

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WRIGHT AND YOUNG FUNERAL HOME,)
INC.,)
)
 Petitioner,)
)
vs.) Case No. 10-1187F
)

DEPARTMENT OF FINANCIAL)
SERVICES, BOARD OF FUNERAL,)
CEMETERY, AND CONSUMER)
SERVICES,)
)
 Respondent.)

KIMBERLY WHITE,)
)
 Petitioner,)
)
vs.) Case No. 10-1188F
)

DEPARTMENT OF FINANCIAL) *AMENDED AS TO COPIES
SERVICES, BOARD OF FUNERAL,) FURNISHED ONLY
CEMETERY, AND CONSUMER)
SERVICES,)
)
 Respondent.)

*AMENDED FINAL ORDER

Administrative Law Judge Eleanor M. Hunter held a hearing
in this case on April 20, 2010, at the Division of
Administrative Hearings (DOAH) in Tallahassee, Florida.

APPEARANCES

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For Respondent: James A. Bossart, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to costs and attorney's fees pursuant to Sections 57.111 and 57.041, Florida Statutes (2009).

PRELIMINARY STATEMENT

Petitioners in these cases were the Respondents in consolidated DOAH Case Nos. 09-4918PL and 09-4919PL. On March 5, 2010, they filed a Motion for Attorney's fees and costs in the underlying cases that resulted in the opening of DOAH Case Nos. 10-1187F and 10-1188F.

On March 17, 2010, Respondent in the instant cases (Petitioner in the underlying cases) filed a Response [in opposition] to the Motion for Attorney's Fees and Costs.

The cases were consolidated and set for an evidentiary hearing that was held on April 20, 2010. The Transcript of the proceedings was filed on May 14, 2010. Proposed Recommended

Final Orders were filed on behalf of Respondent on May 14, 2010, and on behalf of Petitioners on May 17, 2010. Unless otherwise indicated, references to Florida Statutes are to the 2009 edition.

FINDINGS OF FACT

Administrative Proceedings

1. On September 10, 2009, Respondent, Department of Financial Services, Board of Funeral, Cemetary, and Consumer Services ("Respondent" or "the Department") referred Administrative Complaints against Petitioners, Wright and Young Funeral Home, Inc., and Kimberly White, to DOAH to conduct a hearing. The cases were consolidated and set for hearing on December 2, 2009.

2. On October 30, 2009, the parties filed a Joint Motion for Continuance and the case was continued and rescheduled for January 6, 2010.

3. On December 23, 2009, the Department filed a Motion for Continuance asserting, in part, the need to raise additional issues with a probable cause panel that could have led to a motion for leave to amend the Administrative Complaint. Petitioners opposed the motion, which was, nevertheless, granted after a motion hearing was held. The case was rescheduled for March 10 and 12, 2010.

4. On January 22, 2010, the Department filed another Motion for Continuance noting that the probable cause panel would meet on January 25, 2010, to consider proposed amendments to the administrative complaints and that, if approved, a motion for leave to amend would be filed that same day. Counsel for the Department, also gave notice that she would be unavailable to conduct discovery or proceed to hearing in February and March due to medical reasons. Because the case had been pending at DOAH for more than four months, counsel for the Department was asked to consider transferring the case to another attorney in the Department who could be available for a hearing in March.

5. On January 25, 2010, the Department filed a Motion for Enlargement of Time to File a Motion for Leave to Amend Administrative Complaint citing the need for two extra days to get approval within the Department to file the proposed amendments to the Administrative Complaint. Petitioners filed their Opposition to Third Motion for Continuance, Opposition to Enlargement to file Motion for Leave to Amend Complaints, and Motion to Transfer Case to Another Attorney. The Department was granted, on January 26, 2010, a two-day extension to January 28, 2010, to file its Motion for Leave to File Second Amended Complaint. That Motion was filed on January 27, 2010.

6. During a pre-hearing status conference on February 15, 2010, counsel for the Department reported that she had been

unable to transfer the case to any other Department attorneys due to their workloads. She agreed to file, and did file, an Unopposed Motion to Relinquish Jurisdiction that same day. The Motion was granted and the DOAH files were closed on February 16, 2010.

Probable Cause Panel

7. The probable cause panel that approved the filing of the initial Administrative Complaint met on June 10, 2009. The Administrative Complaint was filed in the Department on June 26, 2009.

8. On January 25, 2010, counsel for the Department reported to the panel that based on the facts gathered, presumably through further investigations and discovery, Petitioner, Kimberly White, as the responsible funeral director in charge, had not violated Subsections 497.385(2)(f), 497.152(9)(b), and 497.152(9)(e), Florida Statutes, but that probable cause existed to believe that she had violated Subsection 497.152(9)(f), Florida Statutes.

9. With regard to the previous charges against Petitioner Wright and Young Funeral Home, Inc., counsel for the Department reported that based on the facts gathered, it had not violated Subsections 497.385(2)(f), 497.152(9)(b), and 497.385(9)(e), but that probable cause existed to believe that it had violated Subsections 497.152(9)(f) and 497.141(12)(d), Florida Statutes.

10. The panel found probable cause to amend the Administrative Complaints as requested by counsel for the Department.

11. The information that served as the basis for the remaining charges, as amended, was received from Broward County Circuit Judge Mark A. Speiser. Judge Speiser wrote the Department, on April 3, 2009, after presiding in a guardianship proceeding for a six and one-half-year-old minor child, over a hearing on an Emergency Petition to Pay Funeral Expenses of the ward's deceased mother. During the proceeding, Judge Speiser determined that Terry Wright, who identified himself as the CEO of Wright and Young Funeral Home, Inc., falsely represented that an expense associated with the mother's funeral services were \$7,450, but that the actual cost was \$350.

12. Judge Speiser's letter to the Department concluded as follows:

The absolute lie and false statement to this Court in a legal proceeding is intolerable and should not go unpunished. As the State Agency charged with oversight of this industry, I urge you to extend this matter your utmost and immediate attention. To allow financial exploitation of the decedent's legacy to her surviving 6 and one-half-year-old child by a business that supposedly is in existence to reasonably and fairly serve individuals and families in their time of grief and sorrow is utterly impermissible and shameful.

13. The Department's investigator interviewed witnesses, reviewed invoices, and received affidavits that supported the allegations made by Judge Speiser. While Petitioners questioned whether any violation occurred for marking up fees, that is an issue for consideration when, and if, there is a final evidentiary hearing on the pending charges.

Small Business

14. The parties did not contest the status of Petitioners as a small business and its funeral director in charge.

Attorney's Fees and Cost

15. The Department did not question the reasonableness and accuracy of Petitioners' affidavit in support of the Motion that shows attorney's fees in the amount of \$17,220 and costs in the amount of \$1,079 expended in defense of the complaint against Petitioners, except to the extent that fees and costs for maintaining this action should not have been included.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has personal and subject matter jurisdiction in this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2009).

17. In this case, Petitioners seek an award of attorney's fees and costs pursuant to Sections 57.111 and 57.041(1), Florida Statutes (2009). Section 57.111, Florida Statutes, provides as follows:

(1) This section may be cited as the "Florida Equal Access to Justice Act."

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

(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 for all preparations, motions, hearings, trials, and appeals in a proceeding.

(b) The term "initiated by a state agency 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.

(c) A small business party is a "prevailing small business party" 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;

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; or

3. The state agency has sought a voluntary dismissal of its complaint.
(Emphasis added)

18. Similarly, Subsection 57.041(1), Florida Statutes, provides for the recovery of costs as follows:

(1) The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment; but this section does not apply to executors or administrators in actions when they are not liable for costs.

19. 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). Each 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, (Fla. 1st DCA 1998);
Gentele v. Department of Business and Professional Regulation,
513 So. 2d 672 (Fla. 1st DCA 1987.

20. Petitioners are small business parties within the meaning of Section 57.111(3)(d).

21. There is no question that a state agency, the Department, initiated the administrative proceeding pursuant to Chapter 120, Florida Statutes.

22. Petitioners must prove that they have prevailed as defined in Section 57.111(3)(c). To do so, in the absence of any evidence of a settlement, Petitioners must demonstrate either one of the following: (1) that a final judgment or order has been entered in their favor and that such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired; or (2) that the agency has sought a voluntary dismissal of its complaint.

23. Petitioners contend that the Order Closing File in this case is a final order. That view is not supported by the description of a final order in Hill v. Division of Retirement, 687 So. 2d 1376 (Fla. 1st DCA 1997), which is as follows:

The final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated." § 120.569(2)(j), Fla. Stat. (Supp. 1996). An agency has not rendered a final order until it is "filed with the agency

clerk." § 120.52(7), Fla. Stat. (Supp. 1996); Charter Medical-Southeast, Inc. v. State, Dep't of Health and Rehabilitative Servs., 495 So. 2d 759 (Fla. 1st DCA 1986). Rendition is similarly defined by Florida Rule of Appellate Procedure 9.020(h). See Franchi v. Florida Dep't of Commerce, Div. of Employment Sec., Bd. of Review, 375 So. 2d 1154 (Fla. 4th DCA 1979). "The clerk shall indicate the date of filing on the order." § 120.52(7), Fla. Stat. (Supp. 1996).

Final agency action may take the form of an order whether "affirmative, negative, injunctive, or declaratory" in tenor. § 120.52(7), Fla. Stat. (Supp. 1996). A final agency order may articulate jurisdictional boundaries; require a party to cease or desist; grant, suspend, or revoke a license; impose an administrative penalty; deny an evidentiary hearing; or deny substantive relief of various kinds. A final order may or may not dismiss a petition for hearing or some other pleading. Its finality depends on whether it has brought the administrative adjudicative process to a close. "The test to determine whether an order is final or interlocutory in nature is whether the case is disposed of by the order" Prime Orlando Properties, Inc., v. Department of Bus. Regulation, Division of Land Sales, Condominiums, and Mobile Homes, 502 So. 2d 456, 459 (Fla. 1st DCA 1986). Accord Middlebrooks v. St. Johns River Water Management Dist., 529 So. 2d 1167 (Fla. 5th DCA 1988); Peterson v. State Dep't of Env'tl. Regulation, 350 So. 2d 544 (Fla. 1st DCA 1977).

24. Although jurisdiction has been relinquished, there is no evidence that Respondent has entered a final order. On the

contrary, it appears that charges are still pending in an amended administrative complaint.

25. Petitioners rely on the decision in Nicolitz v. Board of Opticianry, 609 So. 2d 92 (Fla. 1st DCA 1992) to assert that an order closing file upon consideration of a motion to relinquish jurisdiction is tantamount to an order closing file after a voluntary dismissal. In Nicolitz, however, the hearing officer denied a motion to relinquish jurisdiction and was then divested of jurisdiction by the subsequent filing of a voluntary dismissal. Id. at 93.

26. Finally, while not necessary to the disposition of this case but argued by the parties, it is worth noting that the actions of the probable cause panel in response to concerns raised by Judge Speiser and the subsequent investigation were substantially justified. See Department of Health v. Thomas, 890 So. 2d 400 (Fla. 1st DCA 2004) (Department was free to believe the opinion of one expert despite the existence of two expert opinions to the contrary because a decision to prosecute that turns on a credibility assessment has a reasonable basis in fact and law).

27. It is not essential for the state agency to adhere to prosecuting every count in its initial administrative complaint in order to demonstrate a substantial justification for the prosecution and to defeat a motion for fees and costs. For

example, in Gentele v. Dep't of Prof'l Regulation, Bd. of Optometry, 513 So. 2d 672, 673 (Fla. 1st DCA 1987), Count I of the administrative complaint was ultimately sustained, Count II was dismissed, and appellant's license was suspended as to the violations alleged in Count I. The court, in Gentele, nevertheless held that:

DPR's determination to prosecute essentially turned on a credibility assessment of the investigator's testimony and, as such, had a reasonable basis in law and fact. See Temp Tech Industries, Inc. v. NLRB, 756 F.2d 586 (7th Cir. 1985) (decision to litigate an issue that turned on a credibility assessment was not itself unreasonable); Natchez Coca-Cola Bottling Co. v. NLRB, 750 F.2d 1350 (5th Cir. 1985) (lack of credibility of witness' testimony was not so clear that no reasonable general counsel would have prosecuted the claim).

28. In sum, Petitioners have demonstrated they are small business parties, but have not demonstrated that they are prevailing parties by virtue of having received a final judgment or order in their favor, obtaining a settlement in their favor, or by having the Department seek a voluntary dismissal of the complaint against them.

CONCLUSION

Based on the foregoing, Petitioners' Petition for Attorney's fees and costs is dismissed.

DONE AND ORDERED this 16th day of June, 2010, in
Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
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Filed with the Clerk of the
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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.