

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

**RECEIVED**

OCT 24 2018

SC Court of Appeals

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.<sup>1</sup> 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

<sup>1</sup> 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.

**FILED**  
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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.<sup>2</sup>

#### *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

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<sup>2</sup> 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.<sup>3</sup> DHEC

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<sup>3</sup> 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

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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**

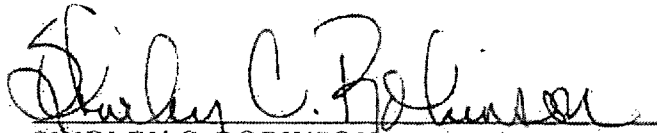
Respondent's motion for attorney's fees under S.C. Code Ann. § 15-77-300 is granted. Respondent is entitled to collect attorney's fees in the total amount of \$91,120.00.

**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 August 2018  
By: [Signature]  
Judicial Law Clerk