STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REGENCY PLACE APARTMENTS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-3449F
	)	
FLORIDA COMMISSION ON HUMAN RELATIONS,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

A Formal Hearing was heard before the Division of Administrative Hearings by Daniel M. Kilbride, Administrative Law Judge, on December 15, 1998, by video conference between Tallahassee and Orlando, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Mike Krasney, Esquire
Krasney and Dettmer
304 South Harbor City Boulevard
Melbourne, Florida 32901

For Respondent: Evelyn Davis Golden
Assistant General Counsel
Florida Commission on Human Relations
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to an award of attorney's fees and costs as a prevailing small business party in an adjudicatory proceeding initiated by a state agency as provided

under the Florida Equal Access to Justice Act (FEAJA), Section 57.111, Florida Statutes.

Whether the amount claimed by Petitioner for attorney's fees and costs is reasonable.

PRELIMINARY STATEMENT

Respondent agency issued a Notice of Determination: Cause and Issuance of Administrative Charge on August 28, 1996. Petitioner filed a request for a formal hearing. A formal hearing, pursuant to Section 120.57(1), Florida Statutes, was held before the Division of Administrative Hearings on April 16, 1997. The Administrative Law Judge issued a Recommended Order, dated July 7, 1997, recommending the charges be dismissed against all parties in that action. A Final Order, adopting the Recommended Order, was issued on June 17, 1998. The Petition for Costs and Attorney's Fees, pursuant to Section 57.111, Florida Statutes, was filed with the Division of Administrative Hearings by the Petitioner on July 27, 1998. Following entry of an Order denying Respondent agency's Motion to Strike, this matter was subsequently set for hearing. At a motion hearing, conducted by telephone conference call, it was determined that Petitioner, Carole Naylor, was not a small business owner, as defined by Section 57.111, Florida Statutes, and is not entitled to recover fees in this matter and was dismissed as a party.

The hearing on the merits was held on December 15, 1998. Official Recognition was taken of the transcript of the formal

hearing held on April 16, 1997, as well as the Recommended and Final Orders in the underlying case. Robert Stitzel testified, as did Eli Subin, Esquire, and counsel for Petitioner on behalf of Petitioner. Respondent agency offered no opposing affidavits and submitted no testimony in opposition to the claim for attorney's fees and costs, but did cross-examine Petitioner's witnesses and offered oral argument. The Transcript was filed with the Clerk of the Division of Administrative Hearings on January 15, 1999. The Petitioner filed a motion for extension of time to file proposed final orders on January 17, 1999. Respondent agency timely filed an objection to the Motion. The Motion was granted by order dated February 1, 1999. Respondent agency filed a Motion to Reconsider the order of February 1, 1999, and Petitioner filed a response thereto. Said Motion to Reconsider is denied. Each party has filed proposed final orders in this matter which have been carefully considered in the preparation of this Final Order.

Based upon all of the evidence, the following findings of relevant fact are determined:

FINDINGS OF FACT

1. The Respondent agency is charged with the administration of the Florida Civil Rights Act of 1992, as amended, Section 760.30, Florida Statutes (1995). If Petitioner is unable to obtain voluntary compliance with Sections 760.20 - 760.37, Florida Statutes, or has reasonable cause to believe a

discriminatory housing practice has occurred, the Respondent agency may institute an administrative proceeding under Chapter 120, Florida Statues, on behalf of the aggrieved party.

2. On February 3, 1993, Polly Leggitt filed a complaint with the Respondent agency and the United States Department of Housing and Urban Development. The Complaint named Carole Naylor, Property Administrator, as the person who discriminated against her.

3. On March 24, 1993, the Respondent agency notified Regency Place Apartments and Carole Naylor that the Complaint had been filed, and stated that within 100 days, the Respondent agency would investigate the Complaint and give notice whether there was or was not reasonable cause to believe that a discriminatory housing practice had occurred. The notice further provided that final administrative disposition of the Complaint would be completed within one year from the filing of the Complaint, which would be on or about February 3, 1994.

4. A Notice of Determination: Cause and Issuance of an Administrative Charge was made and issued and served on August 28, 1996. It named Regency Place Apartments; Carole Naylor, Frank Cutrona, Property Manager; and Robert Stitzel, owner. The notice was issued more than one year after the filing of the Complaint.

5. Following the formal hearing, this Administrative Law Judge made certain findings of fact which were incorporated in

the Recommended Order. Those findings held, inter alia:

> (a) Robert Stitzel was the developer and owner of Regency Place Apartments. Carole Naylor, at the direction of the manager Frank Cutrona, sent Ms. Leggitt letters rejecting her application for an apartment unit at Regency Place Apartments because there was no apartment of the kind she wanted that was available and further that her income was insufficient to qualify her for housing at that place. Cutrona died on December 26, 1996.
>
> (b) Carole Naylor did not work in the rental office. She made no judgments regarding the rental of the apartment, nor the creditworthiness of the prospective tenants.
>
> (c) Robert Stitzel made no judgments regarding the tenants.
>
> (d) Regency Place Apartments had a policy which requires income equaling three times the gross rental. The creditworthiness and the determination of who would rent apartments was left solely with the resident manager.
>
> (e) Stitzel demonstrated that many disabled people had lived in the apartment complex. Accommodations were made for people with disabilities by the manager and such costs for these accommodations were paid by Regency Place Apartments.
>
> (f) The agency made a prima facie case of discrimination in that Leggitt is a handicapped person, who is otherwise qualified to rent the apartment, and suffered a loss of a housing opportunity, under circumstances which lead to an inference that Stitzel based its action solely upon her handicap.
>
> (g) Evidence was presented that Regency Place Apartment's requirement of gross income equaling three times the monthly rent had not been satisfied by Leggitt's mother's agreement to contribute $550 per month. Leggitt's income was $281.34 per month. Three times the

monthly rent was $1,140.00, thus rendering her income short by $308.66 per month.

(h) The motivation for rejecting the application was that the apartment which Leggitt wanted was not available and Leggitt did not have sufficient income to qualify.

(i) There was no evidence of a discriminatory motive on the part of Cutrona, Naylor, Stitzel, or Regency Place Apartments, other than conjecture. There was no evidence that suggests the reasons given were not true at the time the letters were written or that they were merely pretextual. Further, it did not appear from the evidence that any discriminatory motive was proven. There was nothing in the evidence that proves that Leggitt's legal blindness was a cause of the rejection of her application.

(j) There was no evidence of any act or conduct which would suggest discriminatory conduct or a discriminatory animus by any of the persons named as Respondents in the Administrative Charge.

(k) Taken as a whole, the credible evidence indicated that the sole basis for rejecting Leggitt's application was the unavailability of the unit that she requested, and her failure to satisfy management of her financial ability to meet the financial requirements of Regency Place Apartments.

(l) Although Leggitt testified as to her inconvenience caused by the denial of her application, there was no evidence of any quantifiable damages presented at the hearing.

6. In the Conclusions of Law, it was determined that the Motion to Dismiss should have and was granted on the grounds that the Respondent agency failed to comply with the statutory time requirements:

(a) Under the Federal Fair Housing Amendments Act, "the Secretary shall make

> an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after filing of the Complaint . . . unless it is impracticable to do so." 42 U.S.C. s 3610(a)(1)(B)(iv). The statute also provides that if "the Secretary is unable to complete the investigation within 100 days" after complainant files the complaint, the Secretary "shall notify the complainant and respondent in writing of the reasons for not doing so." 42 U.S.C. s. 3610(a)(1)(c).
>
> (b) This same provision is found in the Florida Fair Housing Act. See Section 760.34, Florida Statutes (1995), and Chapter 60Y-7, Florida Administrative Code.
> (c) The Florida Administrative Code provides as follows:
>
> > "Section 60Y-7004(8)(b) If the Commission is unable to complete its investigation within 100 days, it shall notify the complainant and respondent in writing of the reasons for not doing so."
>
> (d) Section 60Y-7.004(10) The Commission will make final administrative deposition of a complaint within one year of the date of receipt of the complaint, unless it is impracticable to do so. If the Commission is unable to do so, it shall notify the complainant and respondent in writing of the reasons for not doing so."

7. It is undisputed in this case that the Respondent agency did not file its determination until August 28, 1996, over three and one-half years from the time Leggitt filed her complaint. It is also undisputed that the Respondent agency never notified Petitioner, or the other parties, that it would be unable to complete the investigation within 100 days as required

by statute. Nor did it notify Stitzel in writing why an administrative disposition of a Complaint had not been made within one year of receipt of the Complaint.

8. Petitioner established that the Respondent agency violated the statutory time limits and that the three and one-half year delay in filing the Respondent agency's Notice of Probable Cause caused the proceedings to be impaired and was to Petitioner's extreme prejudice.

9. At the attorney's fee hearing, Respondent agency offered no testimony or other evidence as to the cause for the extreme delay in the filing of the Administrative Charge, or the rationale for filing the Charge two and one-half years after the expiration of the statutory deadline for filing said charges.

10. At the attorney's fees hearing, Respondent agency offered no testimony or other evidence as to why it claimed to be substantially justified in finding probable cause and filing the Administrative Charge.

11. The Petitioner, demonstrated that, at the time the matter was initiated, Regency Place Apartments was a business operating as a limited partnership and that Robert Stitzel was the general partner; that the principal place of business was in Florida; and that it did not have more than 25 full-time employees.

12. Petitioner retained counsel to defend it on the charges contained in the Notice of Determination, Cause and Issuance of

an Administrative Charge, and Petitioner was the prevailing small business party.

13. Counsel for Petitioner expended 76 hours on this matter, not including time expended on the Petition for Attorney's Fees or time expended following his appearance before the Commission prior to the issuance of the final order. Counsel's billing for Petitioner's time at an hourly rate of $200 is reasonable in this case.

14. The Petitioner's billable costs of $609.75 are reasonable.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsections 57.111(4)(b)1. and Section 120.57(1), Florida Statutes (1997).

16. The Florida Equal Access to Justice Act (FEAJA), Section 57.111, Florida Statutes, provides in pertinent part:

> (4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

17. The FEAJA, enacted by the Florida Legislature in 1984, is patterned after a federal law on the same subject -- The Federal Equal Access to Justice Act (the Federal Act), 5 U.S.C.,

Section 504. Enacted in 1981, the Federal Act provides in pertinent part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust . . . .

18. The federal and state statutes use similar language, and the legislative history of the Florida Act shows that legislators were aware of the federal prototype. Gentele v. Department of Professional Regulation, 9 FALR 311 (DOAH, June 20, 1986), citing Senate Staff Analysis and Economic Input Statements CS/SB 438 (5-2-84); and the record of the 5-2-84 meeting of the Senate Governmental Operations Committee, sponsor of the bill.

19. When, as in this case, a Florida Statute is patterned after a federal law on the same subject, it will take the same construction in the Florida courts as its prototype has been given in federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. Gentele v. Department of Professional Regulation, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

20. Section 57.111, Florida Statutes, provides for an award of attorney's fees from the state to a "small business party" under certain circumstances in order to diminish the detrimental

effect of seeking review of, or defending against governmental action. This section states in part:

> (3)(d) The term "small business party" means:
>
> 1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is 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.

21. The Petitioner established that it was a small business party within the contemplation of the statute in that:

> a) During the relevant time, Petitioner was operating a business as a limited partnership and Robert Stitzel was the general partner;
>
> b) Petitioner's principal place of business was in the State of Florida, located at Regency Place Apartments, Melbourne, Florida;
>
> c) Petitioner did not have more than 25 full-time employees;

See generally Ann and Jan Retirement Villa v. Department of Health and Rehabilitative Services, 580 So. 2d 278 (Fla. 1st DCA 1991).

22. Since Petitioner qualifies as a small business party under the FEAJA, a state agency must have initiated some action against a small business party. The recited purpose behind the establishment of Section 57.111, FEAJA, is that "[t]he Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable government action because of the expense of civil actions and administrative

proceedings . . . . The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, government action by providing in certain situations an award of attorney's fees and costs against the state."

23. Section 57.111(3)(b), Florida Statutes, provides as follows: The term "initiated by a state agency" means that the state agency: . . . (3) was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

24. In the instant case, the Respondent agency issued a Notice of Determination: Cause and Issuance of an Administrative Charge directed to Petitioner, and others, charging them with certain discriminatory housing practice violations. Petitioner denied the charges and requested a formal hearing, pursuant to Chapter 120, Florida Statutes. Therefore, this matter was initiated by a state agency.

25. Petitioner is a "prevailing small business party" since the Final Order has been entered in its favor. Section 57.111(3)(c)1., Florida Statutes (1997). Department of Professional Regulation v. Toledo Realty, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

26. Section 57.111(3)(e) of the Act states: 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. It is

instructive to look to the decisions of federal courts which have construed the meaning of the language of the Federal Act. Structured Shelters Financial Management Inc. v. Department of Banking, 10 FALR 389, (DOAH 1987); Gentele v. Department of Professional Regulation, supra.

27. In discussing the meaning of the term "substantially justified," the court in Ashburn v. U.S., 740 F.2d 843 (11th Cir. 1984), said:

> The government bears the burden of showing that its position was substantially justified. (citation omitted) The standard is one of reasonableness; the government must show "that its case had a reasonable basis both in law and fact." (citations omitted)

Ashburn went on to say that the fact that the government lost its case does not raise a presumption that the government's position was not substantially justified. Neither is the government required to establish that the decision to litigate was based on a substantial probability of prevailing. White v. U.S., 740 F.2d 836 (11th Cir. 1984). See generally Pierce vs. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988).

28. Respondent agency's reliance on Christiansburg Garment Company vs. Equal Opportunity Commission, 434 U.S. 412 (1978) and LeBlanc-Sternberg vs. Fletcher, 143 F.2d 765 (2d Cir. 1998), is misplaced. The test under Section 57.111, Florida Statutes, is far different than the criteria established under the federal cases or under Section 57.105, Florida Statutes. Section 57.105, Florida Statutes, awards attorney's fees only if there is a

complete absence of justiciable issue in law or fact. The cases comparing the results between Sections 57.105 and 57.111, Florida Statutes, are clearly distinguishable.

29. The Florida Legislature recognized the difference between the two criteria for determining attorney's fees. The cases cited by Respondent agency which deny attorney's fees under Section 57.105, Florida Statutes, have a completely different standard of proof. Section 57.111, Florida Statutes, mandates that attorney's fees be awarded unless the agency proves substantial justification. Under Florida Law, the "substantially justified" standard falls somewhere between the "no justiciable" issue standard of Section 57.105, Florida Statutes, and an automatic award of fees to the prevailing party. Helmly vs. Department of Business and Professional Regulation, 707 So. 2d 366 (Fla. 1st DCA 1998).

30. Once the Petitioner, who is seeking fees, proved that it was a small business, as defined by Section 57.111, Florida Statutes, and is the prevailing party, the burden shifted to the Respondent agency to show that its action in initiating the proceeding was "substantially justified." Gentele vs. Department of Professional Regulation, 9 FALR 310, 327 (DOAH 1986), affirmed 513 So. 2d 672 (Fla. 1st DCA 1987). In this regard, Respondent agency wholly failed to present any evidence as the basis on which it initially filed the Administrative Charge. At the

hearing, the only argument that was made was that 'substantial justification' existed.

31. The fact that the Respondent agency was able to prove a prima facie case in the underlying action is insufficient to show "substantial justification" by the agency because the order and burden of proof in a handicap-discrimination case involving the 'traditional' standard set forth in McDonnell-Douglas Corporation vs. Greece, 411 U.S. 792 (1973), and Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981), is that a prima facie case of unlawful discrimination merely raises an inference that the complainant's loss of a housing opportunity was based on her handicap. No inference of animus attaches and the ultimate burden of persuasion remained with the Respondent agency. See St. Mary's Honor Center vs. Hicks, 509 U.S. ____, 113 S.Ct. 2742 (1993). Respondent agency had the obligation in this proceeding to present some evidence to demonstrate that it had probable cause to issue the Notice of Determination: Cause and Administrative Charge in the first instance. This, it has wholly failed to do. At the formal hearing in the underlying case, the only evidence offered to prove pretextual motive on the part of Petitioner was hearsay or conjecture.

32. Equally important, the Recommended Order held, and the Final Order agreed, that the case should be dismissed because Respondent agency failed to make an administrative disposition of the Complaint within one year of the date of receipt of the

Complaint and failed to notify the complainant and Petitioner (Respondents in the underlying case) of the reasons for not doing so. Nevertheless, it filed its Administrative Charge Determination more than two and one-half years after the expiration of the statutory time limit. Respondent agency failed to produce any evidence at the hearing on this matter as to the cause for the excessive delay in prosecuting this case or why it ignored its statutory time limits and filed the charges anyway. This is clearly unreasonable government action. Ann and Jan Retirement Villa v. Department of Health and Rehabilitative Services, supra.

33. Accordingly, at the time the Administrative Charge was issued, the Respondent agency had had no reasonable basis both in law and fact for its decision to issue the Notice of Determination and the Administrative Charge and was, therefore, not substantially justified in issuing the charge citation. Helmly v. Department of Business and Professional Regulation, supra; Gentele vs. Department of Professional Regulation, supra; Department of Professional Regulation v. Toledo Realty, supra.

34. Petitioner presented sufficient evidence to show that the request for attorney's fees and costs was reasonable for the maximum amount allowable under Section 57.111(4)(d)2., Florida Statutes,

CONCLUSION

In this case, the Respondent agency initiated the action and the Petitioner was the prevailing party in the underlying action. The greater weight of the evidence supports the position that Petitioner is a "small business party" within the meaning of the Florida Equal Access to Justice Act. The Respondent agency wholly failed to prove that it had a reasonable basis in both law and fact for its actions at the time the Administrative Charge was issued or that it was substantially justified in its position.

ORDER

It is, therefore,

ORDERED that

1. The Petition for Attorney's Fees and Costs is GRANTED.

2. Petitioner is entitled to an award of $15,000 in attorney's fees and costs.

DONE AND ORDERED this 3rd day of May, 1999, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 3rd day of May, 1999.

COPIES FURNISHED:

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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 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.