STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN AMATEUR MIXED MARTIAL ARTS, INC., a/k/a UNITED STATES AMATEUR MIXED MARTIAL ARTS, INC.,

Petitioner,

vs. Case No. 13-2780F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, STATE BOXING COMMISSION,

Respondent.
_____/

SUMMARY FINAL ORDER

By agreement of the parties this matter is being determined as a summary proceeding pursuant to section 120.57(1)(h), Florida Statutes.

APPEARANCES

For Petitioner: Melissa Posey Furman, Esquire
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For Respondent: Joseph M. Helton, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner, American Amateur Mixed Martial Arts, (AAMMA or Petitioner) is entitled to an award of attorney's fees and costs pursuant to section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On July 19, 2013, Petitioner, American Amateur Mixed Martial Arts, filed a motion for attorney's fees and costs under section 57.111, Florida Statutes.[1/] Specifically, Petitioner requested an award of attorney's fees and costs as the prevailing party in the underlying matter of DOAH Case No. 12-0142. Thereafter, both parties agreed that this matter should be decided upon the record in the underlying proceeding, as well as the affidavits and exhibits filed by AAMMA in support of its application for attorney's fees and costs herein. Further, the parties agreed that this case should be decided without an evidentiary hearing as a summary proceeding.

FINDINGS OF FACT

1. AAMMA is a not-for-profit corporation, incorporated under the laws of Florida. It has no full-time employees and utilizes volunteers to conduct its business.

2. Evidence in the record as to AAMMA's net worth throughout its existence and at the time the case was initiated by the Department of Business and Professional Regulation, State Boxing Commission (Department), demonstrated that AAMMA sustains

itself through personal donations from members and fees from a variety of registrations. Evidence further demonstrated that the association was very small with few members and registrations. In fact, AAMMA uses a home gym located on property owned by founders and members Larry and Alice Downs to operate a mixed martial arts/boxing and training school. Mr. Downs' plumbing business and the Downs' residence are also located on this property. There was no evidence of the value of the home gym. Additionally, there was no evidence that demonstrated that AAMMA has any ownership interest in the home gym owned by the Downs' or in any training equipment associated with that gym. More importantly, there was no substantially credible evidence that demonstrated AAMMA was not a separate entity from any of the Downs' interests or that any of the Downs' finances should be included in the net worth of AAMMA.

3. On the other hand, the testimony, while not specific, was sufficient to infer that AAMMA's net worth is well below the $2,000,000.00 threshold for a business to be considered a small business for purposes of section 57.111, Florida Statutes. Moreover, as indicated earlier, AAMMA has no full-time employees. Based on these facts, AAMMA is a small business as defined under section 57.111.

4. The underlying action in this case was initiated by the Department when it filed an Amended Administrative Complaint against AAMMA in DOAH Case No. 12-0142.[2/]

5. Additionally, after a lengthy multi-day hearing during which both sides vigorously litigated their side of the case and after both parties filed Proposed Recommended Orders in the matter, AAMMA was the prevailing party in DOAH Case No. 12-0142.

6. In case 12-0142, the Amended Administrative Complaint was based on evidence that was obtained through investigation by the Department both before and after the filing of the Administrative Complaints in the related DOAH Case No. 11-5102.[3/]

7. The amended complaint in case 12-0142 alleged in Count I that Respondent allowed minors under the age of 18 to engage in mixed martial arts (MMA) matches on January 28, 2011; February 26, 2011; May 6, 2011; July 16, 2011; and August 3, 2011, in violation of sections 548.006(4), and 548.071(1), Florida Statutes, and Florida Administrative Code Rule 61K1-1.0031(1)(c), by failing to enforce the ISKA Overview as Respondent's minimum health and safety standards and engaging in unprofessional conduct. The ISKA Overview contained age limits for participants in amateur MMA matches.

8. The evidence in the underlying case demonstrated that AAMMA allowed athletes under the age of 18 years to participate in MMA matches on the dates alleged in the Amended Administrative

Complaint. Clearly, such evidence constitutes a reasonable basis in fact for which the Department may proceed with an administrative action.

9. The Department alleged in Count II of the Amended Administrative Complaint that Respondent was aware of, and allowed, amateur fighters to compete outside the appropriate weight class on July 16, 2011, in violation of sections 548.006(4) and 548.071(1) Florida Statutes, and Florida Administrative Code Rule 61K1-1.0031(1)(c), by failing to enforce the health and safety standards in Respondent's Rules and ISKA Overview Guidelines, specifically regarding weight classes, as well as, engaging in unprofessional or unethical conduct.

10. Again, the evidence presented in DOAH Case No. 12-0142 showed that Robert Birge, a heavyweight, and Travis Grooms, a super heavyweight, competed against each other at the July 16, 2011, event with a weight difference of 61 pounds. Again, there was a reasonable basis in fact for the Department to proceed with an administrative action.

11. The Department alleged in Count III of the Amended Administrative Complaint that Respondent misled American Legion Post #75 into signing a letter that incorrectly stated the American Legion was the sole sponsor of Respondent's May 6, 2011, amateur event, thereby violating section 548.071(4), by engaging in unprofessional or unethical conduct.

12. The Department's evidence showed that Alice Downs, Larry Downs, Jr., and his secretary had access to AAMMA's letterhead. While the evidence eventually showed that the event held on May 6, 2011, was not sponsored by AAMMA or the American Legion, the Department's evidence clearly established that the letter to the Department attempting to exempt the May 6, 2011, event from regulation was on AAMMA's letterhead. From these facts, it was reasonable for the Department to conclude that the letter came from AAMMA at the time it initiated the underlying action and was an attempt to mislead the American Legion into signing the letter in order to gain an exemption under the statutes for the May 6 event. Given these facts, there was a reasonable basis for the Department to proceed with an administrative action.

13. In conjunction with the factual basis of the underlying administrative action, the Department's legal position in that action was based on its authority to regulate amateur sanctioning organizations and the rules the boxing commission had promulgated under the authority granted to it in chapter 548, Florida Statutes. Ultimately, AAMMA prevailed because the rules of the boxing commission were so vague that they could not be enforced against AAMMA based on the law governing enforcement of such rules. However, the Department, at the initiation of the underlying proceeding and throughout this process, had reasonable

legal arguments which it posited to support its interpretation that the ISKA Overview contained the health and safety standards AAMMA was required to follow and that the Department was required to enforce. The fact that the Department did not prevail in its legal position does not support a finding that its position did not have a reasonable legal basis. Given these facts, the Department had a reasonable basis in law to proceed with an administrative action against AAMMA.

14. Finally, the undersigned has reviewed the affidavit as to Attorney's Fees and Costs filed on September 23, 2013, and the corrections thereto, and finds the fees and costs contained therein to be reasonable. However, since the Department was substantially justified in initiating the underlying proceeding in this action, Petitioner is not entitled to an award of attorney's fees or costs in this matter.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 57.111(4), 120.569, and 120.57(1), Fla. Stat.

16. Attorney's fees and costs have been sought by Petitioners in this matter pursuant to section 57.111, Florida Statutes, the Equal Access to Justice Act.

17. The legislative intent for enacting the Equal Access to Justice Act is provided in subsection 57.111(2), Florida Statutes, which states the following:

> (2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

18. In pertinent part, subsection 57.111(4)(a), Florida Statutes, provides the following:

> (4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist, which would make the award unjust. (emphasis added).

19. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to section 57.111, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying action and that it was a small business party at the time the action was initiated. Once the party requesting the

award has met this burden, the burden shifts to the agency to establish that its actions in instituting the proceeding were substantially justified or that special circumstances exist that would make an award of attorney's fees and costs to Petitioner unjust. Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

20. Section 57.111(3)(d)1.b., defines "small business party" as follows:

> (d) The term "small business party" means:
>
> 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; (emphasis supplied)

21. In Fields v. United States, 29 Fed. Cl. 376, 383 (Fed. Cl. 1993), aff'd, U.S. App. LEXIS (Fed. Cir. 1995), the court denied an award of attorney's fees under the federal analog to section 57.111 where evidence concerning plaintiff's net worth was incomplete and lacked specificity. Similarly, in Scherr Constr. Co. v. United States, 26 Cl. Ct. 248, 250-51 (Fed. Cl. 1992), the court denied an award of attorney's fees where the record evidence did "not enable the court to ascertain plaintiff's net worth, which plaintiff must establish as a predicate for an award"); See also Monzon v. Dep't of Bus. and Prof'l Reg. Case No 11-6007F, 2012 Fla. Div. Admin. Hearings

LEXIS 654, *10-11 (Fla. DOAH Mar. 30, 2012) and Slavin v. Dep't of Heath, Bd. of Medicine, Case No. 13-2097F (Fla. DOAH (Aug. 14, 2013)) (Bauer, ALJ).

22. In this case, there is sufficient evidence demonstrating that the net worth of AAMMA at the time the case was initiated by the Department was well under the $2,000,000.00 threshold to qualify as a small business party under section 57.111. The evidence demonstrated that AAMMA is a very small not-for-profit business whose operations are financed through personal donations from members and fees from registrations. There was no substantive evidence that sufficiently supported a conclusion that the personal or business finances of any members should be included in AAMMAS's net worth. Additionally, the evidence was clear that AAMMA has less than 25 full-time employees. In fact, it has no full-time employees. As such, AAMMA qualifies as a small business party under section 57.111.

23. Further, section 57.111 requires that the small business party prevail in the underlying action in order to be awarded attorney's fees and costs. Subsection 57.111(3)(c) defines a "prevailing small business party" as follows:

> (c) 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.

24. In this case, there is no dispute that AAMMA prevailed in the underlying proceeding for purposes of subsection 57.111(3), Florida Statutes.

25. Thus, the remaining issue is whether the Department was substantially justified in bringing the underlying action against AAMMA. As indicated, the Department bears the burden of establishing that its actions in initiating this proceeding were substantially justified.

26. The term "substantially justified" is defined in subsection 57.111(3)(e), as follows:

> (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.

27. To be substantially justified, the government agency must have a solid, though not necessarily correct, basis in fact and law for its actions in initiating the underlying case. In Department of Health & Rehabilitative Services v. S.G., 613 So. 2d 1380 (Fla. 1st DCA 1993), the court stated:

> In Gentele v. Department of Professional Regulation, Board of Optometry, 513 So. 2d 672 (Fla. 1st DCA 1987), this court addressed the issue of whether fees were properly awarded pursuant to section 57.111, and concluded that it must follow persuasive federal authority in defining the scope of the statutory definition of "substantially justified." In that respect, McDonald v. Schweiker, 726 F. 2d 311, 316 (7th Cir. 1983), proposed that "non-frivolous" (as that term is utilized in federal rule 11) may not be equated with "substantial justification" for purposes of awarding fees under the Federal Equal Access to Justice Act. Rather, the phrase "substantially justified" was defined in McDonald as meaning that "the government must have a solid though not necessarily correct basis in fact and law for the position that it took" in the action. Id. at 316. Thus, the clear implication is that while governmental action may not be so unfounded as to be frivolous, it may nonetheless be based on such an unsteady foundation factually and legally as not to be substantially justified. 613 So. 2d at 1386.

Importantly, "[t]he Act is designed to discourage unreasonable governmental action, not to paralyze agencies doing the necessary and beneficial work of government." Rudloe v. Dep't of Envtl. Reg., 33 Fla. Supp. 2d 203 (DOAH 1987). Consequently, such evidence at the initiation of the proceeding "need not be as compelling as that which must be presented at the formal hearing on the charges to support a finding of guilt and the imposition of sanctions." Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002). Further, in order to be

substantially justified, "an agency must, at the very least, have a working knowledge of the applicable statutes under which it is proceeding." Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 370 (Fla. 1st DCA 1998).

28. In determining whether there was substantial justification or a reasonable basis in law and fact, the undersigned need only examine the information before the Department when it determined probable cause and filed the underlying administrative complaint. Dep't of Health, Bd. of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003).

29. In this case, it was clear that the material facts of the underlying case contained in Counts I and II of the Department's Amended Administrative Complaint were not disputed. Minors under the age of 18 participated in matches sponsored by AAMMA. Additionally, there was a match in which participants of different weight classes competed against each other in a mixed martial arts contest. Further, the commission had a rule which arguably prohibited such matches. Given these facts, the Department had a reasonable basis in fact to proceed with an administrative action.

30. Ultimately, the issue with respect to Counts I and II was not whether the material facts alleged as violations occurred, but rather, whether under rule 61K1-1.0031, there were

identifiable health and safety standards as indicated in the rule authority contained in section 548.003(2)(k), Florida Statutes. Under normal circumstances, the issue of whether a rule properly implements its authorizing statute is an issue to be determined in a rule challenge proceeding under section 120.54. However, in the underlying case, the determination that the rules at issue were not health and safety standards became an issue of proof in a disciplinary proceeding in which the rule was not challenged as an invalid exercise of delegated legislative authority.

33. The Department legitimately relied on the law that duly promulgated rules under the authority of law, have the effect of law; and are presumed valid until invalidated in a rule challenge proceeding. See State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985), City of Palm Bay v. Dep't of Transp., 588 So. 2d 624, 628 (Fla. 1st DCA 1991), Graham v. Swift, 480 So. 2d 124, 125 (Fla. 3d DCA 1985). At the time the underlying action was initiated by the Department the ISKA Overview had been promulgated under the rulemaking provision of chapter 120, Florida Statutes, as a rule of the boxing commission. More importantly, the Department had a reasonable interpretation of its rule, albeit one that was not communicated sufficiently, and did not make clear the otherwise vague rule. Given its legal position, the Department had a substantial basis in law to enforce its valid, existing rules based on its interpretation of those rules and was substantially

justified in bringing the charges in Counts I and II of the administrative complaint in the underlying action. Consequently, Petitioner is not entitled to an award of attorney's fees and costs under section 57.111, Florida Statutes.

34. In regard to Count III, the facts before the Department arguably indicated that AAMMA misled American Legion Post #75 into signing a letter that incorrectly stated the American Legion was the sole sponsor of Respondent's May 6, 2011, amateur event. Such an action could constitute unethical or unprofessional conduct which is prohibited conduct under section 548.071(4), Florida Statutes. Clearly, the Department had a reasonable basis in fact and law to proceed with an administrative action. As such, the Department was substantially justified in proceeding with Count III and Petitioner is not entitled to an award of attorney's fees and costs under section 57.111, Florida Statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Petitioner is not entitled to an award of attorney's fees and costs under section 57.111, Florida Statutes, and the request for such attorney's fees and costs is denied.

DONE AND ORDERED this 20th day of December, 2013, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of December, 2013.

ENDNOTES

[1/] The initial motion also asked for attorney's fees and costs under section 57.105, Florida Statutes, based on the same facts and arguments. Notably, the same findings and conclusions would apply under that section with the same result.

[2/] For purposes of section 57.011, this case was arguably initiated by the Department when it filed the Administrative Complaint against AAMMA in DOAH Case No. 11-5102. In addition to some similar allegations to the Amended Administrative Complaint in DOAH Case No. 12-0142, the complaint in DOAH Case No. 11-5102 involved several allegations which were not brought forward into DOAH Case No. 12-0142, the underlying action in this matter. Moreover, the complaint in case 11-5102 had some serious evidentiary problems that came to light during the course of the litigation. The Department appropriately asked that jurisdiction be relinquished in case 11-5102. The Department's request was granted, jurisdiction relinquished and DOAH's file closed. Later, the Department filed an Amended Administrative Complaint to initiate case 12-0142 that involved some of the same facts as case 11-5102. Notably, the Department's file number DBPR Case No. 2011-040852 was the same for both cases. More importantly, the same conclusions would result irrespective of whether case

11-5102 is seen as the initiating event under section 57.111, Florida Statutes.

[3/] The Department investigated this case pursuant to its authority under section 455.225, Florida Statutes. Additionally, the Department found probable cause to proceed with this action pursuant to the authority granted it by the boxing commission in Florida Administrative Code Rule 61K-1.070 and section 455.225(4), Florida Statutes.

COPIES FURNISHED:

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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. Rev 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.