STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

G. B., Z. L., THROUGH HIS
GUARDIAN K. L., J. H., AND M.
R.,

Petitioners,

vs.   Case No. 14-4173FC

AGENCY FOR PERSONS WITH
DISABILITIES,

Respondent.
_______________________________/

FINAL ORDER

Pursuant to notice, a hearing was conducted in this case on February 10, 2015, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings, pursuant to the authority set forth in section 120.57(1), Florida Statutes. Unless otherwise stated specifically herein, all references to the Florida Statutes will be to the 2014 codification.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is the amount of attorney's fees to be paid by Respondent, Agency for Persons with Disabilities ("APD" or the "Agency"), to the Petitioners, G.B., Z.L., through his guardian K.L., J.H., and M.R.

PRELIMINARY STATEMENT

This matter arises from an Order entered by the Florida First District Court of Appeal dated July 21, 2014 (the "Fee Order"). The Fee Order states as follows:

> [Petitioner's] motion filed May 12, 2014, for attorney's fees is granted. This case is remanded to the trial court for the determination of the amount thereof if the parties are unable to agree on an amount.

The parties were not able to agree on an amount. On September 5, 2014, Petitioners filed a "Motion to Reopen or to Establish Fee Case for Award of Attorney's Fees and Taxable Costs" at the

Division of Administrative Hearings. The matter was assigned to the undersigned Administrative Law Judge. On November 4, 2014, the undersigned issued an Order directing the parties to provide notice as to whether the matter had been resolved or, if not, to propose available dates for final hearing. Each party unilaterally filed a response to the Order, setting forth proposed dates for a hearing on the matter of attorney's fees.

The final hearing was held on February 10, 2015. At hearing, each of the parties was represented by legal counsel. Petitioners offered three exhibits into evidence, each of which was admitted. The Agency did not offer any exhibits, but asked for leave to submit a late-filed exhibit--a response to Petitioners' expert's affidavit--upon conclusion of the hearing. The request was granted. Petitioners asked for leave to submit a response to the Agency's late-filed exhibit and that request was also granted. The Agency's late-filed exhibit was filed on February 17, 2015. Petitioners then filed a supplemental affidavit of attorney's fees and costs on February 26, seeking fees for its work in the fee case.

The proceeding was recorded, transcribed, and a Transcript was filed at the Division on March 3, 2015. The parties were given ten days from the date the Transcript was filed to submit their proposed final orders. Petitioners and the Agency each

filed proposed final orders, each of which has been considered in the preparation of this Final Order.

Subsequent to the submission of proposed final orders, Petitioners filed a motion to admit additional evidence. APD filed an objection to the motion. Petitioners cited no authority to support its request for late-filed evidence. Also, Petitioners failed to confer with counsel for APD concerning the motion, in derogation of Florida Administrative Code Rule 28-106.204(3). The motion is denied.

FINDINGS AND CONCLUSIONS

1. This matter is related to the promulgation of proposed rules 65G-4.0210 through 65G-4.027 (the "Proposed Rules") by the Agency in May 2013 in its effort to follow the mandate issued by the Florida Legislature concerning the iBudget statute, section 393.0662, Florida Statute (2010). Petitioners challenged the Proposed Rules in DOAH Case No. 13-1849RP. The Proposed Rules were upheld by the Administrative Law Judge, but Petitioners appealed the Final Order to the First District Court of Appeal (the "Court"). The Court's decision was rendered July 21, 2014. G.B. v. Ag. for Pers. with Disab., 143 So. 3d 454 (Fla. 1st DCA 2014). The Fee Order was entered by the Court on the same date.

2. The Fee Order had been entered upon the filing of a motion for appellate attorney's fees filed with the Court by

Appellants/Petitioners. The motion set forth three bases for an award of fees, to wit:

> 1) Section 120.595(2), Florida Statutes, which provides:
>
> Challenges to Proposed Agency Rules Pursuant to Section 120.56(2).– If the appellate court or the administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $50,000.
>
> 2) Section 120.595(5), Florida Statutes, which provides:
>
> Appeals.– When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of the agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of

fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

3) Section 120.569(2)(e), Florida Statutes, which provides:

All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expense incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

3. The Court did not specifically address which of Petitioners' stated bases for award of attorney's fees was being relied upon when granting Petitioners' motion. Petitioners assert that it must therefore be presumed that the Court granted the request for fees on the basis of all three of Petitioners' bases. There is no other support for that presumption, as the Fee Order is silent on the issue. It could equally be presumed that only one of the bases was relied upon by the Court. Thus, a

determination of the appropriate basis for fees is critical in the determination of the amount of fees to be awarded, as will be set forth more particularly below. The Fee Order establishes only that attorney's fees are awarded, with leave for the parties to determine the appropriate amount or, failing to do so, obtain direction from an Administrative Law Judge on the matter. There is no issue as to whether Petitioners are entitled to fees or costs, only the amount to be awarded.

4. DOAH has jurisdiction over the parties and the subject matter of this proceeding under the August 6, 2014, Mandate of the First DCA, and under section 120.595(2). Although it is herein determined that section 120.595(2) is the appropriate provision to be considered for fees in this case, each of the other statutory sections argued in Petitioners' motion for fees will be addressed nonetheless.

Section 120.595(5)

5. If section 120.595(5) is to be the basis for fees, it must be shown that Respondent is guilty of a "gross abuse" of its discretion. "Gross abuse" is not defined in statute. As stated by the Court in Allstate Floridian Insurance Co. v. Ronco Inventions, LLC, 890 So. 2d 300, 302 (Fla. 2d DCA 2004), "The troublesome nature of our review here is the admittedly high 'gross abuse of discretion' standard. . . . However, we have no definition of what a 'gross' abuse of discretion includes or how

it differs from an abuse of discretion. We can only assume that it is more egregious than a typical abuse of discretion." The Court cited Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), in which the Supreme Court iterated that if reasonable men could differ on an issue, there was no abuse of discretion to act one way or the other.

6. Other courts, looking at the issue of "abuse of discretion" in administrative matters, have struggled with a definitive description or definition. In Citizens to Preserve Overton Park, Inc., et al. v. Volpe, Secretary of Transportation, 401 U.S. 402; 91 S. Ct. 814; 23 L. Ed. 2d 136 (1971), the Court was trying to determine whether the Transportation Secretary had acted within his discretion. The Court decided it "must consider whether the decision was based on clear error or judgment. [citations omitted] Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." Id., at 416. And, as found by another Court, whether an act is arbitrary, capricious, or an abuse of discretion is "far from being entirely discrete as a matter of the ordinary meaning of language. . . . Rather than denoting a fixed template to be imposed mechanically on every case within their ambit, these words summon forth what may best be described as an attitude of mind in the reviewing court one

that is 'searching and careful' . . . yet, in the last analysis, diffident and deferential." Natural Res. Def. Council, Inc., et al. v. Sec. and Exch. Comm'n, et al., 606 F.2d 1031, 1034, U.S. App. DC (1979).

7. In Ft. Myers Real Estate Holdings, LLC, v. Department of Business and Professional Regulation, 53 So. 3d 1158 (Fla. 1st DCA 2011), the Court awarded fees under section 120.595(5). In that case, the agency denied party status to the applicant for services. The Court said, "The position taken by the Division in the dismissal order, and maintained in this appeal, is so contrary to the fundamental principles of administrative law that, by separate order, we have granted Appellant's motion for attorney's fees under section 120.595(5), Florida Statutes." The Court did not, however, define gross abuse of discretion any more specifically than that.

8. Likewise, in Salam v. Board of Professional Engineers, 946 So. 2d 48 (Fla. 1st DCA 2006), the Court found that an agency's intentional delay on acting upon a petition for formal administrative hearing warranted fees under the statute. The Salam Court did not further define gross abuse of discretion; it merely found that such abuse existed under the circumstances of the case.

9. Gross abuse of discretion must, by definition, be more difficult to ascertain than simple abuse of discretion. Gross

abuse implies that the Agency first believed its intended action was improper, yet engaged in the action despite that knowledge. That is, that the Agency acted intentionally to do something it knew to be wrong. Proof of such intent would be extremely difficult.[1/]

10. One need only look at the plain language of the Court's opinion in the rule challenge appeal at issue here to see that there was no gross abuse of discretion. The Court ultimately held that although the Agency's rules "directly conflict with and contravene the Legislature's clear language" concerning development of an algorithm to assist with the distribution of funds to needy Floridians, "[W]e recognize the difficulty in adhering to the Legislature's command to create an algorithm solely capable of determining each client's level of need. Further, we accept that [Respondent] is attempting to find a reasonable way to administer funds to the tens-of-thousands of people in need that it assists." G.B. et al., supra, 143 So. 3d 454, 458. Nothing in that language suggests that the Agency knew its proposed rule was improper or that it was doing anything intentionally wrong.

11. Rather, the language of the Court's decision indicates that Respondent was certainly attempting to exercise its discretion properly in the adoption of the Proposed Rules. Despite the Agency's attempts to justify the rules both at final

hearing and on appeal, the Court found that the Proposed Rules did not comport with the specific authorizing statute. That failure did not, ipso facto, establish that there was a gross abuse of the Agency's discretion. Besides, upon hearing all the testimony and reviewing the evidence, the undersigned initially upheld the Proposed Rule; that, in and of itself, is some indication that the Agency's efforts were legitimate. Thus, in the present matter, there is no rational basis for finding that gross abuse of discretion was involved in the Court's award of attorney's fees.

Section 120.569(2)(e)

12. As for section 120.569(2)(e), there is no evidence to support Petitioners' contention that the proposed rule addressed in the rule challenge proceeding (DOAH Case No. 13-1849RP) was interposed for any improper purpose. The appellate court said, "[W]e accept that APD is attempting to find a reasonable way to administer funds to the tens-of-thousands of people in need that it assists." Id. Clearly, the Agency did not act for an improper purpose; its best efforts to follow the Legislative mandate for an iBudget simply fell short. The Proposed Rules contravened certain specific requirements of the governing statute. In order to find a way to meet its mandate, the Agency made a Herculean effort, yet failed. Although Petitioners argue that an "improper purpose" was implied by the Court in the Fee

Order, there is no substantive support for that position. Not only was APD's attempt to find a "reasonable way" to discharge its responsibility found wanting by the Court, experts in the field who testified at the underlying hearing disagreed as well. There was no dispute about the intended purpose of the Proposed Rules, only as to how that intent was to be effectuated. There was never any dispute as to the Proposed Rules' intended purpose; they were meant to find a way to serve the tens-of-thousands of people in need.

13. There is nothing in any of the Agency's actions in this case that would be even arguably described as "interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation." This attorney's fee section does not apply to the facts of this case.

Section 120.595(2)

14. Finally, in section 120.595(2), the Legislature has declared that if an appellate court or administrative law judge declares all or part of a proposed rule invalid, an order will be entered awarding reasonable attorney's fees and costs (unless the agency demonstrated that its actions were substantially justified). The Court ultimately concluded that the proposed rules "directly conflict with and contravene the Legislature's clear language." That being the case, the Court seems to be

finding that the Agency's actions--promulgating the Proposed Rules--was not substantially justified, even if the Court did recognize the difficulty faced by APD in its efforts to comply with the statutes at issue.

15. By process of elimination, section 120.595(2) is the basis for the Court's award of attorney's fees in the present case. That being so, the award is capped at $50,000.

16. The Agency has conceded that Petitioners are entitled to at least $50,000 in fees, as well as costs in the amount of $41,609.65.

17. There remains the issue of whether each of the four Petitioners is entitled to an award of the maximum fee. In their (singular) Petition for Administrative Determination of the Invalidity of Proposed Rules, the parties sought the following relief:

> That a Final Order be entered finding the Proposed Rules to be an invalid exercise of delegated legislative authority; and
>
> That Petitioners be awarded their reasonable attorney's fees; and
>
> Such other relief as the Administrative Law Judge deems appropriate.

18. That is, the relief sought by each of the Petitioners was the same: invalidation of the proposed rules. It cannot be argued that each Petitioner in his or her own right was seeking individual redress or damages. Collectively, they wanted the

proposed rules invalidated so that they could return to the status quo concerning their benefits from the State. In fact, only one of the four Petitioners presented testimony at the underlying administrative hearing as to the impact of the Proposed Rules. There was no issue as to each Petitioner's standing in the underlying administrative hearing. As stated by the Agency in its Proposed Final Order in that case: "Petitioners are each recipients of Medicaid Services under the DD waiver program and have been or will be transitioned to the iBudget system. Stip., pp. 23-24. Thus, Petitioners have standing to challenge the substance of the Proposed Rules."

19. Petitioners contend that each of the 25,000-plus recipients of benefits from the Agency could have filed petitions challenging the Proposed Rule. That is true. But in the rule challenge proceeding there were four petitioners (ostensibly representing those other 25,000), each seeking the same relief, i.e., invalidation of the proposed rules. And only one of those, K.L., testified at final hearing in the underlying rule challenge proceeding. Thus, there is no justification for an award of fees to each of the Petitioners under section 120.595(2).

20. In light of the findings and conclusions above, and based upon the Order as stated below, the issue of contingency multipliers is not relevant to the discussion of fees herein.

21. As a general rule in Florida, fees and costs incurred in litigating entitlement to attorney's fees are collectible although time spent litigating the amount of the award is not compensable. See, e.g., State Farm Fire & Cas. Co. v. Parma, 629 So. 2d 830, 833 (1993). § 92.931, Fla. Stat.; Stokus v. Phillips, 651 So. 2d 1244 (Fla. 2d DCA 1995). Inasmuch as the Agency does not dispute entitlement to attorney's fees, no fees for the fee case are warranted.

22. The amount of fees sought in this administrative rule challenge by the Petitioners is, as set forth in their Proposed Final Order: $255,614.39 for the DOAH rule challenge proceeding; $154,662.35 for the appeal but also applied a contingent multiplier for a total of $309,324.70; $62,850.00 for the fee case but also applied a contingent multiplier for a total of $94,275.00; and $41,609.65 in taxable costs, for a total of approximately $660,000.00. While the amount of fees and costs allowed under the appropriate statute is well less than what Petitioners sought, it has been deemed legally sufficient by statute.

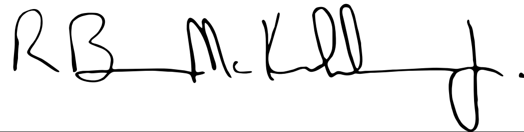
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Agency for Persons with Disabilities pay to Petitioners the sum of Fifty Thousand Dollars ($50,000) in

attorney's fees and Forty-one Thousand Dollars ($41,000) in taxable costs.

DONE AND ORDERED this 24th day of March, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of March, 2015.

ENDNOTE

1/ This effort at defining gross abuse of discretion relies entirely upon the plain meaning of the phrase as generally--but not specifically--expressed by various courts.

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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.