

Before the
Administrative Hearing Commission
State of Missouri



MARY ELAINE GREER,)
)
 Petitioner,)
)
 vs.) No. 11-0499 AF
)
 STATE BOARD OF NURSING,)
)
 Respondent.)

DECISION

We grant Mary Elaine Greer’s application for attorney’s fees, and award her \$7,149.16 in fees and costs.

Procedure

On February 4, 2010, the Missouri State Board of Nursing (“the Board”), represented by Sharie Hahn, filed a complaint seeking to discipline Greer, a registered nurse (“RN”). We held a hearing on the complaint on November 5, 2010. Greer was represented at the hearing by Diane K. Hook. In a decision issued February 15, 2011, we found Greer’s license was not subject to discipline.

Greer filed an application for attorney’s fees on March 10, 2011. The Board filed an answer on April 12, 2011. We held a hearing on the application on September 28, 2012. Greer was represented by Diane Hook; representing the Board was Ian Hauptli. The case became ready for decision when the last brief was filed on December 3, 2012.

Findings of Fact

The Underlying Action

1. Greer has been licensed by the Board as an RN since 1965.
2. Greer was originally certified as a Women's Health Care Nurse Practitioner (now known as an "Advanced Practice Registered Nurse," or "APRN") by the National Certification Corporation ("NCC") on December 1, 1995, and has continuously maintained active, up-to-date recertification status.
3. The NCC's certifications of APRNs are subject to renewal every three years, and applicants are required to submit evidence of compliance with recertification requirements, including actively participating in and satisfactorily meeting continuing education/competency requirements.
4. On November 16, 2004, Greer completed and submitted to the NCC a "Certification Maintenance Application" reporting a total of 119.7 hours of continuing education. A minimum of 45 "contact hours" is required to be reported.
5. On December 6, 2004, the NCC issued to Greer its "verification of certification," valid through its expiration date of December 31, 2007.
6. Before December 31, 2004, Greer mailed to the Board, via regular U.S. mail, a copy of the verification of certification, and thereafter received from the Board a document of recognition ("DOR") in the form of a wallet card. The Board's DOR expires three years after issuance.
7. On February 6, 2007, while working at her employer's office, Greer was advised by a pharmaceutical representative that Greer could not be allowed to sign for the receipt of medication samples because, according to the Board's records, her DOR had expired. Greer

immediately reported this to her employer's office manager, who contacted the Board's office within minutes.

8. Greer was advised by the Board that, according to its records, her DOR as an APRN had not been renewed by December 31, 2004, and had therefore lapsed. Greer was surprised by this news, as she believed her DOR was still current.

9. Based on instructions given to Greer and to the office manager by Board staff, Greer immediately suspended her practice as an APRN, and completed and submitted to the Board via overnight mail on February 7, 2007, an "Advanced Practice Nurse Application," along with an application fee of \$150, and a copy of her NCC certification.

10. Greer did not submit a copy of her valid DOR (with the December 31, 2007, expiration date) to the Board at that time because the Board's staff instructed her to submit a new application, a \$150 fee, and verification of certification in order to "reinstate" her recognition as an APRN. However, the application she submitted indicated her NCC certification expired December 31, 2007.

11. Greer resumed her practice as an APRN as of February 9, 2007, when the Board "reinstated" her DOR.

12. On February 4, 2010, the Board filed a complaint alleging it had cause to discipline Greer's nursing license pursuant to § 335.066.2(6), for practicing as an APRN without being properly recognized to do so, in violation of 20 CSR 2200-4.100.

13. Following a hearing on November 5, 2010, this Commission issued a decision on February 15, 2011, determining Greer was not subject to discipline.

14. Greer filed her application for attorney's fees and expenses on March 10, 2011.

15. On March 15, 2011, the Board filed a petition for judicial review of our decision in the underlying case in the Circuit Court of Cole County, alleging the Commission abused its discretion in determining the credibility of the witnesses and evidence.

16. In *Missouri State Board of Nursing v. Mary E. Greer*, Case No. 11AC-CC00164, that court affirmed this Commission's decision on April 23, 2012. With regard to the Board's argument that it had the more credible evidence, the Court found our decision was

- not in violation of any constitutional provisions;
- not in excess of this Commission's statutory authority or jurisdiction;
- supported by competent and substantial evidence upon the whole record;
- authorized by law;
- made upon lawful procedure and with a fair trial;
- not arbitrary, capricious, nor unreasonable; and
- not an abuse of discretion.

Facts Related to this Application for Fees and Expenses

17. Debra Funk, Practice Administrator for the Board, spoke with Greer on February 6, 2007. Funk checked the Board's computer records and saw Greer's DOR had lapsed. She assisted Greer in bringing her certification status current, and also reported the lapse in Greer's DOR to the Board.

18. The Board relies on its staff to perform investigations and to determine the facts before seeking to discipline a licensee.

19. Because Funk reported to the Board that its computer files did not have a copy of a current DOR for Greer, the Board decided to seek to discipline Greer's license.

20. At the time the underlying complaint was filed against Greer, her net worth did not exceed two million dollars.

21. Greer was represented in the underlying action at all times by Diane K. Hook. Hook billed Greer for a total of 46.20 hours at \$165 per hour and, after changing law firms, for an additional 5.4 hours at \$165 per hour, and 24 hours at \$175 per hour for such representation. Hook's firm also billed Greer for \$268.76 for computer research, fax and long distance calls, photocopies, postage, and a disbursement to the NCC of \$50.

Conclusions of Law

Legal Standard for Attorney Fee Applications

We have jurisdiction to hear the complaint in this case under § 536.087,¹ which provides:

1. A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.

An “agency proceeding” is “an adversary proceeding in a contested case pursuant to a chapter in which the state is represented by counsel[.]” § 536.085(1). A “contested case” is a “proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” § 536.010(4).² The “state” is “the state of Missouri, its officers and its agencies.” § 536.085(5). The Board is a state agency,³ and the underlying case was brought by the Board to establish cause to discipline Greer. Section 621.045 requires that we determine such a case after an adversary proceeding. Therefore, the underlying case was a contested case and an agency proceeding.

For purposes of § 536.085, we find Greer is a “party,” as her net worth did not exceed two million dollars at the time the Board initiated its proceedings. § 536.085(2). We further find

¹Statutory citations are to the 2000 Revised Statutes of Missouri, unless otherwise noted.

²RSMo Supp. 2012.

³Section 335.021.1.

Greer “prevailed” because she obtained a favorable decision before this Commission.

§ 536.085(3).

Substantially Justified

As a prevailing party, Greer is entitled to an award of attorney’s fees and expenses unless we determine that either the Board’s position was substantially justified, or that special circumstances exist that make an award unjust. § 536.087.1. Neither party asserts any “special circumstances” here, nor do we find any. Therefore, attorney’s fees and expenses are to be awarded unless the Board’s position was substantially justified.

Section 536.087.3 provides in part:

The fact that the state has lost the agency proceeding or civil action creates no legal presumption that its position was not substantially justified. Whether or not the position of the state was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by an agency upon which a civil action is based) which is made in the agency proceeding or civil action for which fees and other expenses are sought, and on the basis of the record of any hearing the court or agency deems appropriate to determine whether an award of reasonable fees and expenses should be made, provided that any such hearing shall be limited to consideration of matters which affected the agency’s decision leading to the position at issue in the fee application.

The Board must present a *prima facie* case that it had a reasonable basis in both fact and law for its position, and that this basis was not merely marginally reasonable, but clearly reasonable, although not necessarily correct. *Dishman v. Joseph*, 14 S.W.3d 709, 716-719 (Mo. App., W.D. 2000); *Joseph v. Dishman*, 81 S.W.3d 147, 153 (Mo. App. W.D. 2002). The Board must bear its burden based on the facts previously found in the underlying case, as well as any additional information adduced at the attorney fee hearing as to matters that led to its decision to file a complaint against Greer. We must take into consideration not just the facts as determined

in the underlying case, but also how these facts reasonably may have appeared to the Board. *Dishman*, 14 S.W.3d at 716, 718-719.

Also relevant is the thoroughness and quality of the Board's investigation. *Dishman*, 14 S.W.3d at 718-719; *Joseph*, 81 S.W.3d at 151-152. "The State has a duty to present a *prima facie* case explaining the investigative process and defending the reasonableness of the action it took." *Pulliam v. State*, 96 S.W.3d 904, 907 (Mo. App. W.D. 2003), citing *Joseph*, 81 S.W.3d at 151. The Board must "demonstrate a sufficiently thorough and sufficiently objective investigation to ensure confidence that the result of the investigation could be viewed as substantially justified." *Joseph*, 81 S.W.3d at 153. We may find against the Board for its "failure to properly investigate in the manner a reasonable person would have in similar circumstances," that is, if "the investigation was not sufficiently thorough and sufficiently objective that it could be said that the discipline was substantially justified by the facts that were known *or should have been known* at the time the action was taken." *Id.* More specifically, an agency may fail to show substantial justification if it did not make a thorough review of the documentation upon which it relied, did not conduct thorough interviews of the witnesses, did not interview pertinent witnesses, or did not take into account contrary evidence readily available to it. *Id.* at 151-153.

The record leads us to conclude the Board was not substantially justified in pursuing disciplinary action against Greer. The scant evidence presented by the Board indicates its decision to file the complaint came as a result of its Practice Administrator's discovery on February 6, 2007, that, according to the Board's computer records, Greer's certification had lapsed for the period between December 31, 2004 and February, 2007. While this might be a reasonable conclusion drawn from a peremptory review of its computer records, a review of Greer's application for renewal, which the Board received on February 9, 2007, would have

revealed that Greer's NCC certification covered the very period in question, December 31, 2004, through December 31, 2007. Rather than relying solely on its computer records, had the Board reviewed Greer's February 2007 application, it would have recognized that the problem was due not to any error on Greer's part, but perhaps to misplaced paperwork. Moreover, the Board made no inquiry of Greer to determine whether she had timely submitted her verification of certification prior to December 31, 2004. Had the Board conducted even the most rudimentary investigation, it may have discovered that Greer had a wallet card for 2004 through 2007.

The Board contends its decision to act on the basis of its computer records alone was reasonable, given that the licensee has the burden to maintain active, up-to-date status by timely submitting evidence of recertification.⁴ But once a licensee has submitted the required recertification documents, her responsibility is met; it is then up to the Board to issue evidence of recognition (a certificate or wallet card) and to update its records--processes over which the licensee has no control. To pursue disciplinary action against a licensee when the Board failed to consider documented evidence of continued certification in its possession, or to undertake any investigation, is simply not reasonable or justified.

Greer's Attorney's Fees

Having found the Board's positions not substantially justified, and that no special circumstances make an award of fees unjust, Greer is entitled to an award of reasonable fees and expenses. § 536.087.1. Section 536.085(4) defines that term:

(4) "**Reasonable fees and expenses**" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court or agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. The amount of fees awarded as reasonable fees and expenses shall be based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a

⁴ 20 CSR 2200-4.100(8)(C).

rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]

In her application, Greer seeks an award of \$15,369.16⁵ for attorney fees, which represents 51.60 hours at \$165.00 per hour and 24 hours at \$175.00 per hours for work on the underlying case, an estimated additional 15 hours at \$175.00 for the attorney's fee hearing and post-hearing work, and expenses totaling \$1,608.16.

Section 536.085(4) caps the hourly rate at \$75.00 per hour unless Greer can show a "special factor." Greer does not claim a "special factor," but seeks reimbursement of her actual attorney's fees based upon prevailing market rates for the kind and quality of the services furnished to her. At the hearing, she testified that of the four attorneys she contacted prior to the fee hearing, none would handle her case for \$75.00 per hour.⁶ However, this testimony gives us no basis to ignore the cap on fees imposed by § 536.085(4).

In analyzing a similar federal statute, the United States Supreme Court stated:

If "the limited availability of qualified attorneys for the proceedings involved" meant merely that lawyers skilled and experienced enough to try the case are in short supply, it would effectively eliminate the \$75 cap—since the "prevailing market rates for the kind and quality of the services furnished" are obviously determined by the relative supply of that kind and quality of services. "Limited availability" so interpreted would not be a "special factor," but a factor virtually always present when services with a market rate of more than \$75 have been provided. We do not think Congress meant that if the rates for all lawyers in the relevant city—or even in the entire country—come to exceed \$75 per hour ..., then that market-minimum rate will govern instead of the statutory cap.[⁷]

⁵ Ms. Hook's invoice to Greer, dated August 1, 2011, shows 24.0 hours, not 25, at \$175/hr; we adjusted the amount claimed to reflect this recalculation.

⁶ Tr. 33-34.

⁷ *Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988).

We agree with the Court’s reasoning. Accepting Greer’s argument would mean that every case before us would exceed the \$75.00 cap. We are not free to set aside the clear language of § 536.085(4) to reach that conclusion.

Further, we find that the issues in this case were typical administrative law issues. The Supreme Court stated:

the exception for “limited availability of qualified attorneys for the proceedings involved” must refer to attorneys ... having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.[⁸]

Although Ms. Hook is, to our knowledge, experienced in administrative law and a capable advocate, we are not persuaded that her skills rise to the level of a special factor in this case.

Greer’s legal counsel worked a total of 90.60 hours on the proceedings below; at \$75.00 per hour, the total fee to which she is entitled is \$6,795.00.

Greer’s Expenses

Greer’s application also seeks an award of expenses in the amount of \$1,608.16 for the following:

Expenses on attorney’s statements	\$ 268.76
Expenses paid directly by Greer:	
Transcript	85.40
Unnecessary APRN fee paid on 2/6/07	150.00
Expenses incurred by Greer:	
Time spent away from medical practice in meetings with lawyer and travel to hearings in Jefferson City: 10 hrs @ \$35.00/hr	350.00
Additional trip to Jefferson City, Sept. 2012	350.00
Mileage to/from Jefferson City on 11/5/2011 404 mi. @ \$.50/mi	202.00
Mileage to/from Jefferson City on 9/28/12 404 mi. @ \$.50/mi	<u>202.00</u>
TOTAL:	\$1,608.16

⁸ 487 U.S. at 572.

The Board argues Greer is not entitled to an award of expenses for time away from work to meet with her attorney or to attend hearings, as she could easily have avoided these expenses by meeting with counsel or scheduling hearings on her days off. The Board further contends Greer's APRN registration fee was not an expense generated from this suit, and that there is no authority supporting her claim for mileage expenses to and from the hearing, nor for the mileage reimbursement rate claimed. We find the Board's points well taken.

Greer offered no evidence or argument to explain or justify these additional expenses, and we find no basis to conclude they are "reasonable" or "necessary to the preparation of her case," as required by § 536.087.1. In addition to an award of \$6,795 for attorney's fees, we conclude Greer is entitled to \$354.16 for costs, which includes amounts expended by her counsel, and paid directly by Greer for transcripts.

Conclusion

Because the Board failed to prove its position was substantially justified, Greer is entitled to an award of attorney fees and reasonable expenses as the prevailing party in the underlying case. We award her \$7,149.16 in fees and costs.

SO ORDERED on September 26, 2013.

\s\ Mary E. Nelson
MARY E. NELSON
Commissioner