

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AARON COX, d/b/a COX)
CONSTRUCTION, INC.,)
)
Petitioner,)
)
vs.) Case No. 09-1611F
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Respondent.)
_____)

FINAL ORDER

This cause came before Lisa Shearer Nelson, a duly-appointed Administrative Law Judge of the Division of Administrative Hearings, for consideration of Petitioner's Application for Award of Attorney's Fees pursuant to Section 57.111, Florida Statutes. The parties have waived an evidentiary hearing in this matter, agreeing that the issue of entitlement to attorney's fees and costs would be decided on the basis of legal memoranda submitted by the parties.

APPEARANCES

For Petitioner: Kenneth C. Steel, III, Esquire
Volpe, Bajalia, Wickes,
Rogerson & Wachs
501 Riverside Avenue, Seventh Floor
Jacksonville, Florida 32202

For Respondent: Maura M. Bolivar, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether the Petitioner is entitled to attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

On March 27, 2009, Petitioner Aaron Cox filed a Petition for Attorney's Fees and Costs Under 57.111, Florida Statutes, with the Division of Administrative Hearings. On May 7, 2009, Petitioner filed a Request for Evidentiary Hearing pursuant to the Initial Order dated March 27, 2009.

The case was assigned to the undersigned and scheduled for hearing to be held June 18, 2009. At the request of Respondent, the hearing was continued and rescheduled for July 22, 2009. On July 9, 2009, Petitioner filed a Withdrawal of Request for Evidentiary Hearing and Motion for Leave to File Response to Respondent's Response to Petition for Attorney's Fees and Costs.

On July 14, 2009, the Order Canceling Hearing, Bifurcating Proceedings and Providing Deadline for Proposed Orders was filed. The Order determined that the issues of entitlement to fees and the amount of any fees would be bifurcated, with the initial determination of entitlement decided based on the written submissions of the parties. The Proposed Final Orders were to be submitted by August 3, 2009.

At the request of the Respondent, the deadline for Proposed Final Orders was extended to August 10, 2009. Both parties filed Proposed Final Orders on August 10, 2009, and both submissions have been carefully considered in the preparation of this Final Order. All references to Florida Statutes are to the codification in effect events alleged in the Petition for Attorney's Fees and Costs, unless otherwise specified.

FINDINGS OF FACT

1. Petitioner, Aaron Cox d/b/a Cox Construction, Inc., is a Florida corporation organized for profit. It is owned by Petitioner, Aaron Cox. Petitioner constitutes a "small business party" within the meaning of Section 57.111, Florida Statutes.

2. On April 22, 2008, Jason Brown, a Department of Business and Professional Regulation (Department or DBPR) investigator, observed Cox and workers for Cox performing work on a roof that appeared to require a roofing contractor's license.

3. Petitioner was doing framing work which did not require a license and removed some of the roof related to the framing work. Petitioner did not have a roofing contractor's license.

4. On June 20, 2008, Robert Marnick, another DBPR investigator taking over the case, issued Cox a "Uniform Disciplinary Citation - Unlicensed" pursuant to Florida Administrative Code Rule 61-32.003. The citation stated that Marnick had probable cause to believe that Cox had violated

Section 489.127(1)(f), Florida Statutes, and sought a penalty of \$2,500.00.

5. Section 489.127(1)(f), Florida Statutes, provides that no person shall "engage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization . . . without being duly registered or certified or having a certificate of authority."

6. Florida Administrative Code Rule 61-32.003, provides that citations imposing designated fines may be issued to unlicensed persons for violations under the following conditions: "1) there has been no prior citation, final order or Notice and Order to Cease and Desist to the subject; 2) there is no evidence of consumer harm in the current case; and 3) the subject has not previously held a license to practice the activity at issue."

7. Rule 61-32.003(4) also provides that citations for unlicensed practice of a profession shall include a statement that, in lieu of the citation, the subject may choose the administrative procedures in Section 455.225, Florida Statutes. The citation issued to Petitioner, however, contained the following statement:

SUBJECT MUST CHOOSE ONE OF THE FOLLOWING:
____ I choose to PAY the penalty/investigative costs (if any) on the citation.
____ I choose to DISPUTE the citation and wish to have this case PROSECUTED under s. 455.225, Florida Statutes.

8. The Citation had attached to it a form entitled "Legal Rights and Mailing Instructions." The form included the following information with respect to disputing the basis for the citation:

The legal options available to you after you have been issued a citation are as follows:

(A) You may DISPUTE the facts alleged in the citation and elect to have the case formally prosecuted. In that case, you must check the appropriate box and return the original or a copy of the citation within 30 days of the date you were served. An Administrative Complaint will be filed thereafter and served upon you. If the Department prevails at the hearing, you may be required to pay a fine and any additional investigative or administrative costs associated with prosecution. Prosecution will be in accordance with Chapters 455 and 120, Florida Statutes, and the practice act governing the profession. . . .

9. Petitioner disputed the citation on July 17, 2008, and Respondent began an investigation into the matter as required by Section 455.225(1)(a), Florida Statutes. Petitioner was notified of the investigation by letter dated August 28, 2008.

10. Pursuant to Section 455.225(4), Florida Statutes, a determination of probable cause shall be made by a majority of the probable cause panel, or by the Department, as appropriate. For unlicensed activity the probable cause determination is made by the Department. If probable cause exists, the statute directs that the Department will file a formal complaint against the licensee.

11. Section 455.225(5), Florida Statutes, provides that a formal hearing will then be held before an administrative law judge from the Division of Administrative Hearings pursuant to Chapter 120 if disputed issues of material fact arise after the Department files an administrative complaint.

12. The Department attorney assigned to review the case determined that there was no probable cause to find a violation based on insufficient evidence. The case was closed and the Petitioner was notified. However, the notification letter sent to Petitioner does not specifically make any reference to the term "probable cause."

13. Once notified, the Petitioner served his Request for Award of Attorney's Fees and Costs Pursuant to Section 57.111, Florida Statutes.

14. No administrative complaint was ever filed by the Department.

15. No complaint was ever filed in circuit court.

16. No notice of voluntary dismissal was filed.

17. No settlement took place between the parties.

CONCLUSIONS OF LAW

18. 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 (2009).

19. In this case, Petitioner seeks an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes (2009), the Florida Equal Access to Justice Act (FEAJA). The Legislature enacted Section 57.111 "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state." § 57.111(2), Fla. Stat. (2009). Section 57.111(4)(a) 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 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. (Emphasis supplied.)

20. The burden of proof in these proceedings is a shifting one. The general rule is that the party asserting the affirmative of an issue bears the burden as to that issue. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner is required to show that it is a small business, as defined by Section 57.111; that it is the prevailing party; and that the underlying adjudicatory process was initiated by the state agency. Once this threshold is met, the burden is then shifted to the agency to show that its action in initiating the agency proceeding was "substantially justified." Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Gentele v.

Department of Professional Regulation, 513 So. 2d 672 (Fla. 1st DCA 1987); Pinellas Rebos Club, Inc. v. Department of Revenue, DOAH Case No. 96-3150F, 97 ER FALR 1009 (DOAH 1997); Lauren, Inc. v. Department of Revenue, Case No. 93-0256F, 94 TAX FALR 430 (DOAH 1993).

21. The parties have stipulated that Petitioner is a small business party within the meaning of Section 57.111(3)(d).

22. Petitioner must also prove that it is a prevailing small business party as defined in Section 57.111(3)(c). To do so, Petitioner must demonstrate one of the following:

1. That 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;

2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding;

3. The State agency has sought a voluntary dismissal of its complaint.

23. In this case, Petitioner has not demonstrated that it is a prevailing party as contemplated by Section 57.111.

24. Determination of whether Petitioner is a prevailing party requires an examination of the process related to issuance of citations by the Department, as well as the alternatives to issuing citations. Section 455.224, Florida Statutes, provides the procedures for issuing citations as follows:

(1) Notwithstanding, s. 455.225, the board or department shall adopt rules to permit the issuance of citations. . . . The citation must clearly state that the subject may choose, in lieu of accepting the citation, to follow the procedure under s. 455.225. If the subject disputes the matter in the citation, the procedures set forth in s. 455.225 must be followed. (Emphasis supplied.)

25. Similarly, Section 455.228, Florida Statutes, authorizes citations as one available remedy for cases involving unlicensed practice of a profession regulated by DBPR. Section 455.228 authorizes the issuance of notices to cease and desist; petitions seeking issuance of an injunction or writ of mandamus to enforce orders to cease and desist; or the institution of administrative proceedings pursuant to Chapter 120. § 455.228 (1), Fla. Stat. Issuance of a citation is clearly an alternative to the other remedies provided for unlicensed activity listed in Section 455.228, Florida Statutes. Section 455.228(3), Florida Statutes, provides:

(3)(a) Notwithstanding the provisions of s. 455.225, the department shall adopt rules to permit the issuance of citations for unlicensed practice of a profession. . . . The citation must clearly state that the subject may choose, in lieu of accepting the citation, to follow the procedure under s.455.225. If the subject disputes the matter in the citation, the procedures set forth in s.455.225 must be followed. However, if the subject does not dispute the matter in the citation with the department within 30 days after the citation is served, the citation shall become a final order of the department. . . .

26. Florida Administrative Code Rules 61-32.001 (Issuance of Citations) and 61-32.003 (Guidelines for Issuing Citations for Unlicensed Practice of a Profession) require the same notification regarding election of the procedures in Section 455.225, Florida Statutes.

27. Section 455.225, Florida Statutes, outlines the procedure for the processing of complaints in disciplinary proceedings. The section covers the process from start to finish, beginning with the receipt of consumer complaints, through investigations, the determination of whether to file an administrative complaint and ending with the right to judicial review.

28. Pursuant to Section 455.225(4), a determination as to whether probable cause exists for a violation of the relevant statutes or rules is made after a case has followed an investigative procedure described in subsections (1) and (2). Subsection 455.225(4), Florida Statutes, provides in pertinent part:

(4) The determination as to whether probable cause exists shall be made by majority vote of a probable cause panel of the board, or by the department, as appropriate. . . . If directed to do so, the department shall file a formal complaint against the subject of the investigation and prosecute that complaint pursuant to chapter 120. . . .

29. If there is a dispute as to a material issue of fact after an investigation under Section 455.225(4), Florida

Statutes, a formal hearing is conducted following Section 455.225(5), Florida Statutes:

(5) A formal hearing before an administrative law judge from Division of Administrative Hearings shall be held pursuant to chapter 120 if there are any disputed issues of material fact. The administrative law judge shall issue a recommended order pursuant to chapter 120. If any party raises an issue of disputed fact during an informal hearing, the hearing shall be terminated and a formal hearing pursuant to chapter 120 shall be held.

30. The citation by DBPR was not a final judgment or order. As Section 455.228(3), Florida Statutes, clearly indicates, only citations that are not disputed become final orders of the Department. Florida Administrative Code Rule 61-32.001(4) only provides for those citations that become final orders to be "filed in accordance with the procedures established for the filing of final orders." In this case, there is no indication that an order was docketed with the Agency Clerk, as required in the definition of a final order in Section 120.52(7).

31. No settlement has been obtained between the parties. The record is clear that Petitioner disputed the allegations in the citation and requested prosecution. The Department chose not to prosecute based upon insufficient evidence.

32. The Department closed its investigation due to a lack of sufficient evidence to proceed. However, this does not satisfy the requirement for voluntary dismissal of a complaint under Section 57.111(3)(c), Florida Statutes, because the

Department never filed an administrative complaint consistent with Chapter 120, Florida Statutes, or a complaint for injunctive relief in circuit court.

33. Petitioner must also prove that the underlying adjudicatory action was initiated by a state agency as defined in Section 57.111(3)(b), Florida Statutes. The term "initiated by a state agency" is defined as follows:

(b) The term "initiated by a state agency" means that the state agency:

1. Filed the first pleading in any state or federal court in this state:
2. Filed a request for an administrative hearing pursuant to chapter 120; or
3. Was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency. (Emphasis supplied.)

34. The Department did not file the first pleading in state or federal court, and did not file a request for an administrative hearing pursuant to Chapter 120. Therefore, Section 57.111(3)(d)1. and 2. do not apply.

35. In order for Section 57.111(3)(d)3., to apply, the Department must be required by statute or rule to advise the small business party of a clear point of entry after some recognizable event in the investigation. In this case, the Department is not required, at the time of issuing the citation, to provide a clear point of entry for Petitioner to pursue its remedies pursuant to Chapter 120, Florida Statutes. Instead, it

was required to provide an opportunity for Petitioner to request traditional investigatory procedures pursuant to Section 455.225, Florida Statutes. Providing the option for a traditional investigation is a preliminary step before any clear point of entry be appropriate.

36. Petitioner points to the language of the notification in the citation and the explanation of rights accompanying it, which would lead the recipient to believe that disputing the citation will lead to prosecution of the complaint pursuant to Chapter 120, as opposed to invoking the procedures in Section 455.225. The language in the citation and explanation of rights is troubling in that it does not comply with the statutory and rule directives of Sections 455.224 and 455.228, Florida Statutes, and Florida Administrative Code Rule 61-32.001. If the statutes or the rule required prosecution of the underlying complaint upon dispute of the basis for a citation, then it could be inferred that these provisions required advising a recipient of a clear point of entry at this point. However, both Sections 455.224 and 455.228 require notification of the procedures in Section 455.225, Florida Statutes. Section 455.225 details the entire disciplinary process, and the clear point of entry contemplated by Section 57.111(3)(b)3. does not occur at the point in time where a citation is disputed. A clear point of entry for administrative proceedings does not occur until there has been an administrative complaint filed, which constitutes

notice of intended agency action, after a finding of probable cause.

37. Based on the foregoing it is found that there was no statutory or rule requirement at this point in the process to advise of a clear point of entry for a hearing to occur. The Department was carrying out an investigation pursuant to its authority provided in Section 455.225, Florida Statutes. The citation to Petitioner and the subsequent investigation pursuant to Section 455.225, Florida Statutes, are not considered notices of a clear point of entry for purposes of Section 57.111, Florida Statutes.

38. In sum, Petitioner has demonstrated that it is a small business party; but has not demonstrated that that it is a prevailing party by virtue of receiving a final judgment or order in its favor, obtaining a settlement in its favor, or by the Department seeking a voluntary dismissal of its complaint. Most importantly, Petitioner has not demonstrated that the Department initiated agency action against it as that term is defined in Section 57.111(3)b), Florida Statutes. It is unnecessary to determine whether the Department was substantially justified in its actions, or to determine the reasonableness of the requested fees and costs.

CONCLUSION

Based on the foregoing, Petitioner's Petition for Attorney's Fees is dismissed.

DONE AND ORDERED this 2nd day of September, 2009, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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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.