

NORTH CAROLINA  
RANDOLPH COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16 CVS 201

JERRY OLIVER EARNHARDT, )  
)  
Petitioner, )  
)  
v. )  
)  
NORTH CAROLINA SUBSTANCE )  
ABUSE PROFESSIONAL PRACTICE )  
BOARD, )  
)  
Respondent. )

**ORDER**  
**(Attorney's Fees and Costs)**

This matter came on for hearing before the undersigned Superior Court Judge presiding at the 18 April 2016 regular term of Randolph County Civil Superior Court upon Petitioner Jerry O. Earnhardt's Petition for Judicial Review of the Final Decision of Respondent North Carolina Substance Abuse Professional Practice Board pursuant to Article 4 of Chapter 150B of the North Carolina General Statutes.

The Court, having considered and reviewed the entire Official Record, the Petition for Judicial Review, the Briefs filed by Petitioner and Respondent, and after hearing arguments from Counsel for Petitioner and Respondent, enters the following:

**FINDINGS OF FACT**

1. On January 28, 2016, Petitioner served a Petition for Judicial Review in the above reference matter.
2. On February 25, 2016, the undersigned entered a "Consent Order to Close Proceedings and Seal Record."
3. This matter was heard on Wednesday, April 20, 2016, in the Randolph County Superior Court, in Asheboro, North Carolina. Present were Robert O. Crawford, III, counsel for Petitioner, and Nelson G. Harris and E. Ann Christian, counsel for Respondent.
4. On April 28, 2016, the undersigned, having reserved ruling, issued a Memorandum of Ruling with instructions to counsel.

5. N.C. Gen. Stat. § 150B-51(b) provides that “[t]he court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) *In violation of constitutional provisions;*
- (2) *In excess of the statutory authority or jurisdiction of the agency or administrative law judge;*
- (3) *Made upon unlawful procedure;*
- (4) *Affected by other error of law;*
- (5) *Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or*
- (6) *Arbitrary, capricious or an abuse of discretion.*

6. Petitioner’s Petition for Judicial Review sought review of Respondent’s Final Decision which (1) revoked Petitioner’s licenses, and (2) ordered recovery of the principal sum of \$29,206.58 in attorney’s fees and costs from Petitioner incurred in connection with the investigation and hearing of the contested case pursuant to N.C. Gen. Stat. § 90-113.33. The Court’s decision with respect to the first issue shall be by separate order.

7. With respect to the second issue, Petitioner contended that Respondent Board’s Final Decision ordering recovery of attorney’s fees and costs was in excess of its statutory authority and was an error of law. The Court applies a *de novo* standard of review to this alleged error.

8. Petitioner also contended that the Board’s decision to recover one-half of the requested fees and costs was arbitrary, capricious or an abuse of discretion. The Court applies a “whole record” standard to review to this alleged error.

9. The Respondent Board did not exist at common law.

10. The law of North Carolina requires that attorney fees shall be awarded only pursuant to a specific grant of authority.

11. In its Final Decision, the Respondent Board did not cite any authority to award itself attorney fees in the 161 Findings of Fact or the 21 Conclusions of Law other than conclusory Finding 161 that the expenses incurred by the Board were necessary and appropriate given the Board’s charge.

12. N.C. Gen. Stat. § 90-113.33 states, in pertinent part, after listing the Board’s powers and duties, as follows:

*The powers and duties enumerated in this section are granted for the purposes of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. When the Board exercises its authority under this*

*Article to discipline a person, it may, as part of the decision imposing the discipline, charge the costs of investigations and the hearing to the person disciplined.*

13. The Court is unable to find any grant of authority for attorney's fees.

**CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact, *the Court concludes as a matter of law;* ~~the undersigned Superior Court Judge concludes:~~


1. N.C. Gen. Stat. § 90-113.33 does not provide for the award of any attorney fees.
2. The provisions of the foregoing statute that allow for an award of "the costs of investigations and the hearing" is not authority to award attorney fees.
3. The Respondent Board erred as a matter of law and exceeded its statutory authority in ordering the recovery of the principal sum of \$29,206.58 in attorney's fees and costs from Petitioner Earnhardt in connection with the investigation and hearing of the contested case.
4. The portion of the Final Decision of the Board in which the Board awards itself attorney's fees and costs in the amount of \$29,206.58 should be REVERSED.

**ORDER**

THEREFORE, it is hereby ordered that the portion of Respondent Board's Final Decision that ordered recovery of the principal sum of \$29,206.58 in attorney's fees and costs from Petitioner incurred in connection with the investigation and hearing of the contested case is REVERSED.

IT IS FURTHER ORDERED that Board shall submit to the undersigned a Petition for payment of the cost of the hearing and investigation without regard to any attorney fees within 45 days of the execution of this Order.

This the 5 day of May, 2016.

  
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The Honorable Vance Bradford Long  
Senior Resident Superior Court Judge