



October 23, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: SCDHEC v. Davenport Case No. 17-ALJ-07-0003-CC
Appellate Case No.: 2018-001868
DHEC OGC# 22888

Dear Ms. Kitchings:

Pursuant to the Court's correspondence of October 22, 2018, please find enclosed two copies of the Proof of Service evidencing that the Notice of Appeal was properly and timely served on the Administrative Law Court as required by Rule 203(b)(6), SCACR. A filed stamped copy, from the SC Admin Law Court, has also been enclosed for your files.

Please return a clocked copy to me for our files.

Thank you for your attention to this matter.

Sincerely,

Ashley C. Biggers
Chief Counsel for Health Regulation

Enclosures

cc (w/ enclosures): David E. Rothstein, Esquire
The Honorable Jana Shealy

RECEIVED
OCT 24 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 18-ALJ-07-0003-CC

South Carolina Department of
Health and Environmental Control,

Appellant,

v.

James W. Davenport,

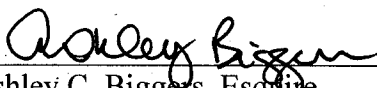
Respondent.

RECEIVED
OCT 24 2018
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Administrative Law Court, by hand-delivering same, on October 17, 2018, addressed to The Honorable Jana Shealy, Clerk of the South Carolina Administrative Law Court, 1205 Pendleton Street, Suite 224, Columbia, South Carolina 29201.

October 24, 2018



Ashley C. Biggers, Esquire
South Carolina Department of Health and
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2600 Bull Street
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(803) 898-3350

Attorney for Appellant
South Carolina Department of Health and
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EXHIBIT

A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 18-ALJ-07-0003-CC

South Carolina Department of
Health and Environmental Control,

Appellant,

v.

James W. Davenport,

Respondent.

NOTICE OF APPEAL

The South Carolina Department of Health and Environmental Control (“Appellant”) appeals the Order Granting Respondent’s Petition for Attorney’s Fees dated August 1, 2018 (the “Attorney Fee Order”) and the Order on Appellant’s Motion to Alter or Amend dated September 20, 2018 (the “Reconsideration Order”) issued by the Honorable Shirley C. Robinson. Appellant received a copy of the Attorney Fee Order on August 1, 2018. On August 13, 2018, Appellant timely filed a Motion to Alter or Amend (Reconsider) the Attorney Fee Order. On August 27, 2018, Respondent timely filed a Memorandum of Law in Opposition to Appellant’s Motion for Reconsideration. Appellant received a copy of the Reconsideration Order on September 20, 2018. A copy of each order is attached hereto as required by Rule 203(d)(2)(B), SCACR.

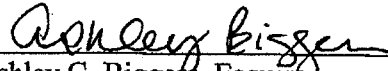
[Signature on following page]

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OCT 17 2018

SC ADMIN LAW COURT

October 17, 2018



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Attorney for Respondent James W. Davenport

EXHIBIT A

**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 GRANTING
RESPONDENT'S PETITION FOR
ATTORNEY'S FEES**

APPEARANCES: Petitioner: Vito Wicevic, Esquire
Ashley Biggers, Esquire

Respondent: David Rothstein, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court ("ALC") for a determination of James W. Davenport's ("Respondent") entitlement to reasonable attorney's fees. On January 6, 2017, Respondent filed a Request for Contested Case Hearing challenging the South Carolina Department of Health and Environmental Control's ("DHEC") Administrative Order revoking his Emergency Medical Technician-Paramedic Certification ("EMT Certification"). In July of 2017, this Court held a hearing on the matter. After careful consideration, on March 20, 2018, the Court vacated DHEC's Administrative Order. On March 22, 2018, Respondent moved for attorney's fees and court costs pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2017). DHEC filed its memorandum in opposition to Respondent's Petition on April 5, 2018. Respondent subsequently filed his reply to DHEC's opposition on April 16, 2018.¹ A hearing on the motion was held on June 13, 2018. Having reviewed the evidence and applicable law, Respondent is entitled to reasonable attorney fees pursuant to § 15-77-300.

LEGAL STANDARD

The fee-shifting statute promulgated in § 15-77-300 authorizes the allowance of attorney's

¹ Without leave of the Court, DHEC filed a supplemental memorandum of law on June 22, 2018. Respondent objected to the pleading on June 25, 2018. Respondent's objection is sustained. This Court took the motion under advisement following the June 13, 2018 hearing. Both parties had ample opportunity to fully brief the matter prior to this date. Consequently, DHEC's supplemental filing was untimely.

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AUG 01 2018

fees to the prevailing party “[i]n any civil action brought by the State . . . if: (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney’s fees unjust.” The South Carolina Supreme Court has interpreted this statute as having the following three basic prerequisites to recovery: (1) the party seeking attorney’s fees is the prevailing party; (2) the agency lacked substantial justification in pressing its claim against the contesting party; and (3) no special circumstances exist which would render an award of attorney’s fees unjust. *Heath v. Aiken County*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988). Whether to award attorney’s fees pursuant to § 15-77-300 is in this Court’s discretion. *See Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

DISCUSSION

I. Applicability

As a threshold matter, DHEC urges the Court to find § 15-77-300 inapplicable to the case *sub judice*. In support of its contention, DHEC claims that the underlying contested case is an administrative action, not a civil action. DHEC also maintains that its order revoking Respondent’s EMT Certification constituted a disciplinary action by a state licensing board, thereby foreclosing an awarding of attorney’s fees under § 15-77-300.

A. *Civil Actions*

The allowance of attorney’s fees under § 15-77-300 is only permitted in “civil action[s] brought by the State” The term civil action has not been defined by statute or case law. As a result, the court must “interpret the term in accord with its usual and customary meaning.” *State v. Hudson*, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999)(citing *Strother v. Lexington County Recreation Comm’n*, 332 S.C. 54, 504 S.E.2d 117 (1998)). Black’s Law Dictionary defines “civil action” as “[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation.” (10th ed. 2014). The term “action” is further defined as “[a] civil or criminal judicial proceeding.” *Id.* Thusly, the customary meaning of civil action is simply a judicial proceeding conducted to determine one’s private or civil rights.

This Court is a court of record, has the same power as circuit court judges, and is a judicial entity. *See* S.C. Code Ann. §1-23-500 (Supp. 2017); S.C. Code Ann § 1-23-630(A)(2005). In fact, the ALC serves as the adjudicatory body for contested cases involving DHEC. *Berry v. S.C. Dep’t. of Health and Envtl. Control*, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013)(citing S.C. Code

Ann. § 1-23-600(A)). Moreover, a contested case is defined as “a proceeding . . . in which the legal rights, duties, or privileges of a party are . . . determined . . . after an opportunity for hearing.” S.C. Code Ann § 1-23-505(3) (Supp. 2017). I find minimal difficulty in concluding that the underlying proceeding meets the customary definition of civil action.

Regarding DHEC’s proposition that all contested cases before the ALC are administrative actions, rather than civil actions, I find the reasoning espoused in *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) instructive. In that case, our Supreme Court held that a civil action commences once an agency ceases being the administrative decision-maker and begins “pressing its claim” in litigation. *Id.* at 543, 833. Therefore, once an agency renders its final decision, and that decision is subject to judicial review, a civil action is created. *Id.* In the case before me, DHEC stood as the administrative decision-maker from the inception of the initial investigation to the issuance of its Administrative Order. However, once the claim was placed before this Court, and DHEC began pressing its objective to have Respondent’s EMT Certification revoked, the otherwise administrative action transformed into a civil action. For these reasons, the Court concludes that Respondent’s contested case hearing equates to a civil action for purposes of qualifying for attorney’s fees under § 15-77-300.²

B. Licensing Board

DHEC also purports that Respondent is precluded from recovering attorney’s fees pursuant to the exception listed in § 15-77-300(C). More specifically, DHEC refers the Court to the statutory exception that fee-shifting does “not apply to . . . disciplinary actions by state licensing boards.” DHEC believes that it is a state licensing board and that it imposed disciplinary action upon Respondent. I disagree.

While DHEC’s argument is compelling, I am unable to identify any statutory authority qualifying DHEC as a “state licensing board” having the power to institute “disciplinary actions.” On the contrary, The Emergency Medical Services Act of South Carolina (“EMS Act”), S.C. Code Ann. § 44-61-10, *et seq.*, bestows upon DEHC, *inter alia*, the responsibilities of training and certifying EMS personnel. § 44-61-30(B)(4)(2018). There is no language in the EMS Act that creates within DHEC a licensing board, nor does it provide DHEC with the power to institute

² DHEC also argues that a civil action must commence by service of a summons and complaint per Rules 2 and 3(a) of the South Carolina Rules of Civil Procedure. However, in *McDowell*, the Court specifically rejected this argument. 304 S.C. at 543, 405 S.E.2d at 833.

disciplinary action proceedings. DHEC presents a cognizable argument that its enforcement actions are tantamount to disciplinary actions by state licensing boards. Yet, the legislature did not provide for such language in the EMS Act. To juxtapose, the legislature, in S.C. Code Ann. § 40-1-40 (2011), charged the Division of Professional and Occupational Licensing, within the South Carolina Department of Labor, Licensing and Regulation, with “protect[ing] the public through the regulation of professional and occupational licensees” Accordingly, the legislature created numerous licensing boards and authorized those boards to “take *disciplinary action*” S.C. Code Ann. § 40-1-90(A)(2011). The exception outlined in § 15-77-300 is referring precisely to these types of disciplinary actions. Consequently, DHEC does not qualify for exemption and is subject to the fee-shifting provision of § 15-77-300.

II. Merits

Turning to the factors listed in § 15-77-300, the Court must ascertain the prevailing party of the contested case, DHEC’s justification in pursuing revocation, and any special circumstances that would render an award of attorney’s fees unjust.

A. *Prevailing Party*

DHEC maintains that Respondent does not qualify as the prevailing party because the Court ultimately found that he committed patient abuse. This contention is unpersuasive and contrary to the law. In *Heath*, our Supreme Court explained that “a party need not be successful as to all issues in order to be found to be a prevailing party.” 302 S.C. at 182, 394 S.E.2d at 711. Instead, this Court must analyze “the degree of success obtained.” 302 S.C. at 183, 394 S.E.2d at 711 (citing *Comm’r, Immigration and Naturalization v. Marie Lucie Jean*, 496 U.S. 154, 110 S.Ct. 2316 (1990)). The issue in the underlying contested case concerned the validity of DHEC’s order revoking Respondent’s EMT Certification. The Court, unable to find any grounds for revocation, vacated DHEC’s Administrative order in its entirety. Respondent was unquestionably the prevailing party, as the relief requested was granted. To the extent this Court found a violation of Anderson County EMS’s patient abuse policy, this finding does not affect Respondent’s status as the prevailing party. The record reflects that Respondent challenged DHEC’s Administrative Order of revocation, not Anderson County’s imposition of remedial action in its quality assurance review.

B. *Substantial Justification*

The second factor the Court must consider in awarding attorney’s fees is whether DHEC

“acted without substantial justification in pressing its claim” § 15-77-300(A)(1). Substantial justification has been interpreted to mean “justified to a degree that could satisfy a reasonable person.” *Heath*, 302 S.C. at 183, 394 S.E.2d at 712 (quoting *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988)). Moreover, substantial justification is predicated on a “reasonable basis in law and fact.” *Layman v. State*, 376 S.C. 434, 445, 658 S.E.2d 320, 326 (2008). In evaluating DHEC’s justification in pressing its claim, the Court has the benefit of considering the outcome of the contested case. *Id.* (citing *Heath*, 302 S.C. at 183, 394 S.E.2d at 712)). However, DHEC’s “loss on the merits does not create a presumption that its position was not substantially justified.” *Id.* (citing *Video Gaming Consultants, Inc. v. S.C. Dep’t. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004)). In addition, in determining the existence of substantial justification, the Court will evaluate DHEC’s litigation position rather than the administrative events giving rise to the litigation. *Id.* (citing *McDowell*, 304 S.C. at 542, 405 S.E.2d at 832)).

The claim DHEC pressed was the complete revocation of Respondent’s EMT Certification based on misconduct proscribed in S.C. Code Ann. § 44-61-80(F)(6), (8), and (14)(2018)—respectively listed as: disregarding a physician’s order concerning emergency treatment or transportation; discontinuing care or abandoning the patient without the patient’s consent or without providing for further administration of care by an equal or higher medical authority; and, by actions or inactions, creating a substantial possibility of death or serious physical harm. DHEC also utilized the catch-all provision of § 41-61-80(F), which allows certification revocation if the emergency medical treatment was of an unacceptable quality. The Court’s inquiry, then, is whether DHEC had substantial justification, or a reasonable basis in law or fact, that any one of these specified grounds existed. I will address DHEC’s basis for each ground in turn.

First, DHEC asserted that Respondent ignored standing orders of a physician. Essentially, DHEC combed the Anderson County EMS Standards of Care and Treatment Protocols Handbook (“Anderson County Handbook”) and found guidelines and protocols that Respondent purportedly failed to follow. DHEC pressed its claim believing that any deviation from the applicable Anderson County Handbook protocols or guidelines constituted “disregard[ing] appropriate order by a physician concerning emergency treatment or transportation.”

DHEC’s own witnesses had difficulty attesting that the applicable guidelines and protocols equated to standing orders. In addition, the Anderson County Handbook, by its own words, discourages blindly following a protocol checklists, and explains that an EMT may deviate from

the guidelines if it can be documented and explained. In other words, and as DHEC's witnesses alluded to, the particular guidelines at issue provided for discretion. For example, Dr. Kickman, the Anderson County EMS Medical Director and author of the Anderson County Handbook, conceded that not all guidelines and protocols constitute doctor's orders. In fact, Mr. Kickman agreed that Respondent could make judgment calls and deviate from a number of the applicable guidelines and protocols. Likewise, Dr. Deschamps, DHEC's State Medical Control Physician, admitted that protocols are not synonymous with orders. Nonetheless, Dr. Deschamps testified, "Whether you violate the standing order or violate the protocol, it's not necessarily a difference in our eyes." This contradiction perfectly demonstrates DHEC's untenable position that any breach of guideline or protocol, however slight or nonsensical, constitutes grounds for certification revocation. Such is not the law. DHEC's reliance on this erroneous conclusion prevented it from forming the requisite amount of justification needed to support its claim. *See McDowell*, 304 S.C. at 542-43, 405 S.E.2d at 832-33 (holding that the Department of Social Services' litigation position was not substantially justified as it relied on an unsupported conclusion). Consequently, I find that DHEC lacked a basis in law or fact to pursue revocation on this ground.

Second, DHEC alleged misconduct on the grounds that Respondent discontinued the patient's care without his consent or without providing for the further administration of care by an equal or higher medical authority. DHEC's justification for this violation was based on Respondent's decision to drive the ambulance and have his less experienced partner, an EMT Basic, ride the call. Yet, DHEC's witnesses could not provide a definition or standard by which to assess the discontinuation of care. DHEC's position was further negated by Anderson County's protocol which specifically permitted Respondent to delegate patient management and transportation to his partner. Moreover, as this Court aptly found, the patient was stable and Respondent was "readily available to resume care of the patient if anything changed en-route to the hospital." DHEC's witnesses, Dr. Kickman and Dr. Deschamps, attested to the permissibility of such a maneuver to the subject call. I find that DHEC acted without substantial justification in seeking revocation for discontinuation of care, as a reasonable person would have been unsatisfied with the evidence, or lack thereof.

For the third ground of misconduct, DHEC alleged that Respondent's actions or inactions created a substantial possibility that death or serious physical harm would result.³ DHEC

³ In closing arguments, DHEC, relying on Dr. Deschamps' testimony, claimed that Respondent's failure to establish

maintained that Respondent's decision to walk the patient to the ambulance and then place him in a supine position on the stretcher created a substantial possibility of death or serious physical harm. The problem with DHEC's position, however, was that it was unable to prove that Respondent's methods were any more prone to substantial harm than its experts' offered approaches. DHEC admitted that any movement of the patient created a risk of further injury and even death, but it was unable to provide alternative approaches that would have alleviated those risks. In fact, this Court found that DHEC's suggested alternatives were as dangerous, if not more dangerous, than Respondent's methods. The Court questions DHEC's motives in seeking certification revocation on this ground, as Respondent was clearly in an unfeasible position. Faulting Respondent for his inability to remediate the risks which DHEC's own experts were unable to do was unreasonable. Therefore, DHEC was not substantially justified in pressing this claim of misconduct.

Lastly, DHEC claimed that grounds for revocation existed based on Respondent's failure to provide emergency medical treatment of a quality deemed acceptable. DHEC premised its argument on the following actions: Respondent's failure to supply the patient with an IV, oxygen, and a heart monitor; Respondent's choice to ambulate the patient and allow his partner to ride the call; and Respondent's language and demeanor towards the patient. All of these actions, DHEC claimed, fell below the generally acceptable standards of care. Once again, I find that DHEC's decision to pursue this ground for revocation was without substantial justification. DHEC failed to provide any credible evidence that Respondent was required to start an IV line. Anderson County's IV protocol utilized circular instructions, was unclear regarding when an IV is necessitated, and bestowed EMT discretion. In addition, DHEC's own expert testified that oxygen and a heart monitor were unneeded. Also, for the reasons already stated, DHEC lacked a reasonable basis to challenge Respondent's actions in ambulating and transporting the patient.

As for Respondent's language, this Court determined that it was inappropriate. Even so, the patient did not complain of Respondent's care, nor did the patient suffer any adverse consequences. Moreover, DHEC made no showing that Respondent's language was of such a degree of offensiveness, and so detrimental to the patient, as to qualify as unacceptable medical treatment. It must also be noted that Mr. Wronski, DHEC's EMS Bureau Chief, revealed that

an intravenous line ("IV") created a substantial possibility of death or serious physical injury. Beyond Dr. Deschamps' recitation of possible injurious outcomes, DHEC failed to demonstrate that the possibility was substantial.

DHEC has never utilized a finding of unacceptable quality medical treatment to revoke an EMT's certification. After reviewing Respondent's language and manner towards the patient, a reasonable person would not conclude that it was of such an intolerable and pugnacious nature as to necessitate revocation on the grounds of unacceptable quality medical treatment.

In summation, DHEC lacked reasonable grounds in law and fact to pursue revocation of Respondent's EMT Certification.

C. Special Circumstances

The awarding of attorney fees pursuant to § 15-77-300 is not allowable if there are any special circumstances that would make the award unjust. DHEC claims that awarding attorney's fees in this situation would have a chilling effect on future enforcement actions. This argument is without merit. In the case before me, DHEC acted without substantial justification in seeking the highest form of punishment for a matter that was handled adequately at the local level. The aim of awarding attorney's fees pursuant to § 15-77-300 is to prevent this type of governmental action.

D. Reasonableness

Having determined that attorney's fees are proper, I also find that Mr. Rothstein's rate of \$300.00 an hour is reasonable. He is a certified specialist in employment and labor law and has years of extensive experience in litigating employment disputes. The nature, extent, and difficulty of this case also supports Mr. Rothstein's rate. He has devoted a substantial amount of time to investigating and researching the matter. Mr. Rothstein also conducted extensive discovery and provided Respondent with beneficial results. In addition, Mr. Rothstein's rate appears to represent the customary amount for similar legal services.

Mr. Rothstein has provided an itemized invoice of billable hours. Included in the invoice are fees incurred prior to the inception of this contested case and fees earned for post-trial matters, neither of which I believe are recoverable pursuant to *McDowell*. 304 S.C. at 543, 405 S.E.2d at 833. In addition, § 15-77-300 only allows for the recovery of attorney's fees, not court costs or expenses.

CONCLUSION

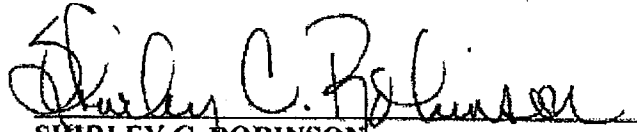
Respondent's motion for attorney's fees under S.C. Code Ann. § 15-77-300 is granted. Respondent is entitled to collect attorney's fees in the total amount of \$91,120.00.

ORDER

Based upon the foregoing,

IT IS HEREBY ORDERED that James W. Davenport is awarded attorney's fees pursuant to S.C. Code Ann. § 15-77-300 in the amount of \$91,120.00. On or before September 14, 2018, the South Carolina Department of Health and Environmental Control shall pay \$91,120.00 in court costs to the Clerk of this Court. After receiving payment, the Clerk of this Court will disburse the full amount to James W. Davenport in payment of his attorney's fees.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
South Carolina Administrative Law Judge

August 1, 2018
Columbia, South Carolina

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 interagency Mail Service addressed to the party(ies) or their attorney(s).

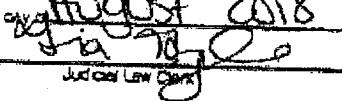
This 1 day of August 2018
By: 
Judicial Law Clerk

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**

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), SCRCF.¹

Generally, Rule 59(e), SCRCF 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).

FILED

¹ DHEC cites Rule 60(b), SCRCF in its request for relief. However, DHEC does not purport that any of the grounds listed therein exist. SEP 26 2018

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*

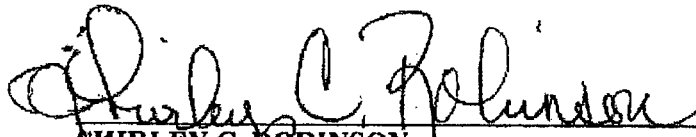
DHEC brings forth several arguments regarding the attorney's fees awarded. First, DHEC disagrees with this Court's determination that no special circumstances existed which would have rendered the award of attorney's fees unjust. In doing so, DHEC supplies the same arguments as found in its briefs in 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).

This 20 day of September, 2018

By [Signature]
Judicial Law Clerk

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 18-ALJ-07-0003-CC

South Carolina Department of
Health and Environmental Control,

Appellant,

v.

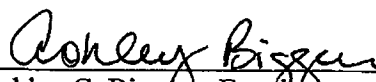
James W. Davenport,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on James W. Davenport by depositing a copy of it in the United States Mail, postage prepaid, on October 17, 2018, addressed to his attorney of record, David E. Rothstein, 1312 Augusta Street, Greenville, SC 29605.

October 17, 2018



Ashley C. Biggers, Esquire
South Carolina Department of Health and
Environmental Control
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Columbia, SC 29201
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Attorney for Appellant
South Carolina Department of Health and
Environmental Control

FILED

OCT 17 2018

SC ADMIN LAW COURT