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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR



Date Mailed: November 5, 2021
MOAHR Docket Nos.: 17-011663
and 17-011663-RECON

Agency No.: [REDACTED]
Petitioner: [REDACTED]
Respondent: Wayne South Central DHHS

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

ORDER DENYING PETITIONER'S REQUEST FOR ATTORNEY FEES AND COSTS

Upon Petitioner's motion requesting attorney fees and costs, this matter is before the undersigned administrative law judge in accordance with MCL 24.323, of the Administrative Procedures Act, MCL 24.201 *et seq.* On [REDACTED] 2021 a motion hearing was held. Paula Aylward of Allegiant Legal, PC, appeared as Petitioner's legal counsel. Kelly McLean, assistant attorney general, appeared as legal counsel for the Michigan Department of Health and Human Services (MDHHS).

The case began after a Children's Protective Services (CPS) complaint dated [REDACTED] 2017, alleged that Petitioner abused her daughter. Following an investigation, MDHHS placed Petitioner's name on the Michigan Child Abuse and Neglect Central Registry (hereinafter, "CR"). Petitioner requested a hearing on [REDACTED] 2017 to dispute CR placement. On [REDACTED] 2018, a hearing was held before the undersigned. The findings included that Petitioner abused her daughter, but that MDHHS otherwise failed to establish Petitioner's placement on CR. On [REDACTED], 2018, the undersigned ordered MDHHS to expunge Petitioner's name from the CR. MDHHS did not; instead, it requested a rehearing. MDHHS's request was granted by a second administrative law judge who reversed the order of the undersigned. A third administrative law judge subsequently affirmed the placement of Petitioner's name on CR. Petitioner appealed the administrative decision to Wayne County Circuit Court which affirmed placement on CR. Petitioner appealed to the Michigan Court of Appeals resulting in the reversal of Petitioner's placement on CR and remand to circuit court.¹ On [REDACTED] 2021, a circuit court ordered reinstatement the order of the undersigned. On [REDACTED] 2021, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's request for

¹ *Chavies v Dep't of Health and Human Servs*, unpublished per curiam opinion of the Court of Appeals, issued June 17, 2021 (Docket No. 352552).

reasonable attorney fees and costs; the amount requested was fees and costs of approximately [REDACTED]

MCL 24.323 states, in relevant part, the following regarding the awarding of attorney fees and costs under administrative proceedings:

- (1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:
 - (a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
 - (b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.
 - (c) The agency's legal position was devoid of arguable legal merit.
- (2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. The party seeking an award of costs and fees shall present evidence establishing all of the following:
 - (a) That the position of the agency was frivolous
 - (b) That the party is a prevailing party.
 - (c) The amount of costs and fees sought including an itemized statement from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed.
 - (d) That the party is eligible to receive an award under this section. Financial records of a party shall be exempt from public disclosure if requested by the party at the time the records are submitted pursuant to this section.
 - (e) That a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the contested case regarding the subject matter of the contested case.

Some facts were not disputed. MDHHS did not dispute that Petitioner was ultimately a "prevailing party" under MCL 24.323(2)(b). MDHHS also expressed no objection to Petitioner's requested amount of approximately [REDACTED] for reasonable attorney fees. The primary dispute was whether MDHHS's position was frivolous. Petitioner's attorney contended that MDHHS's position was frivolous under each of the three definitions in MCL 24.323(1) summarized as follows: (1) the initial CPS investigation was biased and (2) MDHHS's actions in seeking to overturn the [REDACTED] 2018 order of the undersigned were without legal merit.

² A motion Petitioner filed with the Court of Appeals for damages under MCR 7.216(C) for vexatious appeal was denied on August 4, 2021. *Chavies v Dep't of Health and Human Servs*, unpublished order of the Court of Appeals, issued August 4, 2021 (Docket No. 352552).

Petitioner's attorney alleged that MDHHS's frivolous position can be inferred from alleged CPS investigative shortcomings. Petitioner's attorney contended that CR placement was due to a biased investigation. Petitioner's attorney alleged each of the following:

- The CPS investigator failed to disclose that his family members had relationships with estranged members of Petitioner's family
- The CPS investigator called Petitioner's employer to report that abuse occurred before speaking with Petitioner, a supporting witness, and/or Petitioner's daughter;
- The CPS investigator called Petitioner's employer only seven days after the investigator was assigned to the CPS complaint;
- An unspecified person from MDHHS destroyed exculpatory evidence such as Petitioner's polygraph examination results and text messages;
- CPS failed to follow Forensic Interviewing Protocol while interviewing a child;
- CPS failed to investigate an allegedly obvious alternative cause of Petitioner's daughter's injury;
- CPS failed to document all contacts within its investigation report;
- CPS failed to document a witness interview;
- The CPS investigator made hostile statements to Petitioner; and
- The CPS investigation over-relied on statements made by Petitioner's allegedly biased ex-husband.

None of Petitioner's allegations were established. In the original hearing, evidence of investigative bias was presented and rejected. In fact, it was found that Petitioner abused her daughter. The order that Petitioner's name be removed from the CR was due to MDHHS failing to provide evidence of the legal basis to support Petitioner's name being placed on CR. Investigative bias was also not found by any court with subsequent jurisdiction. Without a finding of investigative bias, it will not be considered as evidence of MDHHS's allegedly frivolous position

Petitioner's attorney also contended that MDHHS's actions following the original hearing decision are indicative of a frivolous position. First, Petitioner's counsel argued that MDHHS did not timely remove Petitioner's name from CR. The hearing decision dated [REDACTED] 2018, ordered MDHHS to remove Petitioner's name from CR within 10 days. Instead, MDHHS requested a rehearing on the 60th day following the order. Ultimately, MDHHS did not remove Petitioner's name from CR until shortly after it was ordered to do so by an [REDACTED] County Circuit Court judge.³ During the motion hearing, MDHHS could not explain its failure to expunge Petitioner's name from the CR in accordance with the [REDACTED] 2018 order. However, MDHHS did prevail in reversing the order. Under MAHS docket no. 17-011663-RECON, the ALJ conducting the rehearing ordered

³ *Chavies v Dep't of Health and Human Servs*, unpublished opinion of the Ingham Circuit Court, issued June 23, 2021 (Docket No. 19-000065-AA). MDHHS had 10 days from the order to expunge Petitioner's name from CR. Petitioner contended that MDHHS took approximately 16 days while MDHHS alleged it took only eight. Either way, the time passed was not indicative of an intent to harass Petitioner.

that Petitioner's name remain on the CR.⁴ Because MDHHS prevailed at rehearing, it cannot be found that MDHHS's delay in removing Petitioner's name from the CR was "frivolous" as defined in MCL 24.323(1).

Petitioner's attorney contended that MDHHS's flawed request for a rehearing was consistent with a frivolous position. The Court of Appeals indeed found that MDHHS's rehearing request was flawed because of its reliance on CPS policy rather than Michigan law; however, a flawed request does not render it devoid of legal merit. The decision of the Court of Appeals also does not conclude that MDHHS's position was without legal merit. In fact, following the initial [REDACTED] 2018 order of the undersigned, three different fact finders found favorably for MDHHS; this is consistent with arguments made in good faith. MDHHS's argument ultimately failed, but as MDHHS's counsel noted, reasonable legal minds can disagree and an ultimately losing argument is not necessarily one without legal merit.

Petitioner's attorney's relied on *Peterson v Oakwood Healthcare, Inc.*, __ Mich App __, __; __ NW2nd __ (2021) (Docket Nos. 353314, 353353) as support that attorney fees and costs are apt. In *Peterson*, MDHHS claimed it did not receive notice of a trial court order which it wanted to appeal; as a result, MDHHS missed its time to appeal and filed a motion for relief from judgment under MCR 2.612(C)(1). In awarding attorney fees to the opposing party, a trial court found that MDHHS did in fact receive notice of the order with sufficient time to appeal yet failed to act. The Court of Appeals affirmed the trial court's decision that sanctions be imposed. The present case is not analogous to *Peterson*. While the Court of Appeals determined that MDHHS's conduct in the present case was flawed, it did not conclude that MDHHS's conduct was baseless.

It is found that MDHHS's position was not frivolous. Thus, Petitioner failed to establish a basis for reasonable attorney fees and costs under MCL 24.323.

IT IS ORDERED that Petitioner's request for attorney fees and costs is **DENIED**.

CG/tm



Christian Gardocki
Administrative Law Judge

⁴ The Michigan Administrative Hearing System (MAHS) is the predecessor of the Michigan Office of Administrative Hearings and Rules (MOAHR).

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

Email Recipients:

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