

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIS WITTMER, JR., AND JR.)
WITTMER'S REMODELING, INC.,)
)
Petitioner,)
)
vs.) Case No. 07-5209F
) 57.111
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice this matter came on for formal proceeding before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The parties in this case waived an evidentiary hearing and the matter was submitted to the undersigned for Final Order based upon the record in the underlying case of Department of Business and Professional Regulation v. Wittmer, DOAH Case No. 07-0074, as well as affidavits and memoranda submitted by the Petitioner and the Respondent.

STATEMENT OF THE ISSUES:

The issues remaining to be resolved in this proceeding concern whether the above-named Petitioner is a "small business party" as described in Section 57.111(3)(d)1.a. b. and c., Florida Statutes (2007); whether the action of the above-named Agency in the underlying case was substantially justified in law

and fact and whether an award of attorney's fees and costs would be unjust.

PRELIMINARY STATEMENT

This cause arose when the above-named Petitioner filed a Petition for Award of Attorney's Fees and Costs pursuant to Section 57.111, Florida Statutes. The Petition was based upon the dismissal of an Administrative Complaint by Final Order of the above Agency, which had charged the Petitioner with violating Sections 489.127(1)(f) and 489.531(1), Florida Statutes (2006), by allegedly engaging in the unlicensed practice of contracting and electrical contracting, in DOAH Case No. 07-0074.

DOAH Case No. 07-0074 came on for formal hearing before the undersigned on June 12, 2007. After conclusion of the hearing and upon consideration of the record evidence the Administrative Law Judge issued a Recommended Order, which recommended that the Department dismiss the Administrative Complaint against Willis Wittmer Jr., and JR Wittmer's Remodeling, Inc. (Wittmer), finding and concluding, in essence, that the project for which Wittmer contracted with the complaining witness was not a project that constituted the illegal practice of contracting, since it was a cooperative project designed to be constructed by the Petitioner in conjunction with family members, future family members and friends. The Administrative Complaint was thus recommended to be dismissed. Thereafter, the Department adopted the Recommended Order in great part, adopting the Findings of Fact and the penalty recommendation of dismissal of the charges although several Conclusions of Law were "modified."

The Department entered its Final Order on September 12, 2007, dismissing the action. No appeal was filed by either party. Thereafter, as stated above, the Petition for Attorney's Fees and Costs on the basis of Wittmer being a "prevailing small business party" was initiated and the present proceeding ensued.

FINDINGS OF FACT

1. In the instant case the Respondent Agency (Department) does not dispute the amount of attorney's fees and costs sought in this proceeding and does not contest that the Petitioner is a prevailing party. Moreover, the Department admits that it was a real party in interest in the underlying proceeding involving the Administrative Complaint and was not merely a nominal party. The parties also waived an evidentiary hearing in this attorney fee proceeding. The parties, rather, submitted memoranda and affidavits in support of their respective positions.

2. The present Petition for Attorney's Fees and Costs is based upon the above-referenced Administrative Complaint action brought against Wittmer and JR. Wittmer's Remodeling, Inc., by the Department, which came before the Division of Administrative Hearings by a request for formal hearing filed by Wittmer.

3. Prior to filing that Administrative Complaint the Department performed an investigation related to the Complaint which had been filed by Kenneth Hatin of Palm Coast, Florida, against Wittmer. The Complaint by Hatin alleged that on August 10, 2005, he and Wittmer had entered into a contract for the building of an addition to the complainant's home in Palm Coast, Florida. Hatin had alleged and testified at hearing that

Wittmer was unlicensed to perform the work under the contract and had been paid in excess of \$30,000.00 for the project. Hatin maintained that Wittmer had abandoned the job before completion and that he had to hire another person or entity to complete the work, at further expense.

4. The Department considered the results of its investigation, in the form of an investigative report, and considered the investigative file it had developed concerning Hatin's complaint. This included the original contract on JR. Wittmer's Remodeling, Inc.'s, stationary, signed by Wittmer, as well as copies of original checks amounting to approximately \$30,000.00 written to Wittmer and/or his company or business. It also considered a copy of the local licensing records concerning Wittmer, revealing an expired occupational license, as well as records of the Department showing that Wittmer was unlicensed as any sort of contractor in the State of Florida. The Department also considered various invoices and receipts regarding the work contracted by complainant Hatin with another person or entity, to finish the job purportedly abandoned by Wittmer.

5. During the investigation, the complainant and the complainant's fiancée were interviewed and made no mention of any familial relationship or friendship relationship between Wittmer and the complainant and his family members at the time of the investigation. Wittmer himself was interviewed by the investigator and did not mention any familial or personal relationship he had with the complainant or the complainant's family.

6. The familial or friendship relationship between Wittmer and the complainant and the complainant's family only arose through the evidence adduced at the hearing. That evidence became a significant portion of the reason for the Findings of Fact and Conclusions which resulted in the Complaint against Wittmer being ultimately dismissed.

7. JR. Wittmer's Remodeling, Inc., was dissolved by the State of Florida, Department of State, Division of Corporations on September 16, 2005, for failure to file required annual reports or Uniform Business Report. This fact was confirmed by Wittmer's affidavit submitted on January 18, 2008, in this proceeding, attesting that his corporation was dissolved and that it ceased business due to "financial hardship of the business."

8. As a result of the hearing it was determined in the Recommended Order (with Findings of Fact adopted in the Final Order) that Wittmer performed work on the subject construction project without making any profit. It was performed, in essence, as a cooperative project between family and friends of Wittmer, in the sense that Wittmer's fiancée was related to the complaining witness's family and/or they were close friends. The circumstances established by preponderant evidence did not show that Wittmer was actually performing contracting, as defined in the above-referenced statutory authority underlying the charges in the Administrative Complaint. It was also determined, based upon the preponderant evidence at that hearing, that Wittmer made no profit on the project after paying all the subcontractors.

9. The Department, in essence, adopted the Recommended

Order of the Administrative Law Judge (with non-dispositive modifications of several Conclusions of Law) and entered a Final Order dismissing the charges in the Administrative Complaint. The subject Petition for Attorney's Fees and Costs was thereafter filed and this case ensued.

10. The Department proceeded against Wittmer by naming as Respondents, in the underlying, case JR Wittmer's Remodeling, Inc., which corporation had actually already been dissolved at the time of the filing of the Administrative Complaint. It also named in that Complaint, and proceeded against, Willis Wittmer, Jr., personally. The Petitioners herein have established that Wittmer never had more than 25 full-time employees or a net worth in excess of two million dollars, whether functioning as JR Wittmer, Jr., an individual or as JR Wittmer's Remodeling, Inc. The Petitioner has also established that the construction contract at issue in the underlying case was entered into by the Petitioner herein under the name "JR Wittmer's Remodeling" and not "JR Wittmer's Remodeling, Inc." Moreover, that contact was not signed by Mr. Wittmer as president of JR Wittmer Remodeling, Inc.

11. Aside from the fact that the Department filed the original Administrative Complaint against JR Wittmer Remodeling, Inc., it also named JR Wittmer individually as a Respondent in that Administrative Complaint, so he had defend against the action personally, regardless of the question of whether the corporation was in legal existence at the time of the filing of the Administrative Complaint. The evidence, as referenced above,

shows that he met the requirements of having less than 25 full-time employees and a net worth of less than two million dollars. Thus, the totality of the evidence shows that Mr. Wittmer has standing, as the sole proprietor of an unincorporated business, to pursue the subject attorney's fee claim as a sole proprietor, even if not as a corporation or the president of the originally named, but now dissolved corporation.

12. The Petitioner contends that the Department should have recognized the lack of a factual basis for the Administrative Complaint and, before finding probable cause, should have been able to determine that the construction arrangement between Wittmer and Hatin did not meet the legal definition of contracting or contracting services based upon the familial/friendship relationship of the protagonists. The Department, however, conducted a reasonable investigation and has been shown to have had a reasonable basis to determine, before hearing, that contracting and contracting services had been, in a legal sense, performed by Wittmer, based upon the results of its investigation (interviews, etc.). This is especially the case since Wittmer himself, when interviewed, had not revealed such exculpatory facts to the Department.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 57.111, 120.569 and 120.57(1), Fla. Stat. (2007)

14. This case arises under the "Florida Equal Access to Justice Act." § 57.111(1), Fla. Stat. (2007). The Petitioner

seeks to recover attorney's fees and costs as defined in Section 57.111(3)(a), Florida Statutes (2007), which states:

(3) As used in this section:

(a) The term "attorney's fees and costs" means the reasonable and necessary attorney's fees and costs incurred in all preparations, motions, hearings, trials, and appeals in a proceeding.

15. A "prevailing small business party" is the only entity that would be entitled to collect "attorney's fees and costs" under the Florida Equal Access to Justice Act. A small business party prevails, according to Section 57.111(3)(c), Florida Statutes (2007):

(c) . . . When:

(1) A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired; . . .

There is no dispute that the Petitioner herein has prevailed as a party in the manner described in the above quoted statutory section. It remains to be determined if the Petitioner is a legally bona fide "small business party."

16. Section 57.111(3)(d), Florida Statutes (2007), provides in pertinent part:

(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 the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than two million dollars including both personal and business investments;

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 two million dollars; or

c. An individual whose net worth did not exceed two million dollars at the time the action is initiated by a state agency when the action is brought against that individual's licenses to engage in the practice or operation of a business, profession, or trade; . . .

17. The Petitioner herein has the burden to show that he is a prevailing small business party in the underlying DOAH Case No. 07-0074. The Department must then establish by the preponderance of evidence whether it was substantially justified in law and fact in prosecuting the Administrative Complaint underlying this attorney's fees proceeding or whether special circumstances exist that would make an award of attorney's fees and costs to the Petitioner unjust.

18. The Respondent Department maintains that, although Wittmer was a prevailing party in the underlying case, he was

not a prevailing "small business party" within the meaning of Section 57.111(3)(d)1., Florida Statutes (2007), because at the time of the filing of the Complaint, Wittmer was not a sole proprietor of an unincorporated business, as defined by Section 57.111(3)(d)1.a., and was neither a partnership nor corporation as defined by Section 57.111(3)(d)1.b., Florida Statutes. The Department also contends that he was not an individual against whose licenses to engage in the practice or operation of a business, profession, or trade the subject action was prosecuted. See § 57.111(3)(d)1.c., Fla. Stat.

19. The evidence shows that when the Administrative Complaint was filed in this case on November 27, 2006, that Wittmer's corporation, named in the Administrative Complaint, had already ceased to exist for more than a year by being administratively dissolved by the Department of State, Division of Corporations as of September 6, 2005. Wittmer acknowledges in his affidavit, submitted January 18, 2008, that the corporation had been dissolved, but also went out of business due to "financial hardship of the business." The Department makes the point that, if he ceased business due to financial hardship, then he could not have been doing business either in the form of a corporation (since legally dissolved) nor even in the form of a sole proprietorship, since he has, in the

Department's view, admitted that his business had ceased because of financial hardship.

20. Because the corporation was dissolved at the time the Complaint was filed, then the Department should not have charged the corporation with the violations. It did so apparently by mistake. That aside, however, the Petitioner would not be able to recover as a prevailing small business party under the banner of the corporation, since the corporation had no legal existence at the time the complaint was filed, nor at the time the attorney fee petition was filed.

21. The Department claims that it did not charge in its Administrative Complaint, violations against Wittmer as a sole proprietorship, and that Wittmer cannot now seek to recover attorney's fees, and have standing to do so, as a sole proprietorship business. It argues that if the corporation had dissolved due to "financial hardship of the business" then it cannot be established that Wittmer was "doing business" as a sole proprietorship at the time the Complaint was filed.

22. This argument is somewhat specious, however, since, at least, in the de novo context of a proceeding such as this or, more pointedly, the proceeding in the underlying case, how Wittmer personally was charged in the Administrative Complaint is not determinative of his standing to bring this petition, so long as he was personally charged with the violations, that is,

in his non-corporate capacity. He was personally named in the Complaint, and the fact that the charges against him did not include the description "sole proprietor" is of no consequence.

23. The facts developed showed that regardless of whether he was doing business before the Administrative Complaint was filed, he was doing business, at least with regard to the project at issue, and signed the contract under the title of JR Wittmer Remodeling (not as a corporate entity).

24. In fact, the evidence shows that Mr. Wittmer can properly be considered the sole proprietor of an unincorporated business. He never had more than 25 full-time employees or a net worth in excess of two million dollars. The construction contract did not show the corporate name referenced above, but rather "JR Wittmer's Remodeling" and the underlying construction contract was signed by Wittmer personally, not as president of the then-dissolved corporation. The facts show that he was operating a business as a sole proprietor because, obviously, his corporation was dissolved at the time he entered into the agreement with the complaining witness, Mr. Hatin. He was named individually as a Respondent in the underlying Administrative Complaint and had to defend himself personally in that disciplinary action. According to the totality of the preponderant evidence, he meets the definition of "small business party" under Section 57.111(d)(1)(a), Florida Statutes,

and has standing as the sole proprietor of an unincorporated business to pursue the attorney's fees and costs petition.

25. The Department has the burden to show that its action in prosecuting the underlying case was substantially justified, in order to defeat the claim for attorney's fees and costs. See Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366 (Fla. 1st DCA 1998). The Respondent must establish that, at the time the action was initiated, it had a reasonable basis in law and fact to prosecute the underlying Administrative Complaint proceeding against Wittmer and his dissolved corporation. In deciding whether its action is "substantially justified" an agency "must have solid though not necessarily correct, basis in fact and law for position it took in action." Fish v. Department of Health, Board of Dentistry, 825 So. 2d 421 (Fla. 4th DCA 2002). See also Department of Health, Board of Physical Therapy Practice v. Cralle, 852 So. 2d 930 (Fla. 1st DCA 2003) (question for determination is whether the Department's finding of probable cause and the filing of an Administrative Complaint "had a reasonable basis in law and fact.")

26. The Florida Equal Access to Justice Act has been held to be a statute designed to discourage governmental action against small business parties, but not to totally paralyze agencies who are doing necessary and beneficial work on behalf

of the public. See Department of Health and Rehabilitative Services v. South Beach Pharmacy, Inc., 635 So. 2d 117, 121 (Fla. 1st DCA 1994) (quoting Rudloe v. Department of Environmental Protection, 33 F. Supp. 203 (DOAH 1987)).

27. Before finding probable cause in the instant proceeding the Department conducted an investigation and considered the resulting investigative report and its comprehensive investigative file. This file included the original complaint against the Petitioner by Mr. Hatin, the original contract on JR Wittmer's Remodeling, Inc., letterhead, which appeared to be signed by the Petitioner, as well as copies of original checks in a total amount of approximately \$30,000.00 dollars, written to the Petitioner and his company by Mr. Hatin. It also considered the state of the licensing records indicating an expired occupational license, as well as records of the Department which showed that the Petitioner was unlicensed by the State of Florida for any form of contracting. It also considered various invoices and receipts concerning the work contracted for by the complainant with another entity or persons to finish the job allegedly abandoned by the Petitioner.

28. The Department's investigator interviewed Mr. Wittmer as well as the complainant and the complainant's fiancée. There was no mention in those interviews of any personal or familial relationship between the Petitioner, his fiancée and the

complainant or any of either of their family members at the time the investigation was being conducted. Any information regarding those relationships, which had a substantial effect on the findings, which determined that no illegal contracting had occurred, did not become known to the Department until the evidence was taken at the hearing. Prior to that time the Department had no reason or opportunity to suspect or consider the particular circumstances of any personal relationships between Wittmer, his fiancée and the complainant and his fiancée, or any of their friends or family members who became involved in the dispute or in the project itself.

29. The information available to the Department at the time probable cause was found, and at the time the Administrative Complaint was filed indicated that the Department was pursuing a typical case involving unlicensed construction contracting activity. There was nothing available to the Department, after conducting its investigation in a reasonable fashion, to indicate that there were any extenuating or mitigating circumstances in favor of the Petitioner which would demonstrate that he was not actually engaged in unlawful contracting, nor that the filing of the Complaint would not have a reasonable basis in law and fact.

30. The totality of the evidence in the proceeding shows that the Department was reasonable in concluding, in the early

stages of the case, that violations of the above-referenced portions of Chapter 489, Florida Statutes, had indeed occurred and were perpetrated by Mr. Wittmer. The courts have consistently held, as referenced-above, that the fact that the ultimate determination in the underlying case was based upon an assessment of evidence or information that could have been developed before the finding of probable cause does not mean that the Agency lacked a reasonable basis in fact to initiate and prosecute the proceedings, just because it did not discover such information or evidence after conducting a reasonable investigation. See Cralle, supra. In summary, it has been demonstrated that the underlying prosecution was substantially justified in law and fact.

31. The Department alleges that an award of fees would be unjust because Wittmer took inconsistent positions in the underlying disciplinary action. The Department maintains that Wittmer defended against the administrative prosecution by contending that he was not a business entity and was not doing business. It then argues that in the attorney's fees proceeding that Wittmer seeks to show that he was indeed doing business at the time of the construction project at issue and at the time of the prosecution of the underlying Administrative Complaint proceeding at least as a sole proprietorship. It thus argues

that he is taking an inconsistent position and that an award of attorney's fees would be unjust.

32. The Department misses the point, however, that the Recommended Order, and ultimately the Final Order, in dismissing the Administrative Complaint, found that the Department had failed to prove that Wittmer entered into an agreement to perform unlicensed contracting services or that he actually performed unlicensed contracting services. The finding and determination in that case did not turn on whether Wittmer functioned as an individual or a sole proprietorship or whether he was doing construction business on an ongoing basis. It simply turned on the fact that the Department failed to meet its burden to show that he was actually engaged in unlicensed contracting.

33. Such circumstances do not change the fact that Wittmer incurred the expense of defending that action, prevailed in that action and that he meets the definition of prevailing small business party under Section 57.111, Florida Statutes (2007), at least as a sole proprietorship. Thus, there can be no finding that an award of attorney's fees and cost to him would be unjust, on the basis advanced by the Department in this proceeding. The award of attorney's fees and costs should not be made, instead, because the Department has shown that its prosecution of the underlying case, within the preview of the

legal authority cited above, was substantially justified in law and fact.

Having considered the foregoing Findings of Fact, Conclusions of Law, and the evidence of record, it is, therefore,

ORDERED that the Petition for Attorney's Fees and Costs filed by Willis Wittmer, Jr., and JR Wittmer's Remodeling, Inc., by and the same is hereby dismissed.

DONE AND ORDERED this 14th day of April, 2008, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless an adversely affected party:

- a) brings a civil action within 30 days in the appropriate federal district court pursuant to Section 1415(i)(2)(A) of the Individuals with Disabilities Education Act (IDEA); [Federal court relief is not available under IDEA for students whose only exceptionality is "gifted"] or
- b) brings a civil action within 30 days in the appropriate state circuit court pursuant to Section 1415(i)(2)(A) of the IDEA and Section 230.23(4)(m)5, Florida Statutes; or
- c) files an appeal within 30 days in the appropriate state district court of appeal pursuant to Sections 230.23(4)(m)5 and 120.68, Florida Statutes.