

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ERNEST SELLARS,)
)
 Petitioner,)
)
 vs.) Case No. 97-3540F
)
 BROWARD COUNTY SCHOOL BOARD)
)
 Respondent.)
 _____)

FINAL ORDER

THIS CAUSE came before the undersigned for consideration of the Motion for Attorneys Fees and Costs filed with the Division of Administrative Hearings ("Division") by Ernest Sellars on July 31, 1997. In the motion, Mr. Sellars requested that he be awarded attorney's fees and costs incurred for his defense in the case of Frank Petruzielo, Superintendent of Broward County Schools v. Ernest Sellars, DOAH Case No. 96-0322 (Final Order entered August 5, 1997). In DOAH Case No. 96-0322, Mr. Sellars, a teacher in the Broward County school system, prevailed in an administrative proceeding in which he challenged the School Board's proposed termination of his employment. Although the motion carried the style and case number of this underlying case, it was treated as a petition for attorney's fees, a new file was opened, and the parties were re-aligned to reflect Ernest Sellars as the Petitioner and the Broward County School Board ("School Board") as the Respondent.

The case was assigned on August 5, 1997; counsel for Mr. Sellars was contacted on August 6, 1997, and asked to contact counsel for the School Board and arrange a telephone hearing for the purpose of scheduling the formal hearing in this case. On August 14, 1997, counsel for Mr. Sellars notified the undersigned's office that a telephone hearing had been arranged for August 18, 1997. Also on August 14, 1997, counsel for Mr. Sellars filed a Motion to Set Hearing for Attorneys Fees and Costs, and counsel for the School Board filed his Notice of Appearance.

A telephone hearing was held on August 18, 1997, with counsel for both parties in attendance. Counsel for the School Board asked for leave to file a response to the motion/petition no later than August 25, 1997; the request was granted without objection, and counsel for Mr. Sellars stated that he would file a reply no later than September 4, 1997. The School Board timely filed its response to Mr. Sellars' motion/petition, in which it requested that the Motion for Attorneys Fees and Costs be dismissed; Mr. Sellars filed his answer to this response on September 9, 1997.

Mr. Sellars bases his request for fees and costs on the following allegations:

1. The Court entered an Order on April 10, 1997, following a 3 day trial wherein the Respondent was exonerated of all charges which alleged that he violated various Florida Statutes and Broward County School Board Policies.

2. The Court recommended that the Broward County School Board enter a Final Order dismissing the Administrative Complaint filed by the superintendent, against Mr. Sellars.

3. The Court found that the Superintendent failed to carry his burden of proof by a preponderance of credible evidence.

4. The superintendent alleged in paragraphs F, G, I, J, K, L and M that Mr. Sellars physically abused students that were assigned to his class and committed other alleged violent acts, in violation of Broward County School Board policies and Florida statutes. There is no credible evidence that Mr. Sellars committed any acts of violence against his students, nor did he inappropriately discipline them. Additionally, the superintendent offered no evidence at the formal hearing/trial to support the aforementioned allegations made by him. In fact, the Court found that the Superintendent "failed to present any evidence used as a basis of a finding of fact that Mr. Sellars committed the acts alleged in paragraphs F, G, I, J, K, L and M." The aforementioned allegations were made for [the] purpose [of] harassing the Respondent and/or to increase the cost of litigation for the Respondent, or for some other improper purpose.

5. The Respondent was forced to obligate himself to pay counsel for the extra time required to prepare for and litigate against aforementioned charges made by the superintendent because he failed to dismiss the allegations listed in his Complaint, at paragraphs, F, G, I, J, K, L and M.

6. The superintendent did nothing to prosecute [sic] the allegations listed in his Complaint, at paragraphs F, G, I, J, K, L and M. This evidence that these allegations were baseless and/or unfounded. The Respondent was forced to spend the time and money to defend against them. If the superintendent had dismissed them,

Mr. Sellars cost of litigation would have been less. However, he did not and Mr. Sellars cost of litigation was greater because of this.

7. Mr. Sellars presented, to the superintendent, the names and addresses of witnesses who possessed facts, that were not previously considered by the superintendent, before he determined that he had probable cause to believe that Mr. Sellars committed the acts alleged. These facts would have exonerated Mr. Sellars. The superintendent, nor his committee interviewed any of the witnesses before making a rush to judgment. Therefore, the probable cause finding, by the superintendent was faulty. The witnesses were not interviewed intentionally, to bolster the case against Mr. Sellars. This evidences an improper purpose, or to harrass [sic] the Respondent and/or increase his cost of litigation.

8. Mr. Sellars prevailed at trial and is entitled to attorney fees and cost reimbursement because of the aforementioned facts.

In its response to the motion/petition, the School Board asserts both that Mr. Sellars is not entitled to an award of attorney's fees and costs incurred in defending himself in the underlying administrative action and that the Division of Administrative Hearings does not have jurisdiction to award fees in this case because Mr. Sellars did not "plead entitlement to attorney's fees or costs at any time prior to or during the administrative hearing." The School Board relies, first, on the decision of the Florida Supreme Court in Stockman v. Downs, 573 So. 2d 835 (Fla. 1991), as authority for its position that, by failing to plead entitlement, Mr. Sellars waived his claim for

attorney's fees and costs. The School Board further argues that the Division does not have jurisdiction to decide Mr. Sellars' motion/petition because, in contrast to the teacher in Krueger v. School District of Hernando County, 544 So. 2d 331 (Fla. 5th DCA 1989), he did not request attorney's fees and costs either during the hearing or in his proposed recommended order.

Finally, the School Board argues that, even if Mr. Sellars' claim for attorney's fees and costs was properly presented in the underlying proceeding, he would not be entitled to an award of attorney's fees and costs pursuant to Section 120.595, Florida Statutes (Supp. 1996), because he failed to prove that the superintendent of schools brought the underlying administrative action against him for an "improper purpose" and because no such finding was included in the recommended order entered in the underlying proceeding. In the alternative, the School Board argues that the issue of the superintendent's "improper purpose" was determined in the School Board's favor in the recommended order entered in the underlying case in which it was concluded only that "the evidence did not support the allegations contained in the Administrative Complaint."

In his answer to the School Board's response, Mr. Sellars sets out certain facts relating to his claim for attorney's fees and costs. First, he states that he made his initial demand for attorney's fees and costs to the School Board on April 28, 1997, after the recommended order had been entered in the underlying

case and the matter was before the School Board for final agency action. Mr. Sellars further states that he filed a motion with the School Board on July 15, 1997, which included his claim for an award of attorney's fees and costs but that, even though the School Board voted to reinstate him, it refused to give him an evidentiary hearing on his request for attorney's fees and costs. Mr. Sellars cites the Final Order entered by the School Board on August 5, 1997, in which it stated that "as to reasonable costs and attorney's fees, those issues are not included in the Recommended Order and is [sic] therefore rejected." Finally, he states that he filed with the Division the Motion for Attorneys Fees and Costs which is the subject of this proceeding on July 25, 1997, after the School Board refused to give him an evidentiary hearing on his request for attorney's fees and costs.

Mr. Sellars cites the holding in Krueger v. School Board of Hernando County as authority for his entitlement to an evidentiary hearing on his claim for attorney's fees and costs. He argues that, like the teacher in Krueger, he raised the issue of attorney's fees and costs "at least four times during the administrative process": Once in his exceptions to the recommended order filed with the School Board; once in the motion he filed with the School Board; once in the motion/petition he filed with the Division; and once in the Motion to Set a Hearing for Attorneys Fees and Costs filed with the Division on August 14, 1997. He also argues that, as in Krueger, his request

for attorney's fees and costs was denied by the School Board without an evidentiary hearing.

Mr. Sellars argues that the issue of attorney's fees and costs was not litigated at the final hearing in the underlying case because the issues to be litigated in that hearing were limited "to the issue of child abuse" and that he had not waived his right to an evidentiary hearing on his claim for attorney's fees and costs because he gave the School Board timely notice of his demand for attorney's fees and costs by virtue of the pleadings itemized in the previous paragraph. He cites Stockman v. Downs for the proposition that it is not improper to adjudicate attorney's fees after the merits of the underlying case have been resolved and Procacci Commercial Realty, Inc., v. Department of Health and Rehabilitative Services, 690 So. 2d 603 (Fla. 1st DCA 1997) for the proposition that, absent agreement of the parties as to the amount of fees and costs, an evidentiary hearing on this issue is required. Finally, Mr. Sellars disputes the School Board's assertion that it was resolved in the recommended order that the Superintendent did not have an "improper purpose" in initiating the underlying action.

Based upon careful consideration of the grounds set out in the Motion for Attorneys Fees and Costs, of the representations and arguments of counsel in the response to the motion/petition and in the answer to the response, and of statutory and case law, it is concluded that the Motion for Attorneys Fees and Costs must

be denied and the case dismissed. There is simply no basis to support Mr. Sellars' request for an evidentiary hearing and an award of attorney's fees and costs under the circumstances presented in this case.

First, Mr. Sellars admitted that he did not request attorney's fees and costs until a recommended order had been entered in the underlying case. Rather, he made his first request for fees and costs to the School Board, which considered the request and denied it without an evidentiary hearing in the final order it entered on August 5, 1997.¹ Relief from this final order can only be had through judicial review, as set out in Section 120.68, Florida Statutes. Because Mr. Sellars is not asking the Division to review the School Board's final order, the request for an evidentiary hearing to determine attorney's fees and costs presented herein can only be collateral to the underlying case in which the School Board entered a final order.²

Mr. Sellars has not cited any statutory or contractual basis for his request for an award of attorney's fees and costs in the motion/petition which is the basis for this administrative proceeding.³ He has, however, asserted that the School Board had an "improper purpose" in including certain charges in the Administrative Complaint.

The Administrative Procedures Act contains two provisions, Sections 120.569(2)(c) and .595(1), Florida Statutes (Supp. 1996), which authorize an administrative law judge to award

attorney's fees and costs in a proceeding conducted, as was the underlying case, pursuant to the provisions of Sections 120.569 and 120.57(1), Florida Statutes (Supp. 1996). Neither of these provisions provides a basis for an award of attorney's fees and costs in this case because no request for attorney's fees and costs was made until after the recommended order was entered and sent to the School Board for final agency action.

Section 120.569(2)(c), Florida Statutes (Supp. 1996), formerly Section 120.57(1)(b)5, authorizes a presiding officer in a case proceeding under Section 120.569 to impose sanctions upon a party if it is found that the party filed a "pleading, motion, or other paper" for an "improper purpose." The sanction may include "reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." In a proceeding under Section 120.57(1) in which the presiding officer is an administrative law judge, the finding of "improper purpose" must be included in the recommended order since the decision of the administrative law judge to impose sanctions against an agency cannot be rejected by the agency and is subject to review only in a district court of appeal in an appellate proceeding initiated under Section 120.68. Department of Health and Rehabilitative Services v. S. G., 613 So. 2d 1380, 1384-85 (Fla. 1st DCA 1993). Consequently, if Mr. Sellars' claim for attorney's fees and costs is based on the provisions of Section 120.569(2)(c), it cannot be adjudicated in

this collateral action. This provision would be applicable only if the request had been made timely so that a finding on the issue of "improper purpose" could be included in the recommended order issued April 10, 1997.

Likewise, if Mr. Sellars' claim for attorney's fees and costs is based on the provisions of Section 120.595(1), the claim can not be adjudicated in this collateral action. Section 120.595(1) provides for an award of attorney's fees and costs to a prevailing party if the "nonprevailing adverse party" is found to have "participated in the proceeding for an improper purpose as defined by this subsection and s. 120.569(2)(c)." First, the statute, by its terms, requires that the determination of "improper purpose" be made only "upon motion" and that the determination of improper purpose be included in the recommended order. Section 120.595(1)(b),(d), Florida Statutes. By his own admission, Mr. Sellars raised the issue of attorney's fees and costs for the first time before the School Board after the recommended order had been entered and sent to the School Board for final agency action.

Second, attorney's fees and costs in a case such as this cannot be awarded against the School Board as a nonprevailing adverse party. In Section 120.595(1)(e)3, a "nonprevailing adverse party" is defined as "a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding." The School Board

is the agency proposing to take action against Mr. Sellars. Therefore, even though Mr. Sellars was the prevailing party in the underlying administrative action, the School Board is not a "nonprevailing adverse party."

In addition to these two provisions of Chapter 120, attorney's fees and costs may be awarded by an administrative law judge pursuant to the Florida Equal Access to Justice Act ("Act"), Section 57.111, Florida Statutes. A prevailing small business party can file a claim for attorney's fees and costs under this section by filing a petition with the Division of Administrative Hearings "within 60 days after the small business party becomes a prevailing small business party." Section 57.111(4)(b). The statute and Rule 60Q-2.035, Florida Administrative Code, prescribe the contents of a petition for attorney's fees and costs under the Act. Mr. Sellars' motion/petition contains none of the allegations required by statute and rule to establish entitlement to an award.

Furthermore, Mr. Sellars cannot, as a matter of law, establish that he is a "prevailing small business party" as that term is defined in Section 57.111(3)(c),(d). In Thompson v. Department of Health and Rehabilitative Services, 533 So. 2d 840, 840 (Fla. 1st DCA 1988), the court stated that it "reject[ed] Thompson's contention that a state employee involved in a regulatory proceeding to determine his eligibility for continued employment is entitled to the protection of this act [Florida

Equal Access to Justice Act]." The court further observed that "[b]y definition, the Florida Equal Access to Justice Act does not apply to individual employees such as Thompson."⁴

The issue of fees and costs was not addressed in the recommended order in the underlying case because the issue was not raised by pleading or otherwise in the proceedings before the Division. Had Mr. Sellars timely requested attorney's fees and costs pursuant to Section 120.569(2)(c), his claim could have been evaluated and, if appropriate, a finding of "improper purpose" included in the recommended order. However, Mr. Sellars did not plead entitlement to attorney's fees and costs or otherwise give the School Board notice that he was seeking fees and costs until after the recommended order in his employment termination action had been entered and the case was before the School Board for final agency action. Upon consideration of Mr. Sellars' request for attorney's fees and costs, the School Board refused to remand the case to the Division for an evidentiary hearing and a determination of the amount of fees and costs because it denied Mr. Sellars' request. If Mr. Sellars' believed this action was in error, the appropriate remedy was through the appellate process set out in Section 120.68. Mr. Sellars has cited no authority which vests jurisdiction in the Division to resolve the issue of attorney's fees and costs under the circumstances herein.

CONCLUSION

Based on the foregoing, the Motion for Attorneys Fees and Costs is denied, and this case is dismissed.

DONE AND ENTERED this 25th day of September, 1997, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 1997.

ENDNOTES

^{1/} Mr. Sellars' reliance on Krueger v. School District of Hernando County, to support his argument that he is entitled to an evidentiary hearing before an administrative law judge on the motion/petition filed July 31, 1997, is misplaced. Importantly, the decision in Krueger was rendered on appeal from the school board's order refusing to remand the case back to the hearing officer for an evidentiary hearing and denying the request for attorney's fees. It is clear from the district court's recitation of the facts in Krueger that the four requests for attorney's fees in that case were made prior to entry of the recommended order. The appellate court found that, under these circumstances, it was error to refuse to remand the case to the hearing officer for an evidentiary hearing on attorney's fees and ordered the school board to do so.

^{2/} In this respect, Mr. Sellars' reliance on Stockman v. Downs and Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services is misplaced. In Stockman, the court observed that, when a proper and timely request for attorney's fees is made, "it is not improper to adjudicate entitlement to attorney's fees after resolution of the other claims." 573 So. 2d at 837. In Procacci, the claim for attorney's fees and costs was presented to the administrative law judge in "a motion to dismiss/petition for attorney's fee, damages, and costs" filed

pursuant to Section 120.57(1)(b)5, now Section 120.569(2)(c).
690 So. 2d at 607.

^{3/} In an administrative as well as a civil proceeding, an award of attorney's fees generally must be based on a right granted by statute or by contract. Dade County v. Pena, 664 So. 2d 959 (Fla. 1995); Jory v. Department of Professional Regulation, 583 So. 2d 1075, 1077-78 (Fla. 1st DCA 1991). Several district courts have held, however, that school boards have the authority to award attorneys fees and costs in the absence of a statutory or contractual provision. In Sulcer v. McFatter, 497 So. 2d 1349, 1350 (Fla. 4th DCA 1986), the court held that "a county school board has the discretionary authority to award attorney's fees and costs to an employee who prevails in an administrative proceeding." The court concluded that this authority derives from the provision of section 230.03(2), Florida Statutes, which provides that a school board "may exercise any power except as expressly prohibited by the State Constitution or general law." Id. See also Davis v. School Board of Gadsden County, 646 So. 2d 766, 769 (Fla. 1st DCA 1994)("school boards have authority to pay fees and costs incurred by employees in circumstances like these [employee reinstated after an evidentiary hearing in a termination proceeding]"; "the School Board could lawfully have reimbursed appellant for the attorney's fees he incurred, Krueger v. School District of Hernando County, 544 So 2d 331 (Fla. 5th DCA 1989); Sulcer v. McFatter, 497 So. 2d 1349 (Fla. 4th DCA 1986)"). Mr. Sellars has not cited any authority recognizing a similar discretionary power in the Division of Administrative Hearing.

^{4/} Even if Mr. Sellars were to fit within the definition of a small business party with respect to an endeavor outside his employment as a teacher in the Broward County school system, he would not be entitled to fees under the Act because the "final judgment or order" must be entered "in favor of the small business party." Section 57.111(3)(c)1. Mr. Sellars participated in the administrative proceeding in the underlying case solely as an employee of the School Board.

COPIES FURNISHED:

Willie Jones, Esquire
One River Plaza, Suite 721
305 South Andrews Avenue
Fort Lauderdale, Florida 33409

Charles T. Whitelock, Esquire
WHITELOCK & ADAMS, P.A.
Barnett Bank Plaza, Suite 601
Fort Lauderdale, Florida 33301

Frank R. Petruzielo, Superintendent
Broward County School Board
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Frank T. Brogan
Commissioner of Education
The Capitol
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO JUDICIAL REVIEW

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 Rules 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.

¹ Mr. Sellars' reliance on Krueger v. School District of Hernando County, to support his argument that he is entitled to a hearing before an administrative law judge on the motion/petition filed July 31, 1997, is misplaced. Importantly, the decision in Krueger was rendered on appeal from the school board's order refusing to remand the case back to the hearing officer for an evidentiary hearing and denying the request for attorney's fees. It is clear from the district court's recitation of the facts in Krueger that the four requests for attorney's fees in that case were made prior to entry of the recommended order. The appellate court found that, under these circumstances, it was error to refuse to remand the case to the hearing officer for an evidentiary hearing on attorney's fees and ordered the school board to do so.

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³ In an administrative as well as a civil proceeding, an award of attorney's fees generally must be based on a right granted by statute or by contract. Dade County v. Pena, 664 So. 2d 959 (Fla. 1995); Jory v. Department of Professional Regulation, 583 So. 2d 1075, 1077-78 (Fla. 1st DCA 1991). Several district courts have held, however, that school boards have the authority to award attorneys fees and costs in the absence of a statutory or contractual provision. In Sulcer v. McFatter, 497 So. 2d 1349, 1350 (Fla. 4th DCA 1986), the court held that "a county school board has the discretionary authority to award attorney's fees and costs to an employee who prevails in an administrative proceeding." The court concluded that this authority derives from the provision of section 230.03(2), Florida Statutes, which provides that a school board "may exercise any power except as expressly prohibited by the State Constitution or general law." Id. See also Davis v. School Board of Gadsden County, 646 So. 2d 766, 769 (Fla. 1st DCA 1994) ("school boards have authority to pay fees and costs incurred by employees in circumstances like these [employee reinstated after an evidentiary hearing in a termination proceeding]"; "the School Board could lawfully have reimbursed appellant for the attorney's fees he incurred, Krueger v. School District of Hernando County, 544 So 2d 331 (Fla. 5th DCA 1989); Sulcer v. McFatter, 497 So. 2d 1349 (Fla. 4th DCA 1986)."). Mr. Sellars has not cited any authority recognizing a similar discretionary power in the Division of Administrative Hearing.

⁴ Even if Mr. Sellars fits within the definition of a small business party with respect to an endeavor outside his employment as a teacher in the Broward County school system, he would not be entitled to fees under the Act because the "final judgment or order" must be entered "in favor of the small business party." Section 57.111(3)(c)1. Mr. Sellars participated in the administrative proceeding in the underlying case solely as an employee of the School Board.