STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARK N. SCHEINBERG, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4118F
	)	
DEPARTMENT OF HEALTH,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER DENYING MOTION FOR ATTORNEY'S FEES

This case came before Administrative Law Judge John G. Van Laningham on the motion of Petitioner Mark N. Scheinberg, M.D., for attorney's fees and costs pursuant to section 57.111, Florida Statutes. Respondent Department of Health objected to the relief sought. Neither party requested an evidentiary hearing in accordance with the Initial Order, and upon review of the file, the undersigned determined that the matter could be decided without one.

APPEARANCES

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For Respondent: Shirley L. Bates, Esquire
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STATEMENT OF THE ISSUE

The ultimate issue is whether Petitioner is entitled to an award of attorney's fees and costs in an amount not exceeding $50,000 pursuant to Section 57.111, Florida Statutes. Because it is undisputed that Petitioner is a "small business party" who prevailed in a previous administrative proceeding initiated by Respondent, he is entitled to such an award unless Respondent's decision to prosecute an administrative complaint against Petitioner was substantially justified.

PRELIMINARY STATEMENT

Petitioner Mark N. Scheinberg, M.D., initiated this action by filing Respondent's [sic] Amended Motion for Attorneys' Fees and Costs with the Division of Administrative Hearings on August 16, 2011. Respondent Department of Health moved to dismiss the proceeding, on September 6, 2011. An order denying the motion to dismiss was entered on September 7, 2011. The order provided in pertinent part as follows:

> No later than September 16, 2011, Dr. Scheinberg may (a) file a written response to the Department's argument that the disciplinary proceeding against him was substantially justified, and (b) in accordance with the Initial Order, request an evidentiary hearing if desired.

Dr. Scheinberg timely filed a written reply, as directed, on September 14, 2011. He did not request an evidentiary hearing.

FINDINGS OF FACT

1. After the Board of Medicine found that probable cause existed to suspect that Dr. Scheinberg had committed disciplinable offenses, the Department issued and prosecuted an administrative complaint against him, charging the obstetrician with medical malpractice and failure to keep records justifying the course of treatment in connection with the vacuum-assisted vaginal delivery of an infant born to patient L.G. on February 2, 2005, at West Boca Medical Center.

2. Dr. Scheinberg was found not guilty of the charges. See Dep't of Health v. Scheinberg, Case No. 10-10047PL (Fla. DOAH June 20, 2011; Fla. BOM Aug. 29, 2011).

3. The Department admits that Dr. Sheinberg is an individual whose net worth did not exceed $2 million at the time the Department initiated the underlying disciplinary proceeding and that, therefore, he is a "small business party" as that term is defined in section 57.111(3)(d)1.c., Florida Statutes.

4. The Department admits that, because no appeal was taken from the final order which the Board of Medicine entered in Dr. Scheinberg's favor, he is a "prevailing small business party" as that term is defined in section 57.111(3)(c)1.

5. In defending against the administrative charges, Dr. Scheinberg incurred attorney's fees and costs in excess of $50,000.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to

sections 57.111(4), 120.569, and 120.57(1), Florida Statutes (2010). The Administrative Law Judge has final order authority in this matter. § 55.111(4)(d), Fla. Stat.

7. Section 57.111, Florida Statutes, also known as the Florida Equal Access to Justice Act ("FEAJA"), directs that unless otherwise provided by law, a reasonable sum for "attorney's fees and costs"[1/] shall be awarded to a private litigant when all five of the following predicate findings are made:

1. An adversarial proceeding was "initiated by a state agency."[2/]
2. The private litigant against whom such proceeding was brought was a "small business party."[3/]
3. The small business party "prevail[ed]" in the proceeding initiated by a state agency.[4/]
4. The agency's actions were not substantially justified.
5. No special circumstances exist that would make the award unjust.

See § 57.111(4), Fla. Stat.[5/]

8. The party seeking an award under section 57.111 bears the burden of proving elements 1 through 3 (as enumerated above). If he succeeds, the burden then shifts to the state agency to disprove either element 4 or element 5 by affirmatively demonstrating that its actions were substantially justified or that an award of fees would be unjust under the circumstances. See Helmy v. Dep't of Bus. and Prof'l Reg., 707 So. 2d 366, 368 (Fla. 3d DCA 1998).

9. There is no dispute that elements 1, 2, and 3 are met here. The Department contends that an attorney's fees award is unwarranted nevertheless because its actions were substantially justified. "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." § 57.111(3)(e), Fla. Stat.

10. In the words of the First DCA, "the 'substantially justified' standard falls somewhere between the no justiciable issue standard . . . and an automatic award of fees to a prevailing party." Helmy, 707 So. 2d at 368; see also Dep't of HRS v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993)(citing with approval a federal court's equating "substantial justification" with "solid though not necessarily correct basis in fact and law"). Thus, while an agency need not have been certain of success to be found substantially justified in its litigating position, its grounds for action, to avoid liability for attorney's fees under FEAJA, must have been, not merely nonfrivolous, but reasonably meritorious.

11. In evaluating whether the Department's decision to prosecute Dr. Scheinberg was substantially justified, facts coming to light after the decision was made cannot be used to second-guess the action. See Dep't of Health, Bd. of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 933 (Fla. 1st DCA 2003)(subsequent discoveries do not vitiate reasonableness of

agency's actions). Thus, the "reviewing body——whether DOAH or a court——may not consider any new evidence which arose at a fees hearing, but must focus exclusively upon the information available to the agency at the time that it acted." Ag. for Health Care Admin. v. MVP Health, Inc., 2011 Fla. App. LEXIS 19197, *4 (Fla. 1st DCA Dec. 2, 2011).

12. The undersigned takes considerable guidance from MVP Health, a recent decision reversing the award of attorney's fees and costs which had been entered in MVP Health, Inc. v. Agency for Health Care Administration, Case No. 10-5913F, 2010 Fla. Div. Adm. Hear. LEXIS 221 (Fla. DOAH Dec. 14, 2010). The petitioner in MVP Health sought an award under section 57.111 after successfully establishing in the underlying proceeding that AHCA had erroneously withdrawn its application for licensure as a home health agency on the ground that the application was incomplete. In fact, the petitioner's application had been complete as of July 24, 2009, approximately three months before AHCA gave notice, on October 20, 2009, of the decision to deem the application incomplete and withdraw it from further consideration. See MVP Health, Inc. v. Ag. for Health Care Admin., Case No. 09-6021 (Fla. DOAH Apr. 22, 2010), rejected in part, Case No. 2009012001 (Fla. AHCA May 26, 2010).

13. AHCA had deemed the petitioner's application incomplete, in relevant part, for two reasons: (1) the petitioner could not prove that Rey Gomez was the petitioner's

sole shareholder because a lawsuit whose existence the petitioner had fully disclosed in the application, in which other individuals claimed to own some equity in the petitioner, was still underway; and (2) the petitioner's accreditation had been terminated. AHCA argued that its concerns about the petitioner's ownership and accreditation supplied substantial justification for deeming the application incomplete. The court agreed.

14. Regarding the first justification, the court explained that a reasonable person, having knowledge as AHCA did of the ongoing litigation, "might believe that the application did not contain all of the information concerning [the petitioner's] ownership." 2011 Fla. App. LEXIS 19197 at *6. Regarding accreditation, the court ruled that "a reasonable person could find that AHCA was 'substantially justified' in withdrawing the application as incomplete" based on the fact that "the [accrediting body] had notified AHCA by e-mail that . . . proceedings . . . to terminate [the petitioner's accreditation]" had been started, which "clearly indicated that [the petitioner's] disaccreditation was certain and imminent." Id. at *6-*7.

15. MVP Health teaches the undersigned that in evaluating an agency's action under section 57.111, the dispositive question is whether a reasonable person, viewing the facts known

to the agency at the time of the decision in the light most favorable to the agency, might believe that the agency acted properly. In other words, under MVP Health, the standard of review for an agency's decision for purposes of section 57.111 is deferential—akin to a determination of whether the agency abused its discretion in acting as it did.

16. In this case, the Department contends that the decision to prosecute Dr. Scheinberg was substantially justified because the Department had obtained the written opinion of an expert who asserted that Dr. Scheinberg had not met the prevailing standard of care. In fact, the Department's expert, Dr. Busowski, had stated in a letter to the Department dated March 13, 2009, that Dr. Scheinberg's treatment of patient L.G. had been substandard. In relevant part, Dr. Busowski informed the Department as follows:

> The standard of care would not have been to let the patient remain at cervical dilation of rim for 10 hours. The baby should have been delivered sooner and not delivered via a vacuum delivery which was performed. It should have been a cesarean section hours earlier. There was no evidence that physician was present during the course of labor until the delivery. There is no documentation from the nurses that he ever came out and examined the patient.

17. Dr. Busowski's opinion suffers from some analytical weaknesses that should give a reasonable person pause regarding the persuasiveness of the opinion. One is that the expert did

not actually describe the standard of care in such a way that would permit its application by someone other than Dr. Busowski. Instead Dr. Busowski stated what the standard of care is not and declared that Dr. Scheinberg should have performed a C-section "hours earlier." While this clearly indicated that Dr. Busowski was critical of Dr. Scheinberg's conduct, it is not possible to conceptualize a generally applicable standard of care from his opinion. Consequently, a reasonable person cannot independently evaluate the credibility of the standard of care that Dr. Busowski had in mind, much less whether Dr. Busowski correctly applied this standard to the circumstances surrounding Dr. Scheinberg's treatment of L.G.

18. In view of the foregoing, Dr. Busowski's opinion is essentially an appeal to authority, namely his own. Because he is a physician specializing in the relevant field, Dr. Busowski is an authority, and the Department was not acting capriciously in relying upon his expertise. The strength of an appeal to authority, however, rests on (a) the credentials, professional standing, and reputation of the authority and (b) the extent to which the authority's opinion falls within a professional consensus in the matter at issue. Reliance upon the expert opinion of a highly respected authority on a matter about which there is little controversy among experts in the field is one thing. Reliance upon the opinion of a little known or lightly

regarded authority on a matter about which there is no professional consensus is another.

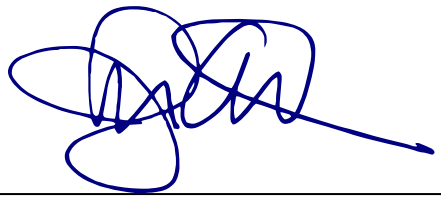
19. Here, it is difficult reasonably to assess the relative strength of Dr. Busowski's opinion because his March 13, 2009, letter sheds little light on the factors that a reasonable person should want to consider in weighing the authoritativeness of the opinion. Under MVP Health, however, it is unnecessary to probe too deeply into the agency's litigating position in search of potential flaws. The determinative question is whether, considering Dr. Busowski's opinion that Dr. Scheinberg should have performed a C-section on patient L.G. hours before the vacuum-assisted delivery occurred, a reasonable person might believe that Dr. Scheinberg had not met the prevailing standard of care. Viewing the facts known to the Department when it decided to take action against Dr. Scheinberg's license in the light most favorable to the Department, the undersigned concludes that a reasonable person might so believe.

20. Therefore, following the approach of the First DCA in MVP Health, it is concluded that the Department was substantially justified in prosecuting the administrative charges against Dr. Scheinberg which formed the basis of the underlying proceeding.

21. Accordingly, Dr. Scheinberg's application for attorney's fees and costs is denied.

It is ORDERED that Dr. Scheinberg shall recover nothing in this action. The file of the Division of Administrative Hearings is closed.

DONE AND ORDERED this 22nd day of December, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1]/ Under FEAJA, "[t]he term 'attorney's fees and costs' means the reasonable and necessary attorney's fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding." § 57.111(3)(a), Fla. Stat.

[2]/ FEAJA provides that "[t]he term 'initiated by a state agency' means that the state agency" did (or was required to do) one of three things: (1) "[f]iled the first pleading in any state or federal court in this state; (2) "[f]iled a request for an administrative hearing pursuant to chapter 120;" or (3) "[w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency." § 57.111(3)(b), Fla. Stat.

[3]/ The term "small business party" is defined as follows:

> 1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice 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 $2 million, including both personal and business investments;
> b. A partnership or corporation, including a professional practice, 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 $2 million; or
> c. An individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade; or
> 2. Any small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of

> tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor.

§ 57.111(3)(d), Fla. Stat.

[4]/ Pursuant to § 57.111(3)(c), Fla. Stat., a 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.

[5]/ The purpose of FEAJA is to "diminish the deterrent effect" exerted by the expense of legal proceedings, which discourages "certain persons" from challenging "unreasonable governmental action." § 57.111(2), Fla. Stat. (emphasis added). Consonant with the legislature's modest goal, FEAJA provides that "[n]o award of attorney's fees and costs for an action initiated by a state agency shall exceed $50,000." § 57.111(4)(d)2., Fla. Stat.

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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 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.