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Previous Case Number 87-4007
was dismissed without a hearing on 01/12/88
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNION TRUCKING, INC., )
)
Petitioner, )
)
vs. ) CASE NO. 87-4007F
)
STATE OF FLORIDA, DEPARTMENT )
OF TRANSPORTATION, )
)
Respondent. )
\_\_\_\_\_)

FINAL ORDER

This action arose after Petitioner, Union Trucking, Inc., received a Final Order dismissing Case NO. 87-4007 instituted by Petitioner upon its request for a hearing regarding the denial of its certification as a minority business enterprise (MBE) by Respondent, Department of Transportation. That proceeding was styled Union Trucking, Inc., vs. State of Florida, Department of Transportation, DOAH Case NO. 87-4007 (Final Order April 18, 1988). The application herein is filed pursuant to Section 57.111, Florida Statutes, and Rule 22I-6.035, Florida Administrative Code, which authorize a "small business party" to seek an award of attorney's fees and costs against the state agency which initiates an administrative action. A hearing was held on Petitioner's application on August 15, 1988, in Tallahassee, Florida, before Hearing Officer, Diane Cleavinger, for the Division of Administrative Hearings.

APPEARANCES

FOR PETITIONER: Frank M. Gafford, Esquire
34 North Marion Street
Lake City, Florida 32056-1789
FOR RESPONDENT: Marlene Adhearn, Esquire
Department of Transportation
Haydon Burns Building
Tallahassee, Florida 32399-0450

Rule 22I-6.035 specifically requires the state agency against which a petition for costs and fees is filed to file a response or counter affidavit within 20 days of the filing of the petition. The Division belatedly filed a response to Petitioner's application alleging the Petitioner was not entitled to an award of attorney's fees for the following reasons:

1. Petitioner failed to submit its application for attorneys fees and costs within the requisite 60 days after Petitioner became a prevailing party as defined in Section 57.111, Florida Statutes, and Rule 22I-6.035, Florida Administrative Code.

2. Petitioner's application fails to assert the necessary allegations upon which an application for attorneys fees and costs may be granted.

3. Respondent was substantially justified in denying Petitioner's certification as a minority business enterprise.

The pleadings and supporting documents that comprise the record herein are Petitioner's application, the affidavit of Frank M. Gafford, the Final Order and Order of Dismissal in DOAH Case NO. 87-4007, and the Request for hearing and the MBE application which formed the basis for DOAH Case NO. 87-4007.

Based on the record and arguments of counsel, the following facts are determined:

#### FINDINGS OF FACT

1. Union Trucking is a Florida corporation engaged in the business of trucking. Its net worth is less than \$2,000,000.00

2. In DOAH Case NO. 87-4007, the Department sent Petitioner a letter dated August 6, 1987, denying Petitioner's request for certification as a minority business enterprise pursuant to the Department's Rule 14-78.005, Florida Administrative Code. The reason stated in the letter was that Petitioner was not actually under the control of a minority person.

3. On August 25, 1987, Petitioner timely requested a hearing and the case was sent to the Division Of Administrative Hearings on September 11, 1987. By Notice of Hearing dated September 23, 1987, hearing was scheduled for November 16, 1987 and later continued until February 10, 1988.

4. Rule 14-78.002, Florida Administrative Code, was amended on September 21, 1987. The amendment effectively removed DOT's reason-for denial of Petitioner's certification. However, on February 11, 1988, well after the rule change came into effect, DOT formally decided to certify Petitioner. Petitioner was therefore forced to proceed for several months in preparation for an action which Respondent admits it had no basis for after the rule change took effect.

5. Respondent's initial decision occurred on August 6, 1987, when Respondent notified Petitioner of its denial of minority business status. At some point in time, Respondent had filed its proposed rule change. Petitioner failed to demonstrate the time of the proposed change. Depending on the facts surrounding the rule change as to its likelihood of adoption at the time Respondent initiated this action, no findings regarding substantial justification can be made at the time of the agency's initial action on August 6. Most certainly after September 21, 1987, the date the MBE rule was amended, Respondent lacked any substantial justification to continue to litigate this matter.

6. The Final Order of the Department recognized the earlier certification of Petitioner and dismissed the action. However, the Final Order of Respondent did not dispose of the attorney's fees issue which had also been raised during the principal action. The order, therefore, did not dispose of substantially

all the issues raised in the principal action. Additionally, there was no settlement of this case since a written settlement agreement was drafted and signed by Petitioner, but refused by Respondent. Respondent's unilateral certification is not enough to force a settlement on Petitioner, especially since Respondent elected to enter a Final Order in this case. Petitioner, therefore, became a prevailing party when Respondent entered its Final Order on April 18, 1988. Section 57.111(4)(b)(2) , Florida Statutes.

7. The application and affidavit which initiated this action were filed on May 23, 1988. The application substantially meets the requirements of Section 57.111, Florida Statutes, and Rule 22I-6.035, Florida Administrative Code, in that it fairly put Respondent on notice of Petitioner's claim. The application and affidavit were timely, having been filed within 60 days after the date on which Petitioner became a prevailing small business party.

8. According to the affidavit of Frank M. Gafford, Petitioner incurred legal fees of \$3,572.86. These fees and costs are found to be reasonable. The Department does not dispute the reasonableness of the fees in this case.

#### CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction of the parties to and subject matter of this proceeding. Section 57.111, Florida Statutes (1987).

10. Section 57.111(4)(a) essentially authorizes the award of attorney's fees and costs to a prevailing small business party in an administrative proceeding initiated by a state agency "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust."

11. Section 57.111(3)(d)1.a. defines a small business party to include:

A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments;...

Petitioner meets this definition and is a small business party.

12. Section 57.111(D)(c)1 specifies that a small business party is a "prevailing small business party" when:

A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;...

13. Again, in this case it is uncontroverted that a Final Order was entered dismissing the action on April 18, 1988, and adopting Petitioner's certification. The Final Order was in Petitioner's favor. Petitioner is, therefore, a prevailing small business party.

14. The attorney's fees and costs incurred by Union were reasonable and necessary to defend against Respondent's denial.

15. Section 57.111(3)(e) specifies that:

A proceeding is substantially justified if it had a reasonable basis in law and in fact at the time it was initiated by a state agency.

Respondent was unjustified in its decision (or lack of decision) to litigate this matter once it had been filed. However, Respondent's action was initiated at a time (August 6) when it had substantial justification in law and in fact to deny Petitioner MBE status. Section 57.111(3)(b)(3) , Florida Statutes. Petitioner failed to demonstrate any facts regarding the likelihood of adoption of the rule change at the August 6 date. Respondent's unjustified acts subsequent to that date are irrelevant under the language of the statute. Petitioner's application for attorneys fee and costs is therefore denied.

DONE and ORDERED this 5th day of October, 1988, in Tallahassee, Florida.

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DIANE CLEAVINGER  
Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of October, 1988.

COPIES FURNISHED:

Frank M. Gafford, Esquire  
34 N. Marion Street  
Lake City, Florida 32056-1789

Marlene Adhearn, Esquire  
Department of Transportation  
Haydon Burns Building  
Tallahassee, Florida 32399-0450

Atten: Eleanor F. Turner, M.S. 58  
Kaye N. Henderson, P.E.  
Secretary  
Department of Transportation  
Haydon Burns Building  
Tallahassee, Florida 32399-0450