

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. OCTAVIO BLANCO,)
)
 Petitioner,)
)
 vs.) Case No. 08-1972
)
 NNP-BEXLEY, LTD., and SOUTHWEST)
 FLORIDA WATER MANAGEMENT)
 DISTRICT,)
)
 Respondents.)
 _____)

FINAL ORDER ON SANCTIONS

On January 20, 2009, an evidentiary hearing to determine reasonable attorney's fees and costs in the above-captioned matter was held in Brooksville, Florida, before J. Lawrence Johnston, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mara Shaughnessy, Esquire
Mara Shaughnessy, P.A.
652 East Bloomingdale Avenue
Brandon, Florida 33511

For Respondent NNP-Bexley, LTD:

David Smolker, Esquire
Margaret M. Craig, Esquire
Brickleyer, Smolker & Bolves, P.A.
500 East Kennedy Boulevard, Suite 200
Tampa, Florida 33602-4936

For Respondent Southwest Florida Water Management District:

Matthew C. Mitchell, Esquire
Southwest Florida Water
Management District
2379 Broad Street
Brooksville, Florida 34604-6899

STATEMENT OF THE ISSUE

The issue in this proceeding is the amount of sanctions against Petitioner, Dr. Octavio Blanco (Dr. Blanco), to be awarded to Respondents, NNP-Bexley, LTD (NNP-Bexley), and the Southwest Florida Water Management District (the District), under the findings of the Final Order and Order on Sanctions previously entered in this case.

PRELIMINARY STATEMENT

Final Order No. SWF 08-047 was entered on December 17, 2008, and adopted the Recommended Order of the Administrative Law Judge in its entirety. The Recommended Order, dated November 17, 2008, contained findings of fact and conclusions of law determining that Petitioner in this matter pursued his objection to the Environmental Resource Permit (ERP) at issue for an improper purpose, and that Respondents should be awarded reasonable attorney's fees and costs under Section 120.595(1), Florida Statutes.¹ The Order on Sanctions, also dated November 17, 2008, further determined that NNP-Bexley's request for sanctions under Section 120.569(2)(e), Florida Statutes, should be granted.

On December 16 and 17, 2008, NNP-Bexley and the District, respectively, notified the Administrative Law Judge of their intention to pursue sanctions. On December 17, 2008, the Administrative Law Judge entered an Order on Procedure to Determine the Amount of Sanctions. The parties were unable to reach an agreement as to the appropriate amount of sanctions, and Respondents filed a Status Report on December 29, 2008. A Notice of Hearing was issued on January 6, 2009, setting the hearing for January 20, 2009.

At the hearing, NNP-Bexley presented the testimony of Richard Harrison, who was recognized as an expert on attorney's fees in the area, and the testimony of the four expert witnesses who testified at the final administrative hearing regarding their fees and costs. Rick Harcrow, a representative of NNP-Bexley, also testified regarding NNP-Bexley's stake in the project and regarding fees and costs incurred. NNP-Bexley offered 14 exhibits that were admitted in evidence. The District presented two exhibits that were admitted in evidence. Petitioner did not offer any evidence.

Initially, a transcript of the hearing was not ordered, and the parties were given ten days from the date of the hearing in which to file proposed orders. The Transcript was subsequently ordered and was filed on January 29, 2009. Respondents filed

proposed orders on January 30, 2009. Petitioner did not file a proposed order.

FINDINGS OF FACT

1. NNP-Bexley had a retainer agreement with Bricklemyer, Smolker and Bolves, P.A. (BSB), for legal services in connection with this matter.

2. NNP-Bexley incurred attorney's fees of \$144,765.25 in connection with this matter. This included 82.65 hours of work by David Smolker, lead counsel, at a rate of \$400.00 an hour; 343.17 hours of work by Margaret Craig, at a rate of \$325.00 an hour; and 1.4 hours of work by an associate at \$125.00 an hour. NNP-Bexley also was obligated to reimburse BSB for \$3,684.23 in costs, such as copies, deposition costs, service of process fees, and postage.

3. On the issue of reasonable attorney's fees, NNP-Bexley presented this testimony of Richard Harrison, an experienced environmental lawyer and an expert on attorney's fees in the area, who testified that the normal range of fees, or market rate, for the type of services provided by BSB in this matter was \$300.00 to \$400.00 an hour. He testified that the services provided by BSB were reasonable, necessary, and efficiently provided. Mr. Harrison specifically stated that the 427 hours of legal services provided, and the total attorney's fee of \$144,765.25, were reasonable based upon consideration of the

factors described in Rule 4-1.5 of the Florida Bar Rules of Professional Conduct and Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

4. Mr. Harrison also reviewed the fees charged by the expert witnesses in the case. He testified that he was familiar with the use of technical experts as witnesses in administrative proceedings, that the experts used in this case were appropriate, and that the fees charged were reasonable. He specifically found that expert witness fees of approximately \$75,889.30 were reasonable in this matter.

5. Mr. Harrison charges \$350.00 an hour for his services and estimated he would spend 12 hours in providing services related to this sanctions hearing. NNP-Bexley moved to tax the \$4,200.00 in expert witness fees for Mr. Harrison.

6. Heidt and Associates, Inc. (Heidt), entered into a retainer agreement with NNP-Bexley to provide engineering and surface water management expert services in support of NNP-Bexley's litigation of Petitioner's ERP challenge. Heidt personnel provided 180 hours of services, at a cost of \$26,202.53. Heidt also billed NNP-Bexley for \$888.03 in reimbursable costs, for items such as copying, mailing, and preparation of specialize graphics for hearing exhibits. Heidt's services in support of the litigation were reasonable and necessary.

7. Heidt also spent an additional 10 to 12 hours beyond the hours invoiced in preparation for the hearing on sanctions, at a rate of \$135.00 an hour, for a total of \$1,350.00 to \$1,620.00.

8. Biological Research Associates, Inc. (BRA), entered into a retainer agreement with NNP-Bexley to provide environmental expert services in support of NNP-Bexley's litigation of Petitioner's ERP challenge. BRA personnel had provided 209.75 hours of services, at a cost of \$27,747.50. BRA also billed NNP-Bexley for \$2,077.20 in reimbursable costs, for items such as copying, mailing, and preparation of hearing exhibits. BRA's services provided in support of the litigation were reasonable and necessary. BRA's estimated services in preparation for and attending the hearing on sanctions would be an additional \$1,000.00.

9. Mortensen Engineering, Inc. (MEI), entered into a retainer agreement with NNP-Bexley to provide environmental expert services in support of NNP-Bexley's litigation of Petitioner's ERP challenge. MEI provided 51 hours of services, at a cost of \$5,610.00. MEI also billed NNP-Bexley for \$840.00 in reimbursable costs, for CAD services and Fed-Ex mailing charges. MEI's services provided in support of the litigation were reasonable and necessary.

10. MEI's services in preparation for and attending the hearing on sanctions required an additional 5 hours of services at \$110.00 an hour, for a total of \$550.00.

11. Marty Sullivan, a professional engineer, entered into a retainer agreement with NNP-Bexley to provide groundwater and modeling expert services in support of NNP-Bexley's litigation of Petitioner's ERP challenge. Mr. Sullivan provided 82 hours of his own services, with 2 hours of administrative support, at a cost of \$13,381.00. The services provided by Mr. Sullivan in support of the litigation were reasonable and necessary.

12. Mr. Sullivan estimated his services in preparation for and attending the hearing on sanctions would require an additional 8 hours of services, at a cost of \$1,560.00.

13. The District seeks recovery of its costs, not attorney's fees. The District's costs include \$10,914.33 in costs incurred, including Division of Administrative Hearings' services and court reporting costs.

14. Petitioner did not rebut Respondents' testimony and evidence regarding the amount, reasonableness, and necessity of the fees and costs incurred.

15. Petitioner is a beneficiary and trustee of a trust that holds title to what was referred to as the Blanco Property at the final administrative hearing. NNP-Bexley requests a finding that Dr. Blanco filed his ERP challenge as trustee on

behalf of the trust. Dr. Blanco's challenge alleged standing based on injury to the trust's property, but it did not name the trust as a party, and the evidence did not prove that Dr. Blanco filed the challenge as trustee on behalf of the trust.

CONCLUSIONS OF LAW

16. Fees and costs may be awarded in an administrative proceeding pursuant to Section 120.569(2)(e), Florida Statutes, requires that pleadings, such as petitions, be filed based upon reasonable inquiry, and not for improper purposes, and provides for sanctions including attorney's fees for filings that violate those requirements. See Friends of Nassau County, Inc. v. Fisher Development Co., et al., 752 So. 2d 42 (Fla. 1st DCA 2000).

17. Section 120.595(1), Florida Statutes, mandates an award of attorney's fees and costs where a proceeding is brought for an improper purpose. The court in Burke v. Harbor Estates Associates, Inc., and Department of Environmental Protection, 591 So. 2d 1034, 1036-37 (Fla. 1st DCA 1991), stated that the fee provisions of an earlier codification of the statute are:

. . . 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. [Footnote omitted.] 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, 1 or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.

This cost shifting protects parties from financial loss from frivolous, unsubstantiated challenges brought for an improper purpose.

18. The Recommended Order, adopted in its entirety in the Final Order, determined that "[b]ased on all the evidence in this case, it is concluded that Blanco participated in this case for an improper purpose."

19. In determining the amount of reasonable attorney's fees, it is appropriate to utilize the criteria set forth in the Florida Bar Code of Professional Responsibility. Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). Rowe requires an attorney seeking to establish the amount of fees to provide detailed records of the services provided, and establish the prevailing "market rate" in the community. Florida Patient's Compensation Fund v. Rowe, supra at 1150-1151.

20. Rule 4-1.5 of the Florida Bar Code of Professional Conduct directs consideration of the following criteria:

a. The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

- b. The likelihood that the acceptance of the particular employment would preclude other employment by the lawyer;
- c. The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
- d. The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
- e. The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
- f. The nature and length of the professional relationship with the client;
- g. The experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
- h. Whether the fee is fixed or contingent, and if fixed as to amount and rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

21. Rowe and the Rule 4-1.5 criteria have been applied to fee determinations in administrative proceedings. See Brown v. Capital Circle Hotel Company, DOAH Case No. 04-1591F, 2002 Fla. Div. Adm. Hear. LEXIS 1712 (DOAH Sept. 4, 2002).

22. Respondent NNP-Bexley presented un rebutted testimony and evidence that it incurred \$144,765.25 in reasonable and

necessary attorney's fees in litigating Petitioner's ERP challenge. NNP-Bexley provided that detailed records of services required by Rowe, and established the market rate for attorney's fees of \$300.00 to \$400.00 an hour for this type of service. NNP-Bexley established through unchallenged and unrebutted expert testimony that the attorney's fees were reasonable pursuant to the criteria, established by Rule 4-1.5 of the Florida Bar Code of Professional Conduct and Rowe, supra.

23. NNP-Bexley did not seek attorney's fees for litigating the amount of fees to be awarded after entitlement was established by the Final Order and Order on Sanctions in apparent recognition of the general Florida law that attorney's fees are not to be awarded for litigating the amount of fees. See, e.g., Wight v. Wight, 880 So. 2d 692, 695 (Fla. 2d DCA 2004). But see Condren v. Bell, 2003 Fla. App. LEXIS 13988, at *2-3 (Fla. 4th DCA 2003) ("because the fees awarded for litigating the issue of fees was a sanction and supported by substantial competent evidence, the award does not run afoul of" the general law disallowing such fees). However, NNP-Bexley does seek expert witness fees incurred in proving the amount of fees and costs to be awarded. Logically, there is "no cogent reason why a consistent rule should not be followed in considering expert witness fees" Seminole County v. Chandrin, 816 So. 2d 1241, 1246 (Fla. 5th DCA 2002). For that

reason, the amount of expert witness fees to be awarded is \$75,889.30, not the \$89,090.49 requested.

24. The total amount of fees and costs that should be awarded to NNP-Bexley under Section 120.595, Florida Statutes, is \$220,654.55.

25. The District submitted un rebutted evidence that it incurred \$10,914.33 in reasonable costs (including Division of Administrative Hearings' costs and court reporter fees). These costs are recoverable under Section 120.595(1), Florida Statutes.

26. The District is entitled to an award of \$10,914.33 in costs.

27. NNP-Bexley is also entitled to an award of fees and costs pursuant to Section 120.569(2)(e), Florida Statutes, in accordance with the findings of the Order on Sanctions. However, this award is subsumed by the finding of entitlement to all fees and costs under Section 120.595, Florida Statutes.


28. It is not appropriate for the award of sanctions to be entered against the trust that owns the Blanco Property, as well as against Dr. Blanco individually.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner, Dr. Octavio Blanco, must within 30 days of the date of this Final Order on Sanctions pay

Respondent NNP-Bexley \$220,654.55 in fees and costs, and pay
Respondent District \$10,914.33 in costs.

DONE AND ORDERED this 10th day of February, 2009, 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
Division of Administrative Hearings
this 10th day of February, 2009.

ENDNOTE

1/ Unless otherwise noted, references to statutes are to the
2008, Florida Statutes.

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.