STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIA ENTERTAINMENT CENTER, LLC,

Petitioner,

vs. Case No. 16-5682F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

DAYTONA BEACH KENNEL CLUB, INC.,

Petitioner,

vs. Case No. 16-5683F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

JACKSONVILLE KENNEL CLUB, INC.,

Petitioner,

vs. Case No. 16-5684F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

MELBOURNE GREYHOUND PARK, LLC,

Petitioner,

vs. Case No. 16-5685F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

BONITA-FORT MYERS CORPORATION,

Petitioner,

vs. Case No. 16-5686F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

INVESTMENT CORPORATION OF PALM BEACH,

Petitioner,

vs. Case No. 16-5687F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

WEST FLAGLER ASSOCIATES, LTD.,

Petitioner,

vs. Case No. 16-5688F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

TAMPA BAY DOWNS, INC.; AND TBDG ACQUISITION, LLC, d/b/a TGT POKER AND RACEBOOK,

Petitioners,

vs. Case No. 16-5689F

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent.
_____/

PARTIAL FINAL ORDER ON EFFECT OF STATUTORY CAP ON FEES

Pursuant to notice, a hearing was convened in this case on January 16, 2018, in Tallahassee, Florida, before E. Gary Early, the Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners Dania Entertainment Center, LLC; Daytona Beach Kennel Club, Inc.; Jacksonville Kennel Club, Inc.; Melbourne Greyhound Park, LLC; Bonita-Fort Myers Corporation; Investment Corporation of Palm Beach; and West Flagler Associates, Ltd.:

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For Petitioners Tampa Bay Downs, Inc.; and TBDG Acquisition, LLC, d/b/a TGT Poker and Racetrack:

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STATEMENT OF THE ISSUE

The issue to be determined by this Partial Final Order is whether the $50,000 cap on attorneys' fees established in section 120.595(2), Florida Statutes (2017), is to be applied so as to limit the amount of fees to be awarded against an agency in a single rule challenge proceeding to $50,000, or whether an award of attorneys' fees of up to $50,000 may be made to each prevailing party in a rule challenge proceeding with multiple

Petitioners. Upon entry of this Order, a date will be established to reconvene the hearing for the purpose of taking evidence to establish the amount of reasonable costs and reasonable attorney's fees to be awarded, after which a final, appealable Order will be entered.

PRELIMINARY STATEMENT

This case is before the undersigned upon the entry of two Orders by the First District Court of Appeal (First DCA) granting motions for attorney's fees and costs and remanding the matter to DOAH to assess the amount pursuant to section 120.595(2).

On September 26, 2016, after entry of a Final Order determining several proposed rules of the Department of Business and Professional Regulation, Division of Pari-mutuel Wagering (DBPR or Respondent), relating to "designated player" card games, Florida Administrative Code Rules 61D-11.001(17) and 61D-11.002(5), to have been invalid exercises of delegated legislative authority, The Lockwood Law Firm filed separate Motions for Attorney's Fees and Costs pursuant to section 120.595(2) with DOAH on behalf its clients in DOAH Case Nos. 15-7010RP (Petitioner Dania Entertainment Center, LLC); 15-7011RP (Petitioner Daytona Beach Kennel Club, Inc.); 15-7012RP (Petitioner Jacksonville Kennel Club, Inc.); 15-7013RP (Petitioner Melbourne Greyhound Park, LLC);

15-7014RP (Petitioner Bonita-Fort Myers Corporation); 15-7015RP (Petitioner Investment Corporation of Palm Beach); and 15-7016RP (Petitioner West Flagler Associates, Ltd.)(the "Lockwood Petitioners"). On the same day, the Foley & Lardner law firm filed a Motion for Attorney's Fees and Costs on behalf of its clients in DOAH Case No. 15-7022RP (Petitioners Tampa Bay Downs, Inc. and TBDG Acquisition, LLC, d/b/a TGT Poker and Racetrack)(the "Foley & Lardner Petitioners"). The Lockwood Petitioners and the Foley & Lardner Petitioners shall be collectively referred to as "Petitioners."

On October 7, 2016, the Motions for Attorney's Fees and Costs, by then reassigned as DOAH Case Nos. 16-5682F, 16-5683F, 16-5684F, 16-5685F, 16-5686F, 16-5687F, 16-5688F, and 16-5689F, were consolidated and placed in abeyance pending the resolution of DBPR's appeal of the Final Order.

On November 8, 2017, the court entered its written opinion in Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Dania Entertainment Center, LLC, et al., 229 So. 2d 1259 (Fla. 1st DCA 2017), affirming the Final Order. The court also entered two separate Orders granting the motions for attorney's fees and costs filed by the Lockwood Petitioners and the Foley & Lardner Petitioners, and remanded the matters to DOAH to assess the amount.

The case proceeded under the consolidated style. On November 30, 2017, the parties filed a Joint Status Report by which they requested that the final hearing be bifurcated into two phases, with the first phase being a hearing to determine how the $50,000 cap on attorneys' fees established by section 120.595(2) would be applied in the consolidated multi-party litigation, and the second phase being an evidentiary hearing to determine the amount of reasonable costs and attorneys' fees to be awarded. The hearing on the first phase was scheduled for January 16, 2018.

On January 11, 2018, pursuant to the Notice of Hearing, each of the parties filed a memorandum setting forth the facts and law supporting their respective positions, i.e., that each individual Petitioner is entitled to a separate award of up to $50,000, as advanced by the Petitioners, or that $50,000 is the maximum amount that can be awarded against DBPR, as advanced by Respondent.

The parties generally relied upon or distinguished the same five DOAH Final Orders entered between 1997 and 2014. The legislative bill analysis of 1996 Senate Bills 2288 and 2290, which led to the creation of section 120.595(2) with a $15,000 cap, and bill analysis of 2008 Senate Bill 704, which raised the cap to $50,000, were officially recognized, as was, by consent of the parties, the docket in DOAH Case Nos. 15-7010RP, et seq.

The bifurcated hearing was convened on January 16, 2018, as scheduled, with argument taken to supplement the memoranda previously filed. At the conclusion of the argument, the undersigned indicated that the decision was likely to be controlled by Administrative Law Judge R. Bruce McKibben's Final Order in G.B. v. Agency for Persons with Disabilities, Case No. 14-4173FC (DOAH Mar. 24, 2015), aff'd, 180 So. 3d 183 (Fla. 1st DCA 2015). As a result, the parties were allowed to file supplemental memoranda to specifically address the G.B. case.

The parties' memoranda and supplements thereto have been considered in the preparation of this Partial Final Order.

FINDINGS OF FACT

1. The Findings of Fact set forth in the Final Order entered in DOAH Case Nos. 15-7010 through 15-7016 and 15-7022 are hereby adopted in this Final Order.

2. Each Petitioner currently holds a permit and license under chapter 550, Florida Statutes, to conduct pari-mutuel wagering and a license under section 849.086, Florida Statutes, to conduct cardroom operations. Petitioners offer designated player games at their respective cardrooms.

3. On December 11, 2015, the Lockwood Petitioners each filed a Petition Challenging the Validity of Proposed Rules 61D-11.001, 61D-11.002, and 61D-11.005(9), Florida Administrative Code. But for paragraphs identifying the

specific Petitioners, generally paragraphs 2 and 26 of each Petition, the Petitions and their exhibits were, with few exceptions, identical.

4. On December 11, 2015, the Foley & Lardner Petitioners jointly filed their Petition Challenging the Validity of Proposed Rules 61D-11.001, 61D-11.002, and 61D-11.005(9), Florida Administrative Code. Though the Petition was not identical to those filed by the Lockwood Petitioners, there were pervasive similarities and frequently identical provisions, including common exhibits and a substantively similar prayer for relief, that suggest a high degree of coordination among the Petitioners.

5. There was no dispute as to the standing of any party.

6. The final hearing was held on a stipulated record, with the hearing itself consisting of oral argument on the legal issues framed by the Joint Prehearing Stipulation.

7. The exhibits constituting the record were filed as Petitioners' exhibits, with no differentiation between the Lockwood Petitioners and the Foley & Lardner Petitioners.

8. The only testimony of any representative of a Petitioner was the deposition of the president of the Jacksonville Kennel Club that was offered in evidence by Respondent.

9. Among the facts stipulated was that "Surveillance videos gathered by the Division during the investigations in late 2015 and early 2016 showing designated player games [at various of Petitioners' facilities] are representative of the style of play for designated player games throughout Florida cardrooms."

CONCLUSIONS OF LAW

10. Section 120.595(2) provides:

> (2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or 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.

Plain Meaning

11. Each party initially relies on the "plain meaning" of the statute to support their respective positions. The Lockwood

Petitioners assert that the first sentence of section 120.595(2) provides that a "judgment or order" is to be rendered against the agency, and does not place a cap on such judgment. The final sentence provides that no "award" of attorney's fees shall exceed $50,000. The Lockwood Petitioners then argue that "construing these sentences together requires that each prevailing party is entitled to an award of its reasonable attorney's fees, up to $50,000, and an order is entered against the agency for the total amount of attorney's fees that are awarded to the prevailing parties." Memorandum of Law Regarding Section 120.595(2)'s Cap on Attorney's Fees, at 6.

12. Similarly, the Foley & Lardner Petitioners argue that the "plain meaning" of "[e]ach of the operative words are singular, meaning the cap applies on a singular basis, i.e., only on a per-party or per-award basis." Brief on the Application of the Attorney's Fees Statutory Cap, at 4. The Foley & Lardner Petitioners also argue that the "improper purpose" provision by which the agency may recover attorney's fees applies to any "party" that has participated in a proceeding for an improper purpose. They argue that under the "reciprocity principle," it would be illogical to allow the agency to recover fees up to $50,000 from multiple parties, while allowing multiple parties only to split a single $50,000 fee. Id. at 7. That argument, though facially appealing, fails

to recognize that the multiple "improper purpose" parties would still collectively be responsible for the reasonable and actual fees of a single party, i.e. the agency, while the agency could, under that argument, be responsible for the reasonable and actual fees of potentially countless Petitioners.

13. Respondent also asserts that the "plain meaning" of section 120.595(2) controls, arguing that:

> The underlined language above [i.e. "No award of attorney's fees as provided by this sub-section shall exceed $50,000"] is abundantly clear; any proposed rule challenge proceeding is limited to an aggregate award of $50,000 of attorney's fees. Alternatively put, the judgment or order shall be rendered against the agency for reasonable attorney's fees, but that (singular) order shall not exceed $50,000. Any other result would necessitate inclusion of additional language into the statute.

Memorandum of Law in Support of an Aggregate Method for Awarding Attorney's Fees in Accordance with Section 120.595(2), Florida Statutes, at 8.

14. Despite the assertions of the parties, the undersigned concludes that section 120.595(2) is not so clear as to allow for a definitive determination on its face as to whether the statute allows for multiple awards against an agency up to $50,000 when multiple parties have challenged the same proposed rule.

Bill Analysis

15. The parties have each cited to the Final Bill Analysis & Economic Impact Statement for CS/SB 2290 and 2288 (1996 Bill Analysis), as providing evidence of the intent of the Legislature when it created the fee cap provision. CS/SB 2290 and 2288 is the 1996 legislation that created section 120.595, and was codified as chapter 96-159, Laws of Florida. The 1996 Bill Analysis may be found at http://www.japc.state.fl.us/Documents/Publications/SummariesAnalyses/1996/CSSB2290_2288SGR.pdf.

16. As related to this proceeding, the 1996 Bill Analysis, in the section entitled Attorney Fees, provides that:

> For challenges to proposed and existing agency rules, the Governor's Commission recommended that if a proposed rule, existing rule, or portion of a rule is declared invalid, the administrative law judge shall award reasonable costs and reasonable attorney's fees to the petitioner, unless the agency demonstrates that its actions were substantially justified or that special circumstances exist that would make the award unjust. "Substantially justified" is defined the same as in section 57.111, Florida Statutes, as an action that has "a reasonable basis in law and fact at the time the actions were taken by the agency." An agency may be awarded attorney fees and costs if a party has participated in the proceeding for an improper purpose. An "improper purpose" is defined as "participation in a proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or

> securing the approval of an activity." An award of attorney fees under these provisions shall not exceed $15,000. These provisions are included in subsections (2) and (3) of section 120.595, Florida Statutes.

1996 Bill Analysis, at 32.

17. There is little in the Attorney Fees section of the 1996 Bill Analysis that sheds further light on the issue of whether the statutory cap on fees is to be applied per case or per party.

18. More persuasive information is provided in the Fiscal Analysis & Economic Impact Statement of the 1996 Bill Analysis, section III.A.1., which provides, in pertinent part, that:

> 1. Non-recurring Effects:
>
> If attorney fees and costs are awarded under this bill, it will add an indeterminate cost to the rulemaking process. The new attorney fee provisions are capped at $15,000.

1996 Bill Analysis, at 37.

19. It is the conclusion of the undersigned that, if the $15,000 cap was to be applied to individual parties in multi-party litigation, thus creating a potentially limitless non-recurring economic impact of the bill on state agencies, there would have been some mention of that by the committee staff.

20. Further insight as to the scope of the statutory cap may be gleaned from the Bill Analysis and Fiscal Impact Statement for CS/CS/SB 704 (2008 Bill Analysis). CS/CS/SB 704

is the 2008 legislation that amended section 120.595 to raise the statutory cap to $50,000, and which was codified as chapter 2008-104, Laws of Florida. The 2008 Bill Analysis may be found at http://www.japc.state.fl.us/Documents/Publications/SummariesAnalyses/2008/SenateStaffAnalysis-CSCSSB704-TA.pdf.

21. In section 13 of the 2008 Bill Analysis, the committee staff, in describing the proposed change, stated that:

> This bill amends s. 120.595, F.S., to clarify that all references to "the court" are references to the appellate court. It raises the cap on attorney's fees that may be awarded against a party in a proceeding in s. 120.595(2) and (3), F.S. to $50,000. (emphasis added).

2008 Bill Analysis, pg. 16.

22. Not only does the 2008 Bill Analysis suggest that the Legislature understood that an award against a party was to be limited to the capped amount but, as indicated previously, if the attorney's fee cap could create an open-ended economic impact on state agencies, it is unlikely that the committee staff would have neglected to perform an analysis of that possibility.

Cases

23. As indicated previously, the parties each relied upon or distinguished the same five Final Orders entered by DOAH. Petitioners rely on The Environmental Trust v. Department of Environmental Protection, Case Nos. 96-4663RP, et al. (Fla. DOAH

Sept. 8, 1997)(six consolidated cases); Florida Bankers Association v. Department of Insurance, Case Nos. 98-4118F, et al. (Fla. DOAH Dec. 6, 2000)(three consolidated cases); and Anderson Columbia Company, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, Case Nos. 00-0754F, et al., (Fla. DOAH July 18, 2000)(five consolidated cases); whereas Respondent relies on Vipul Patel v. Board of Pharmacy, Case Nos. 08-2728RX, et al. (Fla. DOAH July 30, 2009)(14 consolidated cases); and G.B. v. Agency for Persons with Disabilities, Case No. 14-4173FC (Fla. DOAH Mar. 24, 2015)(four consolidated cases).

Cases Relied Upon by Petitioners

24. Each of the cases relied upon by Petitioners conclude (some more explicitly than others) that attorney's fees up to the statutory cap established in section 120.595(2) (in those cases being $15,000) may be awarded to each party in multi-party litigation.

The Environmental Trust

25. In The Environmental Trust, Judge P. Michael Ruff held that:

> Each of the parties was, due to the Department's attempt to promulgate a rule that was clearly and facially illegal, required to retain counsel in order to effectively represent and protect its interests against the Department's illegal action. As the attorney's fees provisions

> of Chapter 120, Florida Statutes, are intended to provide some measure of financial relief in situations in which agencies have acted outside of their authority, the $15,000.00 attorney's fee cap must apply to each party requiring representation.

The Environmental Trust, FO ¶ 33.

26. Based on his construction of the language of section 120.595(2), his review of the 1996 Bill Analysis, and his understanding of the underlying policy of the fee statute to "level the playing field and allow for effective participation by the private sector," Judge Ruff concluded that the fee cap applied individually to each rule challenge proceeding, with the Petitioners to the consolidated proceedings being "each entitled to an award of their attorneys' fees and costs up to the statutory $15,000 limit." The Environmental Trust, FO ¶ 43.

27. The Final Order in The Environmental Trust was appealed to the First DCA, along with three other related cases. Judge Ruff's Final Order was reversed. The opinion also reversed the Order awarding attorney's fees for reasons unrelated to the application of the statutory cap to multi-party litigation, holding that "[w]e need not determine whether the administrative law judge properly applied the 1996 version of the Administrative Procedure Act, because there is no substantive basis for an award of attorneys' fees." The Envtl. Trust v. Dep't of Envtl. Prot., 714 So. 2d at 501.

Florida Bankers Association

28. Petitioners also rely on the Final Order in Florida Bankers Association, in which Judge William F. Quattlebaum awarded attorney's fees and costs after a successful challenge to certain rules promulgated by the Department of Insurance.[1/]

29. In Florida Bankers Association, the fees to the two parties, $15,000 to Florida Bankers Association and $10,290 to Community Bankers Association, were awarded by stipulation of the parties. Thus, the applicability of the statutory cap in multi-party litigation was neither raised by the parties, nor presented to Judge Quattlebaum for disposition.

30. The Florida Bankers Association Final Order on Remand was again appealed to the First DCA, where the court reduced certain expert witness costs. Dep't of Ins. v. Fla. Bankers Ass'n, 799 So. 2d 353 (Fla. 1st DCA 2001). Again, since the fees had been stipulated by the parties, there would have been no mechanism for the section 120.595(2) fee cap issue to have been brought before the court.

Anderson Columbia

31. Finally, Petitioners rely on Judge Donald R. Alexander's Final Order in Anderson Columbia, in which he concluded that:

> [T]he Board does not dispute the fact that each Petitioner . . . incurred reasonable fees in excess of $15,000.00 in challenging

> the rule. Moreover, each of these parties came to the case with a different perspective, that is, one had a disclaimer with a reversionary interest, one did not, one was a tenant, and one was a landlord. The parties did not participate in a shared venture, and except for the fact that the cases were consolidated for administrative efficiency, their claims would have been tried separately. Contrary to the Board's suggestion, it would be unfair to now penalize the four parties by forcing them to share a fee simply because they happened to choose the same attorney for representation and their claims were joined for purposes of hearing. If the Board's theory were accepted, multiple parties would always oppose consolidation and seek to have their claims tried separately, or they would be forced to retain separate counsel in order to be made whole under the statute. Such a result is illogical, unfair, and contrary to the very purpose of the statute. Obviously, the process is better served by fewer attorneys and consolidation of multiple cases. Therefore, each of the four Petitioners is entitled to recover $15,000.00 in fees.

Anderson Columbia, FO ¶ 31.

32. As a result, Judge Alexander awarded fees in the amount of $15,000 to each of the Petitioners in four of the cases, and $9,117 to the fifth Petitioner.

33. Judge Alexander's Final Order was affirmed, per curiam, by the First DCA. Bd. of Trs. of the Int. Imp. Trust Fund of Fla. v. Support Terminals Operating P'ship, L.P., 796 So. 2d 1176 (Fla. 1st DCA 2001). Though PCAs have limited precedential value (Department of Legal Affairs v. District

Court of Appeal, 434 So. 2d 310 (Fla. 1983)), Anderson Columbia provides the firmest support for Petitioners' position regarding the award of attorney's fees in multi-party rule challenges.

Cases Relied Upon by Respondent

34. Predictably, Respondent relied on the two DOAH Final Orders that concluded the statutory cap established in section 120.595(2) is to be applied as a single award against an agency, with that amount to be divided amongst parties in multi-party litigation.

Vipul Patel

35. In Vipul Patel, Judge Susan B. Harrell determined that the cap would be applied as an aggregate to each of the 14 Petitioners. There were a number of factors -- some of which are applicable to the current Petitioners, and some of which are not -- that appear to have influenced her decision.

36. Factors that were similar to the situation in this case were that "Petitioners had a common goal . . . . The wording of each of the petitions was essentially the same except for the names of the individual Petitioners. Because the issues were the same for all the rule challenges, the rule challenges were consolidated for final hearing." Vipul Patel, FO ¶ 5. In Vipul Patel, the common goal was for each Petitioner to be allowed to sit for the pharmacist professional licensure examination. In this case, the common goal was for each

Petitioner to be allowed to conduct player-banked designated player card games.

37. Factors that shared no similarity between Vipul Patel and the instant case were that "the reason for filing 14 separate petitions was to increase the amount of attorney's fees which could be awarded. The cases were taken on a contingency fee basis, principally because Petitioners could not afford to pay on an hourly basis." It is clear from Judge Harrell's Order that the filing of separate petitions in Vipul Patel was an artifice for generating enough fees to make the case worth the Vipul Patel attorney's time. There is not even a hint that any such circumstance exists here.

38. Judge Harrell noted, citing a factor applied by Judge Alexander in Anderson Columbia, that "the Petitioners are not bringing different perspectives to the cases."

39. Petitioners in this case argue that each Petitioner had a different set of circumstances that they brought to the case. Even though all of the Petitioners sought invalidation of the same proposed rule, and all shared the goal of offering designated player games at their respective facilities, "each [was] impacted differently by the proposed rule repeal because their internal controls and rules governing the games differ, as do the number of tables they offer and the demands of their local markets." Lockwood Petitioners' Supplemental Memorandum

of Law Regarding Section 120.595(2)'s Cap on Attorney's Fees at 7.

40. The differences between the Petitioners in terms of the particulars of their games and internal controls are not so distinct as to lead the undersigned to conclude that they brought materially different perspectives. To the contrary, the general "style of play for designated player games" at each facility was consistent, and Petitioners' journeys through the rulemaking and enforcement processes, as well as through the rule challenge proceeding, were substantially similar, and led to a result that would not have varied depending on the circumstances of any individual Petitioner. As stated by Judge Harrell, Petitioners, as with the Vipul Patel Petitioners, "were all in the same boat." Vipul Patel, FO ¶ 93.

G.B.

41. In G.B., Judge R. Bruce McKibben entered a Final Order after the First DCA granted the Petitioners' motion for attorney's fees with the following Order:

> [Petitioners'] 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.

42. In his Final Order on remand, Judge McKibben concluded that the statutory cap on attorney's fees in section 120.595(2) applied as an aggregate, to be divided among the four

Petitioners. In drawing his conclusion, Judge McKibben determined that:

> [T]he 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.

G.B., FO ¶ 18.

43. Judge McKibben noted that, in G.B., there was no dispute as to standing, and only one of the Petitioners testified. Similarly, there was no dispute in this case as to the standing of any party in the underlying rule challenge. The case was tried on a record stipulated by all of the parties. The only testimony of any representative of a Petitioner was the deposition of the president of the Jacksonville Kennel Club. Among the facts stipulated was that "[s]urveillance videos gathered by the Division during the investigations in late 2015 and early 2016 showing designated player games [at various of Petitioners' facilities] are representative of the style of play for designated player games throughout Florida cardrooms." As in G.B., the level of coordination between the Petitioners was substantial.

44. Judge McKibben's Final Order on remand was appealed to the First DCA. In its Opinion and Order on Amended Motion for

Review of Administrative Order on Appellate Attorneys' Fees, the court held that:

> Appellants seek review pursuant to rule 9.190(d)(3), Florida Rules of Appellate Procedure, of the administrative final order on attorneys' fees entered upon remand in case number 1D13-4903 . . . . That administrative order awarded $50,000.00 in attorneys' fees pursuant to section 120.595(2), Florida Statutes . . . . We reject all of Appellants' arguments and affirm the administrative order."

G.B. v. Agency for Persons with Disabilities, 180 So. 3d 183 (Fla. 1st DCA 2015).

45. G.B. provides the most direct and recent expression of the construction of section 120.595(2) by an appellate court. Thus, it is concluded that in cases such as this, in which a group of Petitioners is acting in a concerted and collective manner to achieve a common result, the total award of fees to the Petitioners, and against the agency, is limited to $50,000.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned concludes that the $50,000 cap on attorney's fees established in section 120.595(2) establishes the maximum amount that may be awarded to Petitioners, collectively, in this proceeding.

This Partial Final Order on Effect of Statutory Cap on Fees shall be adopted and incorporated in the Final Order to be

entered in this case determining the amount of attorney's fees up to $50,000 and reasonable costs.

DONE AND ORDERED this 26th day of January, 2018, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2018.

ENDNOTE

[1/] The Final Order on Remand was entered after an appeal of his initial Final Order. The court's opinion focused entirely on the insufficiency of the findings as to whether the Department of Insurance was "substantially justified" in proposing the rule, and on whether Judge Quattlebaum was correct in denying fees to a non-attorney qualified representative. Dep't of Ins. v. Fla. Bankers Ass'n, 764 So. 2d 660 (Fla. 1st DCA 2000). The earlier opinion made no reference to the applicability of the section 120.595(2) statutory cap on fees.

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. 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.