

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WASTE MANAGEMENT, INC., OF)	
FLORIDA,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-3151F
)	
SHERRY ALLAN BUCAR and WILLIAM)	
PAUL FISH,)	
)	
Respondents.)	
_____)	

FINAL ORDER OF DISMISSAL

On June 30, 2009, Sherry Allan Bucar and William Paul Fish filed a Response to Waste Management, Inc., of Florida's Motion for Attorney's Fees and Supplemental Motion for Attorney's Fees under Sections 120.569(2)(e) and 120.595(1), Florida Statutes. On July 6, 2009, Waste Management, Inc., of Florida (WMIF) filed an unopposed Motion for Extension of Time to File Reply, which was granted and extended the time to file a reply on or before July 20, 2009. On July 21, 2009, WMIF filed a Reply, which treated the Response as a motion to dismiss. On July 24, 2009, Respondents filed a Motion to Strike Petitioner's Untimely Reply. On July 27, 2009, WMIF filed a Response to the Motion to Strike Untimely Reply.

WMIF's Reply was untimely, but Respondents' Motion to Strike is denied, and WMIF's Reply is being considered in determining whether WMIF's claims should be dismissed.

Respondents seek dismissal of WMIF's claims on three grounds: (1) untimely filing and lack of jurisdiction; (2) Respondents' not being "non-prevailing adverse" parties; and (3) Respondents not having had an "improper purpose." The third ground involves questions of fact and is not susceptible to dismissal at this stage. Even if meritorious, the second ground for dismissal only applies to one of WMIF's two claims. The first ground for

dismissal (the untimely and lack of jurisdiction argument) has merit and applies to both of WMIF's statutory claims.

WMIF filed its Motion for Attorney's Fees the day after entry of an Order Closing Files in consolidated Division of Administrative Hearings (DOAH) Cases 09-1558 and 09-1559, which relinquished jurisdiction from DOAH to the Department of Environmental Protection (DEP) for dismissal of the Bucar and Fish petitions with prejudice (DOAH Case 09-1559) and for entry of a final order in accordance with a settlement among WMIF, DEP, and the petitioner in the consolidated case (DOAH Case 09-1558) resolving essentially the same issues raised by Bucar and Fish. It is not clear if DEP has entered a final order.

In support of its claim of jurisdiction, WMIF cites Sections 57.105 and 57.111, Florida Statutes. Under Subsection (5) of the first statute, jurisdiction is retained after the filing of a notice of voluntary dismissal; under the second statute, original jurisdiction is conferred. Sections 120.569(2)(e) and Section 120.595(1), Florida Statutes, do not provide for retention of jurisdiction or create original jurisdiction; to the contrary, those statutes contemplate their invocation before relinquishment of jurisdiction and closure of the DOAH file.

WMIT also cites to G.E.L. Corp. v. Dep't of Environmental Protection, 875 So. 2d 1257 (Fla. 5th DCA 2002), for the proposition that jurisdiction is retained, at least under Section 120.595(1), Florida Statutes. But in that case a notice of voluntary dismissal was filed immediately after G.E.L. filed a motion for attorney's fees and costs under the statute. The court held that the notice of voluntary dismissal did not deprive DOAH of jurisdiction to rule on the pending motion for attorney's fees and costs under Section 120.595(1), Florida Statutes.

In this case, there was no notice of voluntary dismissal, and no motion for attorney's fees under Section 120.595(1), Florida Statutes, was pending when the DOAH files were closed and jurisdiction relinquished. Instead, after a motion to dismiss the Bucar and Fish petitions was granted with leave to amend, WMIF entered into a settlement with the petitioner in a consolidated case that resolved essentially the same issues raised in the dismissed petition, and Bucar and Fish allowed the time for amendment

of their dismissed petition to run. WMIF moved DOAH to relinquish jurisdiction to DEP to effectuate the settlement. The day after the Order Closing Files in DOAH Cases 09-1558 and 09-1559, WMIF filed its Motion for Attorney's Fees (which was later supplemented). Under these circumstances, DOAH no longer had jurisdiction to consider WMIF's Motion for Attorney's Fees. See Summer Place Condo Association/Peggy Shanbarker v. Brenda Steiner, DOAH Case 05-1924F (May 9, 2005); Rafael R. Palacios and Steven L. Johns v. Dep't of Business and Professional Reg., DOAH Cases 99-4163F and 99-4164F (November 20, 2000); Ernest Sellars v. Broward County School Board, DOAH Case 97-3540F (September 25, 1997); Richard Hall v. Dep't of Juvenile Justice, DOAH Case 97-0175F (July 3, 1997). WMIF has not cited any DOAH case to the contrary, and none has been found.

WMIF contends in part that its claims are timely because they were made promptly after the filing of transcripts of deposition testimony supporting the claims. But the depositions took place over ten days before the Order Closing Files and relinquishing DOAH jurisdiction.

For the foregoing reasons, WMIF's Motion for Attorney's Fees and Supplemental Motion for Attorney's Fees are dismissed.

DONE AND ORDERED this 7th day of August, 2009, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of August, 2009.

COPIES FURNISHED:

Kenneth G. Oertel, Esquire
Oertel, Fernandez, Cole & Bryant, P.A.
301 South Bronough Street
Post Office Box 1110
Tallahassee, Florida 32302-1110

Charles J. Basinait, Esquire
Henderson Franklin Starnes & Holt, P.A.
Post Office Box 280
Fort Myers, Florida 33902

Richard S. Annunziata, Esquire
Brennan, Manna & Donaldson, P.L.
3301 Bonita Beach Road, Suite 100
Bonita Springs, Florida 34134

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.