STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD LANGFORD, D.V.M.,

Petitioner,

vs. Case No. 11-5760F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, BOARD OF VETERINARY MEDICINE,

Respondent.

FINAL ORDER

On December 5, 2012, a duly-noticed final hearing was conducted in Tallahassee, Florida, by Administrative Law Judge Lisa Shearer Nelson, of the Florida Division of Administrative Hearings, for consideration of a Section 57.105 Motion for Failure to Present Facts to Establish a Claim.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue presented is whether Petitioner is entitled to attorney's fees pursuant to section 57.105, Florida Statutes (2011), and if so, what constitutes a reasonable fee?

PRELIMINARY STATEMENT

This case concerns a Section 57.105 Motion for Failure to Present Facts to Establish a Claim ("Fees Motion"), filed against Respondent, Department of Business and Professional Regulation ("the Department" or "DBPR"), by Petitioner, Richard Langford, D.V.M. ("Petitioner" or "Dr. Langford"). The Fees Motion was filed in response to the Amended Administrative Complaint filed against Dr. Langford in Department of Business and Professional Regulation v. Richard Langford, D.V.M., DOAH Case No. 11-3268 (Fla. DOAH Nov. 14, 2011; Bd. Veterinary Med. June 25, 2012)(the Merits Case). The Fees Motion, which was filed August 29, 2012, during the pendency of the underlying case, was opened as Case No. 11-5760 upon the issuance of the Recommended Order in the Merits Case. The current case was then placed in abeyance pending the issuance of a Final Order in Case No. 11-3268.

On June 25, 2012, the Board of Veterinary Medicine's Final Order in the Merits Case, dismissing the Second Amended Administrative Complaint, was filed with the Division. On July 5, 2012, an Order issued directing Petitioner to file an

Itemized Statement listing the fees and costs for which he seeks reimbursement, along with any supporting affidavits, and a statement as to whether he was requesting a hearing on the issue of fees. The Department was directed to file a response no later than 20 days after Dr. Langford's statement, identifying any dispute as to entitlement of an award and/or reasonableness of the fee sought, and stating whether a hearing was requested.

On August 1, 2012, Dr. Langford filed an Itemized Statement as required by the July 5, 2012, Order, with affidavits of counsel for Dr. Langford, and of Monica Rodriguez, Esquire, in support of the requested fees in the amount of $93,350.58. The Department filed a response on August 20, 2012, and, consistent with the dates provided by the parties, the case was scheduled for final hearing to commence October 1, 2012. At the request of the Department, the matter was continued and rescheduled for December 5, 2012, and the case proceeded as scheduled. At hearing, Petitioner presented the testimony of Monica Rodriguez, Esquire, and Petitioner's Exhibits lettered A-C, F, H, M, N, P, R, and T-X were admitted into evidence. The Department presented the testimony of Elizabeth Henderson, Esquire, and Kevin O'Donnell, Esquire, and Respondent's Exhibits A, B, and H were admitted into evidence.

The parties filed a Joint Prehearing Stipulation that included stipulated facts which, where relevant, have been incorporated into the Findings of Fact below.

The Transcript of the proceedings, consisting of one volume, was filed with the Division on December 27, 2012. Petitioner's Proposed Final Order was filed January 7, 2013, while the Department's Proposed Final Order was filed January 16, 2013. Both submissions have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of veterinarians in the State of Florida pursuant to section 20.165 and chapters 455 and 474, Florida Statutes.

2. At all times material to these proceedings, Petitioner has been a licensed veterinarian in Florida, having been issued license number VM 5290.

3. Petitioner was the treating veterinarian for a dog named, Awesomer, owned by Sheri Lawhun.

4. On April 28, 2009, Ms. Lawhun brought Awesomer to Petitioner for examination and treatment. Details of the treatment provided to Awesomer are related in the Findings of Fact in the Merits Case. For the purposes of this Final Order,

it is sufficient to state that Respondent treated Awesomer from April 28-30, 2009, and that on April 30, Awesomer died.

5. Ms. Lawhun filed a complaint with the Department of Business and Professional Regulation regarding the care and treatment Respondent provided to Awesomer.

6. Just prior to his provision of care for Awesomer, Dr. Langford's office switched to a "paperless" system, which involved switching to electronic medical records, bookkeeping, etc. Petitioner testified in the Merits Case that the medical record itself is stored on the computer software and that there are a wide variety of "print screen" options available. Dr. Langford demonstrated the complicated nature of the software and the ability to "hide" different parts of the medical records from the print screen, as well as to copy and paste entries to the "top" or most recent page, of the medical record. The software does not allow the user to delete record entries, but does allow a user to hide them, change the dates for them, or make them unavailable to print. There are also entries on screens called "snatch screens" that do not print.

7. As a result, there are three different sets of medical records for the same period of time for Awesomer that were admitted into evidence in the underlying case: 1) Petitioner's Exhibit A, which was printed on May 16, 2009, at the request of Ms. Lawhun; 2) Petitioner's Exhibit B, which is the copy of the

records printed on July 15, 2009, in response to the complaint filed with the Department; and 3) Petitioner's Exhibit C, which was printed August 2, 2011, and provided to Petitioner's counsel during the litigation of this case.

8. The three sets of medical records are not identical. Dr. Langford attributed these differences to entries that he ordered "declined" or hidden, so that the client did not see them, or because information was on the "snatch screen" in the program, which does not print.

9. For example, the information related to Awesomer's final visit to the clinic, according to Dr. Langford, was moved to the top of the record on May 16, 2009, so that Ms. Lawhun could see what happened on the day the dog died. He claimed that the entry was originally recorded soon after the dog's death, but that it was moved when providing the records to Ms. Lawhun. Similarly, the date of the dog's death is recorded in Petitioner's Exhibits A and B as May 1, 2009, the first business day following the dog's after-hours' visit. It is changed to April 30, 2009, in Petitioner's Exhibit C.

10. After the initial investigation of this case, counsel for the Department prepared a draft closing order and presented it to the probable cause panel for the Board of Veterinary Medicine at its meeting April 21, 2010. However, after some concerns expressed by the panel members, the Department's

recommendation was changed from closing the case to obtaining an expert review of the file.

11. The Department had the file reviewed by two veterinary experts, Dr. Jerry Green and Dr. Melanie Donofro. Dr. Donofro is a former member of the Board of Veterinary Medicine. Both experts opined that there were problems with the care and treatment of Awesomer, as well as problems with the medical records for Awesomer. As a result of the expert witness reviews, a four-count Administrative Complaint was drafted and filed, charging Respondent with violating subsections 474.213(1)(r)(violation of the relevant standard of care); 474.213(1)(ee)(failure to keep contemporaneously written medical records as required by rule of the board); 474.214(1)(w) (practicing at a location without a valid premises permit); and 474.214(1)(m)(failure to notify Board of a change of address).

12. The case was not taken back to probable cause prior to the drafting of the Administrative Complaint because of a computer data entry error that resulted in a computer record indicating probable cause had already been found. As is recounted below, the case eventually was presented to the probable cause panel a second time on the issue of medical records. Because the Fees Motion is directed to the medical records count, the failure to take the case back to the probable cause panel before the filing of the original Administrative

Complaint has no real significance at this point. Petitioner's assertion that counsel for the Department had a personal vendetta against him and had to remember that probable cause was not found at the April 2010, meeting is specifically rejected. As stated by Ms. Henderson at hearing, Dr. Langford's case was one of many presented for consideration. While it is unfortunate that an error occurred, it is not indicative of any "personal" interest in prosecuting Petitioner.

13. The Department and Dr. Langford agreed to a settlement that would have dismissed three of the four counts in the Administrative Complaint, and imposed a minimal penalty for Count III. However, when the stipulation was presented to the Board for approval, it was rejected. Board members voiced serious concerns regarding both the standard of care given to Awesomer and the adequacy of the medical records. The prosecutor told the Board that the Department entered into the settlement stipulation "in the interest of getting the case wrapped up," and that the Department believed that the case would be a "battle of the experts" with respect to the standard of care issue.

14. Ultimately, the Board voted to reject the stipulation offered and offered a counter proposal that would have resulted in dismissal of all of the charges except the medical records count, with a penalty consisting of a $1,500 fine, 30 days

probation, and costs. Dr. Langford rejected the counter-proposal.

15. An Amended Administrative Complaint was prepared and, along with the expert reports received, was submitted to the probable cause panel for review and approval. Also included in the materials was Dr. Langford's response to the Amended Administrative Complaint. While counsel for Dr. Langford offered to "walk them through" his response to the allegations contained in the Amended Administrative Complaint, counsel acknowledged that she did not have anything to add that was not in his written response.

16. The probable cause panel voted to approve amendment of the Administrative Complaint to a single charge of violating section 474.213(1)(ee). The panel also directed counsel for the Department to consult one of its experts, Dr. Green, to make sure the allegations in the Amended Administrative Complaint were consistent with his opinion. She did so.

17. Contrary to Petitioner's assertions, the panel did not simply "rubber stamp" the actions of the Department. Dr. Jones indicated her agreement with Dr. Green's expert opinion, and there is lengthy discussion of the case. See Petitioner's Exhibit P, pages 13-21, and 23-26.

18. Respondent disputed the allegations in the Amended Administrative Complaint and on June 24, 2011, the case was

forwarded to the Division of Administrative Hearings to conduct a section 120.57(1) hearing.

19. Discovery and motion practice was active and, at times, acrimonious.[1/] See, for example, the Order on Pending Motions, dated August 24, 2012. On August 29, 2012, Respondent filed the Fees Motion giving rise to this proceeding. The Fees Motion contains a certification that it was served on Petitioner on August 4, 2012.

20. Ironically, much of the Fees Motion has nothing to do with the allegations contained in the Amended Administrative Complaint. The first four pages of the Fees Motion present Dr. Langford's version of what happened in the final days of Awesomer's life, and include facts not found anywhere in the pleadings. The next sections deal with accusations of the dog owner involving a psychic, and "public untrue statements about Respondent," by Ms. Lawhun, which are also accusations not finding their way into the Department's charging document. It is not until page 16 of the Fees Motion that the actual allegations that would give rise to the motion are identified and discussed.

21. Ultimately, a Recommended Order was submitted that recommended dismissal of the Second Amended Administrative Complaint. The Recommended Order was issued after a section

120.57(1) hearing, and after consideration of all of the evidence presented at that hearing.

22. The Board of Veterinary Medicine issued a Final Order on June 25, 2012, adopting the Findings of Fact and Conclusions of Law contained in the Recommended Order.

23. At the time Petitioner filed the Fees Motion, the case was proceeding on the Amended Administrative Complaint. There was pending at that time a Motion to Amend the Amended Administrative Complaint, which was granted, and the case went to hearing on the Second Amended Administrative Complaint.

24. At pages 16-17 of the Fees Motion,[2/] Petitioner asserts that the Department alleges that he failed to properly document the dog’s heart rate and did not record any recommendations for diagnostic tests or follow-up examinations to determine the cause of the heart rate.[3/] The basis for Petitioner’s challenge is an attack on the sources used by and the opinion of Dr. Donofro, one of the Department’s experts.

25. The fact that Petitioner ultimately prevailed on this issue does not negate the fact that the Department obtained and relied upon an expert in veterinary medicine with respect to the allegations regarding Awesomer’s heart rate. The Department had a reasonable basis upon which to file the allegations in the Second Amended Administrative Complaint, and to proceed with those allegations.

26. Petitioner cites to the Department's allegations regarding his failure to record a fecal test. It was found in the Recommended Order that Respondent did not perform a fecal test (hence no record for one). While the Recommended Order concluded that the Department did not prove a medical records violation on this ground by clear and convincing evidence, the medical records indicate that the pet owner had reported that Awesomer had suffered from diarrhea the night before, and noted that his stool was "near normal" at the clinic. A notation of "near normal" stool could be interpreted, as it was in light of testimony presented at hearing, that no fecal test was performed and that the notation was based upon observation alone, or that fecal tests resulted in findings that were close to normal but that were not expressly recorded. Petitioner's record is ambiguous enough to support either interpretation, and the Department relied on the interpretation of its experts.

27. The fact that Petitioner ultimately prevailed on this issue does not negate the fact that the Department obtained and relied upon an expert in veterinary medicine with respect to the allegations regarding the tests, or lack thereof, of Awesomer's stool, and the Department had a reasonable basis to include the allegation in the Second Amended Administrative Complaint and to proceed with prosecution.

28. Respondent takes issue with the allegations regarding low-urine gravity and other serum values. The specific allegations, found at paragraphs 12-13 of the Second Amended Administrative Complaint, state:

> 12. Respondent performed a urinalysis for Awesomer.
>
> 13. Respondent recorded in the medical records that he found a "low urine gravity," but failed to address the elevated serum creatinine, serum albumin, serum sodium, and urine pH in Awesomer's medical records.

29. Dr. Donofro found the failure to address these values to be a problem. Ultimately, Dr. Langford's testimony that he documented the values in the record but did not record any follow-up based on his belief that the identified values were not abnormal was credited at hearing. However, the fact that Petitioner ultimately prevailed on this issue does not negate the fact that the Department obtained and relied upon an expert in veterinary medicine with respect to the allegations regarding the evaluation of serum creatinine, serum albumin, serum sodium, and urine pH. The Department had a reasonable basis on which to include the allegations in the Second Amended Administrative Complaint and to proceed with the prosecution of these allegations.

30. At page 16 of the Fees Motion, Petitioner takes issue with paragraphs 14-15 of the Second Amended Administrative

Complaint, which allege that Respondent failed to record any indication that Awesomer drank excessively, beyond the tentative diagnosis of polydipsia. Dr. Donofro's report specifically addresses the failure to indicate excessive fluid consumption in that one would expect to see a notation regarding the level of consumption, in light of Respondent's tentative diagnosis for Awesomer. Once again, however, the inclusion of this item in the Second Amended Administrative Complaint was based upon expert reports received by the Department prior to filing the Amended Administrative Complaint and the Department had a reasonable basis for including it and for prosecuting it.

31. At page 19 of the Fees Motion, Petitioner takes issue with the allegation that he failed to include anything in the medical records for April 28, 2009, to support the administration of Phenylpropanolamine. This allegation is discussed by Dr. Donofro in her report, upon which the Department relied. At hearing, the issue was decided in Dr. Langford's favor based upon his testimony and that of his expert witness, Dr. Vega (who is also a former member of the Board of Veterinary Medicine). However, the Department had a reasonable basis for including this factual allegation in the Second Amended Administrative Complaint and for prosecuting it.

32. At pages 19-20 of the Fees Motion, Petitioner takes issue with the inclusion of allegations related to the

documentation of a modified water-deprivation test. He is especially critical because he testified that he performed a modified water-deprivation test as opposed to a water-deprivation test, and states that the medical records clearly delineate that a modified water-deprivation test was performed. While the April 28, 2009, entry indicates that a modified water-deprivation test will be performed, there are other entries in the records for Awesomer that refer to scheduling and conducting a water-deprivation test. Based on the records, Dr. Donofro addressed this issue in her report.[4/] While Petitioner ultimately prevailed on this issue, there was a legitimate basis for the Department to include the allegations in the Second Amended Administrative Complaint and to proceed with these allegations.

33. On page 21 of the Fees Motion, Petitioner alleges that "Amended administrative complaint lines 25-26 allege Respondent failed to record in Awesomer's medical record for April 29, 2009, anything regarding this visit, including the lactated-ringers solution administration. It is there in the record for that date, clear as day, that it was administered, as it was, on April 30, 2009, not on April 29, 2009."

34. Petitioner's allegation is not consistent with the actual allegations in the Second Amended Administrative Complaint. That document states:

> 26. Respondent's written response from July 7, 2009, states that he examined Awesomer after 9:30 PM on April 29, 2009 and "found nothing abnormal in the examination of the dog, but considered the possibility of the lingering effects from the water deprivation study."
>
> 27. Respondent failed to record in Awesomer's medical records for April 29, 2009, anything regarding this visit or examination.
>
> 28. Respondent's written response from July 7, 2009, also states that he examined Awesomer after 9:30 PM on April 29, 2009, and "placed a catheter in [Awesomer's] arm, and administered 1000 cc of [Lactated Ringers Solution]."
>
> 29. Respondent failed to record in Awesomer's medical records for April 29, 2009, that he placed a catheter or administered the Lactated Ringers Solution (LRS).

35. The Fees Motion does not mention the July 7, 2009, response by Dr. Langford. It was not admitted into evidence in this proceeding or in the disciplinary proceeding. It is, however, mentioned in Dr. Donofro's report, and she comments on the discrepancy between Dr. Langford's account of the events and Ms. Lawhun's. Dr. Donofro also discusses at length what she viewed as some ambiguities in the recording of the amount of LRS, and opined that the amount provided under either interpretation she could reach was inappropriate. There was a basis upon which the Department could rely for including these

allegations in the Second Amended Administrative Complaint and proceeding with those allegations.

36. At page 21 of the Fees Motion, Petitioner claims that the Department alleges "in administrative complaint line 35 that Respondent should have included a 'discussion' of electrolytes and white blood count," and claims that there are no facts to support a records violation for line 35. Paragraph 35 of the Second Amended Administrative Complaint simply states that "the CBC results indicated that Awesomer's white blood count was elevated." A review of both the original and the Amended Administrative Complaint confirm that neither of those documents have the allegation of which Petitioner complains, at paragraph 35.

37. Paragraph 36 of the Second Amended Administrative Complaint alleges that "Respondent failed to record any explanation or discussion of the results of the CBC or General Health Profile with Electrolytes in the April 30, 2009, medical records for Awesomer." Dr. Langford's criticism that "this is a medical record, not a dissertation," is flippant at best, and ignores the requirement in Florida Administrative Code Rule 61G18-18.002(1) that the records "contain sufficient information to justify the diagnosis or determination of health status and warrant any treatment recommended or administered." Concerns about issues revealed in the CBC were discussed in Dr. Donofro's

report, and the lack of follow-up or discussion led her to believe that certain possibilities in treatment were overlooked. The Department's belief, that some reference other than the test result itself was necessary, was reasonable given the need for records to justify a diagnosis, and the Department had a basis to proceed with this allegation.

38. Finally, at page 22 of the Fees Motion, Dr. Langford takes issue with the Department's allegations that medical records were not contemporaneously recorded for events taking place April 30, 2009. Yet, there is no dispute that there are three separate versions of the medical records in this case, and one of the issues presented was the discrepancy in dates for certain services. The Department had a reasonable basis to proceed with the allegations with respect to the May 16, 2009, entries.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569, 120.57(1), and 57.105(4), Florida Statutes (2012).

40. Petitioner filed his Fees Motion pursuant to section 57.105, Florida Statutes (2011), which provides in pertinent part:

1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, . . . on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or
(b) Would not be supported by the application of then-existing law to those material facts.

* * *

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(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.

41. Petitioner, as the party seeking fees, has the burden of proving his entitlement to fees pursuant to section 57.105 by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977); § 120.57(1)(j), Fla. Stat.

42. The standards for an award of attorney's fees in subsection (1), and incorporated by reference in subsection (5), are the result of an amendment to section 57.105 in 1999. § 4, ch. 99-225, Laws of Fla. Prior to the 1999 amendment, the statute provided for a fees award when "there was a complete absence of a justiciable issue either of law or fact raised by the complaint or defense of the losing party."

43. In Wendy's of N.E. Florida, Inc. v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003), the First District discussed the 1999 legislative changes to section 57.105, stating:

> [T]his statute was amended in 1999 as part of the 1999 Tort Reform Act in an effort to reduce frivolous litigation and thereby to decrease the cost imposed on the civil justice system by broadening the remedies that were previously available. Unlike its predecessor, the 1999 version of the statute no longer requires a party to show a complete absence of a justiciable issue of fact or law, but instead allows recovery of fees for any claims or defenses that are unsupported. However, this Court cautioned that section 57.105 must be applied

> carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings.
>
> In determining whether a party is entitled to statutory attorney's fees under section 57.105, Florida Statutes, frivolousness is determined when the claim or defense was initially filed; if the claim or defense is not initially frivolous, the court must then determine whether the claim or defense became frivolous after the suit was filed. In so doing, the court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law. An award of fees is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action. (Citations omitted.)

44. The court noted that application of the standard in section 57.105 is problematic and requires a case-by-case analysis, stating that "while the revised standard incorporates the 'not supported by the material facts or would not be supported by application of then-existing law to those material facts' standard instead of the frivolous standard of the earlier statute, an all-encompassing definition of the new standard defies us." 865 So. 2d at 524.

45. The First District has since noted that section 57.105 now applies "to any claim or defense, and does not require that the entire action be frivolous." Albritton v. Ferrera, 913 So.

2d 5, 8 (Fla. 1st DCA 2005)(quoting Mullins v. Kennelly, 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003)).

46. The phrase, "supported by material facts" found in section 57.105(1)(a), was defined by the court in Albritton to mean that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." 913 So. 2d at 7, n.1. If the losing party "presents competent, substantial evidence in support of the claim . . . presented and the trial court determines the issue of fact adversely to the losing party based on conflicting evidence," fees are not warranted. Siegel v. Rowe, 71 So. 3d 205, 212 (Fla. 2d DCA 2011).

47. In this case, the Department had not only the records themselves, but two expert opinions regarding the adequacy of those records. While it is true that some of those opinions also reflected a belief that Respondent's care and treatment of Awesomer fell below applicable standards, it is clear from the expert opinions that the Department's experts believed that the records raised several legitimate questions in terms of whether they actually told the story of Awesomer's care.

48. In Department of Children and Families v. S.E., 12 So. 3d 902 (Fla. 4th DCA 2009), DCF filed a verified petition for dependency against the mother of two children. The petition was based primarily on the medical opinions and recommendations of

the applicable Child Protection Team ("CPT"). The Department's experts believed that the mother suffered from Munchausen Syndrome by Proxy. The Department received documentation rebutting this theory. While it deleted the allegations regarding Munchausen Syndrome by Proxy, it continued with the dependency proceeding based upon the belief that the mother still posed a threat of harm to the children.

49. The trial court granted S.E.'s motion to dismiss and awarded S.E. fees pursuant to section 57.105. On appeal the Fourth District reversed the award, stating:

> Although the trial court granted S.E.'s motions to dismiss, we find the trial court abused its discretion in finding that, at the time of filing, DCF knew or should have known its petition for dependency lacked support. We also note that DCF's petition did not subsequently become frivolous during the pendency of the action.
>
> Pursuant to section 39.01(15)(f), Florida Statutes (2006), a child can be found dependent if he or she is "at substantial risk of imminent abuse, abandonment, or neglect." In its initial and amended petitions for dependency, DCF relied on the opinions of CPT's medical professionals. Because the CPT doctors remained convinced throughout the pendency of this litigation that a risk of imminent abuse, abandonment, or neglect existed, despite the withdrawal of the Munchausen Syndrome by Proxy allegations, we find that DCF's petition for dependency was always supported by the necessary material facts to overcome an award of section 57.105 fees.

12 So. 3d at 903-904 (citations omitted).

50. The same can be said here. While the Department withdrew the standard of care allegations, it continued to believe, based on sufficient evidence presented through the records and expert opinions, that record-keeping deficiencies existed. Fees pursuant to section 57.105 are not warranted under these circumstances.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner's Section 57.105 Motion for Failure to Present Facts to Establish a Claim is dismissed.

DONE AND ORDERED this 12th day of February, 2013, in Tallahassee, Leon County, Florida.

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of February, 2013.

ENDNOTES

[1/] This acrimony is continued in Petitioner's Proposed Final Order, which includes what the undersigned interprets as personal attacks on the Department's counsel. Notwithstanding

the "knew or should have known" standard under section 57.105, such personal attacks add nothing to the analysis of this case and have no place in pleadings before the Division.

[2/] The Fees Motion does not contain numbered paragraphs.

[3/] Ironically, these allegations do not appear as represented in the Amended Administrative Complaint, as Petitioner asserts (see Petitioner's Exhibit R), but do appear in the Second Amended Administrative Complaint, which had not yet been filed. The same can be said for the remaining asserted deficiencies. Therefore, although the Fees Motion references the Amended Administrative Complaint, the allegations are from the Second Amended Administrative Complaint throughout.

[4/] As previously noted, the Department secured reports from two experts, Dr. Green and Dr. Donofro. Dr. Green's report is not in evidence in this proceeding, and Dr. Green did not testify at hearing in the Merits Case. While Dr. Green's opinion is specifically referenced by the probable cause panel, there is sufficient evidence to determine the Department also had Dr. Donofro's report and was entitled to rely on it. Because Dr. Green's report is not in evidence, the specifics of his opinions are not discussed in this Final Order.

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.