STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NADER + MUSEU I LIMITED
LIABILITY LIMITED PARTNERSHIP, A
FLORIDA LIMITED PARTNERSHIP,

Petitioner,

vs. Case No. 16-6954F

MIAMI DADE COLLEGE, AN AGENCY OF
THE STATE OF FLORIDA,

Respondent.
_____/

FINAL ORDER AWARDING APPELLATE ATTORNEY'S FEES AND COSTS

A final hearing in this case was held on September 12, 2018, by video teleconference at sites in Tallahassee and Miami, Florida, before Robert L. Kilbride, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: William W. Riley, Jr., Esquire
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For Respondent: Jose M. Ferrer, Partner
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STATEMENT OF THE ISSUE

The issue to be determined in this case is the amount of appellate attorney's fees to be awarded and paid to Respondent by Petitioner.

PRELIMINARY STATEMENT

This matter came before the undersigned on March 21, 2018, on a remand order from the Third District Court of Appeal ("Third DCA") in Case No. 3D17-0149. The undersigned was directed by the Court to "fix" the amount of appellate attorney's fees to be awarded to Respondent.

To that end, on September 12, 2018, an evidentiary hearing was held before the undersigned. Respondent presented the testimony of Albert E. Dotson, Jr., Esquire, and the expert testimony of Ms. Dagmar Llaudy, Esquire. Petitioner presented the expert testimony of Mr. Robert Klein, Esquire. Petitioner offered Exhibit 1, which was admitted. Respondent offered Exhibits 1 through 22, which were admitted.

The Transcript of the final hearing was filed with DOAH on September 25, 2018; and, after an extension was granted, the parties submitted proposed final orders that were reviewed in the preparation of this Final Order. Unless otherwise noted, the 2018 version of the Florida Statutes is applied where applicable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented, the following findings of fact and conclusions of law are made:

1. The dispute taken on appeal to the Third DCA in Case No. 3D17-0149 concerned the undersigned's Final Order on Petitioner's Motion for Attorney's Fees dated December 20, 2016.[1/]

2. In that Final Order, the crux of the ruling denying the request for fees was that in the administrative case, there had been no prevailing party; that the wording of section 255.0516, Florida Statutes, contemplates that costs and attorney's fees may be recovered only after a final administrative hearing is held (no final hearing had been held); and that the separate agreement between the parties did not provide a basis for an award of fees.

3. The Final Order denying the award of attorney's fees to Nader was appealed and upheld by the Third DCA in a per curiam affirmed Opinion dated March 21, 2018. Respondent was also awarded its appellate fees in a separate Opinion issued the same day. That matter was referred to the undersigned for a determination.

4. Respondent is requesting that this tribunal award it payment of $120,539.70 as appellate attorney's fees resulting from approximately 303.75 hours of time. In doing so, it relies upon several invoices submitted by its counsel regarding the

legal work performed on the appeal. See Resp. Exs. 3-17 and Ex. A of Resp. Ex. 20.

5. Those invoices reflect that the following attorneys and paralegals worked on the appeal for Respondent at the listed rate(s):

a. Albert E. Dotson, Jr. ($740 to 750.00/hour)

b. Eileen Ball Mehta ($685 to 695.00/hour)

c. Jose M. Ferrer ($595.00/hour)

d. Melissa Pallett-Vasquez ($565.00/hour)

e. Eric Singer ($480 to 510.00/hour)

f. Leah Aaronson ($315.00/hour)

g. Elise Holtzman ($290 to 295.00/hour)

h. Maria Ossorio ($295.00/hour)

i. Jessica Kramer ($290.00/hour)

j. Maria Tucci ($275.00/hour)

6. In deciding the amount of attorney's fees to be awarded, a court must consider not only the reasonableness of the fees charged, but also the appropriateness of the number of hours counsel engaged in performing their services. Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); and Mercy Hosp. Inc., v. Johnson, 431 So. 2d 687 (Fla. 3d DCA 1983).

7. Respondent has the burden to prove, by a preponderance of the evidence, that the amount of attorney's fees it has

requested is reasonable. Rowe, 472 So. 2d at 1145; see also § 120.57(1)(j), Fla. Stat. (2015).

8. In Rowe, it was determined that the criteria listed in Rule 4-1.5 of the Rules Regulating The Florida Bar should be used to calculate the amount of reasonable attorney's fees. Rowe, 472 So. 2d at 1151.

9. The undersigned has considered all the relevant factors outlined in Rule 4-1.5 and Rowe. Several of the factors and related findings are highlighted below.

Rule 4-1.5(b)(1)(A)

10. In determining whether a requested fee award is reasonable, one factor to be considered is "the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly."

11. The issue on appeal to the Third DCA was limited primarily to an analysis and determination of a "prevailing party" fee award. Notably, this issue was addressed, briefed, and argued by these parties before the undersigned in the underlying administrative proceeding.

12. Many of the arguments set forth by Respondent in the appellate proceedings, which is the subject of this remand Order, were duplicative and, as mentioned, had been briefed, argued, and

utilized in prior filings in the underlying administrative proceedings.

13. Respondent contends that "new theories of liability" were introduced in Petitioner's Initial Brief. However, this argument is not persuasive.

14. The evidence presented at the hearing also does not support Respondent's claim that all the labor and services of the aforementioned attorneys was required. A good deal of their work was duplicative in nature, redundant, and not necessary in order to perform the legal services properly. In short, some of the time billed was excessive.

15. Petitioner's expert, Attorney Robert Klein, testified that he reviewed the Bilzin Sumberg firm's invoices for legal services, reviewed a considerable number of pleadings from the administrative proceedings, and reviewed nearly the entire collection of pleadings in the appellate case.[2/]

16. Klein testified convincingly, and the undersigned credits, that based on his global review of the Bilzin Sumberg invoices: (1) the fees charged "were far beyond what they should have been"; (2) he discovered a "tremendous duplication of effort"; and (3) "the overwhelming majority of the arguments" raised on appeal had already been raised in the administrative proceedings.

17. In describing the firm's preparation time for oral arguments, he opined that the time billed was "really high." In short, Klein's expert testimony, while stated in general or more abstract terms, properly supplemented by the undersigned's own review of the invoices and the Exhibit A summary of Respondent's Exhibit 20, supports a considerable reduction in the fees charged.

18. As a legal back drop to the distinctive issues in this case, an analysis regarding the reasonableness of an attorney's posted time is helpful. In Donald S. Zuckerman, P.A. v. Alex Hofrichter, P.A., 676 So. 2d 41, 43 (Fla. 3d DCA 1996), the court held that a party has the right to hire as many attorneys as it desires, but the opposing party is not required to compensate for overlapping efforts, should they result.

19. In Brevard County v. Canaveral Properties, Inc., 696 So. 2d 1244 (Fla. 5th DCA 1997), the Fifth District Court of Appeal panel held that:

> The polestar of an appellate attorney fee award pursuant to section 73.131 and the case law generally, is that it must be reasonable. One that is bloated because of excessive time spent, or unnecessary services rendered, or duplicate tasks performed by multiple attorneys, does not meet that criterion of reasonableness.

20. The Fifth District Court of Appeal reminded the parties, "[i]n making an attorney fee award, the court must

consider the possibility of duplicate effort arising from multiple attorneys, in determining a proper fee award. Fees should be adjusted and hours reduced or eliminated to reflect duplications of services." Id.

21. In determining the hours, the undersigned must also look at the amount of time that would ordinarily be spent to resolve the particular type of issues, which is not necessarily the time actually spent by counsel in the case. It is settled that a court is not required to simply accept the hours stated by counsel. In re Estate of Platt, 586 So. 2d 328, 333-34 (Fla. 1991).

22. Finally, in Baratta v. Valley Oak Homeowners' Association at the Vineyards, Inc., 928 So. 2d 495 (Fla. 2d DCA 2006), the court outlined that as a general rule, duplicative time charged by multiple attorneys working on the case is usually not compensable.

23. In this case, a considerable portion of Respondent's appellate arguments, case law, drafting time, and associated research was similar, if not identical to, the arguments, case law, and documents filed with this tribunal prior to the initiation of the appeal.[3/]

24. Moreover, Respondent's expert witness, Dagmar Llaudy, acknowledged that a fair amount of duplication occurred. She testified, for instance, that "the answer brief and everything

else they [Miami-Dade College] did, it used the same case law and it used the same arguments. So it was very difficult to separate work done for a 57.105 and then work done for the remainder of the case because they all touched on the same issues." Tr. p. 134, Line 22-25, and p. 135, Line 1-2.

25. This statement by Respondent's expert witness is telling, and explains a good deal of the legal work for which fees are being sought.

26. The undersigned concludes that when legal work done for one aspect of a case closely resembles, or is similar to, legal work performed for another phase of the case and is used again, the party is normally not entitled to recover all of its fees for this repetitious work.

27. Perhaps the most compelling support for reducing the requested award in this case can be found in the reasoning outlined by the magistrate judge in Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 2009 U.S. Dist. LEXIS 71823 (M.D. Fla. 2009).

28. In that case, the applicant was awarded and sought a determination of fees incurred on appeal. The defendants objected to almost half of the requested award complaining that much of the time requested was for the same issues that had been fully briefed at the trial court level.

29. The magistrate judge agreed with the defendants and reduced the requested fee by more than one-half, from $68,510.00 to $33,080.00. In doing so, she pointed out and aptly concluded:

> Because most of the work had already been done prior to the appeal, the total number of hours expended by Pantas during the appeal was excessive and unreasonable. See, e.g., Hoover v. Bank of Amer., Corp., No. 8:02-CV-478-T-23TBM, 2006 U.S. Dist. LEXIS 59825, 2006 WL 2465398 (M.D. Fla. Aug. 24, 2006) [*12](concluding that the total number of hours sought by counsel for the appeal was excessive "in light of the prior work done on these same issues," and reducing the total hours billed by one-third); Wilson v. Dep't of Children and Families, No. 3:02-cv-357-J-32TEM, 2007 U.S. Dist. LEXIS 26739, 2007 WL 1100469 (M.D. Fla. Apr. 11, 2007) (concluding that the total number of hours sought by counsel for the appeal was excessive "in light of the prior work done on these same issues," and reducing the hours billed by one-third); Action Sec. Serv., Inc., v. Amer. Online, Inc., No. 6:03-cv-1170-Orl-22DAB, 2007 U.S. Dist. LEXIS 4668, 2007 WL 191308 (M.D. Fla. Jan. 23, 2007) (concluding that the hours claimed by counsel for the appeal were excessive, and reducing the amount of fees by more than half, from $37,889.50 to $18,000.00).

30. The undersigned likewise finds and concludes that there was a significant amount of billing for identical and similar research, drafting, and appeal preparation, which had already been performed at the administrative proceeding level. Consequently, the undersigned will make the appropriate reduction to the amount(s) allowed.

Rule 4-1.5(b)(1)(B)

31. In determining whether a requested fee is reasonable, one factor to be considered is "the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer."

32. There was no compelling evidence provided by Respondent regarding this factor. Respondent's counsel did not provide any tangible examples of particular employment which was rejected or passed upon due to the ongoing representation of Respondent.

33. As a result, the undersigned finds that there was no persuasive evidence presented regarding this criterion which supports the fees requested.

Rule 4-1.5(b)(1)(C)

34. In determining whether a requested fee is reasonable, another factor to be considered is "the fee, or rate of fee, customarily charged in the locality for legal services of similar nature."

35. In support of their fee claim, Respondent presented Llaudy as their expert witness with regard to this criterion.

36. Llaudy provided a brief, but sufficient, opinion that the rates charged by Respondent's law firm were reasonable and reflected the hourly rate customarily charged in the Miami area at the relevant time. Tr. p. 168, Line 6-12.

37. Petitioner's expert, Klein, did not persuasively or seriously dispute the reasonableness of the rates charged. The undersigned finds that the hourly rates were reasonable and within the range for prevailing rates in the Miami-Dade County legal community.

Rule 4-1.5(b)(1)(D)

38. In determining whether a requested fee is reasonable, a fourth factor to be considered is "the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained."

39. The case on appeal was fairly straightforward. It concerned whether "prevailing party" attorney's fees should have been awarded.

40. The question for the Third DCA was: Did the administrative law judge err when he refused to award the Petitioner prevailing party fees after dismissing the underlying administrative bid protest case?

41. The record demonstrates that the issue on appeal was not overwhelmingly complicated or intricate.

42. When evaluating this factor, the undersigned also considered that Respondent achieved a good result and considered whether Respondent's reasonable attorney's fees should include work and services its counsel conducted in connection with an

appellate motion filed pursuant to section 57.105, Florida Statutes.

43. Petitioner argues that the time spent on the motion for sanctions should be entirely discounted because Respondent was "unsuccessful" on this claim, citing Baratta, 928 So. 2d at 495 ("Attorneys' fees should not usually be awarded for claims on which the moving party was unsuccessful.").

44. Although the undersigned does not agree with this argument by Petitioner, the undersigned finds that the time spent on the motion for sanctions by Respondent's counsel was excessive. As a result, time was adjusted accordingly.

45. More specifically, the motion sought sanctions and was voluntarily withdrawn after it was filed, but before the merits of the motion was addressed by the Third DCA.

46. For several reasons, the undersigned finds that it is proper to award fees for work performed on a motion despite the fact that it was voluntarily withdrawn before it was adjudicated on its merit.

47. First, under these circumstances, it was not proven that Respondent was "unsuccessful" on this claim.[4/]

48. Although the motion for sanctions was never heard on the merits, it did result, indisputably, in Petitioner's prior counsel withdrawing from the appellate proceedings.

49. As such, the undersigned cannot conclude that Respondent was "unsuccessful" on this claim. Rather, it simply withdrew a motion after gaining some success and some of the relief it sought.

Rule 4-1.5(b)(1)(E)

50. In determining whether a requested fee is reasonable, another factor to be considered is "the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional time demands or requests of the attorney by the client."

51. There was no persuasive evidence presented by Respondent regarding this factor, and it does not materially bear upon the award of reasonable attorney's fees in this case.

Rule 4-1.5(b)(1)(F)

52. In determining whether a requested fee is reasonable, one factor to be considered is "the nature and length of the professional relationship with the client."

53. There was some evidence presented by Respondent regarding the nature of the professional relationship between the attorneys and Respondent. This included a 10-percent professional discount provided to Respondent, which was taken into account and already credited in the total $120,539.70 requested.

54. There was no compelling evidence regarding the length of the relationship. Therefore, while this criterion was considered when determining a reasonable fee, it did not have a significant bearing on the fee being awarded.

Rule 4-1.5(b)(1)(G)

55. In determining whether a requested fee is reasonable, one factor to be considered is the "experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of the effort reflected in the actual providing of such service."

56. Llaudy and Klein both expressed some general knowledge of the attorneys involved, and their reputation and levels of expertise. There was also some limited testimony from Albert E. Dotson, Jr., on this topic. All of this was taken into account both with respect to the rates charged and the hours spent on the case.

Rule 4-1.5(b)(1)(H)

57. In determining whether a requested fee is reasonable, a final factor to be considered is "whether the fee is fixed or contingent, and, if fixed as to amount or rate, whether the client's ability to pay rested to any significant degree on the outcome of the representation."

58. In this matter, the hourly rates were fixed and the amount of the fee did not rest on the outcome of the appeal.

Ultimate Findings and Conclusions

59. The undersigned finds that the rates charged by the Bilzin Sumberg firm for the attorneys involved in the case were reasonable.

60. However, the undersigned finds that the number of hours expended by the Bilzin Sumberg firm on this matter exceeded the number reasonably necessary to provide the services.

61. Based on the evidence presented and exercising the discretion the undersigned is afforded in a hearing of this nature, the undersigned finds that the reasonable hourly rates and reasonable number of hours expended are as follows:

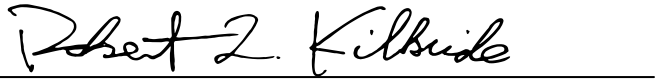
Attorney	Reasonable Hourly Rate	Reasonable Hours Expended	Lodestar amount
Albert E. Dotson, Jr.	$745.00	18.05	$13,447.25
Eileen Ball Mehta	$690.00	28.50	$19,665.00
Jose M. Ferrer	$595.00	2.3	$1,368.50
Melissa Pallett-Vasquez	$565.00	0.80	$452.00
Eric Singer	$495.00	38.9	$19,255.50
Leah Aaronsen	$315.00	6.1	$1,921.50
Elise Hotlzman	$292.50	72.5	$21,206.25
Maria Ossorio	$295.00	7.9	$2,330.50
Jessica Kramer	$290.00	6.8	$1,972.00
Maria Tucci	$275.00	0.4	$110.00
		TOTAL AWARDED	**$81,728.50**

62. The undersigned has also considered the appropriateness of any reduction or enhancement factors, including the withdrawal of the section 57.105 motion for sanctions.

DISPOSITION AND AWARD

Based on the forgoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Respondent's reasonable attorney's fees are determined to be $81,728.50, with recoverable costs in the amount of $461.35 for the total sum of $82,189.85

DONE AND ORDERED this 20th day of November, 2018, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
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this 20th day of November, 2018.

ENDNOTES

[1/] The undersigned has taken administrative notice of the docket entries in Third DCA Case No. 3D17-0149.

[2/] Neither party's expert provided any meaningful testimony involving a detailed, line-by-line analysis of the Bilzin Sumberg time sheets. Specifically, neither party's expert went through, reviewed, or discussed, for the undersigned's benefit, Respondent's combined attorney invoices admitted as Respondent's Exhibits 3 through 17, nor did they sufficiently opine on individual time entries. Instead, both provided generalized comments and opinions about the overall quantity of time devoted to different aspects of the case. Nonetheless, the undersigned

reviewed all exhibits and invoices, particularly Exhibit A of Respondent's Exhibit 20.

[3/] There are examples at Exhibits A-1 through A-5 and B attached to Petitioner's proposed final order.

[4/] Recently, the Fourth District Court of Appeal determined that a motion for attorney fees/sanctions is a "claim" as contemplated by section 57.105. Mark W. Rickard, P.A. v. Nature's Sleep Factory Direct, LLC, 2018 Fla. App. LEXIS 15520 (Fla. 4th DCA 2018).

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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.