

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA)
CONDOMINIUMS, TIMESHARES, AND)
MOBILE HOMES,)
)
Petitioner,)
)
vs.) Case No. 11-0180
)
WHITEHALL CONDOMINIUM OF THE)
VILLAGES OF PALM BEACH LAKES)
ASSOCIATION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 4, 2013, in West Palm Beach, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Walt Trierweiler, Esquire
Department of Business and Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: John R. Sheppard, Esquire
1818 Australian Avenue South, Suite 400
West Palm Beach, Florida 33409

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Notice to Show Cause, filed on September 14, 2010, and, if so, what action should be taken.

PRELIMINARY STATEMENT

On September 14, 2010, the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshare, and Mobile Homes (Department) filed a Notice to Show Cause against Whitehall Condominium of the Villages of the Palm Beach Lakes Association, Inc. (Whitehall). The Department charged Whitehall with failing to deliver, in the manner authorized by statute, a copy of its 2009 year-end financial statement to all of its unit owners no later than 120 days after the end of the fiscal year or other date as provided in its bylaws, in violation of section 718.111(13), Florida Statutes; and, when the 2009 year-end financial statement became available, failing to make it available to unit owners in the manner authorized by statute. Whitehall disputed the material allegations of fact, asserted affirmative defenses, and requested a hearing. On January 1, 2011, this matter was referred to the Division of Administrative Hearings.^{1/}

At hearing, the Department presented the testimony of two witnesses and entered 21 exhibits (Petitioner's Exhibits numbered 1, 2, 3, 4, 8, 9, 10, 11, 12, 19, 21, 22, 23, 26, 27,

28, 36, 38, 40, 41, and 46)^{2/} into evidence. Whitehall presented the testimony of three witnesses and entered 12 exhibits (Respondent's Exhibits numbered 1, 14, 16, 17, 18, 19, 20, 21, 51, 52, 72, and 97)^{3/} into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The transcript, consisting of two volumes, was filed on March 22, 2013. Both parties filed timely their post-hearing submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating condominiums, including condominium associations, pursuant to chapter 718, Florida Statutes.

2. At all times material hereto, Whitehall was a condominium association operating in the State of Florida.

3. At all times material hereto, Whitehall was responsible for managing and operating Whitehall Condominium in West Palm Beach, Florida.

4. Pertinent to the case at hand, regarding a condominium's year-end financial statement, section 718.111, Florida Statutes, provides in pertinent part:

(13) Financial reporting. --Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner. The division shall adopt rules setting forth uniform accounting principles and standards to be used by all associations and addressing the financial reporting requirements for multicondominium associations. The rules must include, but not be limited to, standards for presenting a summary of association reserves, including a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on the straight-line accounting method. This disclosure is not applicable to reserves funded via the pooling method. In adopting such rules, the division shall consider the number of members and annual revenues of an association. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare a complete set of financial statements in accordance with generally accepted accounting principles. The financial statements must be based upon the association's total annual revenues, as follows:

* * *

3. An association with total annual revenues of \$ 400,000 or more shall prepare audited financial statements. (emphasis added).

5. Whitehall's annual revenue is in excess of \$400,000.00. Therefore, Whitehall is required to produce audited year-end financial statements.

6. Whitehall's fiscal year coincided with the calendar year. As a result, Whitehall's 2009 year-end financial statement was due on or before May 1, 2010.

7. On December 11, 2009, Whitehall engaged Hafer Company, LLC (Hafer), a Certified Public Accountant (CPA) firm, to produce its audited 2009 year-end financial statement. Whitehall must rely upon a third-party vendor, such as Hafer, to produce its audited financial statement.

8. Hafer assigned Nicole Johnson as the auditor to produce Whitehall's audited 2009 annual financial statement.^{4/} Ms. Johnson's process involved, among other things, preparing a draft audit; providing a draft audit to the condominium board, which reviews the draft audit with Ms. Johnson; and then preparing the final audit.

9. Whitehall's engaging Hafer in December 2009 did not contribute to any delay in producing Whitehall's audited financial statement.

10. Ms. Johnson wanted to begin the auditing process early and made a request to Whitehall to begin on or about January 6, 2010, but Whitehall was not prepared to go forward at that time. She was not concerned with beginning at a later date because, among other things, her suggested date was an early date for beginning the auditing process.

11. Whitehall's day-to-day bookkeeping and accounting was performed by a third-party vendor, The Accounting Department, Inc. (Accounting).

12. On February 3, 2010, Ms. Johnson met with Accounting's representative who was handling the day-to-day bookkeeping and accounting. Having the meeting occur in February 2010 was not late or abnormal in the ordinary course of preparing an audited year-end financial statement for a condominium; and did not contribute to any delay in Ms. Johnson's producing Whitehall's audited 2009 year-end financial statement.

13. On February 3, 2010, Ms. Johnson began her field-work and received the primary bulk of the accounting information necessary to complete the audit.

14. From February 3, 2010, Ms. Johnson maintained communication, whether by telephone, email, or other methods of communicating, with Whitehall's directors and officers, and its property manager, Michael Weadock, who is a licensed Community Association Manager (CAM). Ms. Johnson's communications

included requesting additional information, asking questions, and obtaining clarifications regarding items for the audited year-end financial statement.

15. One of the items needed by Ms. Johnson to complete the audited year-end financial statement was independent verification from Whitehall's banks regarding Whitehall's certificates of deposit (CDs). Ms. Johnson, as the auditor, was responsible for obtaining the independent verification of the CDs from Whitehall's banks.

16. Due to the economic crisis, which occurred in 2009, banks nationwide were taking an unusual amount of time to respond to auditors' requests associated with the independent verification of bank account information. The banks from which Ms. Johnson was requesting independent verification were no different. She did not receive independent verification of Whitehall's CDs until after the May 1, 2010, due date for Whitehall's audited 2009 financial statement. Whitehall could do nothing to expedite the banks' response to Ms. Johnson's requests.

17. Additionally, on May 28, 2010, Ms. Johnson sent an email to Mr. Weadock requesting additional items that were outstanding. The requested items were non-bank items and were not items that would delay the completion of a draft audit, but were required for the final audit. The next business day,

Whitehall provided the requested items. Whitehall had control over these non-bank items, which delayed completion of the final audit.

18. Subsequently, Ms. Johnson received the independent verification of Whitehall's CDs from the banks. On June 23, 2010, Ms. Johnson completed Whitehall's audited 2009 Financial Statement and forwarded a copy to the Department.

19. Even though the final audit was not completed until June 23, 2010, on or about June 10, 2010, Whitehall posted on its bulletin board a notice indicating that copies of the audited 2009 Financial Statement were available in its office. However, subsequently, another notice was posted on the bulletin board indicating, among other things, that copies of the audited 2009 Financial Statement would be available at the Board of Directors Meeting on July 1, 2010, in order to provide for the completion of the audited year-end financial statement.

Whitehall does not dispute that neither notice complies with the manner/method of delivery requirement in section 718.111(13).

20. Additionally, Whitehall provided notice to its unit owners as to the availability of the audited 2009 Financial Statement through its community television channel, website, and email blast. This same manner/method of sending the notices to unit owners was used in the past by Whitehall. Whitehall does not dispute that this manner/method of providing notice does not

comply with the manner/method of delivery requirement in section 718.111(13).

21. At the time of hearing, Whitehall had not provided its unit owners with a copy of the audited 2009 Financial Statement by mail or hand-delivery.

22. Whitehall has prior disciplinary history regarding its failure timely to prepare and provide its audited year-end financial statements in prior years. On April 1, 2010, Whitehall and the Department entered a Consent Order resolving several statutory violations. One of the violations in the Consent Order was Whitehall's failure timely to prepare and provide its 2005, 2006, 2007, and 2008 audited year-end financial statements. As to this violation, the Consent Order concluded that Whitehall failed timely to prepare and provide the audited year-end financial statements for the four consecutive years. The Consent Order did not include a violation of the manner/method of delivery of notices regarding the year-end financial statements for the four consecutive years.

23. Subsequent to the Consent Order, the Department received a complaint from a one of Whitehall's unit owners regarding Whitehall's failure timely to provide a copy of the 2009 audited year-end financial statement. The Department's usual practice is that, if a repeat violation occurs within a

two-year period, administrative action is taken resulting in a consent order or notice to show cause. Considering the recent Consent Order, the Department followed its usual practice and appropriately pursued the complaint.

24. On September 14, 2010, the Department filed a Notice to Show Cause against Whitehall, which is the subject matter of the instant case.

25. Even though the unit owner's complaint did not include the manner/method in which notice was provided, the evidence fails to demonstrate that the Department was restricted to investigate only that which was complained of.

26. The evidence fails to demonstrate that the Department's investigation of a violation of section 718.111(13) by Whitehall was improper. Further, the evidence fails to demonstrate that the Department's enforcement of the requirements of section 718.111(13) was selective enforcement against Whitehall.

27. The evidence demonstrates that the Department participated in this proceeding primarily due to Whitehall having previously, within a short period of time, violated section 718.111(13) regarding Whitehall's failure timely to provide its unit owners a copy of audited year-end financial statements.

28. Additionally, the evidence fails to demonstrate that either the Department or Whitehall needlessly increased the cost of litigation in the instant case.^{5/}

29. Consequently, the evidence fails to demonstrate that the Department participated in this proceeding for an improper purpose as defined by section 120.595(1)(e)1.^{6/}

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).^{7/}

31. The Department has the burden of proof to show by clear and convincing evidence that Whitehall committed the offenses set forth in the Notice to Show Cause. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

32. Section 718.111, Florida Statutes, provides in pertinent part:

(13) Financial reporting. --Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third

party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner. The division shall adopt rules setting forth uniform accounting principles and standards to be used by all associations and addressing the financial reporting requirements for multicondominium associations. The rules must include, but not be limited to, standards for presenting a summary of association reserves, including a good faith estimate disclosing the annual amount of reserve funds that would be necessary for the association to fully fund reserves for each reserve item based on the straight-line accounting method. This disclosure is not applicable to reserves funded via the pooling method. In adopting such rules, the division shall consider the number of members and annual revenues of an association. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare a complete set of financial statements in accordance with generally accepted accounting principles. The financial statements must be based upon the association's total annual revenues, as follows:

* * *

3. An association with total annual revenues of \$400,000 or more shall prepare audited financial statements. (emphasis added).

33. The evidence is clear and convincing that the due date for Whitehall's 2009 audited financial statement was May 1, 2010. Furthermore, the evidence is clear and convincing that Whitehall failed timely to prepare and provide the 2009 audited Financial Statement, which was not complete until June 23, 2010. Additionally, the evidence is clear and convincing that Whitehall's notice provided to unit owners regarding their obtaining a copy of the 2009 audited Financial Statement was not in compliance with section 718.111(13).

34. Whitehall asserted several affirmative defenses to the Notice to Show Cause: impossibility; selective enforcement; vendor liability; substantial compliance; estoppel; and good faith and best efforts.

35. As to impossibility affirmative defense, Whitehall asserts that the 2009 audited Financial Statement could not have been provided to its unit owners until the 2009 audited Financial Statement was received from its auditor. Further, Whitehall asserts that the 2009 audited Financial Statement could not have been timely completed by its auditor due to the independent verification of Whitehall's CDs from the banks, an item required for completion of the 2009 audited Financial Statement, not being provided by the banks to the auditor until after the deadline of May 1, 2010. Even though the evidence demonstrates that the independent verification of the CDs by

Whitehall's banks was received after May 1, 2010, the evidence demonstrates further that additional non-banking information, needed to complete the audit, was requested from Whitehall by the auditor subsequent to May 1, 2010. The evidence demonstrates that Whitehall contributed to the untimely completion of the 2009 audited Financial Statement. Consequently, the evidence is insufficient to support Whitehall's impossibility defense.^{8/}

36. Regarding selective enforcement affirmative defense, Whitehall asserts that the Department selectively enforced section 718.111(13) against it. The evidence demonstrates that, in April 2010, shortly before receiving the complaint from one of Whitehall's unit owners, the Department had entered into a Consent Order with Whitehall for, among other things, Whitehall's failure timely to prepare and provide its 2005, 2006, 2007, and 2008 audited year-end financial statements. Further, the evidence demonstrates that, shortly thereafter, a complaint was filed with the Department against Whitehall for failure to provide a copy of Whitehall's 2009 audited financial statement. It was not unreasonable for the Department to pursue enforcement of section 718.111(13) against Whitehall. The evidence is insufficient to show that the Department engaged in selective enforcement.

37. As to vendor liability affirmative defense, Whitehall asserts that the auditor was responsible for and was taking responsibility for the 2009 financial statement not being prepared by May 1, 2010. Even though the evidence demonstrates that Ms. Johnson was responsible for obtaining the independent verification of Whitehall's CDs from the banks, the evidence further demonstrates that other non-banking items, which were due from Whitehall, were outstanding on and after May 1, 2010. As a result, the evidence is insufficient to demonstrate vendor liability.

38. Regarding substantial compliance affirmative defense, Whitehall asserts that it substantially complied with section 718.111(13). Section 718.111(13) does not allow for substantial compliance, but requires strict compliance with its provisions in that the said statutory provision uses the word "shall," and nowhere does it state substantial compliance. Whitehall's affirmative defense of substantial compliance fails.

39. As to the estoppel affirmative defense, Whitehall asserts that the Department should be estopped from pursuing prosecution of section 718.111(13) against it. No dispute exists that the three elements required to establish estoppel are: a representation as to a material fact that is contrary to a later asserted position; a reliance on the representation; and a change in position detrimental to the party claiming

estoppels, caused by the representation and reliance thereon. See Dep't of Rev. v. Anderson, 403 So. 3d 39, 400 (Fla. 1981). In addition to establishing the three elements, invoking estoppel against the government requires a showing of the "existence of affirmative conduct by the government which goes beyond mere negligence," that the "governmental conduct will cause serious injustice," and that "the application of estoppels will not unduly harm the public interest. (citation omitted)." Council Bros., Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994).

40. Regarding the applicability of estoppel to the administrative action taken by the Department in the instant case, the evidence fails to demonstrate the elements necessary for establishment of estoppel relating to timeliness. The evidence demonstrates that in all probability, without a repeat violation within a two-year period, no administrative action would have been taken by the Department. However, due to the Consent Order being entered into within a short period of time before the filing of the unit owner's complaint, a repeat violation had occurred within the same year of the Consent Order; and, as a result, the taking of administrative action was the norm.

41. Further, as to the applicability of estoppel to the administrative action taken by the Department in the instant

case, the evidence fails to demonstrate the elements necessary for establishment of estoppel relating to the manner of the notice to the unit owners of the audited year-end financial statements. The Department's failure to include a violation in the Consent Order, regarding the manner of the notice to the unit owners not being in compliance with section 718.111(13), failed to satisfy the requirements for estoppel.

42. As to the good faith and best efforts affirmative defense, Whitehall asserts that Whitehall acted in good faith and used its best efforts to produce the financial report in a timely and appropriate manner. Even though the evidence demonstrates that Whitehall complied with Ms. Johnson's requests for information to complete the draft financial statement, the evidence further demonstrates that, on May 28, 2010, after the deadline for completion of the audited 2009 year-end financial statement, Ms. Johnson was still requesting information required for the final financial statement. Consequently, the evidence is insufficient to demonstrate good faith and best efforts on the part of Whitehall.

43. Hence, the evidence demonstrates that Whitehall violated section 718.111(13).

44. As to penalty, the Department suggests the imposition of a penalty in the amount of \$5,000.00.

45. Florida Administrative Code Rule 61B-21.003 provides
in pertinent part:

(3) Aggravating and Mitigating Factors.
The division will consider aggravating and mitigating factors in determining penalties for violations listed in this rule chapter. The factors are not necessarily listed in order of importance, and they shall be applied against each single count of the listed violation.

(a) Aggravating Factors:

1. Filing or causing to be filed any materially incorrect document in response to any division request or subpoena.
2. Financial loss to parties or persons affected by the violation.
3. Financial gain to parties or persons who perpetrated the violation.
4. The disciplinary history of the association, including such action resulting in an enforcement resolution as detailed in Rule 61B-21.003, F.A.C., or Section 718.501, F.S.
5. The violation caused substantial harm, or has the potential to cause substantial harm, to condominium residents or other persons.
6. Undue delay in initiating or completing, or failure to take, affirmative or corrective action after the association received the division's written notification of the violation.
7. The violation had occurred for a long period of time.
8. The violation was repeated within a short period of time.
9. The association impeded the division's investigation or authority.
10. The investigation involved the issuance of a notice to show cause or other proceeding.

(b) Mitigating Factors:

1. Whether current members of the association board have sought and received educational training, other than information provided pursuant to Rule 61B-21.002, F.A.C., on the requirements of Chapter 718, F.S., within the past two years.
2. Reliance on written professional or expert counsel and advice.
3. Acts of God or nature.
4. The violation caused no harm to condominium residents or other persons.
5. The association took affirmative or corrective action before it received the division's written notification of the violation.
6. The association expeditiously took affirmative or corrective action after it received the division's written notification of the violation.
7. The association cooperated with the division during the investigation.
8. The investigation was concluded through consent proceedings.

* * *

(7) Penalties.

(a) Minor Violations. The following violations shall be considered minor due to their lower potential for consumer harm. If an enforcement resolution is utilized, the division shall impose a civil penalty between \$ 1 and \$ 5, per unit, for each minor violation. The penalty will be assessed beginning with the middle of the specified range and adjusted either up or down based upon any accepted aggravating or mitigating factors. An occurrence of six or more aggravating factors or five or more mitigating factors will result in a penalty being assessed outside of the specified range. The total penalty to be assessed shall be calculated according to these guidelines or \$ 100, whichever amount is greater. Finally, in no event shall a

penalty of more than \$ 2,500 be imposed for a single violation. The following are identified as minor violations:

* * *

Reporting 718.111(13), FS. Failure to timely provide the annual financial report

* * *

(b) Major Violations. The following violations shall be considered major due to their increased potential for consumer harm. If an enforcement resolution is utilized, the penalty will be assessed beginning with the middle of the specified range and adjusted either up or down based upon any accepted aggravating or mitigating factors. An occurrence of six or more aggravating factors or five or more mitigating factors will result in a penalty being assessed outside of the specified range. The total penalty to be assessed shall be calculated according to these guidelines or \$ 100, whichever amount is greater. Finally, in no event shall a penalty of more than \$ 5,000 be imposed for a single violation. The penalties are set forth in categories 1 and 2, for each violation as follows:

Category 1: \$ 6 - \$ 10 per unit.

Category 2: \$ 12 - \$ 20 per unit.

* * *

Reporting 718.111(13), FS. Failure to provide the annual financial report

46. In the instant case, three aggravating factors exist: the disciplinary history of the association, including such action resulting in an enforcement resolution; the violation was

repeated within a short period of time; and the investigation involved the issuance of a notice to show cause. See Fla. Admin. Code R. 61B-21.003(3)(a)4., 8., and 10. Also, one mitigating factor exists: the evidence is insufficient to show that the violation caused harm to condominium residents or other persons. See Fla. Admin. Code R. 61B-21.003(3)(b)4. However, the failure to provide a year-end financial statement to unit owners is a major violation due to its increased potential for consumer harm and for which the maximum penalty is a \$5,000.00. See Fla. Admin. Code R. 61B-21.003(7)(b).

47. As a penalty, the imposition of a \$5,000.00 penalty is reasonable under the circumstances demonstrated in the instant case.

48. Whitehall filed a Motion for Attorney Fees and Costs on August 11, 2011, and October 21, 2011, pertinent hereto, pursuant to sections 120.595 and 57.111, Florida Statutes.

49. Section 120.595 provides in pertinent part:

(1) Challenges to agency action pursuant to section 120.57(1).

* * *

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.
2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.
3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding

results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

* * *

(6) Other sections not affected. --Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney's fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney's fees and costs as provided in those sections. (emphasis added).

50. The proposed final agency action in the instant case was a finding that Whitehall violated section 718.111(13) by failing timely to deliver its audited 2009 Financial Statement to its unit owners and failing to make the audited 2009 Financial Statement available to its unit owners, when it became available, by hand-delivery or mail; and the imposition of a \$5,000.00 fine. In this Recommended Order, the undersigned agreed with the Department's proposed final agency action; and, therefore, there was no substantial change in the proposed final agency action. Whitehall is the nonprevailing adverse party as defined by section 120.595(1)(e)3. Furthermore, the evidence

demonstrates that the Department did not participate in this proceeding for an improper purpose as defined by section 120.595(1)(e)1.

51. Section 57.111, Florida Statutes (2011), provides in pertinent part:

(3) As used in this section:

* * *

(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;

* * *

* * *

(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$ 2 million, including both personal and business investments;

b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$ 2 million; or

* * *

(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.

* * *

(d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order in the case of an administrative law judge. The final order of an administrative law judge is reviewable in accordance with the provisions of s. 120.68. . . .
(emphasis added).

The condition precedent for seeking an award of attorney fees and costs, pursuant to section 57.111, is a final order. The Department has not issued a final order in the instant case. When the Department issues its final order, Whitehall will have an opportunity to seek attorney fees and costs, pursuant to section 57.111, if Whitehall believes that it satisfies the requirements for seeking such an award.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes, enter a final order:

1. Finding that Whitehall Condominiums of the Villages of Palm Beach Lakes Association, Inc., violated section 718.111(13), Florida Statutes, by failing to deliver, in the manner authorized by statute, a copy of its audited 2009 year-end financial statement to all of its unit owners no later than 120 days after the end of the fiscal year, and by failing to make audited 2009 year-end financial statement available in the manner authorized by statute, when it became available; and

2. Imposing a fine in the amount of \$5,000.00.

DONE AND ENTERED this 21st day of May, 2013, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
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

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of May, 2013.

ENDNOTES

^{1/} The Notice to Show Cause was previously before the Division of Administrative Hearings in Case No. 10-9433. An Order relinquishing jurisdiction to the Department was issued on November 8, 2010, based on the parties having settled all issues in dispute. Subsequently, on December 14, 2010, the Department filed a Motion to Reopen Case due to the parties' failure to settle the matter. By Order issued on January 11, 2011, the case was re-opened and assigned Case No. 11-0180.

^{2/} Petitioner's Exhibits numbered 31 and 32 were rejected. The Department made a proffer regarding these exhibits.

^{3/} Respondent's Exhibit numbered 33 was rejected. Respondent made a proffer regarding this exhibit.

^{4/} Ms. Johnson was accepted as an expert regarding the procedures involved in compiling the year-end financial statements for Florida condominiums.

^{5/} Although neither party needlessly increased the cost of litigation, each party came dangerously close. As examples: in a deposition advising a witness, who was not the client, that the witness may want to invoke a privilege, which caused the filing of motions; failing to comply with orders regarding a witness' deposition; failing to provide documents within the time period agreed upon; invoking an allegation of mafia ties; asserting legislative action on the basis of the instant case; and filing over 60-page and 100-page motions and responses.

^{6/} See Conclusions of Law numbered 49 and 50.

^{7/} All future references to Florida Statutes will be for 2009 and 2010, unless otherwise indicated.

^{8/} One of the cases upon which Whitehall relies in support of impossibility is Dep't of Bus. & Prof'l Reg., Div. of Condos., Timeshares, & Mobile Homes vs. Eden Isles Condo. Ass'n., Inc., Case No. 06-4482 (Fla. DOAH May 11, 2007; Fla. DBPR July 12,

2001). The issue presented in the case, which was dispositive of the case, was whether the condominium association complied with section 718.111(13) in the manner in which it provided a copy of the year-end financial statement to its unit owners or, alternatively, provided notice to its unit owners as to how they could obtain a copy of the year-end financial statement. As dicta in a Conclusion of Law, the Administrative Law Judge addressed the impossibility of the condominium association to provide a copy of the year-end financial statement or notice of its availability due to the CPA firm not providing the year-end financial statement on the due date, which fell on a Saturday, but on the following business day, which fell on the following Monday.

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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.