STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LANDMARK FUNERAL HOME, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF FUNERAL, CEMETERY, AND CONSUMER SERVICES,	)	Case No. 12-0433F
	)	
Respondent.	)	
	)	

FINAL ORDER

On May 11, 2012, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee and Miami, Florida.

APPEARANCES

Petitioner: Edward F. Holodak, Esquire
Law Office of Edward F. Holodak, P.A.
Suite 212
2500 Hollywood Boulevard
Hollywood, Florida 33020

Respondent: Thomas A. David, Esquire
Department of Financial Services
Division of Legal Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to recover its attorneys' fees and costs, pursuant to section 57.111, Florida Statutes, incurred in the defense of a disciplinary proceeding styled Department of Financial Services, Division of Funeral, Cemetery, and Consumer Services v. Landmark Funeral Home, Inc., DOAH Case No. 11-3693.

PRELIMINARY STATEMENT

On January 10, 2012, the Board of Funeral, Cemetery, and Consumer Services (Board) issued a Final Order adopting without alteration a Recommended Order in DOAH Case No. 11-3693. On January 30, 2012, Petitioner filed with the Division of Administrative Hearings (DOAH) a Motion for Attorney's Fees. By Order entered February 20, 2012, the Administrative Law Judge struck all of the statutory grounds cited in the motion for attorneys' fees, except section 57.011, Florida Statutes.

At the hearing, the parties offered, and the Administrative Law Judge accepted, a stipulation that Petitioner is a small business party and that, if it prevailed on the issues discussed below, it incurred at least $50,000 in attorneys' fees and costs covered by section 57.111, Florida Statutes.

Petitioner called no witnesses and offered into evidence no exhibits. Respondent called two witnesses and offered into evidence four exhibits: Respondent Exhibits 1-4. All exhibits

were admitted. The Administrative Law Judge took official notice of DOAH Case No. 11-3693.

The parties did not order a transcript. Choosing not to file proposed final orders, the parties submitted post-hearing filings on May 16, 2012.

FINDINGS OF FACT

1. On May 9, 2009, the Board issued to Petitioner an unconditional funeral establishment license. On April 6, 2010, a probable-cause panel of the Board authorized Respondent to file a two-count Administrative Complaint against Petitioner. On May 3, 2010, Respondent executed a two-count Administrative Complaint and served the complaint on Petitioner shortly thereafter. After Petitioner requested a formal hearing, Respondent transmitted the file to DOAH on July 25, 2011, thus commencing DOAH Case No. 11-3693.

2. Count I of the Administrative Complaint alleged an advertising violation. Petitioner never disputed this allegation and did not expend significant time at or prior to the hearing defending this count. At the start of the hearing, the parties announced a stipulation in which Petitioner admitted the violation. The Recommended Order incorporated the stipulation and recommended a small fine, which was included in the Final Order.

3. Count II of the Administrative Complaint alleged that a principal of Petitioner misrepresented to the Board that two individuals (Pancieras) would not be involved in the operations of Petitioner; that the Board issued the license in reliance on this misrepresentation, but erroneously failed to incorporate into the license a condition restricting the Pancieras from involvement with the operations of the licensee (Panciera Condition); and that, after starting operations, Petitioner failed to restrict the activities of the Pancieras.

4. Petitioner defended Count II by disputing the contention that it induced the Board to issue the license with false representations or that the Board erroneously failed to attach the Panciera Condition (Main Defense). In the event that the Main Defense failed, Petitioner defended Count II by disputing that the Panciera Condition was violated (Backup Defense).

5. Petitioner prevailed as to Count II due to the Main Defense. Although consideration of the Backup Defense was thus unnecessary, the Recommended Order addressed the Backup Defense for three reasons: 1) if the Final Order materially altered the portion of the Recommended Order addressing the Main Defense, the alternative findings on the Backup Defense might avoid the necessity of a remand; 2) the alternative findings would not

take long to make; and 3) the alternative findings presented an opportunity for humor.

6. All of the facts needed to adjudicate the Main Defense and this fee case are derived from the minutes of Board meetings. All of these meetings took place 11-16 months prior to the determination of probable cause, so the minutes were available to the probable-cause panel when it took action.

7. On November 7, 2008, the Board received an application for a funeral establishment license from Presidential Circle, Inc. (PC Application I). Valerie Panciera-Rieth was the principal of the corporate applicant.

8. Prior to the Board meeting on December 3, 2008, at which the Board was to take up PC Application I, the Division of Funeral, Cemetery, and Consumer Services (Division) recommended the issuance of the license, and Ms. Panciera-Rieth's brother, Mark Panciera, filed a complaint against the "applicant." This marked the start of two themes in the runup to the license eventually issued to Petitioner: 1) the ongoing disputes between the siblings, which arose (or sharpened) after their father gave one of them (Ms. Panciera-Rieth) the location at which he (or his corporation) had operated a funeral establishment for many years and gave the other of them (Mr. Panciera) the name of this establishment; and 2) a failure to differentiate between a corporate entity and its principal.

9. At the December 3 Board meeting, the Board deferred action on PC Application I, so that the Division could conduct an investigation. The ensuing investigation uncovered some violations, probably not of Presidential Circle, Inc., as it had recently been incorporated. The Division concluded that the violations were not of such gravity as to justify denying the PC Application I, so it agreed that "the Respondent" would pay an administrative fine of $1000. It is unclear who or what "the Respondent" was.

10. But the identity of "the Respondent" quickly became irrelevant. At its February 4, 2009, meeting, the Board rejected the settlement and denied PC Application I.

11. Prior to the Board meeting on April 8, 2009, three events occurred. In order, Ms. Panciera-Rieth filed a request for a formal hearing on the denial of PC Application I; Ms. Panciera-Rieth conveyed her Presidential Circle stock to Jonathan Shaw; and Presidential Circle, Inc., filed a new application for the same license at the same location (PC Application II).

12. At its April 8 meeting, the Board members appeared to treat PC Application II as "Mr. Shaw's application." More to the point, the Board members were also concerned that they could not act on PC Application II while PC Application I was pending. During the discussion, the advocate for Presidential Circle,

Inc., told the Board that there was no relationship between Ms. Panciera-Rieth and Mr. Shaw, who owned businesses along Hollywood Boulevard in the vicinity of the proposed location of the funeral establishment to be operated by Presidential Circle, Inc.

13. During the April 8 meeting, the Board considered the difficult questions of whether Presidential Circle, Inc., could withdraw the request for hearing that Ms. Panciera-Rieth had filed on its behalf or could withdraw PC Application I after the Board had denied it. There was some concern that, if Presidential Circle, Inc., could withdraw its request for hearing, but not PC Application I, then the Board's denial of PC Application I would become final and serve as a form of prior discipline that could impede the granting of PC Application II.

14. Another advocate for Presidential Circle, Inc., repeated the earlier representation that Ms. Panciera-Rieth and Mr. Shaw had no relationship and added that Mr. Shaw did not intend to employ Ms. Panciera-Rieth in the new funeral operation. Mr. Shaw himself more or less joined in these assertions.

15. The Board then voted not to allow Presidential Circle, Inc., to withdraw PC Application I. The advocate for Presidential Circle, Inc., responded by advising that Ms. Panciera-Rieth had authorized the withdrawal of the request

for hearing that she had filed on behalf of Presidential Circle, Inc.

16. The advocate for Mr. Panciera (or an entity with which Mr. Panciera was associated) had taken a prominent role in Board discussions about PC Applications I and II. At this point, Mr. Panciera's advocate declared her satisfaction with the resolution because her primary concern had been to ensure that Ms. Panciera-Rieth, her husband, and her father would not be able to control the new business in some way. But no one on the Board took up this point, so it remained the personal opinion of the advocate of Mr. Panciera.

17. Instead, someone whose capacity is not disclosed in the minutes restated the concern that the denial of PC Application I would have a negative effect on PC Application II because, even if Mr. Shaw is a new principal, the applicant itself remains the same. The Division Director agreed, warning Mr. Shaw that, if the Board considered PC Application II, Presidential Circle, Inc., would have to reveal this past denial as a form of discipline.

18. After his offer of a corporate name change understandably sparked no interest among the Board members, the advocate of Presidential Circle, Inc., asked whether "the applicant" should form a new corporation. Clearly, he did not mean a subsidiary; he was asking if the principal of

Presidential Circle, Inc., Mr. Shaw, should form a new corporation. Liking this idea, the Division Director recommended that the Board table action on PC Application II to give Mr. Shaw time to form a new corporation. The Board did so, and this essentially concluded the April 8 Board meeting.

19. Prior to the next Board meeting on May 6, 2009, Mr. Shaw caused the formation of Petitioner, and it filed an application for a funeral establishment license. All of the other details remain unchanged from PC Application II.

20. At the May 6 meeting, the Board approved the license without conditions. The minutes erroneously refer to Petitioner as formerly Presidential Circle, Inc.; the application as PC Application II; and the new application as a resubmission of PC Application II. More importantly, though, nothing took place at the meeting that would suggest that the Board intended to attach the Panciera Condition to the license that it was issuing. The advocate of Mr. Panciera mentioned the representations at the preceding meeting that Ms. Panciera-Rieth would have no role with the business, but the Board completely ignored this comment.

21. Any representations from Mr. Shaw or the advocate of Presidential Circle, Inc., during the Board meeting of April 8 attached to PC Application II, not the application that the Board granted unconditionally on May 6. Minor confusion

concerning the entity or application that was before the Board on May 6 does not support even an inference of an intention to condition the resulting license. Clearly, the formation of a new corporation spared the Board members the necessity of considering prior discipline imposed on a prior applicant (that, at the time of the offense, was controlled by Ms. Panciera-Rieth, not Mr. Shaw). Over the continued protest of the advocate of Mr. Panciera, the Board granted the new application and issued the license to the new applicant, Petitioner.

22. The probable-cause panel lacked substantial justification when it found probable cause to initiate the proceeding against Petitioner that ultimately took the form of Count II. It is irrelevant whether the moment for determining substantial justification is the date on which the Board's probable-cause panel voted or the later date on which Respondent filed the Administrative Complaint with the Division of Administrative Hearings, as nothing material took place between these two actions.

23. It is difficult to find anything in the record on which the probable-cause panel may have relied in determining that probable-cause existed for Count II. Demands from Mr. Panciera's advocate for the Panciera Condition are strewn throughout the minutes, but the advocate was not a member of the Board, which increasingly tended to ignore her.

24. The probable-cause panel discussed exclusively the advertising violation alleged in Count I and ignored the misrepresentation issue alleged in Count II. As for Count II, the panel relied on a presentation by the author of a memorandum from Respondent's Division of Legal Services. Her presentation disregarded the distinction between Presidential Circle, Inc., and Petitioner; misstated that the Board issued the license at the April 8 meeting; and failed to address the omission of the Panciera Condition from the license. Her memorandum states that the Board took up Petitioner's application at its April 8, 2009, meeting, even though Petitioner was not formed until after that meeting; that Mr. Shaw said that the Pancieras would not be involved with Petitioner, even though Petitioner was not formed until after that meeting; and that the Board approved Petitioner's application at its April 8, 2009, meeting, which is flatly untrue. Like the presentation, the memorandum also fails to address the omission of the Panciera Condition from the license. The probable-cause panel had copies of the Board minutes for its April 8 and May 6, 2009, meetings, but the minutes of April 8 meeting are incomplete. If anyone had read these minutes, they would have seen that they ended at the announcement of a ten-minute break for Presidential Circle, Inc., to explore other options; the omitted minutes documented the approach of forming a new corporation, as described above.

25. Additionally, no special circumstances exist that would render an award of attorneys' fees and costs unjust.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 57.111(4)(d), 120.569 and 120.57(1), Fla. Stat.

27. Section 57.111 authorizes an award of attorneys' fees and costs, up to $50,000, incurred by a "prevailing small business party" in a proceeding initiated by a state agency, "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust." The quoted language identifies the sole issues that remain in dispute following the acceptance of the stipulation noted in the Preliminary Statement.

28. Section 57.111(3)(c) defines a "prevailing small business party" as:

> 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.

29. The burden of proof is generally on Petitioner, although the burden of going forward is on Respondent as to a claim of substantial justification or special circumstances. See, e.g., Dep't of Health & Rehab. Services v. South Beach Pharm. Inc., 635 So. 2d 117, 121 (Fla. 1st DCA 1994).

30. To determine if Petitioner prevailed in DOAH Case No. 11-3693, it is necessary to determine whether it meets the requirements of section 57.111(3)(c)1. As Respondent argues, neither section 57.111(3)(c)2. or 3. is applicable to this case because the parties did not settle the disciplinary proceeding, nor did Respondent voluntarily dismiss the disciplinary proceeding. This means that the determination of whether Petitioner is a prevailing party cannot be based on whether it prevailed on a majority of the issues, as applies under section 57.111(3)(c)2. when the parties settle a case.

31. The Final Order is a split decision. Respondent prevailed on Count I, and Petitioner prevailed Count II. Citing a DOAH Final Order, Respondent argues that Petitioner is not a prevailing party because it lost on one of the counts. However, higher authority exists. In a fee case arising out of a multicount complaint, in which each count is capable of supporting an independent proceeding, it is necessary to identify the prevailing party on each count and award attorneys'

fees accordingly. Folta v. Bolton, 493 So. 2d 440, 442 (Fla. 1986) (former section 768.56, Florida Statutes).

32. Petitioner is thus entitled to fees and costs for defending Count II, unless Respondent proves substantial justification or special circumstances. Because Petitioner never defended the advertising count, there is no need to look behind the stipulation that Petitioner incurred at least $50,000 in attorneys' fees and costs to apportion attorneys' fees and costs between the two counts.

33. Section 57.111(3)(e) provides that 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." This is an intermediate standard between an automatic award of fees and the no-justiciable-issue standard of section 57.105, Florida Statutes. See, e.g., Helmy v. Dep't of Bus. & Prof'l Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

34. Respondent argues that "the time it was initiated by a state agency" is the time of the finding of probable cause by the Board. Because no facts emerged between the finding of probable cause and the filing of the Administrative Complaint, for the sake of argument, the Administrative Law Judge will adopt Respondent's argument. Although the initiation of the proceeding does not appear to be the determination of probable

cause, perhaps this distinction is typically meaningless, as suggested in the following statement.

> 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. [Citation omitted.] Generally, in resolving whether there was substantial justification for filing an administrative complaint against the licensee, one need only examine the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint. *See Kibler v. Dep't of Prof'l Regulation.* 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982).

Fish v. Dep't of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002).

35. The minutes of the Board meetings clearly reveal no intent by the Board to impose the Panciera Condition on the license that it issued to Petitioner. The minutes of the Board meetings clearly reveal that any discussions of PC Application II at the April 8 Board meeting were superseded by the formation of a new corporation, which would file a new application--an approach endorsed by the Division Director at the April 8 meeting.

36. Regardless of whether the failure of a Board member at the April 8 meeting to object to the recommendation of the Division Director suggests the Board's tacit approval of this approach, it is impossible to infer from this failure an intent to impose the Panciera Condition on the new application from the

new corporation. Obviously, the failure of any Board member to mention at the May 6 meeting any restrictions on the license that the Board was issuing does not support an inference of an intent to impose the Panciera Condition. Nothing in the minutes supports the key allegations of Count II--namely, that the Board erroneously issued the license at the May 6 meeting without the Panciera Condition in reliance on representations made to it at the April 8 meeting when it was considering a different application from a different corporation.

37. Nor can substantial justification be found in the complaints of Mr. Panciera's advocate or error-strewn presentation and memorandum from the representative of the Division of Legal Services. An accurate rendering of the facts was available in the minutes of two meetings of the Board that were readily available to the probable cause panel. Dep't of Health & Rehab. Services v. S. G., 613 So. 2d 1380, 1387 (Fla. 1st DCA) (no substantial justification from a "totally irresponsible investigation"). The failure to include a full set of the April 8 minutes in the packet provided to the probable-cause panel does not excuse the panel's failure to inform itself of Board action taken merely one year earlier.

38. Additionally, no special circumstances existed at the time of the determination of probable cause that would render an award unjust.

ORDER

It is ORDERED that, pursuant to section 57.111, Florida Statutes, Respondent pay Petitioner the sum of $50,000 for its attorneys' fees and costs incurred in the defense of Count II of the Administrative Complaint in DOAH Case No. 11-3693.

DONE AND ORDERED this 14th day of June, 2012 in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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 14th day of June, 2012.

COPIES FURNISHED:

Brady J. Cobb, Esquire
Tripp Scott
15th Floor
110 Southeast 6th Street
Fort Lauderdale, Florida 33301
sxm@trippscott.com

Thomas A. David, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333
tad.david@myfloridacfo.com

Edward F. Holodak, Esquire
Edward F. Holodak, P.A.
Suite 212
2500 Hollywood Boulevard
Hollywood, Florida 33020
edward@holodakpa.net

Doug Shropshire, Director
Division of Funeral, Cemetery
and Consumer Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0361

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.