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IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

WILLIAM P. McCLOSKEY,

Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF FINANCIAL SERVICES,

Appellee.
_____/

DCA Case Number 14-2234
L.T. No. 13-3214F

An Appeal From A Final Order Denying Appellant's Petition for Attorney's Fees Before The Florida Division Of Administrative Hearings, Leon County, Florida, DOAH Case Number 13-3214F

The Honorable Administrative Law Judge William F. Quattlebaum, Presiding

APPELLANT'S INITIAL BRIEF

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PREFACE

In this Brief, the Petitioner, WILLIAM P. MCCLOSKEY, shall be referred to as "MCCLOSKEY" or the "Appellant." The Appellee, FLORIDA DEPARTMENT OF FINANCIAL SERVICES, shall be referred to as "the DEPARTMENT" or as the "Appellee." The Florida Division of Administrative Hearings as the Lower Tribunal shall be referred to by its initials as "DOAH" or "Lower Tribunal."

The following symbols shall be utilized in references to the record on appeal:

(R.)—Record on Appeal, followed by the page number(s).

(T.)---Transcript of the Final Hearing. The transcript volume number will precede the letter "T," which will then be followed by the page and line number.

(D)---Deposition, followed by the Deponent's name, page and line number.

(E)---Where applicable, sections shall be designated by the symbol "§"; paragraphs by the symbol "¶";page numbers by the symbol "pg."; and lines by the symbol "L."

STATEMENT OF THE CASE AND FACTS

Subsequent to this Court's decision in Fifth DCA Case No. 5D12-2872, captioned McCloskey v. Department of Financial Services, 115 So. 3d 441 (Fla. 5th DCA 2013) (R. 110-115) and issuance of the Court's Mandate (R. 116) reversing the DEPARTMENT'S Final Order suspending MCCLOSKEY'S insurance license and ordering the DEPARTMENT to dismiss its administrative complaint against him, MCCLOSKEY timely filed before DOAH a Petition for Attorney's Fees and Costs pursuant to §57.111, Fla. Stat. (R. 110-192) (hereinafter the "Petition"). MCLOSKEY sought reimbursement from the DEPARTMENT for his substantial attorney's fees and costs incurred in excess of $80,844.75 defending against the DEPARTMENT'S administration action at DOAH in DOAH Case No. 11-3982PL and on appeal to this Court in Fifth DCA Case No. 5D12-2872 . (R.10, 25).

The DEPARTMENT's Response to MCCLOSKEY'S Petition stipulated that the Department "initiated" the administrative proceeding under 57.111(3(b), Fla. Stat.; that MCCLOSKEY was a "prevailing small business party" under 57.111(3)(c) & (d), Fla. Stat.; that the DEPARTMENT was not a "nominal party" under 57.111(4)(d)(1), Fla. Stat.; and that MCCLOSKEY'S demand for attorney's fees and costs up to the $50,000.00 statutory fee & costs cap of §57.111(4)(d) 2, Fla. Stat. was reasonable—thus conceding that MCCLOSKEY satisfied all but one

of the necessary elements to maintain his action under §57.111, Fla. Stat. (R. 200-210). The DEPARTMENT limited its defense by asserting when it initiated the administrative action on June 7, 2011 that it was "substantially justified in both law and fact" under §57.111(4(a), Fla. Stat. (R. 200, ¶ d).

DOAH on August 22, 2013 initially assigned Administrative Law Judge ("ALJ") Susan B. Kirkland to MCCLOSKEY'S Petition (R. 193) and on August 27, 2013 reassigned it to ALJ Quattlebaum (R. 197).

Since the DEPARTMENT based its defense solely upon the factual assertion that its administrative action on June 7, 2011 was "substantially justified in law *and fact*," MCCLOSKEY on January 17, 2014 served upon the Department a Notice of Taking Corporate Deposition (R.250-254), seeking to gather evidence for MCCLOSKEY'S case in chief by deposing those "agency head, staff directors, bureau chiefs, managing agents, attorneys, or employees, whether employed by the Department or the Office of Financial Regulation or the Office of Insurance Regulation, (or their predecessors in interest, if applicable) designated by The Florida Department of Financial Services to testify, *inter-alia,* concerning:

1. The DEPARTMENT's policies, and procedures from July 1, 2005 to the present relied upon by the DEPARTMENT for initiating a) the investigation of or b) administrative enforcement actions against Florida licensed life insurance agents who sold or offered for sale viatical settlement purchase agreements prior to July 1, 2005.

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3. THE DEPARTMENT's promulgated or unpromulgated polic(ies) from July 1, 2005 to the present regarding the Department's approval of renewal applications submitted by life agents who, prior to July 1, 2005, sold or offered for sale viatical settlement purchase agreements while licensed in Florida as life agents, but while not licensed to sell securities under Chapter 517, Florida Statutes.

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6. The Department's interpretation and implementation of the legislative "grace period" established under Chapter 2005-237, §37 at 2186-87, Laws of Florida.

(R. 251, ¶¶1, 3; 253, ¶6).

The DEPARTMENT, in turn, filed a Motion for Protective order (hereinafter "MFP") (R. 244-312) in opposition to MCCLOSKEY taking the corporate deposition of the Agency, claiming that taking the deposition was 'both improper and not calculated to lead to the discovery of relevant and admissible evidence in this matter, and is designed solely to harass and burden the respondent." While noting that under §57.111(3)(e), Fla. Stat. a proceeding is considered "substantially justified if it had a reasonable basis in law or fact at the time it was initiated by a state agency," the DEPARTMENT asserted that when determining whether there was a substantial justification for the administrative complaint "one need only examine the information *before the Department* at the time it found reason to file an administrative complaint" (citations omitted) which, according to the Department's unsworn motion, consisted "its investigative report including the affidavits of the three victims as the basis in fact as well as the relevant and substantial case law,

both state and federal, that holds a viatical to be a security, as its basis in law…." (R. 245, ¶¶4,5,6). (Emphasis supplied).

MCCLOSKEY's Memorandum in opposition to the DEPARTMENT'S MFP argued, in pertinent part, that the DEPARTMENT'S reference to the word "Department" in its MFP implied that "the Department" was "one corporeal entity with the ability of independent thought, rather than compromised of divisions, bureaus and sections, and hundreds of employees, any or all of whom could have had input into the decision to move forward with the prosecution of Mr. McCloskey" and that "at some point, one or more of [the DEPARTMENT'S] employees made the decision to file the administrative complaint against Mr. McCloskey. [MCCLOSKEY] is entitled to depose any or all of those persons to question them as to how that decision was made. MCCLOSKEY cited two examples warranting taking the corporate deposition:

1. Deposition testimony of corporate representatives with knowledge of agency policy regarding the sale by life agents of viaticals under the pre-2005 Florida laws might show that the administrative complaint filed against Mr. McCloskey was in contradiction to the Department's overall policy as to the treatment of such life agents.

2. [While] some of the Department's employees [had] been deposed by [MCCLOSKEY] during the underlying case, the underlying case involved a separate matter and separate issues, and [MCCLOSKEY was] entitled to depose the same or additional employees in its efforts to refute the Department's current position on an entirely new issue.

(R. 318-322).

ALJ Quattlebaum summary granted the DEPARTMENT's MTP, without citing to any specific factual or legal basis in his January 31, 2014 Order in which he simply and tersely stated that "based upon review of the Motions, Attachments and responses, it is hereby ORDERED that … the Motion for Protective Order [is] GRANTED." (R.323).

Since MCCLOSKEY deemed taking the corporate deposition of the DEPARTMENT before the Final Hearing set for February 26, 2014, (R. 238) as vital to his ability to properly present his case in chief and to rebut the DEPARTMENT'S defense of "substantial justification," MCCLOSKEY filed on February 20, 2014 before this Court a Petition for Writ of Certiorari assigned under Fifth DCA Case No. 5D14-570 (R.374-411), wherein MCCLOSKEY asserted in pertinent part that ALJ Quattlebaum's ruling granting the DEPARTMENT'S MFP "departed from the essential requirements of the law" and "… cause[d] material injury throughout the remainder of this proceeding by preventing MCCLOSKEY from gathering the vital evidence MCCLOSKEY requires to adequately present his case at the final evidentiary hearing and to defend against the DEPARTMENT's defense that its prosecution of McCLOSKEY was "substantially justified." (R.374-375). In conjunction with MCCLOSKEY'S Petition For Certiorari, MCCLOSKEY also filed a Motion before ALJ Quattlebaum seeking to stay the February 26th DOAH final hearing pending review before this Court (R. 347) which motion ALJ

Quattlebaum summarily denied (R. 558) as did this Court upon considering MCCLOSKEY'S companion motion to his Petition for Certiorari (R. 1640).

Absent a stay, MCCLOSKEY's Petition proceeded to Final Hearing before ALJ Quattlebaum on February 26, 2014 (R. 1641-1720). Petitioner MCCLOSKEY testified on his behalf (R. 1696-1714) whereas the DEPARTMENT presented no witnesses in its defense of MCCLOSKEY's Petition (R. 1695, L.11-12). Though MCCLOSKEY attempted to call as a witness in his case in chief Assistant General Counsel James Bossart--the DEPARTMENT'S prosecutorial attorney responsible for filing the June 7, 2011 Complaint against MCCLOSKEY to "ask him how he came to that decision" (R. 1715, L. 16-17), ALJ Quattlebaum ruled that he "didn't think its necessary to call Mr. Bossart as a witness, and [he was not] going to allow that to occur." (R. 1716, L.8-10).[1]

After the Final Hearing transcript was filed with the DOAH Agency Clerk, (R. 1641), the DEPARTMENT on March 24, 2014 filed its Proposed Recommended Order (R. 1724-1734), followed by MCCLOSKEY's filing of his Proposed Recommended Order on March 28, 2014 (R. 1844-1866).

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[1]The Final Hearing Transcript reveals the following colloquy between ALJ Quattlebaum and MCCLOSKEY'S attorney on MCCLOSKEY's request to call Attorney Bossart as a witness:
MS. HART: Your Honor, the testimony elicited at the hearing in the underlying case makes it quite clear that Mr. Bossart was instrumental in the decision to prosecute this case. So far, the Department has not presented any evidence as to why they decided to prosecute this case. Mr. Bossart was the one that made that decision. We think that he should be that we're entitled to ask him how he came to that decision.
THE COURT: Well, if your position is the department hasn't offered any evidence as to why they prosecuted the case and the burden is on them to establish why they prosecuted the case, then why would you call him to establish it if you're already saying there's no evidence of that.
MS. HART: We think it will actually strengthen our case, Your Honor. (R. 1715, L. 8-25).

ALJ Quattlebaum on May 23, 2014 entered a Final Order denying MCCLOSKEY'S Petition for Attorney's Fees and Costs, (R. 1868-1876), from which decision MCCLOSKEY filed the Notice of Appeal pending before this Court. (R. 1877)

SUMMARY OF ARGUMENT

The Lower Tribunal's Final Order finding that the DEPARTMENT'S June 7, 2011 filing of its Administrative Complaint against MCCLOSKEY was "substantially justified in law and fact" was without evidentiary support and therefore clearly erroneous as a matter of law.

The Lower Tribunal's January 31, 2014 Order granting the DEPARTMENT's motion for protective order-thereby prohibiting MCCLOSKEY from taking the corporate deposition of the DEPARTMENT to properly prepare and present his case at the Final Hearing—was clearly erroneous in that the ALJ failed to identify with specificity the factual or legal basis for his ruling and substantially prejudiced MCCLOSKEY'S ability to properly prepare and present his case at the Final Hearing.

Based upon the foregoing material and substantial errors by the Lower Tribunal which were contrary to MCCLOSKEY'S rights to due process, this Court should properly reverse the lower tribunal's Final Order; find based upon the record of the proceedings before it that the DEPARTMENT failed to meet its burden of proof; and award MCCLOSKEY his attorney's fees and costs up to the $50,000.00 statutory cap pursuant to section 57.111, Fla. Stat.

ARGUMENT

I. Standard of Review:

Section 57.111(4)(d), Fla. Stat. provides that the Final Order of an administrative law judge issued in a Chapter 120, Florida Statutes, proceeding on an application for attorney's fees and costs under section 57.111, is reviewable " in accordance with the provisions of s.120.68." Accordingly, s. 120.68(6)(a), Fla. Stat., provides that:

> The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:
>
> 1. Order agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and
>
> 2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

An appellate court also reviews an agency's conclusions of law *de novo*. Wise v. Department of Management Services, 930 So. 2d 867 (Fla. 2d DCA 2006). Chapter 120, which governs review of administrative proceedings, provides that the appellate court may "set aside an agency decision where the agency has "erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 120.68(7)(d), Fla. Stat.; Manuel v. Dep't of Children and Family Serv's, 880 So. 2d 714 (Fla. 2d DCA 2004). Here, the Lower Tribunal's

Final Order denying MCCLOSKEY's Petition for attorney's fees and costs is erroneous as a matter of law and should be reversed.

Additionally, an appellate court may set aside agency action when that action is a based on any finding of fact not supported by competent substantial evidence established in the record of the administrative hearing. § 120.68(7)(b), Fla. Stat.; Wise, 930 So. 2d at 867-871. Here, the Department failed to present any competent, substantial evidence to meet its burden of proof, thus requiring the Lower Tribunal's Final Order be reversed.

II. Once the DEPARTMENT stipulated that MCCLOSKEY was a "small business party" and the "prevailing party," the burden of proof rested solely upon the DEPARTMENT at the Final Hearing to demonstrate that on the June 7, 2011 filing date of its Complaint its action was "substantially justified in both law and fact" and the Lower Tribunal erred in finding that the DEPARTMENT met that burden of proof, thereby ruling in favor of the DEPARTMENT.

The DEPARTMENT, as noted in the Statement of Facts, *supra*, stipulated before the lower tribunal that MCCLOSKEY was a "prevailing small business party" under 57.111(3)(c) & (d), Fla. Stat., thereby conceding that MCCLOSKEY satisfied the necessary condition precedents to pursue his action for fees under §57.111, Fla. Stat. (R. 200-210).[2] The burden of proof then shifted to the

[2] ALJ Quattlebaum also entered similar findings of fact in his Final Order based upon the DEPARTMENT's stipulation that MCCLOSKEY was a "small business party" (R.. 1872, ¶9) and that in the event fees and costs were awarded that the

DEPARTMENT to demonstrate that on the June 7, 2011 filing date of its Complaint when it initiated its action against MCCLOSKEY that it was "substantially justified" at that time, i.e. that the DEPARTMENT had a reasonable basis in law and fact at the time the DEPARTMENT initiated the proceeding. Helmy vs. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998). The record before DOAH and now before this Court plainly reveals that the DEPARTMENT failed to meet its burden and that the DOAH Final Order should therefore properly be reversed.

ALJ Quattlebaum erroneously framed the "central issue" in the DEPARTMENT'S underlying disciplinary case against MCCLOSKEY (and before this Court during MCCLOSKEY's initial appeal of the DEPARTMENT'S Final Order suspending his license) to be whether the products MCCLOSKEY sold, i.e. Mutual Benefit Corporation viatical settlement purchase agreements, were "securities" that were unregistered in Florida. After prejudicially limiting the issue accordingly, ALJ Quattlebaum determined *without* citing to any specific precedents, legal authority, and without engaging in any factual or legal analysis that when the DEPARTMENT commenced prosecution of the disciplinary case against MCCLOSKEY the "existing case law" supported the Respondent's determination that the products MCCLOSKEY sold were "securities that were not property

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DEPARTMENT did not dispute that an award up to the $50,000.00 statutory cap was reasonable (R. 1870).

registered for sale in Florida as required by law" (R. 1873) and hence ruled there was a "reasonable basis in law" to support the DEPARTMENT'S action. (R.1873). In rejecting MCCLOSKEY'S claim that the DEPARTMENT failed to meet its burden of proof that it had a reasonable basis in "fact" on June 7, 2011 when it filed the Complaint, ALJ Quattlebaum merely cited to a finding in ALJ Kirkland's Recommended Order in the initial DOAH disciplinary case (R. 62-89) that MCCCLOSKEY's viatical sales had taken place which "findings have not been disturbed by an subsequent review of the Recommended Order." (R. 1874).

The record on appeal before this Court, however, reveals that the DEPARTMENT--despite having the burden of proof throughout--offered no competent, substantial evidence which was not otherwise inadmissible hearsay to demonstrate who made the decision to initiate the underlying proceeding on behalf of the DEPARTMENT and, therefore, offered no evidence to show what was considered by that person or persons when the decision was made to initiate the underlying disciplinary proceeding against MCCLOSKEY. Accordingly and contrary to ALJ Quattlebaum's findings, there was no evidence to show the <u>factual</u> basis for the Department's determination to issue an administrative complaint against MCCLOSKEY. Since the DEPARTMENT presented absolutely no

witnesses in its case in chief (R. 1716, L.17-21) [3], there was also no testimony establishing that the DEPARTMENT was substantially justified in either fact or law when the DEPARTMENT decided on June 7, 2011 to file its complaint against MCCLOSKEY.

In an earlier, procedurally similar administrative case filed under §57.111, Fla. Stat., Berger v. Department of Business and Professional Regulation and Agency For Health Care Administration, Case No. 96-2562F (Fla. DOAH Sept. 29, 1998), the state agency against whom Berger sought an award of fees failed to present at the final hearing any evidence "to show who made the decision to initiate the underlying proceeding on behalf of the Department." While in Berger the state agency attorney who prosecuted the underlying proceeding against Berger did testify (*unlike* in MCCLOSKEY where ALJ Quattlebaum barred without explanation MCCLOSKEY from calling the DEPARTMENT's prosecuting Attorney Bossart during his case in chief ((R. 1716, L.8-10)), the Berger agency attorney's testimony was that he reviewed the investigative file and discussed with his supevisor his recommendation that Berger be prosecuted criminally-not administratively. The ALJ, finding in Berger's favor and awarding attorney's fees under §57.111, Fla. Stat., found that "no evidence was offered [by the state agency]

[3] After MCCLOSKEY rested his case, ALJ Quattlebaum asked DEPARTMENT attorney Bossart whether there was "anything else from the Respondent" to which he replied "Yes sir. I would like to make a statement now, if I might. I have no witnesses to call." (R.1716, L. 19-21).

to show who made the decision to initiate the underlying proceeding on behalf of the Department, and therefore, no evidence was offered to show what was considered by that person or persons when the decision was made to initiate the underlying proceeding against [Berger]. There is, accordingly, no evidence to show the factual basis for the Department's determination to issue an administrative complaint against [Berger]."

The ALJ in Berger further found that "No evidence was offered [by the state agency] to show that anyone on behalf of the Department determined that there was a legal basis for initiating a proceeding against [Berger].

The ALJ in Berger thus ultimately concluded as a matter of law that the state agency failed to meet its burden of proof that its prosecution of Berger was substantially justified, stating "since there is no evidence as to who within the Department determined to initiate the underlying proceeding against [Berger], then, a fortiori, there is no evidence as to what was considered by the Department, factually or legally, as the basis for filing an Administrative Complaint against [Berger].

Since the lower tribunal's Final Order was not supported by competent, substantial evidence in the appellate record of the hearing conducted pursuant to ss.120.569 and 120.57, Fla. Stat., this Court exercising its authority under §120.68(7)(b), Fla. Stat. should properly set aside ALJ Quattlebaum's May 23, 2014

Final Order; find that the DEPARTMENT failed to meet its burden of proof based upon the appellate record of the proceedings before it; and award MCCLOSKEY his attorney's fees and costs up to the $50,000.00 statutory cap under §57.111(4)(d) 2, Fla. Stat. which the DEPARTMENT stipulated were reasonable.

III. ALJ Quattlebaum's January 31, 2014 Order granting the DEPARTMENT's Motion For Protective Order, thereby prohibiting MCCLOSKEY from taking the corporate deposition of the DEPARTMENT in order to properly develop and present his case at the Final Hearing, was clearly erroneous and a departure from the essential requirements of the law due to the ALJ's failure to identify with specificity the factual or legal basis for his ruling and, in addition, substantially prejudiced MCCLOSKEY'S ability to properly prepare and present his case at the Final Hearing.

The relevant issue before the Lower Tribunal as noted, *supra*, and purpose behind the final evidentiary hearing held February 26, 2014 was whether the DEPARTMENT was "substantially justified" at the time it filed its Complaint on June 7, 2011 against MCCLOSKEY or, alternatively whether "special circumstances existed which would make the award [of attorney's fees] unjust."

The Lower Tribunal, in arriving at its determination of the "substantial justification" issue, is required under §57.111(4)(d), F.S. to conduct an "evidentiary hearing," during which the burden of proof shifts to the DEPARTMENT which must prove that when it filed the June 7, 2011 Complaint against MCCLOSKEY it was "substantially justified." Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla 1st DCA 1987),

citing Gentele v. Department of Prof. Reg. Bd. Of Optometry, 513 So. 2d 672 (Fla. 1st DCA 1987).

To counter the DEPARTMENT'S "substantial justification" defense, MCCLOSKEY on January 17, 2014 served upon the Department a Notice of Taking Corporate Deposition (R.250-254), seeking to gather evidence for MCCLOSKEY'S case in chief by deposing those "agency head, staff directors, bureau chiefs, managing agents, attorneys, or employees, whether employed by the Department or the Office of Financial Regulation or the Office of Insurance Regulation, (or their predecessors in interest, if applicable) designated by The Florida Department of Financial Services to testify, *inter-alia,* concerning:

2. The DEPARTMENT's policies, and procedures from July 1, 2005 to the present relied upon by the DEPARTMENT for initiating a) the investigation of or b) administrative enforcement actions against Florida licensed life insurance agents who sold or offered for sale viatical settlement purchase agreements prior to July 1, 2005.

****

4. THE DEPARTMENT's promulgated or unpromulgated polic(ies) from July 1, 2005 to the present regarding the Department's approval of renewal applications submitted by life agents who, prior to July 1, 2005, sold or offered for sale viatical settlement purchase agreements while licensed in Florida as life agents, but while not licensed to sell securities under Chapter 517, Florida Statutes.

****

6. The Department's interpretation and implementation of the legislative "grace period" established under Chapter 2005-237, §37 at 2186-87, Laws of Florida.

(R. 251, ¶¶1, 3; 253, ¶6).

In response to MCCLOSKEY's deposition notice, the DEPARTMENT's counsel of record who, notably, was also counsel of record throughout the DEPARTMENT'S investigative, prosecutorial, appellate, and pending §57.111 phase of this case, filed a Motion for Protective Order[4] on January 23, 2014 claiming (albeit incorrectly) that *"the deposition is both improper and not calculated to lead to the discovery of relevant and admissible evidence in this matter, and is designed to solely harass and burden the Respondent."* (R. . 244-312). In a format analogous to that of a "speaking motion" (absent the verification), the DEPARTMENT'S counsel represented to the Lower Tribunal the following "facts":

> In reaching its decision to file a complaint in this case, the Department considered its investigative report including the affidavit complaints of the three victims as its basis in fact as well as the relevant and substantial case law, both state and federal, that holds a viatical to be a security, as its basis in law. The Department had a legal basis to file this action pursuant to the authority of *Securities and Exchange Commission* v. *W. J. Howey Co*, 328 U.S. 293,*66* S.Ct 1100, 90 L. Ed 1244 (1946), holding that "investment contracts" are securities. Other cases supporting the legal basis for the Department's actions are *Securities & Exchange Commission* v. *Mutual Benefits Corporation., et al,* 408 F.3d 737 (11th Cir. 2005) (viaticals offered by MBC were investment contracts and therefore securities under Federal Law), affirming *Securities & Exchange Commission* v. *Mutual Benefits Corp., et al*, 323 F.Supp.2d 1337 (S.D. Fla. 2004). The Department also relied on cases in this local jurisdiction that involved similar, if not, identical facts as the present

[4] The DEPARTMENT'S counsel also simultaneously filed a Motion for Oral Argument upon its Motion for Protective Order.

case. See *In the Matter of Bradley Wayne Kline,* DO AH 07-01218PL (October 9, 2007), *per curiam affirmed* 980 So.2d 1065 (1ST DCA 2008)(a [Mutual Benefits] viatical met the definition of a security under the law that existed in 2003); *In the Matter of George Marshall Smith,* DOAH 07-4701PL (May 8, 2008), *per curiam affirmed* 14 So.3d 1009 (1st DCA 2009) (The transactions entered into.., in which the Respondent offered for sale and sold interests in the death benefits of life insurance policies for MBC pursuant
to viatical settlement purchase agreements involved securities as defined in Section 517.021(20)(q), Florida Statutes (2002 and 2003), as investment contracts); and *Kligfeld* v. *State of Florida Office of Financial Regulation,* 876 So.2d 36 (4th DCA 2004)(Investmeht contracts are expressly defined as securities under Section 517.021(20)(q), Florida Statutes and the [viatical agreements] clearly meet the investment contract analysis as adopted by Florida courts,
citing *Faraq* v. *Nat'l Databank Subscriptions, Inc.* 448 So.2d 1098,1101 (Fla. 2d DCA 1984)). Additional support is found on the authority of *Department of Banking and Finance vs. Donald J. Denton,* DOAH 02-1284 (November 20, 2002), *per curiam affirmed* 869 So.2d 569 (5th DCA 2004), finding a viatical to be an "investment contract" under Chapter 517 and, therefore, a security. No additional deposition testimony can change this basis for the agency action.

MCCLOSKEY on January 30, 2014 filed his Objection to Petitioner's Motion (R.318-322) noting that:

- The DEPARTMENT'S use of the word "Department," *supra,* implied that one "corporeal entity" was responsible for the DEPARTMENT'S prosecutorial decision, plainly ignored the fact that any number of bureaus, sections, investigators, attorneys and managerial staff would likely have played a role in that decision;

- That at some point "one or more" of the DEPARTMENT'S employees made the prosecutorial decision and MCCLOSKEY was entitled to question any or all of those persons as to what factual or legal basis they relied upon in reaching their decision in support of the DEPARTMENT's "substantial justification" defense;

- That deposition testimony of corporate representatives with knowledge of agency policy and the sale of viatical settlement purchase agreements by life agents prior to the July 1, 2005 effective date of Chapter 2005-237, Laws of Florida, could reveal that the DEPARTMENT'S June 7, 2011 Complaint against MCCLOSKEY was in contradiction to the DEPARTMENT'S overall policy relating to "life agents" and their pre-July 1, 2005 viatical sales similar to those sales of MCCLOSKEY; and,

- Perhaps most importantly and contrary to the protestations of the DEPARTMENT'S counsel, the DEPARTMENT's "Agency Policy" was clearly at issue since the Fifth District Court of Appeal in McCloskey vs. Department of Financial Services, *supra,* determined that Administrative Law Judge Kirkland's reliance on the cases the DEPARTMENT cited before her and in the DEPARTMENT'S Final Order suspending MCCLOSKEY'S license to justify its position was "misplaced." (McCloskey at 444). It logically followed, then, that MCCLOSKEY's deposition questions directed at how the DEPARTMENT arrived at its decision to file the June 7, 2011 Complaint would be highly relevant and material to MCCLOSKEY'S ability to gather the necessary evidence to introduce at the Final Hearing to refute the DEPARTMENT'S defense that its' prosecution was "substantially justified."

Despite MCLOSKEY's arguments to the contrary, the Lower Tribunal on January 31, 2014—the day after MCCLOSKEY's Objection was filed-- entered an order (R. 323) which departed from the essential requirements of the law by granting the DEPARTMENT's Motion For Protective Order without citing as required by law any specific legal, factual or other basis to support such a ruling. See Office of the Attorney General vs. Millennium Communications and Fulfillment, Inc. 800 So.2d 255 (Fla 3d DCA 2001). The net result of the Lower Tribunal's Order effectively eliminated MCCLOSKEY's ability and right afforded

under the Florida Rules of Civil Procedure to conduct relevant discovery reasonably calculated to lead to the discovery of admissible evidence that MCCLOSKEY intended to use at the pending evidentiary hearing in MCCLOSKEY'S case in chief, thereby effectively depriving MCCLOSKEY ofhis ability to gather evidence to counter the DEPARTMENT's case under s. 57.111, Fla. Stat.

Based upon the Lower Tribunal's erroneous order granting the DEPARTMENT'S motion for protective order in violation of MCCLOSKEY'S right to properly discover and prepare his case for the Final Hearing, this Court should reverse the Lower Tribunal's Final Order; find that the DEPARTMENT failed to meet its burden of proof based upon the appellate record of the proceedings before it; and award MCCLOSKEY his attorney's fees and costs up to the $50,000.00 statutory cap under §57.111(4)(d) 2, Fla. Stat. which the DEPARTMENT stipulated were reasonable.

CONCLUSION

The appellate record before this Court demonstrates the lack of any competent, substantial evidence presented at hearing by the DEPARTMENT before the Lower Tribunal demonstrating that its prosecutorial decision on June 7, 2011 was "substantially justified in law and fact." Absent such evidence, the Lower Tribunal's May 23, 2014 Final Order was erroneous as a matter of law in denying MCCLOSKEY'S Petition for Fees by finding that the DEPARTMENT met its burden of proof.

The Lower Tribunal erred granting the DEPARTMENT'S motion for protective order, prohibiting MCCLOSKEY from conducting necessary discovery. In addition, the Lower Tribunal's Order failure to cite any specific basis for its ruling departed from the essential requirements of the law and substantially prejudiced MCCLOSKEY's ability to discover evidence, present his case.

Based upon the foregoing, this Court should properly reverse the Lower Tribunal's May 23, 2014 Final Order; find that the DEPARTMENT failed to meet its burden of proof based upon the appellate record of the proceedings before this Court; and award MCCLOSKEY his attorney's fees and costs up to the $50,000.00 statutory cap under §57.111(4)(d) 2, Fla. Stat. which the DEPARTMENT stipulated were reasonable.

Respectfully submitted this 22nd of December, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief was served by e-mail upon:

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300 South Beach Stret
Daytona Beach, Florida 32114

this 22nd day of December, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellant's Initial Brief has been drafted, formatted, and executed in compliance with Florida Rule of Appellate Procedure 9.210 in 14-point Times New Roman.

/H. Richard Bisbee
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