STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHILDREN'S HOUR DAY SCHOOL,

Petitioner,

vs. Case No. 15-2426F

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.
_____/

FINAL ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on November 9, 2015, at sites in Tallahassee and Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case, which arises from Petitioner's application for an award of attorney's fees and costs pursuant to section 57.111, Florida Statutes, are whether Petitioner was

a prevailing small business party in a disciplinary proceeding that Respondent initiated, and, if so, whether Respondent's decision to prosecute Petitioner was substantially justified or whether special circumstances exist that would make an award unjust.

PRELIMINARY STATEMENT

On April 21, 2015, Petitioner filed with the Division of Administrative Hearings ("DOAH") a Motion (Action) for Attorney's Fees pursuant to section 57.111(4), Florida Statutes. On June 18, 2015, Respondent filed Department of Children and Families['] Response to Petition for Attorney's Fees and Costs and Initial Order ("Response to Petition"). In its Response to Petition, Respondent waived the right to a formal hearing. Petitioner requested one, however, in its Reply to Department of Children and Families['] Response to Petition for Attorney's Fees and Costs and Initial Order, which was filed on June 29, 2015, and so the undersigned scheduled a hearing.

The final hearing was held on November 9, 2015, with both parties present. Petitioner called Kevin Lennon as its witness and offered Petitioner's Exhibits 2 through 4 and 7, which were received in evidence. Respondent's witness was Michaelyn Radcliff. Respondent's Exhibits 1 through 3, 5, 8 through 13, and 15 were admitted as well.

The final hearing transcript was filed on December 2, 2015. Each party timely filed a proposed final order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015.

FINDINGS OF FACT

1. On August 15, 2014, Respondent Department of Children and Families ("DCF") issued an Administrative Complaint against Petitioner Children's Hour Day School (the "School"), a licensed child care facility, charging the School with two disciplinable offenses, namely denial of food as form of punishment (Violation 1) and misrepresentation (Violation 2).

2. The allegations of material fact in support of Violation 1 were as follows:

> During a complaint inspection on 8/6/14, the child care facility was cited for a Class I violation of Standard #12, Child Discipline, [because] a child, to wit, S.B., was denied a snack as a form of punishment when the child allegedly hit her sister, L.B. who is also enrolled at the child care facility.

3. The allegations of material fact in support of Violation 2 were as follows:

> During a complaint inspection on 8/6/14, the child care facility was cited for a Class I violation of Standard #63, Misrepresentation, when it came to the Family Safety Counselor's attention that child care personnel, K.L. misrepresented and forged information, related to the child

> care facility when he utilized a notary stamp belonging to a former employee, namely I. Albarran and submitted the 2014 application for licensure to the Department with the forged notarization.

4. The School, which requested a hearing, was found not guilty of the charges. See Dep't of Child. & Fams. v. Child.'s Hour Day Sch., Case No. 14-4539, 2015 Fla. Div. Adm. Hear. LEXIS 8 (Fla. DOAH Jan. 9, 2015; Fla. DCF Feb. 18, 2015).

5. The Administrative Law Judge made the following findings of material fact with respect to Violation 1:

> S.B. and L.B. are young sisters who stayed at Respondent's day-care center in July 2014. On July 9, 2014, one of Respondent's employees gave S.B. and L.B. a small cup of Cheez-Its as a snack. [Kevin] Lennon was present when the two girls were sharing the cup of Cheez-Its. After S.B., who is the older and bigger child, finished her share of the Cheez-Its, S.B. began to hit her sister to take her sister's share of the Cheez-Its. Mr. Lennon separated the two girls and permitted L.B. to eat her share of the Cheez-Its. Mr. Lennon testified, credibly, that he did not take the Cheez-Its from S.B. to punish S.B.

Id. at 3-4 (paragraph number omitted).

6. The Administrative Law Judge made the following findings of material fact with respect to Violation 2:

> On March 25, 2014, Petitioner received from Respondent an "Application for a License to Operate a Child Care Facility" (the application). Mr. Lennon completed the application on behalf of Respondent. The application contained an attestation section that required Mr. Lennon's signature to be

> notarized. On March 25, 2014, Petitioner received an attestation section (first attestation section) signed by Kevin Lennon on February 28, 2014. The first attestation section contains Ivanne Albarran's notary seal and a signature dated February 28, 2014. Mr. Lennon testified, credibly, that he signed the first attestation section as Kevin Lennon. Mr. Albarran testified, credibly, that he signed the first attestation section as the notary public.
>
> The application package contains a second attestation section that was received by Petitioner on March 28, 2014. The second attestation section contains Mr. Lennon's signature and a date of March 26, 2014. The second attestation section contains Mr. Albarran's notary seal and a signature dated March 28, 2014. Mr. Lennon testified, credibly, that he signed the second attestation section as "Kevin Lennon." Mr. Albarran testified, credibly, that he signed the second attestation section as the notary public.

Id. at 4-5 (paragraph numbers omitted).

7. The School's owner is a corporation, Hamilton-Smith, Inc. ("HSI"), whose principal office is located in the state of Florida.[1/] Kevin Lennon, who was referred to as "K.L." in the Administrative Complaint and is mentioned in the findings of fact quoted above, is HSI's sole shareholder. HSI employed fewer than 25 persons at the time DCF initiated the underlying disciplinary proceeding, and at all relevant times thereafter. Thus, HSI is a "small business party" as that term is defined in section 57.111(3)(d)1.b., Florida Statutes.[2/]

8. DCF agrees that HSI is a "prevailing" party as that term is defined in section 57.111(3)(c)1., inasmuch as a final order dismissing the charges against the School was entered in DOAH Case No. 14-4539. It is determined, as a matter of ultimate fact, that HSI is a "prevailing small business party" entitled to recover its reasonable attorney's fees and costs from DCF "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust." § 57.111(4)(a), Fla. Stat.

9. In defending against the administrative charges, HSI incurred attorney's fees in the amount of $4,515.00 and costs totaling $434.50, for which it now seeks to be reimbursed. DCF does not contest the amount or reasonableness of either sum.

10. DCF contends, however, that an award of attorney's fees and costs is unwarranted because its actions were substantially justified. It is therefore necessary to examine the grounds upon which DCF made its decision to charge the School with the offenses alleged in the Administrative Complaint.

11. The disciplinary action had its genesis in an anonymous complaint that, on August 6, 2014, was phoned in to the local DCF licensing office in the School's vicinity. DCF counselor Michaelyn Radcliff went out that same day to investigate, and she met Tajah Brown at the School. Ms. Brown,

an employee of the School, revealed to Ms. Radcliff that she had made the complaint, which involved the ratio of staff to children. Mr. Lennon, who was Ms. Brown's boss, happened to be out of town at the time and hence was not present for Ms. Radcliff's inspection.

12. For the next six hours or so, Ms. Brown described for Ms. Radcliff every regulatory violation or offense she could think of, which she believed the School might have committed. One such offense was the alleged withholding of S.B.'s snack. Ms. Brown had not witnessed this incident, but she knew the child's mother, E.B., and offered to ask the mother to give a statement about it, which Ms. Radcliff agreed was a good idea.

13. E.B. met Ms. Radcliff at the School, accompanied by her daughter S.B., who was then two years old. E.B. did not have personal knowledge of the alleged denial-of-snack incident, but she had been told about the event by her sister (S.B.'s aunt) who had picked S.B. and L.B. up from day care the evening of its alleged occurrence. The aunt did not have personal knowledge of the matter either, having arrived afterward. Rather, according to E.B., the aunt had told E.B. that Mr. Lennon had told her (the aunt) that S.B. had hit L.B. and thrown a tantrum. Ms. Radcliff did not speak to the aunt, however, whose testimony about what Mr. Lennon told her actually might have been admissible at hearing under an exception to the

hearsay rule[3/]; instead, she accepted E.B.'s statement about the incident, which was based on hearsay (Mr. Lennon's declaration) within hearsay (the aunt's declaration) and had no evidential value on its own.

14. Ms. Radcliff did question one eyewitness: two-year-old S.B., who denied hitting her sister, complained that Mr. Lennon would not give her a snack, and accused Mr. Lennon of hitting her. S.B.'s statement, such as it was, was the only independently admissible evidence Ms. Radcliff had. She never spoke with Mr. Lennon, who was the only adult eyewitness to the alleged denial-of-snack incident.[4/]

15. As for the alleged misrepresentation, Ms. Brown informed Ms. Radcliff that she (Ms. Brown) had observed Mr. Lennon using a notary stamp belonging to Ivanne Albarran, a former employee of the School, to "notarize" signatures in Mr. Albarran's name when he was not around. Ms. Brown did not, however, identify any specific documents that she claimed to have seen Mr. Lennon fraudulently notarize in this fashion.[5/] Nor, apparently, was she asked whether she was familiar with either Mr. Albarran's or Mr. Lennon's signature or if she could identify anyone's signature on any document.

16. Ms. Radcliff herself compared the signatures on documents purportedly signed by Mr. Albarran during the time when Mr. Albarran was an employee of the School with some of his

purported signatures on documents executed after his employment had ended. She concluded that the signatures looked different. Ms. Radcliff is not a forensic document examiner, however, and she has no discernable expertise in handwriting analysis.

17. Based on her layperson's opinion about the signatures, Ms. Radcliff determined that Mr. Albarran had not executed some notarized documents that the School had submitted with its recent application for renewal licensure, even though his stamp, seal, and purported signatures appeared on them. Based on Ms. Brown's claim to have seen Mr. Lennon use Mr. Albarran's notary stamp, Ms. Radcliff concluded that Mr. Lennon had forged these signatures. Ms. Radcliff never asked Mr. Albarran whether he had signed the documents in question, nor did she speak with Mr. Lennon about the matter.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes. The Administrative Law Judge has final order authority in this matter. § 55.111(4)(d), Fla. Stat.

19. Section 57.111, Florida Statutes, also known as the Florida Equal Access to Justice Act ("FEAJA"), directs that unless otherwise provided by law, a reasonable sum for "attorney's fees and costs"[6/] shall be awarded to a private

litigant when all five of the following predicate findings are made:

1. An adversarial proceeding was "initiated by a state agency."[7/]
2. The private litigant against whom such proceeding was brought was a "small business party."[8/]
3. The small business party "prevail[ed]" in the proceeding initiated by a state agency.[9/]
4. The agency's actions were not substantially justified.
5. No special circumstances exist that would make the award unjust.

See § 57.111(4), Fla. Stat.[10/]

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

21. As found above, the School carried its burden with regard to elements 1, 2, and 3. No special circumstances were shown to exist that would make an award of attorney's fees and costs unjust. The remaining question, therefore, is whether DCF's actions were substantially justified. "A proceeding is 'substantially justified' if it had a reasonable basis in law

and fact at the time it was initiated by a state agency." § 57.111(3)(e), Fla. Stat.

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

23. Practically speaking, however, in evaluating an agency's action under section 57.111, the dispositive question, ultimately, is whether a reasonable person, viewing the facts known to the agency at the time of the decision in the light most favorable to the agency, might believe that the agency acted properly. Scheinberg v. Dep't of Health, Case No. 11-4118F, 2011 Fla. Div. Adm. Hear. LEXIS 1046, 10-11 (Fla. DOAH Dec. 22, 2011), per curiam aff'd, 144 So. 3d 551 (Fla. 4th DCA 2013). In other words, the standard of review for an agency's decision for purposes of section 57.111 is extremely

deferential——akin to a determination of whether the agency abused its discretion in acting as it did. Id. at 11.

24. Moreover, in evaluating whether the agency's decision to proceed was substantially justified, facts coming to light after the decision was made cannot be used to second-guess the action. See Dep't of Health, Bd. of Phys. Therapy Pract. v. Cralle, 852 So. 2d 930, 933 (Fla. 1st DCA 2003)(subsequent discoveries do not vitiate reasonableness of agency's actions). Thus, the "reviewing body——whether DOAH or a court——may not consider any new evidence which arose at a fees hearing, but must focus exclusively upon the information available to the agency at the time that it acted." Ag. for Health Care Admin. v. MVP Health, Inc., 74 So. 3d 1141, 1144 (Fla. 1st DCA 2011).

25. In this case, the only nonhearsay evidence that DCF had in support of the allegations comprising Violation 1, at the time it issued the Administrative Complaint, was the statement of a two-year-old infant, S.B. Her mother E.B.'s statement, while that of an adult, was plainly inadmissible, except perhaps as corroborative evidence to supplement or explain S.B.'s testimony. See § 120.57(1)(c), Fla. Stat. The undersigned rejects the idea that, without unusual or extraordinary circumstances not present here, an agency may properly take disciplinary action against a licensee on the strength of a two-

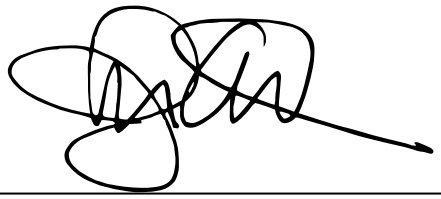
year-old's testimony bolstered, if at all, only by otherwise inadmissible hearsay.

26. The allegations forming the basis of Violation 2 were based on (i) Ms. Brown's statement——which accused Mr. Lennon of misusing Mr. Albarran's notary seal *generally* but not specifically in connection with the application for licensure the School submitted to DCF——and (ii) Ms. Radcliff's lay opinion concerning the apparent dissimilarity of various signatures purporting to be those of Mr. Albarran. All of this amounted, at best, to circumstantial evidence, which was, the undersigned concludes, insufficient under the circumstances to support a reasonable inference that Mr. Lennon had forged Mr. Albarran's signature and fraudulently used the latter's notary stamp in preparing documents for submission to DCF with the School's application for a renewal license.

27. In sum, DCF's prosecution of the Administrative Complaint against the School was not substantially justified. Accordingly, the School's application for attorney's fees and costs is granted.

It is ORDERED that, as the prevailing party in DOAH Case No. 14-4539, the School is hereby awarded the sum of $4,949.50 for attorney's fees and costs, which the undersigned finds and concludes is a reasonable amount.

DONE AND ORDERED this 21st day of December, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1/] The underlying disciplinary action was brought against "Children's Hour Day School," which is a fictitious name, not a jural entity. In actuality, HSI is the real party, and the Administrative Complaint probably should have named "Hamilton-Smith, Inc., d/b/a Children's Hour Day School," as Respondent. This technicality has not caused any genuine confusion, however, nor prejudiced either party, and therefore the undersigned, like the parties, intends that references to the School be understood to mean either the facility or the licensee, as the context requires.

[2/] HSI's net worth did not exceed $2 million, either, which provides an alternative basis for designating the corporation a "small business party." Id. DCF argues strenuously that HSI failed to prove that its net worth fell below the $2 million mark. While the School's evidence regarding this fact was perhaps less than definitive, it was sufficient to establish that, more likely than not, HSI is not worth more than $2 million. The dispute about HSI's net worth is not especially meaningful, however, because the School convincingly proved that it never has had more than 25 full-time employees——a fact that

DCF seems to accept. Under the statutory definition, a corporation is a small business party if it has *either* (i) a net worth less than or equal to $2 million, *or* (ii) 25 or fewer full-time employees; it need not have *both*. Id.

[3/] See § 90.803(18), Fla. Stat.

[4/] In its Response to Petition, DCF asserted that Ms. Brown had personally observed Mr. Lennon withhold food from S.B. as alleged in the Administrative Complaint. If that were true, DCF would have had a substantial justification for charging the School with Violation 1. The evidence at hearing, however, established unequivocally, as found above, that Ms. Brown was not an eyewitness to the alleged denial-of-snack incident. (T. 193-94).

[5/] In its Response to Petition, DCF asserted that Ms. Brown told Ms. Radcliff that Mr. Lennon used Mr. Albarran's notary stamp to notarize documents submitted to DCF. The evidence at hearing, however, did not bear this out. Ms. Radcliff's testimony about Ms. Brown's accusations proved, at most, that DCF had a basis for suspecting that Mr. Lennon had generally misused the notary stamp (if Ms. Brown were believed)——but this was not the offense charged as Violation 2. Rather, DCF alleged in the Administrative Complaint that Mr. Lennon had forged Mr. Albarran's signature on the School's 2014 application for licensure——a specific document. At hearing, Ms. Radcliff emphasized that Ms. Brown had not named any particular documents that Mr. Lennon had allegedly "notarized" with a forged signature. (T. 195-97).

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

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

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

> 1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments;
>
> b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million; or
>
> c. An individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade; or
>
> 2. Any small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor.

§ 57.111(3)(d), Fla. Stat.

[9/] Pursuant to section 57.111(3)(c), a party is a "prevailing small business party" when:

> 1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking

judicial review of the judgment or order has expired;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or

3. The state agency has sought a voluntary dismissal of its complaint.

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

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.