STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL STILL,

Petitioner,

vs.

NEW RIVER SOLID WASTE ASSOCIATION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Case No. 01-1033

RECOMMENDED ORDER

On June 4-5, 2001, a final administrative hearing was held in this case in Gainesville, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues remaining in this case are: (1) whether New River Solid Waste Association (NRSWA) requested that its permitted bioreactor landfill system be included as part of its application for renewal of its operating permit for the New River Regional Landfill in Union County, Florida; (2) whether Petitioner participated in this proceeding for an improper purpose under Section 120.595(1); and (3) whether the prevailing party is entitled to an award of attorney fees and costs under Section 403.412(2)(f). (Citations to sections are to the 2000 codification of Florida Statutes. Rule citations are to the current Florida Administrative Code.)

PRELIMINARY STATEMENT

This case involves NRSWA's application to renew its Permit No. SC63-271982 for the continued operation of its landfill, in particular as it relates to NRSWA's earlier application to modify the permit to allow construction and operation of a bioreactor landfill system on retired cells 1 and 2 of the landfill (Permit No. 001-3500-004SC). The complicated interplay between these proceedings is part of both the procedural background and pertinent facts of this case.

On June 26, 2000, DEP gave notice of its intent to issue NRSWA a permit modification to construct a bioreactor system at its landfill (Permit No. 001-3500-004-SC). On July 11, 2000,

Petitioner, Paul Still, timely filed a Petition for Administrative Hearing to challenge DEP's proposed agency action. On or about August 15, 2000, DEP referred the matter to DOAH, which gave it DOAH Case No. 00-3448 and assigned an ALJ. On August 28, 2000, NRSWA filed a Motion to Dismiss the Petition for Administrative Hearing for lack of standing.

On September 8, 2000, while Case No. 00-3448 on the bioreactor modification application was pending, NRSWA applied to DEP for renewal of Permit No. SC63-271982 for continued operation of its landfill.

On September 18, 2000, the ALJ in Case No. 00-3448 entered an Order Granting Motion to Dismiss with Leave to Amend as to standing.

On September 26, 2000, the Petitioner filed an Amended Petition for Administrative Hearing in Case No. 00-3448 which included new standing allegations. On October 5, 2000, NRSWA filed a Motion to Dismiss the Amended Petition for Administrative Hearing for lack of standing.

On October 6, 2000, DEP issued a Request for Additional Information (RAI) as to the renewal application.

On October 20, 2000, the ALJ in Case No. 00-3448 granted NRSWA's motion to dismiss Petitioner's amended petition for lack of standing.

On November 3, 2000, NRSWA submitted its response to DEP's RAI, which included the statement:

> Please note the permit modification application for the bioreactor construction and operation, DEP File Number 0013500-004-SC, is currently under review by Department. It is understood that the previously submitted bioreactor information is to be incorporated in the renewed permit.

DEP entered its Final Order dismissing Case No. 00-3448 on December 4, 2000. On December 12, 2000, DEP issued Permit Number 001-3500004-SC to NRSWA for the bioreactor modification. This permit provided in pertinent part:

> This modification shall remain in effect as long as the underlying permit, SC63-271982, is in effect. The underlying permit will remain in effect until final agency action is taken on the renewal application of that permit . . . .

Petitioner did not appeal the Final Order in Case No. 00-3448.

On February 15, 2001, DEP gave notice of intent to renew NRSWA's permit for continued operation of its landfill. DEP's draft permit incorporated specific conditions addressing the construction and operation of the bioreactor system.

On February 28, 2001, the Petitioner filed a verified Petition for Administrative Hearing concerning DEP's proposed agency action with respect to NRSWA's application for the renewal of Permit No. SC63-0271982. DEP referred this petition

to DOAH on March 14, 2001, where it was given DOAH Case No. 01-1033.

On March 19, 2001, NRSWA filed a Motion to Dismiss Petition for Administrative Hearing and a Motion for Attorney Fees and Costs. On April 9, 2001, DEP filed its Motion to Dismiss Verified Petition for Administrative Hearing.

NRSWA's Motion for Attorney Fees and Costs was based on both Section 120.595(1) and Section 120.569(2)(e). NRSWA's motion to dismiss was based on standing and res judicata. DEP's motion was based only on res judicata. The res judicata arguments were that the Petition for Administrative Hearing in Case No. 01-1033 challenged the bioreactor modification which was decided in Case No. 00-3448. Petitioner filed responses in opposition to all three motions, and a telephone hearing was held on the motions to dismiss on April 25, 2001.

On May 1, 2001, an Order Denying Motions to Dismiss was entered. However, the Order Denying Motions to Dismiss noted a discrepancy between allegations in the Petition for Administrative Hearing and Petitioner's argument on the motions to dismiss, and Petitioner was instructed to amend his pleading if he intended the Petition for Administrative Hearing in this case to challenge renewal of the modified underlying landfill permit under the standards of Rule 62-701.330(3)(a).

There was no hearing or ruling on NRSWA's Motion for Attorney Fees and Costs.

On May 3, 2001, a Notice of Hearing was issued, based on responses to the Initial Order and other input given during the telephone hearing on April 25, 2001. Final hearing was scheduled for June 4-6, 2001, in Gainesville, Florida. An Order of Pre-Hearing Instructions requiring a pre-hearing stipulation, among other things, also was entered.

On May 8, 2001, an Amendment to Petition for Administrative Hearing was filed clarifying Petitioner's challenge to renewal of the modified underlying landfill permit under the standards of Rule 62-701.330(3)(a).

Also on May 8, 2001, NRSWA filed a Motion to Require Petitioner to Post a Bond to secure payment of the prevailing party attorney fees and costs award anticipated by NRSWA under Section 403.412(2)(f). Petitioner filed a response in opposition, and the motion was heard by telephone on May 22, 2001 (along with other prehearing case management matters.) At the hearing, DEP indicated its opposition to the motion to require bond.

On May 21, 2001, NRSWA filed a Motion in Limine. Petitioner filed a response in opposition (along with a "preamble related to the motion and its impact on case management"), and DEP filed a response in support of the Motion

in Limine. Essentially, NRSWA and DEP sought to limit the issues for final hearing to those identified in the Order Denying Motions to Dismiss as reasons why the doctrine of res judicata did not bar the Petition for Administrative Hearing. A combination hearing/prehearing conference was held by telephone on May 30, 2001.

On May 31, 2001, an Order Denying Bond and an Order Denying Motion in Limine were entered.

On June 1, 2001, the parties filed a Joint Prehearing Stipulation, which identified three issues of fact and five issues of law remaining for determination, including:
(1) whether NRSWA requested, as part of its application for renewal of its existing operating permit, that the bioreactor system be included [as] part of the renewal permit; and (2) whether the prevailing party is entitled to attorney fees under Chapter 403 and/or 120, Florida Statutes. Also, NRSWA's Motion for Attorney Fees and Costs was listed as a pending motion.

At final hearing, NRSWA called Frank Darabi, its professional engineer, and had Respondent's Exhibits 1 through 11 admitted in evidence. (Respondent's Exhibits 10 and 11, the existing permit for cells 1 and 2 and the existing permit for cell 3, were to have been late-filed by DEP post-hearing but have not been filed.) Petitioner called two DEP employees (Mary Nogas, a professional engineer, and Richard Dasher, a

geologist) and testified in his own behalf. He also had Petitioner's Exhibits 1, 2, 9, 10, and 15 admitted in evidence. Objections to Petitioner's expert testimony in his own behalf were sustained; objections to the admission of alleged learned treatises were sustained for lack of sufficient evidence that the treatises were authoritative. Petitioner then called Darabi, who was recalled by NRSWA in rebuttal.

After presentation of evidence, Petitioner announced that he was withdrawing all issues except for the issue whether NRSWA properly applied for renewal of the bioreactor modification permit as part of the renewal application so as to allow inclusion of the bioreactor modification in the renewal permit.

After Petitioner's announcement, NRSWA moved to reopen the evidentiary record for additional rebuttal testimony on the sole remaining issue. Petitioner's objection that the witness was not on NRSWA's witness list was sustained because the testimony would not qualify as rebuttal.

No party ordered a transcript of final hearing, and the parties were given ten days (until June 15, 2001) in which to file proposed recommended orders (PROs).

Petitioner filed his PRO on June 13, 2001. On June 14, 2001, NRSWA filed a Motion for Extension of Time until June 20, 2001, to file PROs; the motion indicated DEP's concurrence and joinder, as well as NRSWA's inability to contact Petitioner. On

June 15, 2001, NRSWA filed an Amended Motion for Extension of Time elaborating on its grounds and indicating Petitioner's objection. NRSWA also timely filed its PRO on June 15, 2001.

DEP then filed an Addendum to Amended Motion for Extension of Time. The Addendum elaborated on DEP's grounds for an extension, indicated that counsel for DEP would attempt to file DEP's PRO by June 20, 2001, and represented that DEP would not review Petitioner's PRO before filing its PRO. On June 15, 2001, Petitioner filed a response in opposition to an extension of time for either NRSWA or DEP. DEP filed its PRO on June 20, 2001.

Based on the filings, and the lack of any prejudice to Petitioner, DEP's extension is granted over objection, and all PRO's have been considered.

NRSWA's PRO included a request for attorney fees and costs under Section 120.595(1) and Section 403.412(2)(f). NRSWA did not specifically renew its Motion for Attorney Fees and Costs under Section 120.569(2)(e).

FINDINGS OF FACT

1. NRSWA is comprised of Union, Baker, and Bradford Counties and was formed to share the costs associated with solid waste disposal. NRSWA owns and operates the New River Regional Landfill in Union County. The landfill was initially permitted in 1990 and was expanded and the original permit renewed in 1995

for an additional five years, expiring on November 6, 2000. The landfill now has a permit for disposal of Class I waste in three cells, with a fourth under design; it also has a permit for disposal of Class III waste and a permit for a waste tire collection center.

2. Cells 1 and 2 were retired, and in July 1999 NRSWA applied to modify its operating permit (Permit No. SC63-271982) to allow construction and operation of a bioreactor landfill system on retired cells 1 and 2. On June 26, 2000, DEP gave notice of its intent to issue NRSWA a permit modification to construct and operate the bioreactor system.

3. On July 11, 2000, Petitioner, Paul Still, timely filed a Petition for Administrative Hearing to challenge DEP's proposed agency action. On August 15, 2000, DEP referred the matter to DOAH, which gave it DOAH Case No. 00-3448 and assigned an ALJ. On August 28, 2000, NRSWA filed a Motion to Dismiss the Petition for Administrative Hearing for lack of standing.

4. On September 8, 2000, NRSWA applied to DEP for renewal of Permit No. SC63-271982 for continued operation of its landfill. The renewal application requested that all landfill permits be consolidated into the renewal permit as a single operating permit. However, at the time Case No. 00-3448 on the bioreactor modification application remained pending, and the

renewal application did not specify the bioreactor modification as part of the renewal application.

5. Frank Darabi, NRSWA's professional engineer, signed a transmittal letter on September 7, 2000; arranged for delivery of the application to DEP's Northeast District office in Jacksonville, Florida; and thought it was delivered and left there after-hours on September 7, 2000. But NRSWA did not prove that the renewal application was submitted to DEP before September 8, 2000, when it was filed-stamped.

6. The renewal application was submitted on DEP FORM 62-701.900(1). The application was signed on the behalf of NRSWA by Darrell O'Neal, its Executive Director. By this signature on the form, O'Neal swore that all statements in the application were true, correct, and complete and agreed on behalf of NRSWA to comply with applicable statutes and DEP rules. The application was also signed, sealed and dated by Frank Darabi, as professional engineer. Darabi's signature certified that all engineering features in the application were "designed/examined by me and found to conform to engineering principals [sic] applicable to such facilities."

7. On September 18, 2000, the ALJ in Case No. 00-3448 entered an Order Granting Motion to Dismiss with Leave to Amend. The ALJ held that the allegations in the Petition for Administrative Hearing failed to demonstrate that the Petitioner

"ha[d] sustained, or [wa]s in the immediate danger of sustaining some direct injury as a result of the proposed agency action." The ALJ granted Petitioner leave to amend as to standing.

8. On September 26, 2000, Petitioner filed an Amended Petition for Administrative Hearing in Case No. 00-3448, which included new allegations in an attempt to address the question of Petitioner's standing. On October 5, 2000, NRSWA filed a Motion to Dismiss the Amended Petition for Administrative Hearing. NRSWA asserted that the Amended Petition for Administrative Hearing failed to sufficiently allege Petitioner's standing.

9. On October 6, 2000, DEP issued a Request for Additional Information (RAI) as to the renewal application. The RAI did not ask for any information concerning the pending bioreactor modification application.

10. On October 20, 2000, the ALJ in Case No. 00-3448 granted NRSWA's motion to dismiss Petitioner's amended petition in that case, finding that the amended petition "ha[d] set forth no new allegations sufficient for a presumption of standing to initiate and sustain these proceedings."

11. On November 3, 2000, NRSWA submitted its response to DEP's RAI, which included the statement:

> Please note the permit modification application for the bioreactor construction and operation, DEP File Number

> 0013500-004-SC, is currently under review by Department. It is understood that the previously submitted bioreactor information is to be incorporated in the renewed permit.

This statement was included after Darabi asked DEP and was told that it would be appropriate to include information about the pending bioreactor modification application in the response to RAI although not asked for in the RAI.

12. NRSWA's response to RAI was signed by Darabi, with a copy to O'Neal. Darabi's signature did not make representations or certifications like those provided for in DEP FORM 62-701.900(1). However, Darabi had been NRSWA's professional engineer since its inception, had signed numerous application submissions on behalf of NRSWA over the years, and clearly had authorization to submit the response to RAI.

13. DEP entered its Final Order dismissing Case No. 00-3448 on December 4, 2000. On December 12, 2000, DEP issued Permit Number 001-3500004-SC to NRSWA for the bioreactor modification. This permit provided in pertinent part:

> This modification shall remain in effect as long as the underlying permit, SC63-271982, is in effect. The underlying permit will remain in effect until final agency action is taken on the renewal application of that permit . . . .

Petitioner did not appeal the Final Order in Case No. 00-3448.

14. Following review of the additional information submitted by NRSWA on its renewal application, DEP deemed the

permit application complete as of November 3, 2000. Additional information was submitted in January 2001, including a request submitted on January 11 that the bioreactor modification part of the renewal permit address specific conditions omitted from the modification permit issued on December 12, 2000.

15. On February 15, 2001, DEP gave notice of intent to renew NRSWA's permit for continued operation of its landfill. DEP's draft permit incorporated specific conditions addressing the construction and operation of the bioreactor system, as well as all other permitted landfill activities.

16. The evidence is clear that, since November 3, 2000, NRSWA consistently has taken the position that the bioreactor system modification was included in its renewal application.

Alleged Improper Purpose

17. The evidence did not prove that Petitioner participated in this proceeding for an improper purpose--i.e., primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of NRSWA's permit renewal applications. To the contrary, the evidence was that Petitioner participated in this proceeding in an attempt to raise justifiable issues as to why NRSWA's permit renewal application, with bioreactor landfill system in cells 1 and 2, should not be granted. Petitioner failed in his attempts in large part

because several issues he wanted to litigate were outside the scope of a permit renewal application and because he had no expert testimony on issues he was allowed to raise. At that point, Petitioner announced he was dropping all issues but one. The sole remaining issue after Petitioner's announcement might be viewed as a procedural technicality bordering on being frivolous. But it arose out of the complex (as DEP described it, "muddled") procedural history. Under these circumstances, it is not found that Petitioner's continued litigation of his sole remaining issue was frivolous.

CONCLUSIONS OF LAW

18. With regard to NRSWA's application for the renewal of its existing operating permit, Section 120.60(4) provides in pertinent part:

> When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application for renewal has been finally acted upon by the agency . . . .

19. With regard to its review of applications for the renewal of permits, Rule 62-4.090 generally requires that an application for the renewal of an operating permit must be submitted at least 60 days prior to the expiration of the permit; but where, as in this case, the renewal application was

not submitted at least 60 days prior to the expiration of the underlying permit, the rule provides:

> If the renewal application is submitted at a later date, it will not be considered timely and sufficient unless it is submitted and made complete prior to the expiration of the operation permit. When the application for renewal is timely and sufficient, the existing permit shall remain in effect until the renewal application has been finally acted upon by Department.

20. Petitioner does not challenge DEP's determination that NRSWA permit application was timely and sufficient under the above-referenced rule. It necessarily follows that NRSWA's existing permit remains in effect pending final agency action by DEP on the renewal application.

21. Petitioner's sole remaining contention in this case is that NRSWA failed to properly request that the bioreactor permit be included as part of the application for the renewal of the existing operating permit. There are several reasons why this contention has no merit.

22. The renewal application filed on September 8, 2000, was not required to include the construction and operation of the bioreactor system because NRSWA did not have a solid waste permit for the bioreactor system at the time. Even when NRSWA responded to DEP's RAI on November 3, 2000 (and the application was complete, timely, and sufficient), DEP still had not taken final agency action with respect to the permit modification for

the bioreactor system. Clearly, NRSWA was not required to apply for renewal of a permit that did not yet exist.

23. Petitioner's argument also fails because NRSWA's response to DEP's RAI requested that DEP include the bioreactor in its consideration and review of the application for the renewal permit. In light of the complicated, "muddled" procedural history circumstances surrounding the submittal and review of the bioreactor and renewal permit applications, the request in the response to RAI to include the bioreactor permit in the renewal application was not inappropriate.

24. Petitioner maintains that the procedure utilized by NRSWA and DEP to incorporate the bioreactor permit into the renewal application technically was fatally flawed in that the sworn verification in the renewal application did not specifically refer to the bioreactor system and there has been no subsequent sworn verification such as the one contained in DEP FORM 62-701.900(1) specifically referring to the bioreactor system. But it has been clear at least since November 3, 2000, up through and including Darabi's sworn testimony at final hearing, that NRSWA has wanted the bioreactor permit, which bears an expiration date tied to expiration of the underlying permit, to be included in the renewal application. Since this is a de novo proceeding, the evidence at final hearing should be permitted to serve the purpose of the DEP FORM 62-701.900(1)

verification. The evidence is clear that: (a) NRSWA's application for the renewal permit was timely and sufficient; (b) NRSWA's underlying permit remains valid and in effect pending final agency action on the renewal application; (c) NRSWA has already received a permit modification which authorizes the construction and operation of the bioreactor system; (d) the bioreactor permit remains valid and in effect pending final agency action on the renewal permit application; and (e) DEP's proposed agency action in this proceeding merges the bioreactor permit and the renewal permit into a single solid waste permit.

25. Even if there were a technical defect in the renewal application, such a defect should not be considered fatal, and denying renewal of the bioreactor permit would not be the appropriate remedy. Instead, such a technical defect easily can be cured by requiring as an additional special condition that NRSWA supply a sworn verification like the one contained in DEP FORM 62-701.900(1) specifically referring to the bioreactor system.

Requests for Attorney Fees and Costs

26. Prior to final hearing, NRSWA moved for attorney fees and costs under Sections 120.569(2)(e) and 120.595(1). At final hearing, NRSWA indicated that it would be seeking attorney fees and costs without specifying the grounds. Post-hearing, NRSWA

requested attorney fees and costs under Section 120.595(1) and Section 403.412(2)(f); NRSWA did not specifically renew its Motion for Attorney Fees and Costs under Section 120.569(2)(e).

27. Jurisdiction will be reserved to determine the request under Section 120.569(2)(e) because DOAH has jurisdiction to enter the final order under that statute. See Procacci Commercial Realty, Inc. v. Dept. of Health and Rehab. Services, 690 So. 2d 603, 606 (Fla. 1st DCA 1997); Dept. of Health and Rehab. Services v. S.G., 613 So. 2d 1380, 1384-85 (Fla. 1st DCA 1993).

28. While Section 120.569(2)(e) and Section 120.595(1) are similar and related, the procedures (and, to some extent, substantive law) are different. Section 120.595(1) provides in pertinent part:

> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection and s. 120.569(2)(e). In making such

> determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.
> (d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.
> (e) For the purpose of this subsection:
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) <u>primarily</u> to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

(Emphasis added.)

29. The "definition" of improper purpose in Section 120.569(2)(e) is not identical to the definition in Section 120.595(1)(e)1. Section 120.569(2)(e) provides that signatures on pleadings, motions, or other papers certify that the signatory has read the document and that "based upon reasonable inquiry, it is not interposed for any improper purposes, such as

to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."

30. Construing the definition in Section 120.595(1)(e)1 in pari materia with the "definition" in Section 120.569(2)(e), it is concluded that Section 120.595(1) only references the examples of improper purposes cited in Section 120.569(2)(e), but that participation in a proceeding is for an improper purpose under Section 120.595(1) only if it is "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." (If such a limitation on the definition is not part of Section 120.569(2)(e), Section 120.595(1)(a) provides that its provisions are "supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.")

31. There is no evidence or indication that the rebuttable presumption of improper purpose created by Section 120.595(1)(c) applies in this case. According to the evidence, Petitioner participated in only one other such proceeding involving NRSWA and its project in which Petitioner did not establish either the factual or legal merits of his position.

32. Case law holds that an objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under Section 120.569(2)(e) and

predecessor statutes. As stated in Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 49-51 (Fla. 1st DCA 2000):

> In the same vein, we stated in Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So.2d 603 (Fla. 1st DCA 1997):
>
> > The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim."
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> Id. at 608 n. 9 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir.1991)). See In re Sargent, 136 F.3d 349, 352 (4th Cir.1998) ("Put differently a legal position violates Rule 11 if it 'has "absolutely no chance of success under the existing precedent." ') Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir.1991)(quoting Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir.1987))."[)]
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> * * *
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> Whether [predecessor to Section 120.595(1)] section 120.57(1)(b)5., Florida Statutes (1995), authorizes sanctions for an initial petition in an environmental case turns . . . on the question whether the signer could reasonably have concluded that a justiciable controversy existed under pertinent statutes and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate.

Procacci, 690 So.2d at 608 n. 9; Mercedes, 560 So.2d at 278.

Although there is no appellate decision explicitly extending the objective standard to Section 120.595(1), there does not appear to be any reason why, absent the rebuttable presumption, the objective standard should not be used to determine whether Petitioner's participation in this proceeding was for an improper purpose. See Friends Of Nassau County, Inc., v. Fisher Development Co., et al., 1998 WL 929876 (Fla. Div. Admin. Hrgs.); Amscot Insurance, Inc., et al. v. Dept. of Ins., 1998 WL 866225 (Fla. Div. Admin. Hrgs.).

33. In another appellate decision, decided before the objective standard was enunciated for cases under Section 120.569(2)(e) and its predecessor statutes, the court in Burke v. Harbor Estates Ass'n, 591 So. 2d 1034, 1036-1037 (Fla. 1st DCA 1991), held:

> The statute is intended to shift the cost of participation in a Section 120.57(1) proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, [FN1] or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.

> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper purpose is an issue of fact. See Howard Johnson Company v. Kilpatrick, 501 So.2d 59, 61 (Fla. 1st DCA 1987) (existence of discriminatory intent is a factual issue); School Board of Leon County v. Hargis, 400 So.2d 103, 107 (Fla. 1st DCA 1981) (questions of credibility, motivation, and purpose are ordinarily questions of fact). The absence of direct evidence of a party's intent does not convert the issue to a question of law. Indeed, direct evidence of intent may seldom be available. In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him.
>
> FN1. A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990).

34. Burke also is of interest because it involves facts similar in some respects to the facts of this case. According to Burke, the hearing officer found:

> 6. Petitioner . . . submitted no evidence to show facts necessary to sustain the pleadings in the Petition. . . . Petitioner offered no expert testimony in support of the pleadings in the Petition. . . . The testimony of fact witnesses called by Petitioner was not material to Petitioner's claims. . . .
> 7. Petitioner consistently demonstrated a lack of knowledge of the applicable law, the proper scope of the formal hearing, and the distinction between argument and evidence. Petitioner repeatedly attempted to establish

> violations of laws not relevant to the proceeding. . . . Petitioner attempted to establish issues by arguing with witnesses during direct and cross-examination, and by repeatedly making unsworn ore tenus representations of fact.
> 8. There was a complete absence of justiciable issue of either law or fact in this proceeding because petitioner failed to show facts necessary to sustain the pleadings. Petitioner presented no evidence refuting Respondent, Burke's, showing that the modifications required by DER were adequate to assure water quality and the public health, safety, or welfare, or the property of others. Evidence presented by Petitioner was not material to the issue of whether the modifications required by DER were adequate for the purposes of the law applicable to this proceeding. Therefore, Petitioner participated in this proceeding for a frivolous purpose, primarily to cause unnecessary delay, or to needlessly increase the cost of licensing or approval of the proposed activity.

Id. at 1035-1036. (For reasons unknown, there are minor discrepancies between the court's version of the findings and those appearing at Harbor Estates Associates, Inc. v. E. Burke, et al., 1990 WL 749394 (Fla. Div. Admin. Hrgs.), and at DOAH's Internet website, Recommended Order, DOAH Case No. 89-2741, entered April 4, 1990.) In Burke, the Department of Environmental Regulation (predecessor to DEP) accepted the hearing officer's findings as to Petitioner's conduct but reversed the hearing officer's award, holding "that the conduct described in the recommended order cannot, as a matter of law,

evince an improper purpose as defined in Section 120.59(6), Florida Statutes." Burke at 1037. The court reversed, holding:

> Despite acceptance of factual findings below, the final order characterizes the conduct of Harbor Estates' representative as mere "incompetent representation." We reject that characterization as not consistent with the hearing officer's findings and, therefore, do not here decide whether incompetent representation alone permits a finding of improper purpose.
>
> * * *
>
> We reject appellees' argument that a qualified lay representative in a Section 120.57 proceeding should be held to a lesser standard of conduct, as distinguished from legal competence, than a licensed attorney. Section 120.62(2), Florida Statutes, permitting qualified lay representatives to represent parties in administrative proceedings, provides no basis for holding such representatives to a lesser standard of conduct. A contrary rule would permit a party to insulate itself from the consequences of Section 120.59(6), Florida Statutes, by choosing lay representation.

Id. at 1037-1038.

35. As indicated, the facts in Burke were similar in some respects to the facts of this case, but they are not identical. First, Petitioner was not represented by a qualified lay person; he appeared pro se. Second, there was no evidence that Petitioner repeatedly attempted to establish violations of laws not relevant to the proceeding, argued with witnesses, or repeatedly made unsworn ore tenus representations of fact during

direct and cross-examination of witnesses. To the contrary, Petitioner accepted and reacted appropriately to adverse rulings, particularly as to the issues for determination on permit renewal and his lack of qualifications to give relevant expert opinion testimony. Indeed, he announced at the close of the evidence that he was dropping all issues except one.

36. Granted, the sole remaining issue after Petitioner's announcement might be viewed as a procedural technicality bordering on being frivolous. But it is concluded that, arising as it did from the complex, "muddled" procedural history, the issue was justifiable and not frivolous. Under the totality of circumstances, it was not proven that Petitioner's participation in this proceeding was for an improper purpose--i.e., primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of NRSWA's permit renewal applications.

37. NRSWA also seeks attorney fees and costs under Section 403.412(2)(f). This statute entitles the prevailing party or parties to costs and attorney's fees "in any action instituted pursuant to this section . . .." But notwithstanding the statute's use of the word "section," it is concluded that those provisions do not apply to administrative actions brought under Section 403.412(5). See West Volusia Conservancy, Inc., v. Bayou Arbors, Inc. and Dept. of Environmental Reg., DOAH Case

86-2463, 1987 WL 62066 (Fla. DER 1987). In this context, the Division of Administrative Hearings (DOAH) is not a "court." See State ex rel. Chiles v. Public Employees Relations Com'n, 630 So. 2d 1093 (Fla. 1994)(PERC not a "court"); Dept. of Revenue v. WHI Ltd. Partnership, 754 So. 2d 205, (Fla. 1st DCA 2000)(DOAH not a "court of competent jurisdiction"); Florida State University v. Hatton, 672 So. 2d 576, (Fla. 1st DCA 1996)(same).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that DEP enter a final order: (1) dismissing the verified Petition for Administrative Hearing; (2) granting NRSWA's application to renew Permit No. SC63-271982, as set forth in the draft permit--i.e., for merger and continued operation of all existing landfill operations, including NRSWA's Class III waste disposal permit, its permit for a waste tire collection center, and its permit for the bioreactor landfill system on cells 1 and 2; and (3) denying NRSWA's request for attorney fees and costs from Petitioner under Section 120.595(1) and Section 403.312(2)(f).

Jurisdiction is reserved to enter a final order on NRSWA's Motion for Attorney Fees and Costs under Section 120.569(2)(e), to the extent that it has been preserved.

DONE AND ENTERED this 7th day of August, 2001, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 7th day of August, 2001.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.