

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAYNE R. PHOENIX,)
)
 Petitioner,)
)
 vs.) CASE NO. 91-3598F
)
 DEPARTMENT OF PROFESSIONAL)
 REGULATION, DIVISION OF REAL ESTATE,)
)
 Respondent.)
 _____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly designated Hearing Officer, William R. Cave, held a formal hearing by telephonic communication in the above-captioned case on August 22, 1991 with the undersigned in Tallahassee, Florida and the parties in Clearwater, Florida.

APPEARANCES

For Petitioner: Leslie M. Conklin, Esquire
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Clearwater, Florida 34624

For Respondent: Steven W. Johnson, Esquire
Department of Professional Regulation
Division of Real Estate
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STATEMENT OF THE ISSUE

Whether the Petitioner, Jayne R. Phoenix (Phoenix) is entitled to attorney's fees and costs incurred while defending the charges made against her in the case of Department of Professional Regulation, Division of Real Estate, Petitioner v. Larry Neil Heckerd and Jayne R. Phoenix, Respondents, DOAH Case No. 90-6199 (DPR, DRE v. Heckerd and Phoenix) under the provisions of Section 57.111, Florida Statutes and Rule 22I-6.035, Florida Administrative Code.

PRELIMINARY STATEMENT

On April 19, 1991 the Florida Real Estate Commission (FREC) issued a Final Order in DPR, DRE v. Heckerd and Phoenix finding Phoenix not guilty of the charges alleged and dismissing the administrative complaint.

On June 10, 1991 Phoenix filed a Petition For Statutory Attorney's Fees and Costs incurred in defending the charges made against her in DPR, DRE v. Heckerd and Phoenix. On June 21, 1991 the Department of Professional Regulation,

Division of Real Estate (Department) filed a response to that petition denying certain allegations of the petition, and this proceeding ensued.

At the hearing, Phoenix testified in her own behalf but did not offer any other witness. Phoenix's composite exhibit 1 was received into evidence. The Department did not present any witnesses. Department's exhibits A, B, C and D were received into evidence.

There was no transcript of this proceeding filed with the Division of Administrative Hearings. Phoenix's attorney requested, and the parties were granted, ten additional days to file their Proposed Final Orders due to his wife having just given birth to their child. The parties timely filed their Proposed Final Orders under the extended time frame. A ruling on each Proposed Finding of Fact has been made as reflected in an Appendix to the Final Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

Facts Stipulated To By The Parties

1. At all times material to this proceeding, Phoenix was a licensed real estate salesman in the state of Florida, holding license number 0069088, working under the brokerage license of Charles E. Earhart of Charles Earhart Realty (Earhart Realty).

2. Phoenix timely filed her petition in the instant case in accordance with Section 57.111, Florida Statutes, and Rule 22I-6.035, Florida Administrative Code.

3. On August 21, 1990 the Probable Cause Panel (Panel) of the FREC met and found probable cause to exist in Department's Case No. 0166101 against Phoenix and recommended the filing of an administrative complaint.

4. The Department issued an administrative complaint in Case No. 0166101 against Phoenix and prosecuted this action in the case of DPR, DRE v. Heckard and Phoenix.

5. Phoenix was a prevailing party in DPR, DRE v. Heckard and Phoenix in that the FREC issued a Final Order on April 19, 1991 finding Phoenix not guilty of the charges as alleged in the Department's Case No. 0166101 and dismissing the administrative complaint filed as a result of those charges.

6. The hourly rate and the total number of hours expended by Phoenix's attorney set forth in the affidavit attached to the Petition For Statutory Attorney's Fees in the amount of \$5,291.00 are reasonable, and should be the amount awarded in the event Phoenix is successful in presenting her petition.

7. At all times material to this proceeding, all statutory requirements or conditions between Phoenix and her broker, Earhart Realty had been met.

Facts Not Stipulated To By The Parties

8. At all times material to this proceeding, Phoenix was domiciled in the state of Florida, having her principal place of residence located in Safety Harbor, Florida.

9. Phoenix works as a licensed real estate salesman under the brokerage license of Earhart Realty; is compensated by commissions only, and receives no salary from Earhart Realty.

10. Phoenix uses the offices of Earhart Realty but is not assigned any particular work area or desk. Phoenix is not required to work any specific hours or number of hours, or assigned any specific duties by Earhart Realty.

11. Phoenix also works out of her home where she has a desk. Phoenix also uses her own car in her realty work.

12. Phoenix does her own work in regard to any real estate transaction that she is handling, including the contract. Charles Earhart only sees Phoenix's real estate contracts at the time he signs as real estate broker on the contracts.

13. Phoenix has no federal income tax employer identification number. Phoenix files her commission earnings for income tax purposes on the business part of IRS Form 1040 under her social security number.

14. Phoenix's commission earnings are reported to the Internal Revenue Service by Earhart Realty on IRS Form 1099.

15. Phoenix has no employees and is not a corporation or a partnership.

16. Phoenix's assets are worth less than two million dollars.

17. All monies received by Phoenix in any real estate transaction is placed in the escrow accounts of Earhart Realty. Phoenix does not maintain any escrow accounts in regard to her real estate business.

18. On August 21, 1990 when the Panel met concerning the complaint against Phoenix it received and considered the complete investigative file which contained among other things, a letter from Rafael C. Lopez dated November 3, 1989 setting out his complaint against Phoenix and Larry Heckard and the Department's investigator's report of his interview with Lopez, Phoenix, Heckard, Charles Earhart and Dave Livesay, Building Inspector. The investigative file did not contain a copy of the local building code or ordinance which was alleged to prohibit the use of any area of the first level of the home as a game room or as an office. However, the investigative report did contain a statement from the investigator that in his interview with Livesay, the Building Inspector, that Livesay had stated that such use would be in violation of such code or ordinance.

19. Lopez's complaint basically contained the following allegations: (a) that Phoenix was aware of the MLS listing sheet indicating a game room on the first floor level of the stilt house she showed the Lopezes during an "open house", (b) that Phoenix knew, or should have known, that the local building code or ordinance prohibited the use of this enclosed area, not only as a game room but as an office; (c) that while in the presence of Phoenix, during the open house showing and the walk-through at closing, the Lopezes discussed converting the so called game room into an office; (d) that on neither occasion did Phoenix advise them or comment on the fact that the use of this area as a game room or as an office was prohibited; and (e) in this regard, Phoenix had misrepresented the house to the Lopezes. Phoenix denied the allegations and pointed out to the investigator that she had referred to the area of the house

in question as a "downstairs storage area" in the contract for sale executed by the Lopezes.

20. There was no evidence presented as to any written agreement between Phoenix and Earhart Realty setting out the conditions of Phoenix's employment with Earhart Realty.

21. While the investigation did not fully clarify all the factual issues, there was a basis for the Panel's determination of probable cause.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

23. Phoenix seeks an award of attorney's fees and costs relative to her successful defense against the allegations of misconduct filed against her by the Department. She claims this reimbursement under the terms of Section 57.111(3)(d), Florida Statutes, which provide that the term, "small business party" shall mean:

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 personal and business investments.

24. The burden of proof is on Phoenix to prove that she is a small business party, she prevailed in the action under consideration, and that that action was initiated by a state agency. Once that burden is met, the burden shifts to the Department to establish that its actions were substantially justified or that circumstances exist which would make the award unjust. *Gentele v. Department of Professional Regulation, Board of Optometry*, 513 So.2d 672 (1 DCA Fla. 1987).

25. The parties have stipulated that Phoenix prevailed in the underlying proceeding and that that proceeding was initiated by the Department. The Department has also stipulated that the fee charged and the hours claimed were both reasonable. The only question remaining is whether Phoenix qualifies as a small business party, and whether the Department's actions were substantially justified.

26. Phoenix was a salesman in the office of Earhart Realty, a broker. Under the provision of Section 475.01(2), Florida Statutes, the terms "employ", "employment", "employer" and "employee" mean:

. . . when used in [that] chapter and in rules adopted pursuant thereto to describe the relationship between a broker and a salesman, include an independent contractor relationship when such relationship is intended by and established between a broker and a salesman. . . .

This interpretation is founded upon, among other things, the fact that the broker is responsible, not only financially but legally, for the authorized actions of the salesman. Therefore, though described as an independent contractor relationship, in fact an employment relationship is shown to exist here, notwithstanding that this same relationship, if agreed to in writing, may be considered an independent contractor relationship for Workers' Compensation purposes under Chapter 440, Florida Statutes. See: Section 440.02(12)(d)1.a., Florida Statutes.

27. Additionally, applying the facts of this case to the test set out in the Restatement (Second) of Agency Section 220 (1958) for determining whether one is an employee or independent contractor that was approved by the Supreme Court in *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966), the weight of the evidence falls on the side of Phoenix being an employee of Earhart Realty rather than an independent contractor. This is particularly so, when one considers that by statute the salesman acts under the direction, control and management of the broker.

28. In the instant case, the evidence clearly establishes too many ties that bind between Phoenix and Earhart Realty. She was not truly independent since Earhart Realty exercised substantial control over her activities. Therefore, she cannot be considered to be a small business party within the parameters of the statute.

29. However, assuming *arguendo* that Phoenix could be considered a small business party within the parameters of the statute, then the burden would shift to the Respondent to establish that its actions were substantially justified. *Gentele v. Department of Professional Regulation, Board of Optometry*, 513 So.2d 672 (1 DCA Fla. 1987).

30. Section 57.111(3)(e), Florida Statutes, states that "[a] proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time it was initiated by a state agency." In this case, the finding of the Panel was based on the investigative report compiled by the Department.

31. As noted by the First District Court of Appeal, "[t]he procedure set forth under Section 455.225, Florida Statutes (1987), relating to disciplinary proceedings initiated by a regulatory agency, clearly suggests that an investigative report may be the most substantial and relevant evidence necessary to assist the panel in rendering a decision of whether probable cause exists for the issuance of a formal complaint against the licensee." *Department of Professional Regulation v. Toledo Realty, Inc.*, 549 So.2d 715, 719 (1 DCA Fla. 1989). Such a report may be relied upon for a finding of probable cause. In the instant case, there was clearly some evidence before the Panel in the form of an investigative report on which it based its decision to file the Administrative Complaint against Phoenix. The fact that the Department did not prevail at the final hearing does not raise the presumption that it was not substantially justified in initiating the disciplinary action against Phoenix's license. *Gentele v. Department of Professional Regulation, Board of Optometry*, 513 So.2d 672 (1 DCA Fla. 1987). The appropriate period of time to be reviewed on the issue of substantial justification occurs when the finding of probable cause is made and not at the conclusion of a case when the final order is entered. In the instant case, there was a reasonable basis in law and fact to determine the existence of probable cause.

ORDERED

It is, therefore ordered that Phoenix petition for attorney's fees and costs be denied.

DONE and ORDERED this 1st day of October, 1991, in Tallahassee, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of October, 1991.

APPENDIX TO FINAL ORDER, CASE NO. 91-3598F

The following contributes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in the case.

Rulings on Proposed Finding of Fact
Submitted by the Petitioner

1. Each of the following proposed findings of fact are adopted in substance as modified in the Final Order. The number in parenthesis in the Finding(s) of Fact which adopts the proposed finding of fact: 1 (4); 2 (4); 3 (5); 4 (6); 5 (4); 6 (1); 7 (4); 9 (8, 10, 11, 15, 16); 10 (18); 11 (18); 12 (18); 13 (18); 14 (18); and 15 (3).

2. The proposed finding in proposed finding of fact 8 that Phoenix was an independent contractor is rejected as not being supported by competent substantial evidence in the record. The balance of proposed finding of fact 8 is adopted in substance in findings of fact 9, 10, 11 and 13.

3. Proposed findings of fact 16, 17 and 18 are not material or relevant other than to show Phoenix was the prevailing party. That has been stipulated. See finding of fact 5.

Rulings on Proposed Findings of Fact
Submitted by the Respondent

1. Each of the following proposed findings of fact are adopted in substance as modified in the Final Order. The number in parenthesis is the Finding(s) of Fact which adopts the proposed finding of fact: 1 (4); 2 (4); 3 (5); 4 (1); 5 (6); 6 (19); 8 (18); 9 (3, 18); 10 (18, 19); and 11 (21).

2. Without a factual basis set out in the proposed findings of fact the conclusion that Phoenix is not a small business party within the meaning of Section 57.111(3)(c) and (d), Florida Statutes is only a conclusion of law and not a finding of fact. The Department's cite: Section 51.111(3)(c) and (d) is incorrect.

COPIES FURNISHED:

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A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULE OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.