

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES DEMOSS ENTERPRISES,)
LLC,)
)
Petitioner,)
)
vs.) Case No. 08-4865F
)
DEPARTMENT OF FINANCIAL)
SERVICES, DIVISION OF WORKERS')
COMPENSATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on February 27, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Bruce Alexander Minnick, Esquire
The Minnick Law Firm
Post Office Box 15588
Tallahassee, Florida 32317

For Respondent: Timothy L. Newhall, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

STATEMENT OF THE ISSUES

The issues presented are (1) whether Petitioner is entitled to recover its attorney's fees and costs from the Department,

and (2) whether the Department is entitled to recover its attorney's fees and costs from Petitioner.

PRELIMINARY STATEMENT

Petitioner's Application for an Award of Attorney Fees and Costs Pursuant to Chapter 57.111, Florida Statutes, was filed on September 11, 2008. On October 10, 2008, the Department filed its Defenses.

On December 24, 2008, the Department filed a Motion for Summary Final Order, which necessitated a postponement of the final hearing as previously scheduled. That Motion was denied by Order entered January 20, 2009.

On February 12, 2009, the Department filed its Motion for Attorney's Fees under Section 57.105, Florida Statutes. No response or opposition to that Motion was filed.

At the commencement of the re-scheduled final hearing, the Department's Motion in Limine was denied but the Department's Motion to Quash Subpoenas Duces Tecum was granted.

Petitioner presented the testimony of Charles DeMoss and Thomas H. Duffy. The Department presented no witnesses. Joint Exhibit numbered 1, Petitioner's Exhibits numbered 1-11, and the Department's Exhibit numbered 1 were admitted in evidence.

The Transcript of the final hearing was filed on March 5, 2009. Pursuant to agreed motions for extensions of time, the parties were afforded up to and including April 28, 2009, by

which to file their proposed final orders. Both parties filed their proposed final orders on April 29, 2009. Those documents have been considered in the entry of this Final Order.

FINDINGS OF FACT

1. Petitioner Charles DeMoss Enterprises, LLC, is in the business of digging trenches and installing telephone cables. During the time relevant hereto, Petitioner was a sub-contractor of Cornerstone Construction Company, which had contracted with Embarq, a telephone company, for the installation of telephone lines.

2. Charles DeMoss, the owner of Petitioner, had applied for and received an exemption from the requirement that he secure the payment of workers' compensation insurance for himself. In completing the exemption application form, DeMoss checked the box indicating that he was in the construction industry and paid \$50 as required for a two-year construction exemption.

3. On October 8, 2007, Petitioner had sub-contracted some of its installation work to Kenny Smith Enterprises, LLC. Kenny Smith, owner of Kenny Smith Enterprises, LLC, had not obtained an exemption from the requirements of workers' compensation coverage.

4. On that date, Vicki Chamelin, an investigator with the Department came to Smith's job site and issued a Stop-Work

Order. She later requested Petitioner to produce business records for the calculation of a penalty assessment for its failure to obtain workers' compensation coverage for its subcontractor Kenny Smith Enterprises, LLC.

5. In issuing the Stop-Work Order, Chamelin concluded that Petitioner was engaged in the construction industry and assigned class code 7611, as set forth in the Scopes Manual published by the National Council on Compensation Insurance, Inc. (NCCI). Class code 7611 is a construction classification applicable to the installation, replacement, removal, and maintenance of underground telephone and cable TV main lines by contractors. As Petitioner was deemed to be working in the construction industry, Kenny Smith was deemed to be Petitioner's statutory employee by operation of law.

6. In October 2007, NCCI class code 7611 was applicable in the state of Florida, although the last sentence of the classification stated: "In the state of Florida, a contractor laying cable under contract with a telephone company shall be classified as Code 7600." NCCI class code 7600 is a non-construction classification, meaning that an individual or entity engaged in work falling within that classification is exempt from the requirements of workers' compensation coverage unless he or it has four or more employees.

7. Charles DeMoss' possession of a construction exemption from the requirements that he be protected by workers' compensation coverage influenced the Department's initial decision to assign Petitioner construction class code 7611 based upon the work being performed by its sub-contractor Kenny Smith Enterprises, LLC.

8. On October 10, 2007, based upon business records produced by Petitioner, the Department issued and served upon Petitioner an Amended Order of Penalty Assessment, assessing a penalty of \$12,899.80 against Petitioner for failing to secure the payment of workers' compensation for its employees.

9. On that same day, Petitioner entered into an agreement with the Department to make a down-payment of 10% of the assessed penalty and to pay the remaining penalty amount in 60 monthly payments. After receiving Petitioner's down-payment, the Department released its Stop-Work Order, conditioned upon the continued payment of the agreed monthly payments, thus allowing Petitioner to resume working.

10. Petitioner timely requested an administrative hearing regarding the Department's Stop-Work Order and penalty assessment, and the matter was transferred by the Department to the Division of Administrative Hearings (DOAH) to conduct the evidentiary proceeding. The dispute was assigned DOAH Case No. 07-5237 and was scheduled for final hearing. For purposes of

this Final Order, DOAH Case No. 07-5237 will be referred to as the underlying action.

11. In the underlying action, Petitioner's petition for an administrative hearing challenged the amount of the penalty assessment and the method of calculating it. It also challenged the employment status of those persons the Department considered to be employees of Petitioner in calculating the penalty assessment. It alleged that Petitioner is a "small business enterprise" entitled to be reimbursed for its attorney's fees and costs.

12. The parties began preparing for final hearing in the underlying action, and the final hearing was continued twice at the parties' request. On April 2, 2008, the parties filed their Pre-hearing Stipulation. That Stipulation expanded Petitioner's allegations to include an issue regarding the form utilized by Petitioner to obtain the construction exemption from workers' compensation coverage for its owner Charles DeMoss, alleging that the form caused DeMoss to erroneously state that he was in the construction business. An issue still not raised at that time by either party was the correctness of class code 7611.

13. While preparing for the imminent final hearing, the Department's attorney became concerned about the meaning of the last sentence of class code 7611 and its cross-reference to class code 7600. He wondered if the exception in Florida for a

contractor laying cable under contract with a telephone company required contractual privity with the telephone company, in which case class code 7611 would apply to Petitioner, or whether it referred to all sub-contractors in a contractual chain emanating from a telephone company, in which case class code 7600 would apply to Petitioner.

14. The Department's attorney initiated discussions with other Department personnel and then contacted NCCI, the promulgator of the Scopes Manual. The Department's initial contacts with NCCI did not help resolve the question of whether Petitioner's work activities were construction or non-construction in nature. Eventually, NCCI concluded that Petitioner's work activities fell within class code 7600 even though Petitioner was not in direct contractual privity with Embarq. This conclusion meant that Petitioner was not engaged in construction work and that Petitioner, therefore, had no obligation to secure the payment of workers' compensation for its sub-contractor Kenny Smith.

15. Thereafter, the Department made a settlement offer to Petitioner, pursuant to which all penalties paid to date would be returned, all future penalty payments would be waived, and the Stop-Work Order would be fully released, in return for Petitioner's waiver of any right to recover attorney's fees. The Department's settlement offer was essentially identical to a

settlement demand previously made by Petitioner and rejected by the Department.

16. The Department's attorney drafted the written Settlement Agreement, which included a specific waiver of all of Petitioner's rights to recover attorney's fees and costs, and forwarded it to Petitioner's attorney. Petitioner's attorney requested some changes to the wording of the Settlement Agreement, which changes were agreeable to the Department. At no time during the negotiation of the Settlement Agreement did Petitioner or Petitioner's attorney express to the Department any disapproval of the provision setting forth Petitioner's waiver of attorney's fees and costs.

17. The written Settlement Agreement, including Petitioner's waiver of all rights to claim reimbursement for its attorney's fees and costs, was clear and unambiguous to Petitioner. Charles DeMoss specifically discussed the waiver of the right to claim attorney's fees with Petitioner's attorney, and based upon the attorney's advice, signed the Settlement Agreement.

18. On August 5, 2008, Petitioner filed its Notice of Settlement and Voluntary Dismissal of the underlying action.

19. The waiver of attorney's fees provision in the signed Settlement Agreement reads as follows: "Each party hereto agrees that it shall bear its own costs and attorney fees in

this matter. DeMoss Enterprises expressly waives any rights to claim attorney fees or costs under Sections 57.041, 57.061, 57.105, 57.111, 120.595, Florida Statutes, or any other statute or other authority."

20. On September 11, 2008, Petitioner's Application for an Award of Attorney Fees and Costs Pursuant to Chapter 57.111, Florida Statutes, was filed and assigned the above-captioned style and case number. In its Defenses filed October 10, 2008, the Department noted that it was considering filing a motion to recover from Petitioner the Department's attorney's fees and costs incurred in defending against Petitioner's Application, pursuant to Section 57.105, Florida Statutes, unless Petitioner withdrew its Application.

21. Petitioner did not withdraw its Application, and on February 12, 2009, the Department filed its Motion for Attorney's Fees under Section 57.105, Florida Statutes.

22. In conjunction with filing Petitioner's Application, Petitioner's attorney filed an Affidavit asserting that he had earned a fee, based upon the number of hours involved, of \$1,935 and had expended costs of \$48 in the underlying case. However, at the final hearing in this cause, neither party offered any evidence as to the amount or the reasonableness of the attorney's fees and costs it was seeking in this proceeding.

23. Although Petitioner's business records were somewhat unclear, those records did not show that Petitioner had four or more employees at the same time, the number necessary for workers' compensation coverage to be required for a non-construction employer.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 57.105, 57.111, 120.569, and 120.57(1), Florida Statutes.

25. Petitioner relies upon Section 57.111, Florida Statutes, in seeking reimbursement for its attorney's fees and costs. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to that Section, 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 action and that it was a small business party at the time the action was initiated by the state agency. Once the party requesting the award has met this burden, the burden of proof then shifts to the state agency to establish that it was substantially justified in initiating the underlying action or that the award of attorney's fees and costs would be unjust. Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366 (Fla. 1st DCA 1998); Department of Professional

Regulation, Division of Real Estate v. Toledo Realty, Inc. and Ramiro Alfert, 549 So. 2d 715 (Fla. 1st DCA 1998).

26. Section 57.111(4)(a), Florida Statutes, provides as follows:

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.

27. Section 57.111(3)(c), Florida Statutes, provides the definition of a "prevailing small business party" and includes the circumstance wherein a settlement has been obtained by the small business party which is favorable on the majority of issues raised by that party. Since the settlement provided that Petitioner owed no monies to the Department and provided for the return of monies already paid, Petitioner has proven that it prevailed in the underlying action.

28. Petitioner has also proven that it meets the definition of small business party. Since the Petitioner is not a sole proprietor of an unincorporated business or an individual, and since the underlying action was not brought pursuant to Section 72.011, Florida Statutes, Petitioner was required to prove that it met the definition applicable to a corporation, including a professional practice, as defined in

Section 57.111(3)(d), Florida Statutes. That Subsection requires Petitioner to prove that, at the time the action was initiated by the Department, Petitioner had not more than 25 full-time employees or a net worth of not more than \$2,000,000. Although Petitioner offered no evidence as to its net worth, the Department's attorney in the underlying action testified in this proceeding that Petitioner's business records did not reflect that Petitioner ever had four or more employees at any time.

29. The burden of proof, therefore, shifts to the Department to prove that its actions were substantially justified or that special circumstances exist which would make unjust an award of attorney's fees and costs to Petitioner. The Department has met its burden.

30. The Department was substantially justified in initiating the underlying action because it had a reasonable basis in law and fact at the time it did so. At the time that the Department issued its Stop-Work Order and the resultant penalty assessment, the investigator applied a class code from the Scopes Manual that applied to Florida at the time, which class code was a construction industry class code. Further, the Department's own records revealed that Petitioner's owner had applied for and obtained a construction industry exemption from workers' compensation coverage for himself.

31. Although the class code chosen by the investigator turned out to be erroneous, that subsequent determination arose from the Department's own efforts. The evidence indicates that the Department did not provide Petitioner's attorney with a copy of the Scopes Manual but did make it available to him to view, which invitation he declined. The Department's subsequent determination based upon the guidance it obtained from the NCCI which, in turn, caused the Department to use a different, non-construction industry class code to describe Petitioner's business activities did not change the fact that the Department was substantially justified in its action at the time it issued the Stop-Work Order and the penalty assessment.

32. In addition, the Department has proven that an award of attorney's fees and costs to Petitioner would be unjust. The Settlement Agreement between the parties in the underlying action contained a specific waiver of Petitioner's right to claim attorney's fees and costs pursuant to the very statute it invokes in this proceeding. The waiver provision was clear and unambiguous, Petitioner's owner understood the waiver before he executed the Settlement Agreement on behalf of Petitioner, and Petitioner's attorney advised him to enter into that agreement. To allow Petitioner to recover its attorney's fees and costs in this proceeding after voluntarily and knowingly entering into a

contract wherein it waived its right to do so would be manifestly unjust.

33. The Department's Motion for Attorney's Fees incurred defending this proceeding relies upon Section 57.105, Florida Statutes. Subsection (5) requires an administrative law judge to award a reasonable attorney's fee and damages to a prevailing party when the losing party or the losing party's attorney knew or should have known that the claim being presented by the losing party or the losing party's attorney was not supported by the material facts necessary to establish the claim or was not supported by then-existing law applied to those material facts. § 57.105(1), Fla. Stat.

34. The Department is the prevailing party in this proceeding. The evidence is clear that both Petitioner and Petitioner's attorney knew that Petitioner had, in the underlying action, clearly and unambiguously waived Petitioner's right to seek attorney's fees and costs under the very statute on which Petitioner relies in this proceeding. The initiation of this proceeding when Petitioner had waived its right to do so is the very kind of conduct for which Section 57.105, Florida Statutes, authorizes sanctions against the losing party and the losing party's attorney.

35. The Department followed the condition precedent to making a claim for attorney's fees under Section 57.105 by

serving Petitioner with a copy of its motion for attorney's fees and allowing Petitioner 21 days to withdraw Petitioner's Application which initiated this proceeding before the Department filed with DOAH its motion for attorney's fees.

36. Even though the Department has proven its entitlement to attorney's fees and damages in this proceeding since there was no basis in material fact or in existing law for Petitioner to initiate this proceeding, the Department's motion for attorney's fees is denied. Although the Department properly filed its motion, the Department failed to offer any evidence as to the amount of or reasonableness of the fee it seeks in this proceeding and failed to offer any evidence as to the damages it has suffered. Further, the Department's Proposed Final Order filed in this cause makes no mention of its motion for attorney's fees, not even listing it as an issue to be resolved in this proceeding. It may well be that the Department only filed its motion in the hope that Petitioner would dismiss this proceeding so as to not cause either party to incur additional fees and costs.

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

ORDERED that:

1. Petitioner's Application for an Award of Attorney's Fees and Costs Pursuant to Chapter 57.111, Florida Statutes, is denied with prejudice.

2. The Department of Financial Services' Motion for Attorney's Fees under Section 57.105, Florida Statutes, is denied with prejudice.

DONE AND ORDERED this 21st day of May, 2009, in Tallahassee, Leon County, Florida.



LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of May, 2009.

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.