

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JULIAN B. IRBY, P.E., AND )  
IRBY ENGINEERING AND )  
CONSTRUCTION, INC., )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 07-0427F  
 )  
FLORIDA ENGINEERS )  
MANAGEMENT CORPORATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

On March 27, 2007, a hearing was held in Tallahassee, Florida, pursuant to the authority granted in Sections 120.56, 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioners: A. G. Condon, Jr., Esquire  
Emmanuel, Sheppard & Condon  
30 South Spring Street  
Pensacola, Florida 32502

For Respondent: John J. Rimes III, Esquire  
Florida Engineers Management Corporation  
2507 Calloway Road, Suite 200  
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether Petitioners are entitled to attorneys' fees and costs pursuant to Section 57.111, Florida Statutes?

PRELIMINARY STATEMENT

On December 14, 2006, the Florida Engineers Management Corporation (FEMC) issued a Final Order dismissing disciplinary charges filed against Petitioners with respect to a house relocation project. The underlying facts forming the basis of the Final Order are described in DOAH Case No. 06-1871. On January 22, 2007, Petitioners filed a Motion to Tax Attorneys' Fees, Legal Assistant Fees and Costs with Interest and Incorporated Memorandum of Law, seeking attorneys fees and costs pursuant to Section 57.111, Florida Statutes. The Motion was treated as a Petition for Attorneys' Fees and Costs and assigned as DOAH Case No. 07-0427F.

Respondent filed a Motion for Summary Final Order, which was denied by Order March 20, 2007. The case proceeded to hearing March 27, 2007, as originally noticed. No witnesses were presented by either party. However, Petitioners' Exhibits numbered 1 and 2 were admitted into evidence, as was Respondent's Composite Exhibit numbered 1. Prior to hearing, the parties stipulated that Petitioners are prevailing small business parties in the underlying case; that the amount of fees claimed is reasonable and not unjust; and that Respondent is not a nominal party as defined by Section 57.111, Florida Statutes.

The parties were given until April 6, 2007, to file their proposed final orders. Both submissions were timely filed and have been carefully considered in the preparation of this Final Order.

## FINDINGS OF FACT

1. On September 29, 2004, Respondent notified Petitioners that a complaint against them was received regarding an engineering project and that an investigation was to be undertaken.

2. Between September 29, 2004, and March 16, 2006, Petitioners submitted numerous informal responses to Respondent either via e-mail or regular United States mail.

3. On March 16, 2006, the probable cause panel of the Board of Professional Engineers found probable cause to charge Petitioners with violating Section 471.033(1)(g), Florida Statutes, by being negligent in the practice of engineering.

4. At the time it found probable cause, the probable cause panel reviewed the materials that are attached to the Affidavit of Teresa Bake, Custodian of Records of FEMC (Respondent's Composite Exhibit numbered 1). These materials include the Investigative Report compiled by the investigator for FEMC; a copy of the plans for the relocation project, and letters dated October 22, 2005, and February 5, 2006, from Roland Holt, P.E., FEMC's engineering consultant. Mr. Holt's reports contained the opinion that Petitioners' plans for the relocation project were deficient.

5. An Administrative Complaint reflecting the March 16, 2006, findings of the probable cause panel was issued April 20, 2006, and was subsequently served on Petitioners.

The allegations in the Administrative Complaint are consistent with the purported deficiencies noted in Mr. Holt's letters.

6. Petitioners requested a Section 120.57(1) hearing, which was held July 31, 2006. On August 29, 2006, a Recommended Order was filed recommending that all charges against Petitioners be dismissed.

7. On December 12, 2006, the Board of Professional Engineers entered a Final Order that adopted the findings of fact and conclusions of law recommended by the administrative law judge and dismissed the charges against Petitioners.

8. The amount of attorneys' fees claimed is \$26,298.00, which is reasonable and not unjust. The parties have stipulated to recoverable costs of \$793.00, which represents that portion of the costs that conform to the Statewide Guidelines for Taxation of Costs in Civil Actions, effective January 1, 2006.

#### CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

10. Section 57.111(4)(a), Florida Statutes, provides:

(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 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.

11. 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.

12. It is the Respondent's burden to show that its initiation of an administrative action was substantially justified as envisioned by Section 57.111(4)(e). "It is the agency which must affirmatively raise and prove the exception." Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366 (Fla. 1st DCA 1998).

13. When dealing with license disciplinary actions, in order to determine whether there was substantial justification for filing an Administrative Complaint against a licensee, the focus is upon the information before the probable cause panel at the time it found probable cause and directed the filing of an Administrative Complaint. Fish v. Department of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002); Department of Professional Regulation v. Toledo Realty, 549 So. 2d 715, 716 (Fla. 1st DCA 1989); Kibler v. Department of Professional Regulation, 418 So. 2d 1081 (Fla. 4th DCA 1982).

14. The basis for proceeding at the time the Administrative Complaint was authorized must be solid but not necessarily correct.

To sustain a probable cause determination there must be some evidence considered by the panel that would reasonably indicate that the violation had indeed occurred. The evidence, however, need not be as compelling as that which must be presented at formal

administrative hearing on the charges to support a finding of guilt and the imposition of sanctions.

Fish, 825 So. 2d 423 (citations omitted); Toledo Realty.

15. In this case, the probable cause panel of the Board of Engineering had a reasonable basis in law and fact to direct the charges in the Administrative Complaint. It had before it a copy of the plans, the investigative report, and expert witness reports indicating that in his view, there were several deficiencies in the plans that were inconsistent with the requirements of the Florida Building Code. Therefore, it had "some evidence considered by the panel that would reasonably indicate that the violation had indeed occurred." Fish, 825 So. 2d at 423.

16. Petitioners point to several deficiencies in Mr. Holt's expert reports that they contend nullify the panel's consideration of the reports. Further, they argue that the evidence presented to the panel was virtually the same as that presented at formal hearing, after which the undersigned recommended dismissal of the charges.

17. The deficiencies to which they cite, however, go to the weight and credibility to be attached to the opinion of the expert at formal hearing. Compare Department of Health, Board of Physical Therapy Practice v. Cralle, 852 So. 2d 930 (Fla. 1st DCA 2003); Department of Health, Board of Medicine v. Thomas, 890 So. 2d 400, 401 (Fla. 1st DCA 2004) ("The Department is free to

believe the opinion of one expert despite the existence of two expert opinions to the contrary." ).

18. For the undersigned to assess the quality of the expert report is to assess the weight and credibility to be accorded the expert's opinion, which is simply not the function of the probable cause panel at the time it considers whether an Administrative Complaint should be filed. Even assuming that the evidence presented by FEMC to the panel is the same as that presented at formal hearing, as Petitioners contend, the role of the panel is simply different.

19. While a probable cause panel considers whether some evidence exists to proceed, the burden at hearing is clear and convincing evidence to support an alleged violation. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The two cannot be equated. That the evidence presented at hearing was not sufficient to ultimately sustain the charges does not mean that it was insufficient to initiate the proceedings.

20. Moreover, it cannot be said that the panel had all of the same information presented at formal hearing. The undersigned had the benefit of testimony by Petitioner's expert as well as the testimony of Petitioner Julian Irby. Moreover, all witnesses who testified at formal hearing were subjected to cross-examination. The probable cause panel does not have the opportunity or the responsibility to weigh the strengths and weaknesses of each party's position, but rather simply to

determine if some evidence exists to support the conclusion that a violation has occurred. Agency for Health Care Administration v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995); Gentele v. Department of Professional Regulation, Board of Optometry, 513 So. 672 (Fla. 1st DCA 1987). Here, the panel performed that function. The fact that charges were ultimately dismissed does not form a basis for fees and costs pursuant to Section 57.111, Florida Statutes.

CONCLUSION

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

ORDERED:

Petitioners' request for attorney's fees and costs pursuant to Section 57.111, Florida Statutes, is denied.

DONE AND ORDERED this 18th day of April, 2007, in Tallahassee, Leon County, Florida.

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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of April, 2007.



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 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.