

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GERALD J. CAREY, II,)
)
 Petitioner,)
)
 vs.) Case No. 10-9282
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 17, 2010, by video teleconference in Tallahassee, Florida, and Tampa, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen Tabano, Esquire
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Frye, O'Neill & Mullis, P.A.
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For Respondent: Matthew F. Childs, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner is entitled to reimbursement for expenses incurred in relocating and reestablishment of his small business pursuant to section 421.55, Florida Statutes (2009),^{1/} as implemented by Florida Administrative Code Rule 14-66.007, which, in turn, incorporates by reference the provisions of 49 Code of Federal Regulations Part 24, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs (effective October 1, 2006),^{2/} and the Florida Department of Transportation Right of Way Manual 9.3.15, and, if Petitioner is entitled to reimbursement, the amount owed to him.

PRELIMINARY STATEMENT

On June 8, 2010, Respondent, Department of Transportation (Department), informed Petitioner, Gerald J. Carey, II (Mr. Carey), that it was affirming its district office's denial of his application for "relocation benefits for landlord reestablishment expenses in the amount of \$7,654.56."

On August 3, 2010, Mr. Carey filed with the Department an Amended Request for Formal Administrative Hearing, requesting a formal administrative hearing concerning the Department's decision to deny him reimbursement expenses related to the relocation and reestablishment of his small business.

On September 23, 2010, the Department forwarded the request to the Division of Administrative Hearings for an administrative hearing. The case was assigned to Thomas P. Crapps, Administrative Law Judge, for a final hearing set on December 17, 2010.

At the December 17, 2010, video teleconference hearing, Mr. Carey testified in his own behalf and offered Exhibits A through F, which were admitted into evidence. The Department presented the testimony of Andrew Nappi (Mr. Nappi) and Robert Knight (Mr. Knight) and offered Exhibits 1 and 3 through 9, which were admitted into evidence.

A Transcript of the hearing was ordered and filed with the Division of Administrative Hearings on January 31, 2011. Both parties submitted Proposed Recommended Orders, which the undersigned considered in preparing this Recommended Order.

FINDINGS OF FACT

Based on the evidence and witnesses' testimony, the undersigned found the following facts:

1. The Department is the state agency that has responsibility for paying certain relocation and reestablishment expenses of businesses that have been displaced because of a public transportation project. See § 421.55, Fla. Stat.

2. Sometime in 1999 to 2000, Mr. Carey purchased eight rental units in Hillsborough County, Florida, as an investment

property. Mr. Carey managed the rental property and testified that he would advertise vacancies through "word of mouth." The record shows that these rental units were rented weekly and included written and verbal leases.

3. In 2005, the Department informed Mr. Carey that his rental property would be subject of an eminent domain taking and informed Mr. Carey about the law authorizing the Department to pay certain expenses in relocating and reestablishing a small business. On December 6, 2005, Mr. Carey filled out a Business Survey Questionnaire for the Department, stating his desire to relocate his rental business.

4. The Department acquired Mr. Carey's property on April 18, 2009.

5. By mid July 2009, Mr. Carey contacted Mr. Nappi to determine whether or not he was still eligible to receive relocation and reestablishment reimbursement for his small business. Mr. Nappi determined that Mr. Carey remained eligible to apply for reimbursement and informed him of that fact.

6. On August 28, 2009, Mr. Carey purchased a replacement property located at 19002 Apian Way, Lutz, Florida, for \$300,000.00. The replacement property contained a house that had been the homestead property of the prior owner.

7. Mr. Carey credibly testified that the purpose of purchasing this replacement property was "to get back into the

rental business" and that he advertised the replacement property for rent by "word of mouth." Receipts introduced into evidence show that Mr. Carey began making repairs and purchasing materials as early as the first week in September.

8. Mr. Carey testified, on cross-examination, that he could not remember the exact date when he listed the replacement property for sale, or the exact date when he entered into a contract for the sale of the replacement property. Mr. Carey testified that he would speculate that the contract for sale of the replacement property occurred in early October 2009.

9. On October 15, 2009, Mr. Nappi went to the replacement property with Mr. Carey to review the work that Mr. Carey had already begun on the replacement property and to discuss the expenses eligible for reimbursement.

10. In reviewing Mr. Carey's claimed expenses, Mr. Nappi found that the following expenses would be eligible for reimbursement: (1) the drywall work detailed in Exhibit A; (2) \$561.00 worth of the receipts of materials purchased from Home Depot; and (3) the painting expenses detailed in Exhibit C. Mr. Nappi also testified that in reviewing the claimed expenses that Mr. Carey would be eligible for reimbursement of a portion of the replacement property's ad valorem taxes. According to Mr. Nappi, Mr. Carey would have been eligible to receive the difference of the amount of the property taxes between the

acquired property and the replacement property in the amount of \$849.56. The only expenses that Mr. Nappi identified as not being reasonable were for hauling away yard waste contained in Exhibit D. According to Mr. Nappi, the Department questioned the amount of the charges and determined that an appropriate amount would be \$1,200.00 as opposed to the \$2,450.00 sought by Mr. Carey. Consequently, the majority of the expenses claimed by Mr. Carey were eligible items for reimbursement.

11. On November 4, 2009, the Department sent Mr. Carey a letter denying his eligibility to receive reimbursement for expenses in relocating and reestablishing his small rental business. The Department denied Mr. Carey's eligibility because the updated TRIM notice for the property tax, that Mr. Carey provided the Department, showed the replacement property was homestead property. Because the replacement property was homestead, the Department reasoned that Mr. Carey had not reestablished a small business.

12. Mr. Carey informed Mr. Nappi that the replacement property was not homestead property and that the TRIM notice was wrong. In response, on November 9, 2009, Mr. Nappi wrote the Hillsborough County Tax Collector to determine whether or not Mr. Carey's replacement property was homestead property.

13. On November 23, 2009, while the Department waited for a response from the Hillsborough County Tax Collector, Mr. Carey

closed on the sale of the replacement property for \$332,500.00.

14. Mr. Carey did not inform the Department that the replacement property had been sold.

15. In February 2010, the Hillsborough County Tax Collector informed the Department that the replacement property was not homestead. Also, the Department learned for the first time that Mr. Carey had sold the replacement property.

16. After learning that Mr. Carey had sold the replacement property, Mr. Nappi contacted his supervisor Elbert Johnson (Mr. Johnson). Mr. Nappi informed Mr. Johnson that "it did not appear that the reestablishment status of the landlord had been in fact established[,]" and the claim would be denied.

17. Mr. Nappi testified the Department attempted to determine whether or not Mr. Carey had reestablished his rental business by examining Mr. Carey's efforts to rent the replacement property. Mr. Nappi directed a right-of-way specialist for the Department to contact realtors, who were associated with the property, to determine if Mr. Carey had listed the property for rent; to contact the local newspaper to learn if the property had been advertised for rent; and to conduct an internet search of the property.

18. According to Mr. Nappi, the realtor indicated that she was not aware of whether or not Mr. Carey listed the property for rent and learned nothing from the newspaper or internet search.

Mr. Nappi admitted that the Department did not contact Mr. Carey to ask him about his efforts to rent the property.

19. The Department did not contact Mr. Carey or ask him to provide any information about his efforts to rent the property. Consequently, the Department did not have before it any information concerning Mr. Carey's efforts as to "word of mouth" advertising of the property.

20. Mr. Knight, the state administrator of Relocation Assistance, testified that asking Mr. Carey about his efforts to rent the property would have been helpful information to have in considering the reimbursement. However, Mr. Knight acknowledged that Mr. Carey's selling of the home prior to determination of whether or not he was entitled to reimbursement made the issue moot. In the Department's estimation, Mr. Carey had simply "flipped a house" and had not reestablished his business.

21. On March 25, 2010, the Department informed Mr. Carey that it was denying his application for reimbursement because he was not eligible because he had not reestablished his small rental business at the replacement property.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. § 120.57, Fla. Stat. (2010).

23. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Fla. Dep't of Transp. v. J.W.C. Corp., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). Accordingly, Mr. Carey bears the burden of proof in this proceeding by a preponderance of the evidence that he is entitled to receive relocation and reestablishment expenses and the reasonableness of those expenses.

24. Sections 339.09(2) and (3) and 421.55, Florida Statutes, provide the Department with authorization to pay certain expenses for the relocation and reestablishment of a small business displaced by the Department's acquisition of real property for a public transportation project.

25. Florida Administrative Code Rule 14-66.007 implements sections 339.09 and 421.55, as the Relocation Assistance Program. The purpose of rule 14-66.007 is to:

[G]overn the provision of relocation services, moving costs, replacement housing costs, and other related expenses and to ensure that each person displaced as a direct result of a transportation project is treated fairly, consistently, and equitably, so that such person will not suffer disproportionate injury as a result of projects designed for the benefit of the public as a whole, and to ensure that the Department implements these regulations in a manner that is efficient and cost effective.

In furtherance of this purpose, the Department incorporated the "provisions of 49 C.F.R. Part 24, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs (effective October 1, 2006)." Fla. Admin. Code. R. 14-66.007(1).

26. Rule 14-66.007(7) provides, in pertinent part, that "[a]ny displaced person is entitled to payment of his or her actual moving and related expenses, as the Agency determines to be reasonable and necessary, as outlined in 49 C.F.R. Part 24, subject to [provisions listed in the rule]. . . ." ^{3/}

27. The federal Department of Transportation implemented the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. section 4601 et seq.), as amended, in 49 C.F.R. section 24.1 et seq. Because rule 14-66.007 incorporates the federal rule in determining Mr. Carey's eligibility for relocation and reestablishment expenses, we turn to 49 C.F.R. Part 24.

28. Federal Regulation 49 C.F.R. section 24.304 provides for payment of reestablishment expenses for a small business. Specifically, the regulation provides, in relevant part:

In addition to the payments available under §§ 24.301 and 24.303 of this subpart, a small business, as defined in § 24.2(a)(24), farm or nonprofit organization is entitled to receive a payment, not to exceed \$10,000, for expenses actually incurred in relocating and reestablishing such small business, farm

or nonprofit organization at a replacement site.

The regulation provides that the "[r]establishment expenses must be reasonable and necessary, as determined by the Agency," and then provides a list of eligible and ineligible expenses for guidance. Id.

29. The question presented by this case is whether Mr. Carey presented sufficient evidence to demonstrate that he relocated and reestablished his small business of renting property at the replacement site. The resolution of this issue turns on the definitions of "small business" and to "reestablish."

30. First, 49 C.F.R. section 24.2(a)(24) defines a "small business" as:

[A] business having not more than 500 employees working at the site being acquired or displaced by a program or project, which site is the location of economic activity. Sites occupied solely by outdoor advertising signs, displays, or devices do not qualify as a business for purposes of § 24.304.

The second pertinent definition is of the term to "reestablish." The term "reestablish" is not defined in 49 C.F.R. Part 24, or in rule 14-66.007. A canon of statutory construction requires that the term be given its plain and ordinary meaning which can be ascertained by reference to dictionary definitions. See Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc., 982 So. 2d

628, 633 (Fla. 2008); Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000). "Re" is a prefix meaning "again" or "anew," while "establish" means to "set up," "found" or "to bring into existence." Merriam-Webster Online 15 February 2011, <http://www.merriam-webster.com/dictionary/>. As shown earlier, a "small business" is defined as "a business having not more than 500 employees at the site being acquired or displaced by a program or project, which site is the location of economic activity." 49 C.F.R. § 24.2(24). Thus, in order to "reestablish" the "small business" at the replacement site, there must be some economic activity occurring at the replacement property. If there is no economic activity at the replacement site, then the applicant has not reestablished the small business and is not entitled to reimbursement.

31. Applying the law to the facts here, Mr. Carey failed to prove by a preponderance of evidence that he reestablished his rental business at the replacement site. Although the record shows that Mr. Carey intended to reestablish his rental business at the replacement site and that he advertised by "word of mouth," these facts are outweighed by the specific time-line concerning the sale of the replacement property. The key facts here showed that Mr. Carey purchased his replacement property on August 28, 2009, for \$300,000.00. He began repairs and listed the replacement property for sale sometime in September 2009. By

early October, Mr. Carey had entered into a contract for the sale of the replacement property. On October 15, 2009, Mr. Carey met with Mr. Nappi to discuss the reimbursement for the reestablishment expenses of his rental business. Clearly, Mr. Carey would not be reestablishing his rental business at the replacement site, because he had already entered a contract to sell the property. Moreover, since Mr. Carey had already entered into a contract to sell the property, there would not be any economic activity to support the reestablishment of the rental business at the replacement site. The final key fact is that on November 23, 2009, Mr. Carey closed on the sale of the replacement property for \$332,500.00; thus, supporting the Department's conclusion that Mr. Carey had simply "flipped a house," rather than reestablishing his rental business.

32. The Department's interpretation of 49 C.F.R. section 24.304 that Mr. Carey had not "reestablished" his small business is permissible, and its decision that Mr. Carey was not eligible for reimbursement of expenses is accorded wide discretion and deference. See Bd. of Podiatric Med. v. Fla. Med. Ass'n., 779 So. 2d 658, 660 (Fla. 1st DCA 2001) (it is fundamental that an agency is accorded wide discretion and deference in the interpretation of statutes which it administers and that an agency's interpretation of a rule it administers should be upheld when it is within the range of permissible

interpretations). The Department's interpretation of "reestablish" as it applies under the facts here is permissible.

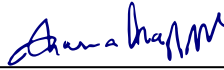
33. One area of concern was that the Department failed to contact Mr. Carey to ascertain the efforts that he had made to market the replacement property for rental. Federal Regulation 49 C.F.R. section 24.207(b) requires that the "claimant shall be promptly notified as to any additional documentation that is required to support the claim." 49 C.F.R. § 24.207(b). Mr. Knight candidly admitted that the Department could have done a better job by requesting the information from Mr. Carey. This failure, however, does not change the outcome of the recommendation. Even if Mr. Carey had brought forward the evidence that he advertised the rental property through "word of mouth," by October 15, 2009, the date when he was meeting with the Department about the reimbursement expenses, this fact would be outweighed by the time-line that he had already entered into a contract to sell the replacement property. Thus, it is clear that Mr. Carey did not bring forward evidence showing that he reestablished his rental property business at the replacement site.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation

enter a final order affirming its denial of Mr. Carey's application for reimbursement of reestablishment expenses.

DONE AND ENTERED this 28th day of February, 2011, in Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2011.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

^{2/} The provisions of 49 Code of Federal Regulations, Part 24, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs (effective October 1, 2006), shall be referred to as 49 C.F.R. Part 24, with designation of the specific section number for Part 24 when referenced.

^{3/} The Department also uses the Florida Department of Transportation Right of Way Manual. The undersigned took judicial recognition of Right of Way Manual section 9.3.15, which mirrors 49 C.F.R. section 24.304 in setting out the eligibility for reestablishment expenses. Like the federal regulation, the Right of Way Manual provides "a small business, farm or nonprofit organization may be eligible to receive a payment, not to exceed \$10,000, for expenses actually incurred in relocation and reestablishing such small business."

A review of section 9.3.15 and 49 C.F.R. section 24.304 yielded two differences in the listing of ineligible expenses. The Right of Way Manual provides two ineligible expenses not found in the federal regulation. Section 9.3.15(B)(3) provides that that interior and exterior refurbishment at a replacement site for aesthetic purposes is not an eligible expense and that a person is ineligible to receive a "re-establishment expense that has already been paid to the displaced person through a business damage claim." Neither of those differences is relevant for the decision in this case.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.