violations, for which fines were sought. Of the three charges litigated, the agency proved two and failed to prove one. However, in the Final Order, the agency declined to impose any fines for the two violations based on mitigating circumstances proven at the hearing. Even though the agency prevailed on only two of the original four allegations and imposed no fines against the facility when fines had previously been advocated, the petition for attorney's fees and costs under section 57.111 was denied because the petitioner did not prove prevailing party status. Petitioner could not claim prevailing party status based on the voluntary dismissal of one of the four charges, because section 57.111(3)(c) does not define a prevailing party as one against whom the state agency voluntarily dismissed one of four counts in its complaint.

31. Briggs, et al. v. Department of Professional Regulation, Florida Real Estate Commission, Case No. 86-0583F

(Fla. DOAH May 9, 1986), was another such case. The petitioners sought an award of attorney's fees and costs pursuant to section 57.111 for having to defend a four-count Administrative Complaint. By Final Order, petitioners were found to have committed a violation charged in one of the four counts and a civil penalty of $1,000 was imposed for that violation. Under these circumstances, the attorney's fees petition was denied because the final order was not entered in petitioners' favor--the determination of a violation and imposition of a penalty was not a result in Briggs' favor. As stated in the Final Order denying the section 57.111 petition:

> Apparently, Petitioners conclude that if one is not found guilty of 3 of 4 alleged statutory violations, the order is "favorable." While this may seem a moral victory for a respondent and substantial mitigation may result in a reduced penalty being assessed . . ., neither the Recommended Order or Final Order reflects any "approval" of Respondent's conduct as reflected by the penalty assessed.

Briggs, supra, Final Order ¶ 16.

32. Likewise, in Hilgeman v. State, Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Case No. 90-6664F (Fla. DOAH Apr. 26, 1991), aff'd, 595 So. 2d 52 (Fla. 1st DCA 1992), a petition for section 57.111 fees and costs was denied, because the petitioner failed

to prove that a final order was entered in his favor by the prosecuting agency. As the hearing officer explained:

> In spite of the prosecuting agency's decision to not exact a penalty against the present Petitioner in the final order . . ., it found him in violation of the substantive provision [of a regulatory statute]. That was a conclusion of law which was adverse to his position. . . . [T]he decision which the prosecuting agency reached when it held that the present Petitioner had violated [a regulatory statute] does not favor the present Petitioner and the willingness to dismiss the case without imposing a penalty based upon the prosecuting agency's assessment of mitigating circumstances does not promote a different result.

Hilgeman, supra, at ¶ 14. As these cases instruct, a final order in one's favor is something different than a final order that is less adverse than it otherwise could have been.

33. Ruffin v. Department of Professional Regulation, Division of Real Estate, Case No. 85-4465F, 1986 Fla. Div. Adm. Hear. LEXIS 4004 (Fla. DOAH Feb. 7, 1986), squarely considered and rejected the argument, similar to that made by Petitioners here, that prevailing small business party status is achieved by litigating to final order and prevailing on a majority of issues. In Ruffin, the petitioner sought section 57.111 fees and costs for defending a four-count administrative complaint. After a hearing in the disciplinary action, the final order found the petitioner guilty of two of three allegations in Count I; guilty of the charges in Count II; and not guilty of

the charges in Counts III and IV. A fine and a 90-day license suspension were imposed as discipline for the violations found, and Counts III and IV were dismissed. Under these circumstances, the petitioner contended that she was a prevailing small business party as defined in section 57.111, because the final order found in her favor on a majority of issues. However, the section 57.111 petition was denied, and the standard argued by petitioner was rejected because "prevailing on a majority of the issues" is a criterion that only applies to cases resolved by settlement; there is no "majority of the issues" standard in section 57.111(3)(c)1., which sets the standard for cases that are litigated to final order. Ruffin, supra, 1986 Fla. Div. Adm. Hear. LEXIS 4004 at *6-*7.

34. Petitioners' argument for prevailing party status is predicated solely on judicial interpretations of the phrase "prevailing party" when used in other statutes that do not contain a specific definition of the phrase for purposes of such statutes (as section 57.111 does). For example, "prevailing party" is not generally defined in the federal Equal Access to Justice Act, 28 U.S.C. section 2412, for purposes of applying the statute in all cases (there is only a limited definition of "prevailing party" applicable only to eminent domain cases). By judicial interpretation of the undefined phrase, a prevailing

party can be one who has succeeded on a significant issue in litigation, which achieves a benefit the parties sought in bringing the lawsuit. But even if this were the applicable standard here, Petitioners would have to demonstrate that the success they achieved was accomplished in the litigation itself. Petitioners would not be prevailing parties to the extent their claimed success was not the result of Petitioners prevailing through litigation, but rather, was the result of the Department's voluntary choices to not pursue some charges in litigation and to seek reduced penalties based on mitigating circumstances. See, e.g., Dionne v. Floormasters Enters., 647 F.3d 1109, 1113 (11th Cir. 2011) (defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change); Morillo-Cedron v. Dist. Dir., U.S. Citizenship and Immigration Servs., 452 F.3d 1254, 1257-1258 (11th Cir. 2006) (same); Am. Cargo Transp., Inc. v. U.S., 625 F.3d 1176, 1182 (9th Cir. 2010) (plaintiff was not a "prevailing party" where the claimed victory was the result of government voluntary behavior, and not judicial action). As found above, Petitioners did not succeed on any significant issue that was actually litigated on the merits and decided in the Final Order. Petitioners benefited from voluntary Department actions in reducing and streamlining its charges and changing the proposed

penalties it would advocate in litigation, but Petitioners did not succeed through litigation on the significant issues.

35. It would be anomalous and contrary to the purposes of section 57.111 to accept Petitioners' position, because the result would be to punish the Department for voluntarily considering the most recent facts leading up to the final hearing as new mitigating circumstances that warranted leniency and by voluntarily reducing the proposed penalties sought in litigation. The Department's voluntary actions in this regard should be encouraged, not discouraged. "The [Florida Equal Access to Justice] Act is designed to discourage unreasonable governmental action, not to paralyze agencies doing the necessary and beneficial work of government." State Dep't of HRS v. South Beach Pharmacy Inc., 635 So. 2d 117, 121 (Fla. 1st DCA 1994), quoting Rudloe v. Dep't of Envtl. Reg., 33 Fla. Supp. 2d 203, 211 (DOAH 1987).

36. Finally, even if the applicable "prevailing small business party" standard in section 57.111 required only a showing that Petitioners prevailed on a majority of the issues or on substantial issues decided by the Final Order, it would be incumbent on Petitioners to establish an allocation of attorney's fees and costs so that the only fees and costs claimed would be those attributable to the issues resolved through litigation in Petitioners' favor. See, e.g., Cmty.

Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1146 (Fed. Cir. 1993) (award warranted where plaintiff presented documentation allocating and apportioning fees and costs to the prevailing issues); Kehoe, supra, Case No. 90-3236F, at ¶ 10 ("Assuming, arguendo, that Petitioner prevailed in two of the original four allegations against him, there was no evidence to support an allocation of fees and costs among the four allegations.")

"Substantially Justified"

37. Pursuant to section 57.111(3)(e), "[a] proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time it was initiated by a state agency."

38. In assessing the reasonableness of government action, for the Department to be "substantially justified" in initiating disciplinary action against a licensee, it "must have a solid though not necessarily correct basis in fact and law for the position it took in the action." Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002), quoting McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983). For example, when an investigation goes before a probable cause panel prior to issuance of an administrative complaint, the question of reasonableness of the factual and legal basis for the action can be resolved by considering the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint. Id. While

there must be some evidence considered that would reasonably indicate that a violation had occurred, the evidence need not be as compelling as that which must be presented at the administrative hearing on the charges to support a finding that a violation had occurred and to support the imposition of sanctions. Id.

39. Based on these standards, even if Petitioners had proven they were "prevailing small business parties," Respondent has met its burden of proving that the Department was substantially justified in initiating the underlying proceeding. The information available to the Department from its investigations and inspection reports was sufficient to reasonably indicate that violations had indeed occurred. The "reasonable cause" standard does not require that Respondent be fully prepared to present its case and prove all charged violations by clear and convincing evidence at the time it decides to file an administrative complaint; that would be an impossible standard that has been flatly rejected in Fish and other cases. Such a standard would defeat the intended purpose of section 57.111, by paralyzing agencies trying to do the necessary and beneficial work of government.

40. As explained in Irby, et al. v. Fla. Eng. Mgmt. Corp., Case No. 07-0427F (Fla. DOAH Apr. 18, 2007), the two standards--reasonable cause required to initiate a disciplinary action

versus clear and convincing evidence required to prove charges at the final hearing--plainly cannot be equated:

> That the evidence presented at hearing was not sufficient to ultimately sustain the charges does not mean that it was insufficient to initiate the proceedings. Moreover, it cannot be said that the [agency] had all of the same information presented at formal hearing. . . . Moreover, all witnesses who testified at formal hearing were subjected to cross-examination. The [agency] does not have the opportunity or the responsibility to weigh the strengths and weaknesses of each party's position, but rather simply to determine if some evidence exists to support the conclusion that a violation has occurred.

Irby, supra, at ¶¶ 19, 20.

41. Judged from the proper perspective, as found above, Respondent's action in initiating the disciplinary proceedings against Petitioners was not unreasonable governmental action, but, rather, was more than substantially justified by the information gathered from investigating the September 4, 2009, incident, which was the primary factual predicate for the underlying proceeding. Respondent's initiation of the underlying proceeding was a very reasonable, appropriate governmental action based on the information available to Respondent indicating that serious violations had indeed occurred. Indeed, unlike in Irby, the indications of serious violations were proven to be largely well-founded, after an

adversarial evidentiary hearing in which the evidence was judged by the more exacting clear and convincing evidence standard.

42. Because Respondent has established that its actions were substantially justified, it is unnecessary to address Respondent's alternative contention that special circumstances exist that would make an award unjust.

Respondent's Motion for Section 57.105 Sanctions

43. Respondent contends that Petitioners' section 57.111 petition is unsupported by facts or law, and thus, sanctions should be imposed against Petitioners and their attorney pursuant to section 57.105 for filing and pursuing the petition and causing Respondent to devote resources to responding to the petition.

44. Frankly, Respondent's section 57.105 motion presents a substantially closer question than did Petitioners' section 57.111 petition. Nonetheless, the undersigned does not find Petitioners' action here to warrant sanctions.

45. As to Petitioners' arguable factual support for the petition, it is factually true that Respondent abandoned at least some of the original charges; it is factually true that Respondent was unable to prove by clear and convincing evidence certain parts of the charges actually litigated; and it is factually true that between the time when Petitioners requested

a hearing and the hearing was held, Respondent reduced the proposed penalty it advocated at the hearing.

46. As to Petitioners' arguable legal support for the petition, there is not an abundance of appellate decisional guidance interpreting the "prevailing small business party" standard in section 57.111(3)(c), while there are certainly a plethora of decisions interpreting similar phrases used in other statutes, such as in the federal Equal Access to Justice Act. While the statutory definition in section 57.111 itself seems clear enough, especially when coupled with the administrative final orders reviewed above, one could argue that the variation in the factual contexts presented by each case is a distinction that renders the legal question presented not so plainly and conclusively settled by other administrative final orders, even when affirmed without opinion by an appellate court. In other words, at least arguably, Petitioners' reliance on cases interpreting different statutes is an implicit argument for the adoption of new standards to be applied to the material facts, as a case of first impression. This argument was not actually articulated by Petitioners, but being most generous, one could infer such an argument as implicit from Petitioners' reliance on other decisions interpreting different statutes. While this unarticulated implicit argument is unconvincing, the undersigned concludes that it is barely sufficient support for the legal

positions of the section 57.111 petition, making them slightly better than "unsupported" and sanctionable under section 57.105.

ORDER

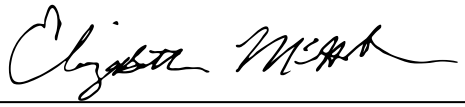
Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

ORDERED as follows:

1. The Petition for Attorney's Fees and Costs filed by Petitioners, Smith Child Care Center and Sarah Smith, is denied.

2. The Motion for Attorney's Fees and Costs filed by Respondent, Department of Children and Families, is denied.

DONE AND ORDERED this 12th day of October, 2011, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 2011.

ENDNOTES

[1/] In the caption of their petition that initiated this proceeding, Petitioners continued the use of initials to identify Petitioner Sarah Smith, following the practice of the

Department in the underlying proceeding. As indicated in the underlying proceeding, upon inquiry, the Department was unable to identify any basis for protecting the identity of an owner of a licensed child care facility and agreed that the owner's name is a matter of public record. Thus, while the caption in the underlying proceeding was not changed, it was deemed unnecessary to protect Ms. Smith's identity in the record of the underlying proceeding. The same approach is followed here.

[2/] Unless otherwise indicated, all references to the Florida Statutes are to the 2009 codification in effect at the time the Department initiated the underlying disciplinary action against Petitioners.

[3/] Petitioners claim that the original complaint charged them with "child abuse and neglect" and that this "most serious" charge was dropped in the amended complaint. Petitioners misread the complaints, neither of which directly charge Petitioners with "child abuse and neglect," but both of which refer indirectly to an investigation of the September 4, 2009, incident for child abuse and neglect pursuant to chapter 39, Florida Statutes, which resulted in a verified finding of "inadequate supervision." Thus, the reference to "child abuse and neglect" was to a child abuse and neglect investigation into the child care facility's inadequate supervision of a child in its care as a form of child neglect under chapter 39. While the child care licensure rules have their own definitions of inadequate supervision, they also incorporate by reference chapter 39, such that a violation of chapter 39 is also a violation of the child care licensure law. The charge of inadequate supervision was not dropped, and Petitioners were found to have violated this provision of the licensure rules.

[4/] The pleadings in this proceeding are confusing because Petitioners kept reverting to their denomination as Respondents in the underlying proceeding; Petitioners further confused the references by often just referring to the single Respondent Ms. Smith. Thus, for example, on July 15, 2011, Petitioners filed their reply to the Department's response to their section 57.111 petition. Petitioners named this pleading, "Respondent's Reply to Petitioner's Response to Her [Ms. Smith's] Motion for Attorney's Fees." More accurately, the pleading was Petitioners' reply to Respondent's response to Petitioners' petition for attorney's fees.

[5/] Petitioners inaccurately assert that several violations found in the underlying proceeding were not litigated because they

"were admitted," such as the charge of inadequate supervision, which included the components of failure to send the child's file with him when he was transported from Smith Child Care Center to Ms. Smith's other facility. Petitioners' Reply, filed July 15, 2011, ¶¶ 3-4. These charges were not admitted by Petitioners before the final hearing; Petitioners did not stipulate to any issues of fact or law so as to remove certain charges from the scope of the final hearing.

COPIES FURNISHED:

David Wilkins, Secretary
Department of Children and Families
Building 2, Room 202
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Drew Parker, General Counsel
Department of Children and Families
Building 2, Room 204
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Gregory Venz, Agency Clerk
Department of Children and Families
Building 2, Room 204B
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Robert H. Grizzard, II, Esquire
Robert H. Grizzard, II, P.A.
Post Office Box 992
Lakeland, Florida 33802-0992

T. Shane DeBoard, Esquire
Department of Children and Families
400 West Robinson Street, Suite S-1129
Orlando, Florida 32801-1782

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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.