STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,	)	
Petitioner,	)	
vs.	)	Case No. 02-4286
BERRYMAN & HENIGAR, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

On February 10-11, 2003, a final administrative hearing was held in this case in West Palm Beach, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Catherine M. Linton, Esquire
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STATEMENT OF THE ISSUES

The primary issue in this case is whether the Minority Business Enterprise (MBE) certification issued by the South

Florida Water Management District (SFWMD) to the Respondent, Berryman & Henigar, Inc. (BHI) should be revoked. In addition, BHI seeks an award of attorney's fees and costs under Section 120.595(1), Florida Statutes.

PRELIMINARY STATEMENT

On September 19, 2002, Raymond J. Berryman, P.E., Chief Executive Officer (CEO) of BHI, received a letter from Frank Hayden, SFWMD's Director of the Procurement Department, stating SFWMD's intent to decertify BHI on grounds set forth in a Memorandum from Allen Vann, SFWMD's Inspector General.

The Vann Memorandum recommended decertification essentially on three grounds: (1) BHI is not independently owned and operated; (2) BHI shares resources with affiliated "non-minority" businesses; and (3) BHI exceeds size standards because, together with its affiliates, it has more than 200 permanent, full-time employees.

This BHI decertification proceeding followed a prior decision by SFWMD regarding an application for certification by Everglades Surveying Joint Venture (ESJV), of which BHI was the qualifying MBE. An administrative hearing was held in the ESJV case before Donald R. Alexander, Administrative Law Judge, who found that ESJV failed to meet all requirements for MBE certification because Mr. Berryman did not hold a surveyor’s license.

On January 31, 2003, BHI filed a Motion to Request Official Recognition of: (1) Judge Alexander's Recommended Order in the ESJV case; (2) SFWMD's Exceptions to the Recommended Order; and (3) SFWMD's Final Order entered October 22, 2002. In response, SFWMD filed a Motion in Limine to completely exclude any evidence or testimony regarding the ESJV case and to prohibit BHI from arguing the legal significance of the ESJV Final Order. During a telephonic hearing on February 7, 2003, BHI's Motion for Official Recognition was granted, and SFWMD's Motion in Limine was denied.

BHI and SFWMD filed a Joint Prehearing Stipulation on February 5, 2003. In accordance with the Joint Prehearing Stipulation, Petitioner's (SFWMD's) Exhibits 1-33 and Respondent's (BHI's) Exhibits 1-31 were admitted in evidence at the outset of the final hearing. SFWMD then called three witnesses: Candice Boyer, Senior MBE Coordinator for SFWMD; John Timothy Beirnes, consulting auditor for SFWMD; and Mr. Berryman. BHI called Mr. Berryman and Rhonda Mortimer.

After presentation of the evidence, the parties were given 30 days after the filing of the Transcript of the final hearing to file proposed recommended orders (PROs). The Transcript was filed on February 27, 2003, making PROs due by

March 31, 2003. The timely-filed PROs have been considered in the preparation of this Recommended Order.

In addition to a PRO, BHI filed a Motion for Attorney's Fees and Costs under Section 120.595(1), Florida Statutes; and SFWMD filed a response in opposition on April 4, 2003. The ruling on BHI's Motion for Attorney's Fees and Costs is incorporated in this Recommended Order.

FINDINGS OF FACT

1. It is undisputed that Raymond J. Berryman is an "Asian American" under the part of the definition of "Minority" person under Florida Administrative Code Rule 40E-7.621(12)(b). (All rule citations are to the current Florida Administrative Code.)

2. Mr. Berryman owns 77.4 percent of Berryman & Henigar Enterprises, Inc. (BHE), a Nevada corporation formed in March 1994. BHE is the sole owner of Berryman & Henigar, Inc. (BHI), a Florida corporation and the Respondent in this case. BHE also owns holds 100 percent of the stock of Berryman & Henigar, Inc., a California corporation (BHI California), and Employment Systems, Inc., a California corporation (ESI). BHE also holds ten percent of the stock of GovPartner.com, a Nevada company.

3. BHI and BHI California are both engineering firms. BHI's business in Florida is oriented more towards

environmental engineering consulting. The business of BHI California in that state is more oriented towards engineering management consulting. BHI California does more building safety and project management work than BHI in Florida. Notwithstanding these differences between the business of the two corporations, they can be said to be in business in the same or an associated field of operation.

4. BHE provides a corporate shield and consolidated tax reporting for the companies it owns. Most of its directors and officers also serve as directors and officers of the subsidiaries. As a result, BHI and BHI California share the following directors: Ray Berryman, Mary Berryman, Jon Rodriguez, and Scott Kvandal. They also share three or four officers, including Mr. Berryman as CEO. BHE also provides accounting, legal, human resource, and marketing services to all the affiliates under the holding company's umbrella.

5. BHE's marketing department refers to both BHI and BHI California as "Berryman and Henigar" in order to imply the size and strength of BHE and all of its affiliates. By holding both businesses out as one large company, the marketing department attempts to make BHI "look as grandiose as possible."

6. BHE has a negative net worth, as reflected in the consolidated statements of its affiliates.

7. BHI itself has approximately 114 permanent, full-time employees; however, altogether, BHI and its affiliates have well over 200 permanent, full-time employees (although the exact number of employees of BHI's affiliates was not clear from the evidence).

8. Candice Boyer, SFWMD's Senior MBE Coordinator, testified that SFWMD consistently interprets its MBE rules to disqualify an entity either: (1) owned by a holding company not certified by SFWMD as an MBE, or at least not able to qualify for such certification (e.g., by not being domiciled in Florida); (2) affiliated with or sharing resources with another business concern in the same or an associated field of operation if the affiliate is not certified by SFWMD as an MBE, or at least is not able to qualify for such certification (e.g., by not being domiciled in Florida); or (3) whose net worth, or number of permanent, full-time employees, together with all affiliates, exceeds the rule's limits. However, the evidence of SFWMD's actual practice (which was limited to its practice with respect to BHI and ESJV) did not support Boyer's testimony in that regard.

9. BHI first sought certification from SFWMD in July 1996 under an MBE-type program in effect at the time and was denied because the gross receipts of BHI, apparently together with its affiliates, were too high under the program's

guidelines. SFWMD's MBE rules, as first adopted in Part VI of Florida Administrative Code Rule Chapter 40E-7, entitled "Supplier Diversity and Outreach MBE Contracting Rule," went into effect on October 1, 1996. In April 1997, SFWMD "graduated" BHI under one of the new MBE rules (since repealed) that counted subcontractor participation by a firm exceeding the size standards (at that time, $3 million net worth and $2 million in net income after federal income taxes, excluding carryover losses) towards a prime contractor's MBE participation goal. In December 1997, BHI updated its application for MBE certification and was granted full certification in the fields of civil engineering, surveying, and construction management for a three-year period of time, even though the application revealed BHI's continued affiliations with BHE and the other affiliated companies. In March 2001, BHI was re-certified for another three years notwithstanding that it continued to be affiliated with BHE and the other companies. Boyer's only explanation was that she should have investigated the affiliates in December 1997 and March 2001 but did not.

10. In late 2001 or early 2002, a joint venture called Everglades Survey Joint Venture (ESJV) sought MBE certification in the field of surveying, with BHI as the qualifying member of the joint venture. Certification was

denied because Mr. Berryman did not have a required surveyor's license, as required by Rule 40E-7.653(5). Although not necessary to the decision, the Recommended Order entered by Administrative Law Judge Donald R. Alexander found that ESJV otherwise met the requirements for certification. SFWMD entered a Final Order adopting those findings.

11. Confusing evidence presented in the course of the ESJV proceeding as to BHI's net worth and number of employees caused SFWMD to focus on those issues and cause an investigation to be conducted by its Office of the Inspector General, which is defined by Rule 40E-7.621(14) as the SFWMD "office which provides a central point for coordination of and responsibility for activities that promote accountability, integrity, and efficiency in government as referenced in Section 20.055(2), F.S." The investigation, which was conducted by a consulting auditor employed by SFWMD named John Timothy Beirnes, also focused on the rules dealing with those issues and resulted in an investigative report advancing the interpretations of SFWMD's MBE rules ultimately used to support the decertification recommendation of the Inspector General, Allen Vann. Notwithstanding Boyer's testimony as to SFWMD's purported consistent interpretations of its rules, there was no evidence that SFWMD asserted these

interpretations prior to issuance of the Inspector General's investigative report.

12. Boyer also testified that other government agencies in Florida uniformly interpret their MBE-type programs in a manner that would disqualify BHI in this case. However, the evidence was clear that BHI is certified under the MBE-type programs of other agencies in Florida, including the State of Florida Department of Management Services, Orange County, the City of Orlando, and the City of Tampa.

13. One of SFWMD's exhibits was the affidavit of an Operation and Management Consultant I for the State of Florida Department of Management Services stating: "If a firm is affiliated with other firms, I count the number of employees as well as the net worth of the firm together with all of its affiliates." SFWMD's PRO contended that this hearsay statement supported Boyer's testimony. Actually, besides being inconsistent with the action of the Department of Management Services in certifying BHI as an MBE, the hearsay statement is ambiguous, and it is not clear whether the affidavit supports Boyer's testimony as to the purported uniform interpretation of all state agencies.

14. SFWMD's PRO cites Petitioner's Exhibit 10, page 265, as evidence that Palm Beach County decertified BHI for exceeding size limitations, contrary to Mr. Berryman's

recollection of never having had an MBE-type certification decertified. In fact, the exhibit merely evidences decertification because BHI failed to respond to a request for information needed for re-evaluation of BHI's continued eligibility under recent changes to provisions of the Palm Beach County Code. In addition, while the exhibit reflects the section numbers of the changed provisions, the provisions are not further identified; and it is not clear from the evidence that they related to size limitations. Finally, the evidence was that the requirements of MBE-type programs of different jurisdiction in Florida can vary except, as of October 1, 1998, in certain respects. See Conclusion 31, infra. For that reason, denial of certification or decertification in one jurisdiction does not necessarily require similar action in another jurisdiction--which is one reason why SFWMD has not reciprocated any certifications by other jurisdictions under Rule 40E-7.651(1).

No Improper Purpose

15. BHI takes the position that SFWMD's purpose in seeking revocation of BHI's MBE certification after the Final Order in the ESJV case was improper. But the findings in the ESJV case relied upon by BHI were not necessary to the denial of EVSJ's application, which was based on the joint venture's not having the required professional license as a surveyor.

It does not appear that the issues presented in this case were fully litigated in the ESJV case.

16. It appears that the confusing evidence presented in the course of the ESJV proceeding as to BHI's net worth and number of employees prompted SFWMD to focus on those issues. In so doing, SFWMD also focused on the rules dealing with those issues and ultimately advanced interpretations of its MBE rules supporting revocation.

17. It is not found that SFWMD fashioned those interpretations 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 an activity." Section 120.595(1)(e)1, Florida Statutes. Aside from the relative merits of the positions of the parties on the proper interpretation of the pertinent statutes and rules, and the earlier decision in the ESJV case, BHI's evidence of improper purpose essentially involved the timing of SFWMD's decision to initiate decertification proceedings in relation to the letting of contracts for work in which BHI intended to participate as a subcontractor, and the resulting monetary impact on BHI. BHI's evidence was insufficient to prove improper purpose.

CONCLUSIONS OF LAW

18. Certification as an MBE is similar to a license. See Int'l Contractors, Inc. vs. Dept. of Transp., DOAH Case No. 89-4982, 1990 WL 749524 (Fla. Div. Admin. Hrgs. 1990). As such, MBE certification can be suspended or revoked only on clear and convincing evidence. See Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987). As the agency seeking decertification, SFWMD bears the burden of proof by clear and convincing evidence. However, in this case, there was no genuine dispute as to any material underlying fact; the only genuine dispute involved the proper interpretation of applicable rules.

19. Entitlement to certification under SFWMD's MBE program is governed by Part VI of Florida Administrative Code Rule Chapter 40E-7, "Supplier Diversity and Outreach MBE Contracting Rule."

20. Rule 40E-7.653 provides in pertinent part:

> (6) To establish that it is a small minority business concern, the applicant shall:
> (a) Demonstrate that it is an independently owned and operated business concern. In assessing business independence, the District shall consider all relevant factors, including the date the firm was established, the adequacy of its resources, and the degree to which financial, managerial and operational relationships exist with other persons or business concerns. For purposes of this rule, the District's consideration of such

financial relationships, managerial or operational relationships shall not be affected by arrangements made out of necessity or due to the business' inability to secure traditional capitalization through banks, lending institutions or others.

(b) Demonstrate that it is not an affiliate of a non-minority business nor share (on an individual or combined basis) common ownership, directors, management, employees, facilities, inventory, financial resources and expenses, equipment or business operations with a non-minority person or business concern which is in the same or an associated field of operation.

(c) To establish that it is a small business concern, the applicant shall demonstrate that the net worth of the business concern, together with its affiliates, does not exceed five (5) million. In determining the net worth of the business and its affiliates, the District shall consider the most recent federal tax returns or annual financial statements for the business. As applicable to sole proprietorships, the 5 million dollar net worth requirement shall include both personal and business investments.

(d) To establish that it is a small business concern, the applicant shall provide documentation to demonstrate that it employs two-hundred (200) or fewer permanent, full-time employees. In determining whether the applicant meets the criteria for a small business, the District shall consider such documentation as:

1. Personnel records.
2. Florida Quarterly Unemployment Reports.
3. Annual Federal Unemployment Report.
4. Payroll ledgers.
5. Employee leasing agreement.

(e) The applicant must demonstrate that it is domiciled in Florida. In determining whether the applicant is domiciled in Florida, the District shall consider such documentation as:

1. Articles of Incorporation.
2. Partnership Agreement.
3. Certification required to be filed pursuant to Section 620.108, F.S.
4. Business licenses.

21. SFWMD contends that BHI does not qualify for certification as an MBE and should be decertified under these rules because BHI: (1) is not "an independently owned and operated business concern" under paragraph (6)(a); (2) is an "affiliate of a non-minority business" or "share[s] (on an individual or combined basis) common ownership, directors, management, employees, facilities, inventory, financial resources and expenses, equipment or business operations with a non-minority person or business concern which is in the same or an associated field of operation" under paragraph (6)(b); and (3) has more than 200 full-time employees under paragraph (6)(c).

Independent Ownership and Operation

22. Rule 40E-7.653(6)(a) does not define independent ownership. But paragraphs (3) and (4) of the state in pertinent part:

> (3) An applicant business must satisfy subsection (4) below in order to be considered 51% owned by minority persons. The ownership exercised by minority persons shall be real, substantial, and continuing, and shall go beyond mere pro forma ownership of the firm as reflected in its ownership documents. In its analysis, the District may also consider the transferal

> of ownership percentages with no exchange of capital at fair market value.
> (4) . . . .
> (a) The applicant business must satisfy either subparagraphs 1., 2., or 3. below:
> 1. In a corporate form of organization, the minority shareholders of the corporation must own at least 51% of all issued stock. Minority shareholders who own at least 51% of each and every class of stock will be presumed to have satisfied the conditions of this rule.

23. SFWMD takes the position in this case that BHI is not independently owned because Mr. Berryman owns its stock indirectly through the holding company, BHE. Notwithstanding that Mr. Berryman's ownership of 77 percent of the stock of BHE puts him in actual and complete control of BHI, SFWMD takes the position in this case that the form of ownership is dispositive in that BHE is not a "minority shareholder." As found, there is no indication in the evidence that SFWMD ever took this position prior to the Inspector General's investigation of BHI which resulted in this case.

24. The term "Independently Operated" is defined in Rule 40E-7.621(9) as follows:

> "Independently Operated" means not dependent on the support, influence, guidance, control or not subject to restriction, modification or limitation from a non-minority, except for customary business auxiliary services, e.g. legal, banking, etc.

SFWMD contends that, in this context, "non-minority" means either any person or entity not certified by SFWMD as an MBE

or perhaps any person or entity not qualifying for certification by SFWMD as an MBE. If so, BHI would not qualify for certification because BHE is not and clearly cannot be certified by SFWMD as an MBE since it is not domiciled in Florida. See Rule 40E-7.653(6)(e). But Rule 40E-7.621(13) defines "non-minority" as "any person who does not meet the eligibility requirements of a minority person related to ethnicity, race or gender, permanent Florida residency or origins . . . ." (Emphasis added.) Under that definition, BHI is not dependent on any "non-minority" so as to be disqualified under Rule 40E-7.653(6)(a). Since the language used in the rules conveys a clear and definite meaning, resort to rules of statutory and rule interpretation is not warranted. See Donato v. Amer. Telephone and Telegraph, 767 So. 2d 1146, 1151 (Fla. 2000).

Affiliation and Resource-Sharing

25. Similarly, this ground turns on the definition of "non-minority business" and "non-minority person or business concern." If BHI California comes within the definition of those terms in the context of Rule 40E-7.653(6)(b), then BHI would not be eligible for MBE certification by SFWMD due to its affiliation and resource-sharing with BHI California.

26. SFWMD argues that BHI California is a "non-minority business" or "non-minority person or business concern" under the following definitions in Rule 40E-7.621:

> (2) "Certified Minority Business Enterprise" means a firm certified by the District pursuant to Rules 40E-7.651 and 40E-7.653, F.A.C., and Sections 287.0943(1) and (2), F.S.
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> * * *
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> (11) "Minority Business Enterprise" or "MBE" is as defined in Section 288.703(2), F.S.

Section 288.703(2) defines "minority business enterprise" as follows:

> "Minority business enterprise" means any small business concern as defined in subsection (1) which is organized to engage in commercial transactions, which is domiciled in Florida, and which is at least 51-percent-owned by minority persons who are members of an insular group that is of a particular racial, ethnic, or gender makeup or national origin, which has been subjected historically to disparate treatment due to identification in and with that group resulting in an underrepresentation of commercial enterprises under the group's control, and whose management and daily operations are controlled by such persons. A minority business enterprise may primarily involve the practice of a profession. Ownership by a minority person does not include ownership which is the result of a transfer from a nonminority person to a minority person within a related immediate family group if the combined total net asset value of all members of such family group exceeds $1 million. For purposes of this subsection, the term "related immediate family group" means one or more children under 16 years of age and a parent of such

> children or the spouse of such parent residing in the same house or living unit.

Subsection (1) of the statute states:

> (1) "Small business" means an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments.

(This definition of "small business" is essentially the same definition found in Rule 40E-7.621(20).)

27. If either Rule 40E-7.621(2) or (11) defines "non-minority business" or "non-minority person or business concern," then BHI would not be eligible for MBE certification by SFWMD due to its affiliation and resource-sharing with BHI California. But it is concluded that neither of those rules defines "non-minority business" or "non-minority person or business concern" in the context of Rule 40E-7.653(6)(b). Had that been the intent, SFWMD easily could have used the terms defined in Rule 40E-7.621(2) and (11). The use of different terms is strong evidence that different meanings are intended. Instead, the language used--"non-minority business" and "non-minority person or business concern"--is more like the term "non-minority" used in Rule 40E-7.621(9). It also noted that the purpose of the two rules in which the similar language is

used also is similar--to avoid certification of a purported minority applicant actually under the control of another who is not a minority.

Number of Employees

28. In contrast, the last ground asserted by SFWMD for certification relates to size rather than minority control. As can be seen by simple comparison of paragraphs (c) and (d) of Rule 40E-7.653(6), the phrase "together with its affiliates" is found only in paragraph (d). Similarly, in Section 288.703(1) and in Rule 40E-7.621(20), the phrase "together with its affiliates" is used only in connection with the net worth limitation. The language used in the statute and in the rules seems to convey a clear and definite meaning--i.e., that the number of employees limitations apply to the applicant only and that employees of affiliates are not to be counted. As such, there would seem to be no need to resort to rules of statutory and rule interpretation. See Donato, supra at 1151. But even assuming ambiguity, it is a general principal of statutory construction that the mention of one thing implies the exclusion of another. See Jordan v. State, 801 So. 2d 1032, 1035 (Fla. 5th DCA 2001). When drafters of statutes use a term in one section of a statute but omit it in another section of the same statute, courts will not imply it where it has been excluded. See Leisure Resorts, Inc. v.

Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995). Under the doctrine of expressio unius exclusio alterius est, the expression of one thing is the exclusion of the other; that is, when a law expressly describes a situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. See St. John v. Coisman, 799 So. 2d 1110, 1113 (Fla. 5th DCA 2001). Since administrative rules have the force and effect of statutes, these rules of statutory interpretation also apply to administrative rules. See McCoy v. Hollywood Quarries, Inc., 544 So. 2d 274, 277 (Fla. 4th DCA 1989).

29. For these reasons, it is concluded that the number of employees limitations in Section 288.703(1) and in Rule 40E-7.653(6)(d) apply to the applicant only; employees of affiliates are not to be counted.

Arguments for "SFWMD Interpretations" Rejected

30. Citing Donato, supra, at 1153, and State Contracting and Engineering Corp. v. Dept. of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998), SFWMD argues that deference must be given to its own purported interpretations of the pertinent statutes and rules. But, as found, it is not clear from the evidence that SFWMD in fact has previously-established interpretations; rather, the interpretations advanced in this case arose out of

the Inspector General's investigation of BHI. As a result, SFWMD's interpretations are being formulated through this administrative proceeding. See United Wisconsin Life Ins. Co. v. Office Of Ins. Regulation, 2003 WL 1914097, at *3 (Fla. 1st DCA 2003)(not yet released for publication in the permanent law reports and still subject to revision or withdrawal)(agency interpretation of statute was not established prior to entry of final order). See also Hamilton County Board of County Commissioners v. Dept. of Environmental Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); Beverly Enterprises-Florida v. Dept. of Health, etc., 573 So. 2d 19, 23 (Fla. 1st DCA 1990); Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977) (administrative proceeding is de novo and is intended "to formulate final agency action, not to review action taken earlier and preliminarily"). Clearly, SFWMD in its final order may disagree with interpretations of statutes and rules contained in a Recommended Order. See Section 120.57(1)(l), Florida Statutes. If SFWMD's ultimate statutory interpretations are judged to be erroneous, or its rule interpretations inconsistent with the language used in the rules, the interpretations would be subject to reversal on appeal. See Section 120.68(7)(d) and (e)2.

31. SFWMD also argues that Section 288.7031, Florida Statutes, somehow requires the terms "non-minority business" and "non-minority person or business concern" in Rule 40E-7.653(6)(b) to be defined in accordance with the definitions of "Certified Minority Business Enterprise" and "Minority Business Enterprise" in Rule 40E-7.621(2) and (11), respectively, because Section 288.7031 was enacted by Chapter 98-295, Laws of Florida (1998), effective October 1, 1998, which was after initial adoption of SFWMD's MBE rule. But Section 288.7031 merely requires the definitions of "small business," "minority business enterprise," and "certified minority business enterprise" in Section 288.703, to apply to the state and all political subdivisions of the state, which would include SFWMD. However, while this suggests that Rule 40E-7.653(6)(b) should be interpreted so as to be consistent with Section 288.703, it does not require that the terms "non-minority business" and "non-minority person or business concern" in Rule 40E-7.653(6)(b) be defined in accordance with the definitions of "Certified Minority Business Enterprise" and "Minority Business Enterprise" in Rule 40E-7.621(2) and (11), respectively.

32. SFWMD's argument based on Falcon Mechanical, Inc. vs. Dept. of General Services, DOAH Case No. 87-1950, 1989 WL 644887 (Fla. Div. Admin. Hrgs.), adopted in Final Order

entered April 12, 1989, does not assist in the proper interpretation of the number of employees limitations in Section 288.703(1) and Rule 40E-7.653(6)(d). That case merely acknowledged the existence of the limitation. It did not address its application to an applicant with affiliates.

33. SFWMD also argues that legislative amendments to the net worth and number of employees limitations make it clear that the Legislature intended the number of employees limitation to apply to the applicant and all affiliates. The argument begins: the legislative amendments demonstrate that the Legislature considered the net worth and number of employees limitations to be "equally important aspects of the 'small business' definition." While it is not clear how the legislative amendments indicate the relative importance of these two limitations, it is clear that exceeding either limitation would be disqualifying. The argument proceeds: interpreting the language added in 1994 regarding affiliates to apply only to net worth would lead to absurd results that clearly were not intended. For example, SFWMD argues that, assuming a net worth not in excess of $5 million, "a company as large as IBM, if owned by a minority, could open up a subsidiary and call it a minority business enterprise." But the plain meaning of the language of the statute and rules (as well as the "expressio unius" rule of statutory

interpretation) make the intent clear. See Conclusion 28, supra. "It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." State v. Jett, 626 So. 2d 691, 693 (Fla. 1993).

34. Finally, SFWMD cites the requirement of City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989), that an MBE program be narrowly tailored, and argues that this requires strict enforcement of rules applied without exception. That argument merely begs the question of the proper interpretation of the pertinent statutes and rules.

No Improper Purpose Award

35. 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), Florida Statutes, 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." 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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> 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 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., vs. Fisher Development Co., et al., 1998 WL 929876 (Fla. Div. Admin. Hrgs.); Amscot Insurance, Inc., et al. vs. Dept. of Ins., 1998 WL 866225 (Fla. Div. Admin. Hrgs.).

36. In another appellate decision, decided under a predecessor to Section 120.595(1) 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).

37. On the facts, this case is easily distinguishable from the Friends of Nassau County and Burke cases. Likewise, this case is easily distinguishable on the facts from the decision in Good Samaritan Hosp. v. Dept. of Health and Rehabilitative Servs., 582 So. 2d 722, 724 (Fla. 4th DCA 1991), also cited by BHI in support of its claim for an award under Section 120.595(1). As found, it was not proven in this case that SFWMD participated in this proceeding for an improper purpose.

38. In addition, it is not clear how SFWMD can be a "nonprevailing adverse party" under Section 120.595(1)(e)3, Florida Statutes. See Sellars vs. Broward County School Bd., DOAH Case No. 97-3540F, 1997 WL 1053430 (DOAH 1997).

RECOMMENDATION

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

RECOMMENDED that BHI's MBE certification not be revoked.

DONE AND ENTERED this 12th day of May, 2003, 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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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.