

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLOBAL HOOKAH DISTRIBUTORS,
INC.,

Petitioner,

vs.

Case No. 16-3105RU

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on August 30, 2018, via video teleconference with sites in Tallahassee and Lauderdale Lakes, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH"). The parties were represented as set forth below.

APPEARANCES

For Petitioner: Gerald J. Donnini, Esquire
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100 West Cypress Creek Road
Fort Lauderdale, Florida 33309

For Respondent: Elizabeth A. Teegen, Esquire
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STATEMENT OF THE ISSUE

This case was re-opened at DOAH on June 22, 2018, pursuant to a remand from the First District Court of Appeal (the "First DCA") in Case No. 1D16-5200. The First DCA reversed a Final Order in the instant case issued on October 20, 2016. That Final Order denied Petitioner, Global Hookah Distributors, Inc. ("Global Hookah"), the right to seek a ruling on the question of whether certain actions by the Department constituted an unpromulgated rule. Rather, the Final Order held that the issue had already been decided in Florida Bee Distributors, Inc. v. Department of Business and Professional Regulation, Case No. 15-6108 (Fla. DOAH Mar. 3, 2016) ("Florida Bee").

During the appeal by Global Hookah, the First DCA Per Curium Affirmed the Florida Bee Final Order. That affirmance effectively mooted the issue on remand in the instant case, save for a determination of attorneys' fees to be paid by the Department of Business and Professional Regulation (the Department). The sole issue in this preceding, therefore, is the amount of attorneys' fees and costs to be paid to Global Hookah.

Unless otherwise stated herein, all references to Florida Statutes shall be to the 2018 codification.

PRELIMINARY STATEMENT

On June 6, 2016, Petitioner, Global Hookah, timely filed a Petition to Determine Invalidity of Agency Statements. The case

was consolidated with DOAH Case No. 15-6901 on July 19, 2016, and a final hearing was held on August 18, 2016. A Final Order was issued in the instant case and a Recommended Order was issued contemporaneously in Case No. 15-6901.

Global Hookah timely appealed the Final Order in the instant case, arguing a due process violation concerning its right to argue certain aspects of the alleged unpromulgated rule. (Global Hookah prevailed in Case No. 15-6901, with all of the tax assessments against it being withdrawn.) The First DCA issued its opinion in the appeal on May 3, 2018, reversing the DOAH Final Order and remanding the case to DOAH for further action regarding the award of attorneys' fees and costs to Global Hookah. A hearing was then scheduled and held on August 30, 2018.

At the hearing, Global Hookah called two witnesses: Gerald J. Donnini, Esquire; and Brittany Adams Long, Esquire. Global Hookah's Exhibits 1 through 17 were admitted into evidence. The Department called one witness: John Wharton, Esquire.

The parties advised that a transcript of the final hearing would be ordered. The parties were, by rule, allowed 10 days from the filing of the transcript at DOAH to submit proposed final orders. The Transcript was filed at DOAH on September 4, 2018. Thereafter, the parties requested and were granted

additional time, and each party timely submitted a proposed final order.

FINDINGS OF FACT

1. Global Hookah filed a Petition to Determine Invalidity of Agency Statements, claiming the Department was creating tax assessments on certain tobacco products by applying unlawful and unpromulgated policies. A final hearing was held on August 18, 2016, and the undersigned issued a Final Order on October 20, 2016. That Final Order contained the following language at paragraph 20, therein:

Global Hookah also contends that the Department's inclusion of federal excise tax, shipping costs, and other items in the taxable base for distributors constitutes an unpromulgated rule. That issue, however, has already been decided in [Florida Bee], and will not be addressed in this [Final] Order. The Final Order in Florida Bee has been stayed and is currently under appeal at the First District Court of Appeal, Case No. 1D16-1064, meaning that the Department is free to rely on the policy pending a decision by the appellate court.

2. Although Global Hookah had obtained relief from proposed tax assessments by the Department in the contemporaneously issued Recommended Order, it still wished to make its complete arguments concerning the unpromulgated rule. In that vein, Global Hookah filed its appeal to the First DCA on November 18, 2016, which resulted in the Opinion discussed above.

3. Meanwhile, the First DCA issued its Per Curiam affirmance in the Florida Bee appeal the very same day as the issuance of the Final Order in the Global Hookah case at DOAH, i.e., October 20, 2016. A mandate in Florida Bee was ultimately issued on December 16, 2016.

4. Relying on the Florida Bee decision, the Department attempted to have Global Hookah's appeal deemed moot, but the First DCA rejected that argument. Instead, on May 3, 2018, the First DCA issued its Opinion reversing the Final Order and remanding the case to DOAH. The First DCA also issued an Order provisionally granting Global Hookah's motion for appellate attorneys' fees and costs upon Global Hookah "meeting the prerequisites for an award of attorneys' fees pursuant to Section 120.595(4)(a), Florida Statutes. The administrative law judge shall determine the amount thereof."

5. Global Hookah asserts a claim for attorney's fees of approximately \$200,000.00 and costs in the amount of \$3,114.65, as opined by its counsel at final hearing. The competing expert opinions made it impossible to ascertain exact dollar amounts, so attorneys' fees amounts in this Final Order will be rounded to the nearest estimate.

6. The expert hired by Global Hookah affirmed \$199,000.00 in attorneys' fees. She did not opine on the amount of costs.

7. The Department's expert opined that although the hourly rates charged by Global Hookah's counsel seemed appropriate, there seemed to have been excessive hours charged in the matter. More specifically, the number of hours spent on preparation for and conduct of the DOAH hearing was more than would be expected in light of the nature of the case. The issues were not unique or novel and there were no particularly difficult legal questions involved. The appeal by Global Hookah was somewhat novel, however, but the issue was still very narrow. Again, the expert opined that too many hours were charged in the matter.

8. In total, the Department's expert said that there were about \$72,000 in excess legal fees charged by Global Hookah's counsel. That opinion, however, was qualified by the admission that he was not aware of some of the nuances of the case in general, which could lead to less of a reduction than he opined. He concluded that fees for the DOAH proceeding should be approximately \$52,000.00; that the fees for the appeal to the First DCA should be \$82,000.00; and that the total fees should be \$134,000.00.

9. Global Hookah's expert's opinion was also somewhat qualified, as she relied heavily on the novel legal issue in the appeal rather than the costs of an appeal in general. She also did not compare the legal fees and time for Global Hookah's

attorneys versus the Department's attorneys' time. Thus, it was impossible to fully determine the legitimacy of all legal fees.

10. The evidence presented did not fully explain or justify either party's position in this matter. It is clear that the amount of legal fees is in excess of \$134,000.00, but it is also clear that the entire \$200,000.00 claimed by Global Hookah is not completely justified. Unfortunately, the evidence presented was not sufficient to completely support the position of either party, leaving it to the undersigned to weigh the evidence and to formulate an amount that is supported by a preponderance of the evidence.

11. The undersigned therefore compiled all the relevant evidence and extrapolated an amount of attorneys' fees most consistent with the competing opinions, resulting in a finding of \$168,000.00 in fees. Costs in the amount of \$3,114.65 were established by the evidence.

CONCLUSIONS OF LAW

12. The Department of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to section 120.56(4), Florida Statutes.

13. The attorneys' fees at issue in this case are to be awarded pursuant to section 120.595, which says in pertinent part:

(4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4). -

(a) If the appellate court or administrative law judge determines that all or part of an agency statement violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement and any substantially similar statement pursuant to s. 120.56(4)(f), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

14. In this case, there was no showing by the Department that an exception existed to the fee statute. Inasmuch as the First DCA had issued an Order awarding fees to Global Hookah, the only issue was a determination of what constitutes a "reasonable" fee under the facts presented.

15. As cited by Global Hookah in its Proposed Final Order, the case of Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), sets out a lodestar approach for helping to determine a reasonable attorneys' fee amount. The Rowe case sets out eight different factors that can be considered in making the determination or reasonableness, only two of which are particularly pertinent to the instant case. Those factors will be discussed below.

16. As to the first factor, the time, labor and novelty of the matter, the experts differed in their opinions. The issue

before the DCA was indeed a question of first impression, but was not particularly challenging.

17. The experience of Global Hookah's lawyers, the next factor, is not questioned as to the administrative proceeding. However, no showing was made as to any particular expertise by the lawyers in an appeal such as this one.

18. Clearly, Global Hookah bears the burden of proving that the fees it is claiming are reasonable. See Robin Roshkind, P.A. v. Machiela, 45 So. 3d 480 (Fla. 4th DCA 2010). Global Hookah has met its burden, at least to some extent. While its experts were credible and believable, their testimony was not persuasive as to all aspects of the claimed fees.^{1/}

19. Upon consideration of all the evidence, weighing the credibility of the expert witnesses, and considering both the DOAH proceeding and the appeal, the most logical determination is that approximately \$68,000.00 in legal fees is warranted for the DOAH proceeding; \$100,000.00 in legal fees is warranted for the DCA appeal; for a total of \$168,000.00 in attorneys' fees, plus \$3,115.65 in costs, should be granted.

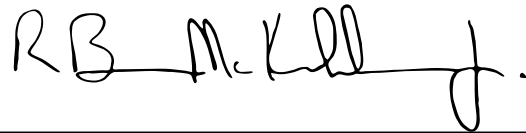
ORDER

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

ORDERED that the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, pay to

Global Hookah Distributors, Inc., the sum of \$168,000.00 in attorneys' fees and \$3,114.65 in costs.

DONE AND ORDERED this 25th day of September, 2018, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 2018.

ENDNOTE

^{1/} For example, no explanation was provided by Global Hookah as to why its entire team of lawyers was necessary for every aspect of the entire case. For example, five attorneys attended the fee hearing, four attorneys attended the deposition of an agency witness, and so on. That fact gave credence to the Department's witness in his opinion regarding excessive numbers of hours charged.

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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.