

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ONE WATERGATE ASSOCIATION,)
INC.,)
)
 Petitioner,)
)
vs.) Case No. 04-4652F
)
FLORIDA COMMISSION ON HUMAN)
RELATIONS, ON BEHALF OF DERRICK)
BHAYAT,)
)
 Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on March 22, 2005, in Sarasota, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary R. Hawk, Esquire
Porges, Hamlin, Knowles & Prouty, P.A.
1205 Manatee Avenue West
Bradenton, Florida 34205

For Respondent: Elizabeth A. Miller, Esquire
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
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STATEMENT OF THE ISSUE

Whether Petitioner, One Watergate Association, Inc. ("One Watergate"), as a prevailing small business party in an

adjudicatory proceeding, initiated by a state agency, should be awarded attorney's fees and costs pursuant to the Florida Equal Access to Justice Act, Subsection 57.111(4)(a), Florida Statutes (2002).

PRELIMINARY STATEMENT

On July 19, 2002, Derrick Bhayat filed a Housing Discrimination Complaint (the "Complaint") with the Florida Commission on Human Relations (the "Commission") against One Watergate. The Complaint alleged that One Watergate discriminated against Mr. Bhayat on the basis of national origin and color in violation of Title VII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988, and of the Florida Fair Housing Act, Sections 760.22 through 760.37, Florida Statutes (2002). The alleged discrimination concerned the failure of One Watergate's Board of Directors (the "Board") to approve Mr. Bhayat's application to purchase a unit in the One Watergate building.

The Commission conducted an investigation of the Complaint. By letter dated November 14, 2003, the Commission notified Mr. Bhayat of its determination that reasonable cause existed to believe that a discriminatory housing practice had occurred and that as the Complainant, Mr. Bhayat could elect to have the Attorney General bring a court action in the name of the State of Florida on his behalf to enforce the provisions of the Fair

Housing Act or to have the Commission petition the Division of Administrative Hearings ("DOAH") for an administrative hearing and seek relief on his behalf. Mr. Bhayat elected to have the Commission pursue an administrative remedy.

The Commission first attempted to conciliate the matter pursuant to Florida Administrative Code Rule 60Y-7.005. The Commission issued a Notice of Failure of Conciliation on March 10, 2004, and filed a Petition for Relief at DOAH on March 12, 2004. The matter was assigned DOAH Case No. 04-0816, and a hearing was held on June 23 and 24, 2004.

On November 3, 2004, the undersigned entered a Recommended Order in Case No. 04-0816, recommending that the Commission enter a final order dismissing the Petition for Relief in its entirety. On December 30, 2004, One Watergate filed a Petition for Attorney's Fees and Costs pursuant to Section 57.111, Florida Statutes (2002). On January 19, 2005, the Commission filed a response that, in addition to defending the Commission's actions on the merits, accurately stated that One Watergate's Petition for Attorney's Fees and Costs was premature because no "final judgment or order" had yet been rendered to establish that One Watergate was a "prevailing small business party." § 57.111(3)(c)1, Fla. Stat. (2003).

On January 31, 2005, the Commission entered a Final Order adopting the Findings of Fact and Conclusions of Law contained

in the Recommended Order. No appeal was taken from the Final Order. At the final hearing in this matter, the undersigned declined to dismiss One Watergate's petition on the jurisdictional ground asserted by the Commission, because subsequent events rendered the premature filing a harmless error. No purpose would be served by requiring One Watergate to re-file the same petition in order to fulfill a technical pleading requirement, where both parties were ready and able to proceed to a hearing on the merits.

The hearing was scheduled for and held on March 22, 2005. At the hearing, One Watergate presented the testimony of Harry W. Haskins, Esquire, its lead trial counsel in the underlying proceeding. One Watergate's Exhibits 1 through 15 were admitted into evidence. The Commission presented the testimony of Vicki D. Johnson, Esquire, its trial counsel in the underlying proceeding. The Commission's Exhibits 1 through 6 were admitted into evidence. No transcript of the hearing was ordered. Both parties timely submitted Proposed Final Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. The Commission is the state agency charged with investigating complaints of discriminatory housing practices and

enforcing the Fair Housing Act, Sections 760.20 through 760.37, Florida Statutes (2002). The Commission is charged with investigating fair housing complaints filed with the Commission and with the federal Department of Housing and Urban Development under the Federal Fair Housing Act, 42 U.S.C. Section 3601, et. seq.

2. One Watergate is the duly-incorporated owners' association for the One Watergate condominium building in Sarasota. The Board is the governing body of One Watergate and is responsible for the approval or denial of potential residents and purchasers of units in the One Watergate building. One Watergate is a "prevailing small business party," as that term is employed in Section 57.111, Florida Statutes (2002).

3. Prior to May 2002, prospective buyers or residents at One Watergate were required to complete an application that asked for character references, but did not require the applicant to provide bank references or other financial information. In early 2001, the Board commenced a search process to find a third-party investigative firm to conduct more detailed screenings of potential residents and purchasers at One Watergate. In April 2002, the Board reviewed detailed information regarding one such firm, Renters Reference of Florida, Inc. ("Renters Reference"), an investigative consumer

reporting agency operating under the Federal Fair Credit Reporting Act.

4. On April 16, 2002, the Board met in a duly-noticed, regularly scheduled meeting and voted to pursue a contract with Renters Reference to conduct applicant screenings. The minutes of the April 16, 2002, Board meeting also indicated that the Board approved an amendment to the Renters Reference motion to the effect that no new applicants would be rejected until the Board voted on the repeal of the "buy back" provision of the One Watergate by-laws. The "buy back" provision stated that if the Board rejected a bona fide purchaser, the owner of the unit in question could demand that One Watergate itself purchase the unit.

5. On May 2, 2002, One Watergate and Renters Reference entered into an "Agreement for Service" for the conduct of confidential background checks, credit checks, and other screenings of potential One Watergate residents.

6. In cooperation with the Board, Renters Reference established form applications to be completed by potential residents and by potential unit purchasers. The forms required applicants to sign an authorization to release their banking, credit, residence, employment, and police record information to Renters Reference. The forms also required applicants to disclose their Social Security numbers to Renters Reference,

which would allow Renters Reference to obtain credit reports directly from the three national credit reporting agencies, TransUnion, Experian, and Equifax. The purchase application form also contained a provision that required the applicant to agree to "hold harmless" Renters Reference and the Board from any claim in connection with the use of information obtained through the Renters Reference investigation.

7. The forms advised applicants that a failure to complete any portion would result in the application being "returned, not processed and not approved." Renters Reference advised One Watergate to strictly enforce the requirement that applicants complete all portions of the forms on the ground that a waiver of application requirements for any one applicant would necessitate such a waiver for any subsequent applicant or else invite a discrimination claim by the subsequent applicant. After completing the investigation, Renters Reference would send a report to One Watergate with its findings. Renters Reference was not authorized to approve or deny the application, and it made no recommendations as to approval of the application.

8. The Board established a screening committee to act upon the applications. The two-person screening committee consisted of Janis Farr, One Watergate's resident manager, along with the sitting Board president. The screening committee's decision to

approve or disapprove the application was later subject to a ratification vote by the full Board.

9. On May 16, 2002, potential unit purchaser Marcia Lang submitted a completed form Application for Occupancy/Approval and a completed form Application for Purchase. The application was forwarded to Renters Reference, which performed a background screening that included obtaining a TransUnion credit report dated May 24, 2002. Renters Reference completed its investigation on May 29, 2002, and made its report to One Watergate. The screening committee approved the application and issued an undated Certificate of Approval. Ms. Lang closed on her unit in One Watergate in August 2002. Because the Board does not meet during the months of May through August, the Board did not ratify the screening committee's approval until its October 15, 2002, meeting.

10. On May 29, 2002, Derrick Bhayat, a Sarasota realtor, entered into a contract with Janey and Paul Hess to purchase their One Watergate unit for \$315,000. Mr. Bhayat was originally from Capetown, South Africa, where he was considered "colored." His ancestry is Malaysian, Zulu, and French. No party to the underlying proceeding disputed that Mr. Bhayat was a person of color.

11. On May 30, 2002, Mr. Bhayat telephoned Ms. Farr and requested that he not be required to complete the application

forms. Mr. Bhayat explained that he had always been cautious about providing personal information, such as his Social Security number to businesses. This general cautiousness became alarm in 2001 when his wife, Nancy Bhayat, was the victim of an identity theft. The thief used Mrs. Bhayat's Social Security number to obtain a Visa card and make \$12,000 worth of purchases.

12. Ms. Farr responded that the application would not be accepted unless all the requested information was provided. Nevertheless, on May 31, 2002, Mr. Bhayat submitted to the One Watergate office an application to occupy a unit and an application to purchase a unit. On these applications, Mr. Bhayat did not provide his or his wife's Social Security number. He did not sign the authorization to release his banking, credit, residence, employment, and police record information to Renters Reference, and he struck through the hold harmless provision.

13. Mr. Bhayat's application to purchase was not accepted because One Watergate deemed it incomplete. This event triggered a series of negotiations between One Watergate's attorneys and the lawyer for Mr. Bhayat, the details of which are recited in the Recommended Order in Case No. 04-0816. The parties finally agreed that One Watergate would accept an application from Mr. Bhayat that reinstated the hold harmless

provision, include his driver's license number in lieu of his Social Security number for conduct of the Renters Reference background check, and also include a credit report provided by Mr. Bhayat.

14. Pursuant to this agreement, Mr. Bhayat re-submitted his application on or about June 12, 2002. On June 14, 2002, One Watergate's lawyer wrote a letter to Mr. Bhayat's lawyer that stated, in relevant part:

It has come to my attention that the credit report submitted by Mr. and Mrs. Bhayat is not a credit report from a national credit reporting bureau but, in fact, is a consumer report which apparently is used quite often by mortgage brokers and realtors to compile only the positive aspects of an individual's credit reports. As a result of Mr. and Mrs. Bhayat's misrepresentation and attempt to deceive the Association, at this point only a complete and accurate application will be accepted by One Watergate Association. A complete and accurate application shall include both applicant's [sic] date of birth and social security numbers, as well as all other information requested on the application. . . .

15. Mr. Bhayat made no further attempts to submit applications to One Watergate. Neither the screening committee, nor the full Board, ever took official action because the application was never deemed complete. Mr. Bhayat's purchase of the unit fell through.

16. On July 19, 2002, Mr. Bhayat filed the Complaint with the Commission, alleging that One Watergate discriminated

against him on the basis of national origin and color. The Commission assigned an investigator to the case.

17. In support of his Complaint, Mr. Bhayat submitted a copy of his One Watergate application, including a 13-page credit report generated by MSC Mortgage, a joint venture of Wells Fargo Bank and Mr. Bhayat's employer, Michael Sanders and Company. The credit report was a "tri-merge" report, meaning that it combined information from all three major reporting services into a single report.

18. In response to the investigator's request, One Watergate submitted a position statement on August 22, 2002. One Watergate generally denied Mr. Bhayat's allegations of discrimination and set forth a statement of facts in support of its position. One Watergate explained that Mr. Bhayat's final application was not considered complete because the credit report came from MSC Mortgage, rather than a credit reporting agency, which rendered it unacceptable. In response to Mr. Bhayat's allegation that he was required to provide information not asked of other applicants, One Watergate pointed out that Marcia Lang had applied and been accepted as a unit purchaser, using the Renters Reference application, two weeks before Mr. Bhayat submitted his first application.

19. The Commission's investigator interviewed Jan Gillett, a former resident and Board member of One Watergate.

Ms. Gillett told the investigator that the Renters Reference form applications had not been approved at the time Mr. Bhayat applied because the Board had yet to resolve the "buy back" controversy. Ms. Gillett also mentioned that a former Board member, now deceased, believed that Arab terrorists were planning to come into high rise condominiums, such as One Watergate, and blow them up. Ms. Gillett asserted that this former Board member had also stated that Mr. Bhayat's reluctance to disclose his Social Security number indicated that he had something to hide.

20. The Commission's investigator interviewed Ms. Hess, co-owner of the unit Mr. Bhayat attempted to purchase. Ms. Hess told the investigator that Larry Farr, the husband of Janis Farr and "a member of management," had made remarks to her about Mr. Bhayat that could only be interpreted as referring to his skin color. According to Ms. Hess, Mr. Farr stated, "I knew the minute I saw that guy he was going to be trouble." Given that Mr. Bhayat did not have an intimidating physical presence, Ms. Hess assumed that Mr. Farr was referencing Mr. Bhayat's skin color or national origin.

21. The Commission's investigator requested One Watergate to produce copies of all applications submitted by prospective residents during the period May 2002 through December 2002. When One Watergate declined to provide the applications, the

Commission issued a subpoena seeking their production. One Watergate again declined on the ground that its residents' privacy interests precluded production of these applications absent a court order setting forth the type and dates of documents to be produced and the information that could be redacted from the documents prior to their production. One Watergate ultimately produced the redacted applications pursuant to an Order of the Circuit Court of the Twelfth Judicial Circuit entered on July 18, 2003.

22. On September 22, 2003, the Commission's investigator produced a Final Investigative Report listing all the witnesses interviewed and documents reviewed during the investigation. The report lists Mr. Bhayat, Ms. Hess, and Ms. Gillett as the only substantive interviewees. On the same date, the investigator also produced a document entitled, "Determination" that set forth his findings and his recommendation that there was cause to believe that a discriminatory housing practice had occurred.

23. On November 14, 2003, the Commission issued a document entitled, "Legal Concurrence: Cause." As the title suggests, this document represented the concurrence of the Commission's legal counsel with the investigator's conclusion that there was reasonable cause to believe that a discriminatory housing practice had occurred. The legal analysis, prepared by the

Commission's attorney Vicki Johnson, stated as follows, in relevant part:

The Complainant has satisfied all the requirements of a prima facie case. The Complainant has a dark complexion and is from South Africa, therefore he is protected on the basis of color and national origin; he submitted an application to purchase the condominium and had obtained mortgage approval. Once his application was rejected, the condominium remained available for sale.

Respondent articulated a non-discriminatory reason for denying the Complainant's application; however, this reason is determined to be pretext. To show pretext, the Complainant need only show that his color and national origin were in some part, the basis for the denial of the sale. . . . A landlord has the right to request information about the financial status of prospective tenants; an inadequate or incomplete application form may act as a defense to a discrimination charge by providing a legitimate basis for the action taken. . . . However, a violation of the Fair Housing Act can be found even where formal requisites of a contract/application are not satisfied, if the motivation behind rejection of the contract was discriminatory. . . .

Respondent states that the Complainant did not submit a complete application because he failed to provide his and his wife's social security number[s]. The Complainant explained that he did not provide the social security numbers because his wife had recently had her identity stolen and was afraid to disclose her social security number. The application which the Complainant was asked to complete was not to take effect until July 1, 2002, when Respondent entered into a contract with

Renter's [sic] Reference, who was to provide a credit report for applicants applying to purchase a condominium. The Renter's Reference application form is more detailed than the previous application. While it is true that the Complainant did not disclose his social security number, which would permit Renter's Reference to obtain his credit report, the Complainant did provide a copy of a credit report that was obtained by his mortgage company. This credit report included both positive and negative credit issues and provided similar information as that which would have been generated by Renter's Reference.

Moreover, the minutes of the April 2002 meeting of the One Watergate Board of Directors indicates [sic] that the board approved a motion that "no new applicants be turned down until the revision of documents with reference to the obligation of the Association to purchase the unit where an applicant has been rejected." The Complainant's application was submitted after this decision by the board, but was turned down. In addition, Mrs. Hess stated that when she inquired about the Complainant's application, Mr. Farr (the building manager) told her that "I knew from the minute I saw that guy that he was going to be trouble . . . when you see him, you'll know what I mean." This statement is clearly referencing the Complainant's physical appearance. Mr. Farr was acting as an agent for the Respondent, therefore, the Respondent is vicariously liable for his actions and statements. . . . [Citations omitted.]

24. Also, on November 14, 2003, the Commission's executive director issued a Notice of Determination and Administrative Charge finding that there was reasonable cause to believe that a discriminatory housing practice had occurred.

25. Prior to filing the Petition for Relief that initiated the underlying proceeding, the Commission afforded One Watergate an opportunity to submit additional information in its defense. On February 23, 2004, counsel for One Watergate submitted several documents to the Commission. The first was a signed statement by Mr. Farr denying that he made the remarks alleged by Ms. Hess. The second document was the contract between Renters Reference and One Watergate, indicating an effective date of May 6, 2002, not July 1, 2002, as alleged by the Commission. Counsel for One Watergate also included Ms. Farr's version of the sequence of events concerning Mr. Bhayat's application and the minutes of a June 25, 2002, Board meeting at which the Board voted to return the application to Mr. Bhayat for completion, thus indicating that the Board did not "disapprove" that application. Finally, One Watergate included a letter from Warren Plant, the president of Renters Reference, explaining why he considered the credit report submitted by Mr. Bhayat to be unacceptable:

At this time in 2002, we could not pull a credit report without an individual's Social Security Number. We obtain our credit reports directly from the national credit bureaus and provide our customer with an exact copy of this credit report. We do not obtain our credit reports from third-party consumer reporting agencies. The credit report submitted by Mr. Bhayat was a concoction put together by a third-party consumer reporting agency, not an exact copy

of a credit report from a national credit bureau. A consumer reporting agency takes information from different sources and they make up their own credit report, including or excluding whatever information they want.

26. On March 10, 2004, the Commission filed the Petition for Relief that initiated Case No. 04-0816. At the hearing in that case, it was established that Mr. Farr had nothing to do with management of One Watergate; rather, he was the building's maintenance man. The undersigned credited his denial of the statements attributed to him by Ms. Hess, but also found that even if Mr. Farr made those statements, they could not be attributed to One Watergate because Mr. Farr played no role in the application process and had not discussed Mr. Bhayat with any Board member or with his wife.

27. At the hearing, it was also established that Renters Reference never received the full credit report prepared by MSC Mortgage and submitted by Mr. Bhayat with his last application. Mr. Bhayat produced a 13-page report at the hearing, but witnesses for One Watergate and Renters Reference credibly testified that they received only the first two pages, which summarized the information in the full report. The undersigned credited Mr. Plant's testimony that even the full report did not meet Renters Reference's criteria for a credit report, and thus, the result would have been the same even if Mr. Bhayat had submitted the full credit report.

28. The undersigned also credited Mr. Plant's testimony that his company does not "mess around" with the Fair Housing Act and that he would have immediately canceled the contract with One Watergate if he had had the least suspicion that the Board was basing its actions on Mr. Bhayat's race, color, or national origin.

29. The Recommended Order in Case No. 04-0816 did not directly address the issue of the minutes of the April 16, 2002, Board meeting because the evidence produced by One Watergate at the hearing rendered that issue irrelevant. The undersigned credited the testimonial and documentary evidence produced by One Watergate to show that the referenced minutes were not accurate. No motion was made or adopted regarding the effect of the "buy back" provision on the new applicant screening process. The issue was discussed at the meeting, but no action was taken by the Board.

30. The undersigned found no evidence that any member of the Board or the screening committee discriminated against Mr. Bhayat due to his race, national origin, or for any other reason. Most of them never met Mr. Bhayat and were unaware of his race or national origin during the period in dispute. Mr. Bhayat simply declined to submit a complete application to One Watergate, which, in turn, declined to consider his incomplete application.

31. Prior to filing its Petition for Relief, the Commission did not interview either of the FARRS or any Board member aside from Ms. Gillett. Such interviews might have caused the Commission to question the credibility and/or accuracy of the information provided by Mr. Bhayat, Ms. Gillett, and Ms. Hess. However, nothing that the FARRS or the Board members stated would necessarily have led the Commission to conclude that it lacked cause to proceed. The Commission would have had to make a judgment as to the credibility of the witnesses, as did the undersigned at the final hearing.

32. A more detailed investigation might have revealed that there was a dispute as to whether Mr. Bhayat submitted the full credit report or merely the first two pages. However, at the time the Commission found cause, neither the Commission nor One Watergate apparently realized there was an issue regarding the report. The Commission assumed that One Watergate received the full 13-page report and had no reason to believe otherwise. One Watergate assumed that the two pages it received constituted the full report until Mr. Bhayat produced the full report at the hearing. The matter was resolved at the hearing, essentially as a matter of witness credibility. Mr. Bhayat was adamant that he submitted the full report, but Ms. Farr and Mr. Plant convincingly testified that they received only the first two pages.

33. It is not clear how extensive the Commission's investigation would have to have been in order to learn that the published minutes of the Board's April 16, 2002, meeting were not accurate. According to the published minutes, no applicant would be rejected until the Board voted on the repeal of the "buy back" provision of the One Watergate by-laws, yet Mr. Bhayat was rejected (or more precisely, his application was not considered) prior to any such vote being taken. Thus, the published minutes were a very significant factor in the Commission's judgment that One Watergate was treating Mr. Bhayat differently than other applicants, and the Commission continued to rely on the minutes throughout the underlying proceeding. The Commission argued, strenuously and not unreasonably, that the undersigned should not credit One Watergate's self-serving testimony and documentary evidence indicating that the minutes were inaccurate.

34. An interview with Mr. Farr would have revealed that he disputed Ms. Hess' account of their conversation, but this again would have been a matter of witness credibility and the weighing of corroborating evidence to determine the facts. The Commission had Mr. Farr's written statement of denial in its possession at the time the Petition for Relief was filed indicating that the Commission did not find Mr. Farr persuasive. The mere fact that Mr. Farr denied the allegation would not

render the Commission's reliance on Ms. Hess' testimony unreasonable per se.

35. From the outset of the underlying proceeding, the Commission made it clear that it did not intend to rely solely on the alleged statement of Mr. Farr, or the hearsay statements of Ms. Gillett, to establish that One Watergate had discriminated against Mr. Bhayat. Counsel for the Commission acknowledged in her opening statement that this would be a case based on circumstantial evidence of discriminatory motive on the part of One Watergate. The Commission's theory of the case, in a nutshell, was that Renters Reference's "bread and butter" lay in assisting organizations such as One Watergate to keep out "undesirables," and that Renters Reference was always going to find some reason not to accept Mr. Bhayat's application because One Watergate had labeled him an "undesirable."

36. Because Mr. Bhayat was a successful realtor, was financially able to purchase the condominium in question, and lacked a criminal record or other disqualifying attribute, the Commission concluded that the reason for not accepting his application must have been his color or national origin, which was the only obvious distinction between Mr. Bhayat and those applicants whose applications were accepted and approved by Renters Reference and One Watergate.

37. Based on the information before it at the time it found reasonable cause to believe that an act of discrimination occurred, the Commission had a reasonable basis in law and fact to proceed with the case. The Commission's investigation was not perfect, but the overriding factor in the underlying case was witness credibility. The Commission was substantially justified in finding the statements and testimony of Mr. Bhayat, Ms. Hess, and Ms. Gillett credible during its investigation, despite the fact that the undersigned ultimately chose to credit the testimony of One Watergate's witnesses, in light of all the evidence produced at the hearing.

CONCLUSIONS OF LAW

38. 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 Subsections 120.57(1) and 57.111(4), Florida Statutes (2004).

39. Section 57.111, Florida Statutes (2002), 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.

40. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes (2002), 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).

41. One Watergate prevailed in the underlying proceeding. § 57.111(3)(c)3., Fla. Stat. (2003).

42. The Commission conceded that One Watergate is a "small business party" as contemplated by Subsection 57.111(3)(d), Florida Statutes (2002), 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. . . .

43. The sole disputed issue for decision in this case is whether the Commission's actions were "substantially justified." Subsection 57.111(3)(e), Florida Statutes (2002), 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.) The "substantially justified" standard falls somewhere between the "no justiciable issue" standard of Section 57.105, Florida Statutes (2002), and an automatic award of fees to a prevailing party. Helmy, 707 So. 2d at 368.

44. In Department of Health v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003), the court set forth the following temporal limitation on the required analysis, quoting from Fish v. Department of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002):

In resolving whether there was substantial justification or a reasonable basis in law and fact for filing an administrative complaint, "one need only examine the information before the probable cause panel at the time it found probable cause and directed the filing of an administrative complaint."

See also 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).^{1/}

45. The evidence established that the Commission had a reasonable basis in law and fact to find cause to believe that One Watergate discriminated against Mr. Bhayat on the basis of national origin and color. While it did not extensively interview One Watergate's Board members and employees, the Commission did afford One Watergate multiple opportunities to respond to the allegations prior to arriving at its finding. It was not unreasonable for the Commission to believe Mr. Bhayat and his supporting witnesses as against One Watergate's information. Department of Health v. Thomas, 890 So. 2d 400, 401 (Fla. 1st DCA 2004)(a decision to prosecute that turns on a credibility assessment has a reasonable basis in fact and law); Gentele v. Department of Professional Regulation, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

46. A prima facie showing of housing discrimination could be made by establishing that Mr. Bhat was a member of a protected class, that he applied for and was qualified to purchase an available unit, that One Watergate rejected him, and that the unit remained available, thereafter, or was sold or rented to a person not in a protected class. Though it ultimately failed to make its prima facie case, because it could not establish that One Watergate "rejected" an application that was never properly completed, the Commission had a reasonable basis for its reasonable cause findings, based on the information available at that time.

CONCLUSION

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

DONE AND ORDERED this 7th day of June, 2005, in Tallahassee, Leon County, Florida.

S

LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2005.

ENDNOTE

^{1/} Though no party contested the applicability of the cited cases, the undersigned notes that the instant case does not involve an agency engaged in imposing discipline on the licensed professionals under its jurisdiction, as do the cited cases. The burden of proof in the underlying proceedings was different (a preponderance of the evidence in the instant case and clear and convincing evidence in the professional licensure cases), but this distinction appears to make no obvious difference in terms of the application of Section 57.111, Florida Statutes (2002), to the facts of the instant case.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a 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.