STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, ELECTRICAL CONTRACTORS LICENSING BOARD,	)	
Petitioner,	)	
vs.	)	Case No. 00-3025F
JOHN J. BOROTA,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on April 4, 2001, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, in St. Petersburg, Florida.

APPEARANCES

For Petitioner: Robert A. Crabill, Esquire
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For Respondent: G. Barry Wilkinson, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent is entitled to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On July 24, 2000, John J. Borota filed with the Division of Administrative Hearings a Motion for Attorney's Fees and Costs. The motion requests an award of attorney's fees and costs incurred by Mr. Borota in litigating the case styled Department of Business and Professional Regulation v. John J. Borota, DBPR Case No. 97-17491. (The original style of the case was retained in this proceeding.) The case was initially set for hearing on October 10, 2000. Four continuances were granted, and the hearing case was ultimately set for and held on April 4, 2001.

At the hearing, Mr. Borota testified in his own behalf. Mr. Borota's Exhibits 1 through 10 were offered and received into evidence. The Department presented the testimony of George Ayrish, the program administrator for the Electrical Contractors Licensing Board ("ECLB"). The Department's Exhibits 1 through 4 were offered and received into evidence.

A one-volume Transcript of the proceedings was filed with the Division of Administrative Hearings on April 23, 2001. The Department timely submitted proposed findings of fact and conclusions of law on April 30, 2001. Mr. Borota moved for an

extension, which was granted without objection, and filed his proposed findings of fact and conclusions of law on May 9, 2001.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency charged with regulating the practice of professions pursuant to Section 20.165, Florida Statutes, and Chapters 455 and 489, Florida Statutes. The ECLB is charged with regulating the practice of electrical contracting pursuant to Section 489.507, Florida Statutes. Pursuant to Rule 61G6-4.006, Florida Administrative Code, the ECLB has established a Probable Cause Panel to determine whether probable cause exists to believe that a violation of governing statutes has occurred.

2. Mr. Borota is, and was at all times material to this matter, licensed as a Registered Electrical Specialty Contractor, having been issued license numbers ET 0000218 and ES 0000213. Mr. Borota is, and was at all times material to this matter, the licensed qualifier for his wholly owned Florida corporation, Communication Installation and Service Co., Inc.

3. Subsection 489.517(3)(a), Florida Statutes, requires a licensee to provide proof of completing at least 14 classroom

hours of continuing education courses during each biennium following issuance of the license.

4. Rule 61G6-9.003(2), Florida Administrative Code, defines "course" as "any course, seminar or other program of instruction which has been approved by the board for the purpose of complying with the continuing education requirements for electrical and alarm contractors." Rule 61G6-9.004(1), Florida Administrative Code, requires that licensees provide proof of completion of at least 14 classroom hours of continuing education courses "approved by the board."

5. Rule 61G6-9.005(1)(a), Florida Administrative Code, requires course sponsors to register with the ECLB prior to submitting their courses to the board for approval. Rule 61G6-9.005, Florida Administrative Code, provides that accredited universities and colleges which offer courses in the contracting areas specified in Part II of Chapter 489, Florida Statutes, are deemed admitted as course sponsors.

6. Rule 61G6-9.006(1), Florida Administrative Code, allows a registered course sponsor to submit to the ECLB an application for approval of a continuing education course, and provides that relevant courses offered by accredited universities and colleges are deemed approved. The ECLB regularly publishes a list of approved continuing education courses.

7. Rule 61G6-9.002, Florida Administrative Code, sets forth criteria for continuing education. The following sets forth the relevant portions of the rule as it read during the period relevant to this case:

> The following programs of continuing education may be used to satisfy the continuing education requirement provided that the licensee complies with the terms set forth herein:
>
> (1) Courses for credit which are business, technical or safety courses relevant to the electrical contracting industry and which require a passing grade taken at an accredited college, university, or community college. The licensee must furnish an official transcript and a notarized statement affirming classroom hours attended and the receipt of a passing grade.
>
> (2) Noncredited courses conducted by an accredited institution of higher learning, official governmental agency, the military, or recognized national or state trade or civil organization provided the following conditions are met:
>
> (a) the course must be business, technical or safety course relevant to the electrical contracting industry.
>
> (b) the course must follow a written text, which must be submitted to the Board for approval on request.
>
> (c) the instructor of the course must be a professional educator, certified electrical contractor or a similar authority in the field.
>
> The licensee must submit a notarized statement affirming the following:

1. Number of classroom hours attended
2. Sponsor of the course
3. Location of the course
4. Date of the course
5. Name of the instructor and his credentials
6. Benefit received from the course

8. George Ayrish, program administrator for the ECLB, testified that Rule 61G6-9.002, Florida Administrative Code, allows a licensee to obtain credit for courses that are not on the approved list, provided the substantive criteria for continuing education courses are met and the notarized statement is filed.

9. The ECLB conducts random audits of its licensees every two years. On January 27, 1997, the ECLB sent Mr. Borota a written notice that his license was undergoing such an audit for the period September 1, 1994, through August 31, 1996. The notice requested that Mr. Borota provide, among other items not relevant to this proceeding, certification that he had completed the required continuing education hours.

10. Mr. Borota responded with certificates of attendance at three separate technical electrical contracting courses presented by equipment vendors: a "3M Hot Melt Fiber Optics Connectors" course offered by 3M Telecom Systems Division on June 25, 1995; a "Category 5" cabling installation course offered by The Siemon Company on December 5, 1995; and an "Installation Certification Program" offered by Ortronics Open

System Architecture Networking Products on June 19, 1995. None of these courses were included in the ECLB's list of approved continuing education courses.

11. By letter dated March 18, 1997, the ECLB informed Mr. Borota that the courses submitted as evidence of continuing education must be "Board approved" and "completed within the audit period."

12. Mr. Borota responded with a certificate indicating that he had completed "product application training" and was thus a certified installer for Superior Modular Products, Inc. The certificate was dated July 31, 1995. This course was not included in the ECLB's list of approved continuing education courses.

13. On August 18, 1997, Mr. Ayrish filed a Uniform Complaint Form alleging that Mr. Borota did not provide proof of continuing education as required by Rule 61G6-9.004(1), Florida Administrative Code. The complaint was forwarded to Kathy MacNeill, a senior consumer complaint analyst for the Department of Business and Professional Regulation.

14. By letter dated October 9, 1997, Ms. MacNeill advised Mr. Borota that a complaint had been filed against him. She enclosed a copy of Mr. Ayrish's complaint. The letter requested that Mr. Borota submit a written response within 20 days.

15. By letter dated October 13, 1997, Mr. Borota responded to Ms. MacNeill's request. He wrote, in relevant part, that:

> Regarding the continuing education for ET 0000218 I did send the certificates of classes that I had taken during the audit time in question. All of the classes that I had taken covered communications cabling which is what our company does. Most of the classes that are held by the contractors schools that are recommended for low voltage systems licensing cover information on security systems cabling and we do not do that kind of work.
>
> Please advise if I need to send any additional information or what I will need to do to close this case.

16. No further direct communication occurred between Mr. Borota and Ms. MacNeill. Mr. Borota testified that he attempted to phone the Department a few times after the exchange of letters, but that he never spoke to anyone.

17. Ms. MacNeill prepared a written Investigative Report, dated November 6, 1997, stating an alleged violation of failure to provide proof of continuing education and forwarding the matter to the Department's legal counsel "for whatever action is deemed appropriate."

18. The Complaint and the audit file were placed on the docket for consideration by the Probable Cause Panel of the ECLB at a telephonic conference on March 20, 1998. On the same date, a Memorandum Of Finding was signed by the chairperson of the Probable Cause Panel, indicating probable cause was found.

19. The Department issued an Administrative Complaint on March 23, 1998, alleging that Mr. Borota failed to submit proof in response to the audit of having complied with the continuing education requirements of Subsection 489.517(3), Florida Statutes, and the rules promulgated thereunder. Mr. Borota was served with the Administrative Complaint on March 30, 1998.

20. On April 21, 1998, Mr. Borota timely filed his written Election Of Rights disputing the material facts set forth in the Complaint and demanding an evidentiary hearing pursuant to Subsection 120.57(1), Florida Statutes.

21. On the same date, Mr. Borota also submitted an affidavit, substantially complying with Rule 61G6-9.002(2), Florida Administrative Code, attesting that he had attended 30 additional hours of continuing education courses during the audit period. These courses were professional seminars provided at the annual winter meeting of Building Industry Consulting Service International, Inc. ("BICSI"), a non-profit telecommunications technical association. The materials for the BICSI conferences show that the University of South Florida was a co-sponsor of the event. The BICSI seminars were not on the ECLB's list of approved continuing education courses.

22. On August 6, 1998, counsel for the Department filed a Motion For Final Order, arguing that there were no disputed issues of material fact in the case because none of the courses

submitted by Mr. Borota were on the ECLB's approved list of continuing education courses.

23. The ECLB denied the Department's motion and agreed to refer the Administrative Complaint to the Division of Administrative Hearings ("DOAH") for the conduct of a formal administrative hearing. The case was never forwarded to DOAH. The record does not disclose why the case remained at the ECLB for nearly two years following the ECLB's denial of the Motion for Final Order.

24. The Administrative Complaint was again considered by the Probable Cause Panel of the ECLB on May 23, 2000. On the same date, a Memorandum Of Finding was signed by the chairperson of the Probable Cause Panel that determined no probable cause was found and that the Administrative Complaint should be dismissed.

25. Both meetings of the Probable Cause Panel were tape recorded. The tapes were of such poor quality that a certified transcript of the meetings could not be prepared by either an independent court reporter or the Department. Redacted tape copies and an uncertified transcript of the meetings were admitted into evidence by agreement of the parties.

26. The transcript is sufficient to show that the March 20, 1998, Probable Cause Panel treated Mr. Borota's case in a pro forma fashion, without discussion of the particulars of

the investigation, prior to making a finding of probable cause to proceed against Mr. Borota.

27. At the hearing in the instant case, the Department admitted that Mr. Borota was the prevailing party in the disciplinary proceeding because the Administrative Complaint was dismissed upon a finding of "no probable cause" at the May 23, 2000, Probable Cause Panel meeting.

28. Mr. Borota testified that he was the sole owner and qualifying licensee of the corporation through which he practiced as a licensed electrical contractor, that his net worth was less than $2 million, and that he and the corporation employed fewer than 25 workers. The Department offered no evidence to dispute Mr. Borota’s testimony on these points.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

30. Section 57.111, Florida Statutes (2000), the Florida Equal Access to Justice Act, provides in pertinent part as follows:

> (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.

31. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying disciplinary action and that it was a small business party at the time the disciplinary action was initiated. Once the party requesting the award has met this burden, the burden of proof shifts to the agency to establish that it was substantially justified in initiating the disciplinary action. See Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc. and Ramiro Alfert, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

32. The Department conceded at the hearing that Mr. Borota prevailed in the underlying proceeding because the ECLB dismissed the Administrative Complaint. Subsection 57.111(3)(c)3, Florida Statutes.

33. Mr. Borota’s undisputed testimony established that he was a "small business party" as contemplated by

Subsection 57.111(3)(d), Florida Statutes, which provides in relevant part as follows:

> (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, who is domiciled in this state, and whose business or professional practice has, at the time that 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; or
>
> b. A partnership or corporation, including a professional practice, which has its principal office in this state and 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. . . .

34. Mr. Borota is the sole owner of a corporation, not of an incorporated business. Further, this proceeding was brought against Mr. Borota in his individual capacity; his corporation is not a party. Thus, Mr. Borota does not meet the literal definition of a “small business party” as set forth above. However, the court in Albert v. Department of Health, Board of Dentistry, 763 So. 2d 1130 (Fla. 4th DCA 1999), recognized that a literal application of the statute would lead to an absurd result that the Legislature could not have intended:

> It is clear from the language of subsections (a) and (b), which both contain the term "including a professional practice," that

> the legislature intended for the statute to apply to professionals, regardless of whether they practice as sole proprietorships or professional service corporations. What the legislature overlooked is that the license to operate, which is generally the subject of the administrative proceedings, is issued to the individual, not the professional service corporation. The Department's interpretation would mean that professionals who have incorporated are not covered by subsection (b), and would render subsection (b) meaningless.

763 So. 2d at 1131-32.

35. The sole disputed issue for decision in this case is whether the Department's actions were "substantially justified." Subsection 57.111(3)(e), Florida Statutes, provides 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." (Emphasis added.)

36. The evidence established that the Department had a reasonable basis in law and fact to issue the Administrative Complaint against Mr. Borota. None of the continuing education courses submitted by Mr. Borota had been approved by the ECLB prior to his attendance. As set forth above, Rule 61G6-9.004(1), Florida Administrative Code, provides that a licensee must provide proof of completion of at least 14 classroom hours of continuing education courses "approved by the board." Rule 61G6-9.003(2), Florida Administrative Code, defines the term

"course" in terms of programs of instruction "approved by the board."

37. Mr. Borota argues that the pro forma manner in which the March 20, 1998, Probable Cause Panel treated the case brings it within the ambit of Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366 (Fla. 1st DCA 1998). In Helmy, the issue before the court was whether a probable cause panel sufficiently considered allegations against a veterinarian prior to finding probable cause that he had practiced veterinary medicine with a suspended license in his role as a veterinary aide. The court noted that the transcript of the probable cause meeting

> contains no discussion as to whether the applicable law was violated, no recognition or discussion of the fact that there was a licensed veterinarian on the premises, no discussion of the fact that Dr. Helmy was working under the immediate supervision of a licensed veterinarian, and no discussion of the exceptions under the Veterinary Medical Practice Act, Chapter 474, Florida Statutes, that allow veterinary aides to do numerous activities, some of which require immediate supervision, and some of which do not require any supervision.

707 So. 2d at 369. The court concluded that the proceedings of the probable cause panel suggested that its members were not even aware of the definition of "supervision" in the applicable statute, and thus its actions were not "substantially justified." Id. at 369-70.

38. Unlike Helmy, the instant case did not involve the application of a statutory definition, itself requiring some degree of interpretation, to a complex set of facts. On March 20, 1998, the Probable Cause Panel had before it a simple case of a licensee who had submitted a set of continuing education courses that were not on the ECLB's list of approved courses, and of a rule that required licensees to demonstrate that they had attended courses "approved by the board." A reading of the audit file would establish these matters, without necessity for extended discussion on the record. Mr. Borota's contention that this case is analogous to Helmy is rejected.

39. The case changed on April 21, 1998, when Mr. Borota submitted an affidavit stating that he had attended 30 hours of seminars sponsored by BICSI, a recognized national trade organization, and the University of South Florida, during the audit period. This affidavit represented at least an attempt to comply with Rule 61G6-9.002(2), Florida Administrative Code, which allows licensees to obtain credit for courses not on the ECLB's approved list.

40. The record indicates that the ECLB recognized this change in the status of the case. It denied counsel's motion for final order against Mr. Borota. It ultimately revisited the issue of probable cause and dismissed the case.

41. The record does not explain why the ECLB took nearly two years to dismiss the case after Mr. Borota submitted his affidavit. However, for purposes of Section 57.111, Florida Statutes, this question is not relevant. As noted above, the substantial justification inquiry is confined to the time a proceeding was initiated by a state agency. Agency for Health Care Administration v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995)(proper inquiry is whether evidence before probable cause panel was sufficient for institution of disciplinary action; error to determine "substantial justification" in light of subsequent dismissal after more evidence was presented).

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, the Respondent's Motion for Attorneys' Fees and Costs is denied.

DONE AND ORDERED this 25th day of May, 2001, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
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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 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.