

EXHIBIT B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of Health)
and Environmental Control,)
)
Petitioner,)
)
vs.)
)
James W. Davenport,)
)
Respondent.)

Docket No.: 17-ALJ-07-0003-CC

ORDER ON PETITIONER'S
MOTION TO ALTER OR AMEND

RECEIVED

OCT 17 2018

SC Court of Appeals

APPEARANCES: Petitioner: Vito Wicevic, Esquire
Ashley Biggers, Esquire
Respondent: David Rothstein, Esquire

This matter comes before the South Carolina Administrative Law Court ("ALC") pursuant to the Department of Health and Environmental Control's ("DHEC") Motion to Alter or Amend (Reconsider) Order Granting Petition for Attorney's Fees. On August 1, 2018, this Court issued an order granting Respondent's, James W. Davenport, petition for attorney's fees in the amount of \$91,120.00 ("Order Granting Fees"). DHEC has since moved the Court to alter or amend its ruling pursuant to ALC Rule 29(D) and Rule 59(e), SCRCP.¹

Generally, Rule 59(e), SCRCP is utilized to correct factual errors in a final order and preserve issues for appeal. See *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C 556, 562, 677 S.E.2d 582, 586 (2009); *Doe v. Doe*, 324 S.C. 492, 501, 478 S.E.2d 854, 859 (Ct. App. 1996). However, courts have also utilized motions to alter or amend to provide relief in the following situations: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Collison v. Int'l Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994) (interpreting Fed. R. Civ. P. 59(e)). Irrespective of the aforementioned grounds, it is in this Court's discretion to grant a motion for reconsideration. See *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 841 (Ct. App. 2012).

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¹ DHEC cites Rule 60(b), SCRCP in its request for relief. However, DHEC does not purport that any of the grounds listed therein exist.

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With these standards in mind, I turn to the substance of DHEC's motion. DHEC does not allege a change in controlling law, that any new evidence has become available, that the Court committed clear error, or that factual errors in the Court's order need correcting. Instead, DHEC's motion focuses on its staunch disagreement with the following Court rulings: (1) DHEC does not qualify for exemption as a state licensing board with the power to institute disciplinary action; (2) DHEC did not have substantial justification in pressing its claim against Respondent; and (3) the award of attorney's fees is reasonable and just. While mere disagreements with the Court's decision does not qualify as sufficient grounds for reconsideration, this Court will briefly address each alleged error in turn.

1. *Disciplinary Action by a State Licensing Board*

This Court carefully considered the applicability of the statutory exception listed in S.C. Code § 15-77-300(C). Namely, whether the underlying contested case was a disciplinary action by a state licensing board. The Court's thorough analysis revealed that DHEC is not a state licensing board and that the underlying contested case did not qualify as a disciplinary action within the meaning of the statute. In its motion, DHEC disputes the Court's interpretation of the terms "disciplinary action" and "state licensing board." DHEC's arguments, however, are simply a reiteration of the same contentions made in its underlying opposition to Respondent's petition. Consequently, this Court is unable to identify any legitimate ground to support reconsideration.

2. *Substantial Justification*

DHEC's justification in pressing its claim against Respondent has been scrupulously evaluated by the Court. Nonetheless, DHEC now purports that the Court erroneously focused on its litigation position without regard to the underlying administrative process. As this Court's opinion correctly stated, *McDowell v. S.C. Dep't of Soc. Services*, 304 S.C. 539, 405 S.E.2d 830 (1991), requires an agency's justification to be analyzed in light of its litigation position, rather than the agency action giving rise to the litigation. In addition to disagreeing with the Court's reliance on this clear precedential authority, DHEC also challenges the Court's ultimate conclusion that it lacked substantial justification in seeking complete revocation of Respondent's certification. The crux of DHEC's argument is that the Court misunderstood witness testimony. However, the fact that the Court perceived the evidence and testimony differently than DHEC does not necessitate this Court's reconsideration.

3. *Attorney's Fees*

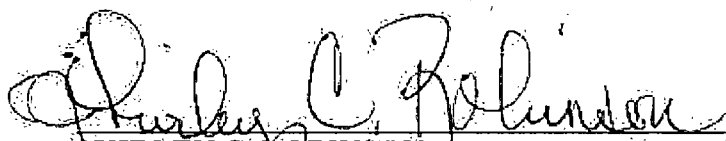
DHEC brings forth several arguments regarding the attorney's fees awarded. First, DHEC disagrees with this Court's determination that no special circumstances existed which would have rendered the award of attorney's fees unjust. In doing so, DHEC supplies the same arguments as found in its briefs in opposition to Respondent's petition for fees. Once again, disagreement is not a sufficient ground for reconsideration. Second, DHEC complains that the Court failed to make statutorily required findings regarding the reasonableness of the rate at which Respondent's attorney charged. There is no merit to this argument. This Court, on page eight of its Order Granting Fees, did indeed render findings for each requisite factor listed in § 15-77-300(B)(1)-(5). Lastly, DHEC challenges the Court's calculation of allowable billable hours. Upon further review, the Court agrees that it was error to include the hours Appellant's attorney spent travelling to and from Columbia on July 20, 2017, and July 24, 2017 through July 28, 2017. Considering the numerous hotels within the Columbia area, the significant amount of billable hours Respondent's attorney incurred for traveling was unreasonable.

For the reasons set forth herein, DHEC has demonstrated a sufficient need for relief pursuant to ALJ Rule 29(d) and Rule 59(e), SCRPC. Accordingly, I find it appropriate to grant DHEC's motion for the limited purpose of amending the amount of attorney's fees awarded to Respondent.²

IT IS THEREFORE ORDERED that DHEC's Motion to Alter or Amend (Reconsider) the Order of this Court dated August 1, 2018, is granted for the limited purpose of amending the amount of attorney's fees awarded from \$91,120.00 to \$87,670.00.

IT IS FURTHER ORDERED that the remainder of Appellant's Motion to Alter or Amend (Reconsider) the Order of this Court dated August 1, 2018, is denied.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
South Carolina Administrative Law Judge

September 20, 2018
Columbia, South Carolina

² In calculating the award in the Order Granting Fees, this Court excluded 7.5 hours of travel time Respondent's attorney billed for attending the July 25, 2017 through July 28, 2017, contested case hearing. Thusly, while the Court now rules that nineteen hours of travel time must be deducted, the aggregate amount to be deducted in the Court's amended award will be 11.5 hours—a deduction of fees in the amount \$3,450.00.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has, this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereof,
in the United States mail, postage paid, or in the emergency
Mail Service addressed to the party(ies), or their attorney(s).

On 26 September 2018

By: [Signature]
Judge [Name]