STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT, Petitioner, vs. CITY OF WILTON MANORS, Respondent.	)	Case No. 11-2224F

FINAL ORDER OF DISMISSAL

This case is before Administrative Law Judge John G. Van Laningham on a Motion for Attorney Fees and Costs ("Motion"), which Petitioner Department of Management Services ("Department") filed with the Division of Administrative Hearings ("DOAH") on May 2, 2011. Since then, the Department and Respondent City of Wilton Manors ("City") have responded to an Order to Show Cause, which was issued on June 16, 2011, taking opposing positions on the question of whether this case should be dismissed for lack of jurisdiction. For the reasons that follow, the undersigned now concludes, as a matter of law, that DOAH is without jurisdiction to entertain the Motion.

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STATEMENT OF THE ISSUE

The issue for determination is whether DOAH has jurisdiction to entertain an agency's motion for attorney's fees brought pursuant to section 185.05(5), Florida Statutes, where the motion was filed with DOAH approximately two and one-half years after the agency's entry of a final order in the administrative proceeding for which the agency seeks an award of attorney's fees and costs.

PRELIMINARY STATEMENT

In its Motion, the Department urges that the City be ordered, pursuant to section 185.05(5), Florida Statutes, to reimburse the Department for the costs and attorney's fees it incurred in a previous administrative proceeding styled City of

Wilton Manors v. Department of Management Services, Consolidated DOAH Case Nos. 08-4766, 09-0933, 09-0934, 09-0934, 09-0936, 09-0937, and 09-0938 (the "Previous Proceeding"). The Previous Proceeding arose from a dispute between the parties regarding premium tax revenue collected on the 1999 tax year, a portion of which revenue was to have been provided to the City for the benefit of the City's local pension plan. The dispute had begun in November 2000, when the Department notified the City that premium tax revenue would not be distributed to the City as in previous years because (the Department alleged) the City's pension plan was no longer in compliance with chapter 185 of the Florida Statutes. Petitioner timely had requested a formal hearing to contest the withholding of such funds.

The dispute regarding the distribution of the 1999 premium taxes remained pending before the Department for many years, as the parties sought to resolve the matter amicably. During that time, the Department notified the City, on an annual basis, that revenue associated with tax years 2000 through 2005, respectively, would not be distributed to the City, and each year the City timely requested a hearing. Eventually, the parties gave up on reaching a settlement, and the Department sent all seven of the City's requests for hearing to DOAH, where the matters were consolidated, becoming the litigation referred to herein as the Previous Proceeding.

The undersigned conducted a final hearing in the Previous Proceeding on April 16, 2009. Thereafter, the undersigned issued a Recommended Order, which suggested that the Department enter a final order declaring the City eligible to receive premium tax revenue. In addition, the undersigned recommended as follows:

> Finally, because the prevailing party in this proceeding is entitled to recover litigation costs and reasonable attorney's fees pursuant to Section 185.05(5), Florida Statutes, it is recommended that the Division of Retirement, in its Final Order, make an appropriate award thereof, unless a genuine dispute of material fact arises concerning the amount of such award, in which event the matter should be referred to the Division of Administrative Hearings for a formal hearing.

On October 15, 2009, the Department rendered its Final Order, which largely rejected the Recommended Order and, accordingly, denied the City recovery of any premium tax revenue for the tax years 1999 through 2005. The Department declined, as well, to make an award of costs and attorney's fees in its Final Order, or to remand the case to DOAH for a determination of the amount of such award prior to the entry of a final order, as the undersigned had recommended. The Final Order was simply silent as to the recovery of costs and attorney's fees pursuant to section 185.05(5).

The City filed a Notice of Administrative Appeal on November 3, 2009. About one year later, the Court of Appeal, Fourth District, affirmed the Final Order. City of Wilton Manors v. Dep't of Mgmt. Servs., 48 So. 3d 962 (Fla. 4th DCA 2010). There was no remand.

The City sought review of the fourth district's decision. The Florida Supreme Court, however, refused to accept jurisdiction of the City's petition for review, which brought an end to the judicial proceedings. City of Wilton Manors v. Fla. Dep't of Mgmt. Servs., 2011 Fla. LEXIS 798 (Fla., Apr. 5, 2011). At the same time, the Court granted the Department's motion for costs and attorney's fees pursuant to section 185.05(5) and "ordered that [the Department] shall recover from [the City] the amount of $2,500.00 for the services of [the Department's] attorney in this Court." Id.

CONCLUSIONS OF LAW

1. Section 185.05(5) provides as follows:

> In any judicial proceeding or administrative proceeding under chapter 120 brought under or pursuant to the provisions of this chapter, the prevailing party shall be entitled to recover the costs thereof, together with reasonable attorney's fees.

(Emphasis added).

2. As relevant, the plain language of this statute entitles the prevailing party to recover the costs and attorney's fees of

an administrative proceeding in that administrative proceeding. The statute does not prescribe the procedure by which the prevailing party in an administrative proceeding is to recover its costs and fees. Neither, however, does section 185.05(5) enlarge the jurisdiction of DOAH or any other administrative agency to adjudicate disputes, other than to authorize the making of an award of costs and fees.

3. DOAH is a "creature of statute" whose jurisdiction extends only so far as the legislature specifically provides. Grove Isle, Ltd. v. Dep't of Envtl. Reg., 454 So. 2d 571, 573 (Fla. 1st DCA 1984); see also S.T. v. Sch. Bd., 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001)(DOAH "has no common law powers, and has only such powers as the legislature chooses to confer upon it by statute."). Thus, a person cannot initiate a proceeding at DOAH by filing a petition or complaint, unless the law provides a particular administrative remedy and requires those who would avail themselves of it to petition DOAH for relief. See, e.g., § 120.56, Fla. Stat. (challenges to rules). Most cases that come before DOAH are not filed directly with DOAH, as this one was, but begin with an agency's intended decision to determine a person's substantial interests. Such preliminary agency action triggers an obligation to give the affected person a clear point of entry into the administrative adjudicative process.[1] If the person whose interests are being determined timely requests a

hearing, and if there are disputed issues of material fact, then the agency generally must refer the matter to DOAH for a formal hearing. See §§ 120.569 and 120.57. At DOAH, an administrative law judge ("ALJ") conducts the formal hearing and, after that, submits a recommended order ("RO") to the agency. The agency then renders a final order, which constitutes final agency action and is appealable as a matter of right. See, e.g., O'Donnell's Corp. v. Ambroise, 858 So. 2d 1138 (Fla. 5th DCA 2003)("Final agency action is that which brings the administrative adjudicatory process to a close."); § 120.68(1), Fla. Stat. (judicial review of agency action).

4. Once the ALJ issues an RO, DOAH's power to act in the matter ends, as jurisdiction is returned to the referring agency for the purpose of taking final agency action. Unlike the courts of the judicial branch, which can entertain various types of post-judgment motions, DOAH is not authorized generally to hear and decide post-RO motions.[2] To the extent such authority exists, it must be specifically granted by law. The same is true of other administrative agencies, whose jurisdiction in a matter——absent specific authorization by statute or rule——ends upon the rendition of a final order. (Agencies do possess the limited, inherent power to correct, within a reasonable time after rendition, clerical errors and inadvertent mistakes in

their final orders. See Taylor v. Dep't of Prof'l Reg., 520 So. 2d 557, 560 (Fla. 1988)).

5. From the foregoing basic principles of administrative law, it can be deduced that, for the prevailing party to recover the costs and attorney's fees of an administrative proceeding in that administrative proceeding pursuant to section 185.05(5), the award must be made——or, at a minimum, the entitlement thereto determined——before the administrative proceeding ends with the rendition of the final order, while the agency still has the power to act. There are two ways the Department could have accomplished this.

6. As one option, before taking final agency action in the Previous Proceeding, the Department could have issued a nonfinal order (a) notifying the City of its intent to render a final order denying the City's multiple requests for the distribution of premium tax revenue and (b) awarding the Department, as the prevailing party, costs and attorney's fees in the amount of $X unless within a specified period of time the City objected to the reasonableness of the amount, in which case the Department would remand the case to DOAH for a determination of the sum to be awarded. Had the Department done that, and had the City disputed the amount, the undersigned, on remand, could have conducted another evidentiary hearing in the Previous Proceeding, made additional findings of fact, and forwarded a recommendation to

the Department concerning the amount of costs and fees to be awarded in the Final Order. This approach would have complied strictly with section 185.05(5), albeit at the risk of litigating an issue (the reasonable amount of the Department's costs and attorney's fees) potentially for naught, given the prospect of an appeal.

7. Alternatively, the Department at least could have included in the Final Order a determination of its entitlement to an award of costs and fees pursuant to section 185.05(5), while specifying that the amount of such award would be determined in a subsequent proceeding. Then, on the authority of the Final Order, the Department could have notified the City of its determination that the Department, as the prevailing party in the Previous Proceeding, was owed costs and attorney's fees in the amount of $X, which the City would be obligated to pay unless it timely requested a hearing. In other words, the Department could have notified the City of its preliminary determination respecting the amount of the award and afforded the City a clear point of entry into an adjudicative process if it disagreed with the intended agency action. This approach would have allowed the parties to avoid potentially needless litigation over the amount of the award (because the follow-on proceeding could have been held in abeyance pending the conclusion of any appeal), while still anchoring the entitlement determination to the

administrative proceeding for which costs and fees would be recoverable.[3]

8. Instead of pursuing either of the options described above, the Department filed its Motion with DOAH——as if the Previous Proceeding were still pending here——some two and one-half years after the rendition of a Final Order that (a) brought the Previous Proceeding to a close and (b) was silent as to the Department's right of recovery under section 185.05(5). The Department, however, has not identified any law which expressly authorizes DOAH to hear and decide, as part of the Previous Proceeding, a post-RO motion for costs and fees pursuant to section 185.05(5). Such authority is plainly not conferred in section 185.05(5), which statute "must be strictly construed as it awards attorney's fees in derogation of the common law." Anchor Towing, Inc. v. Dep't of Transp., 10 So. 3d 670, 672 (Fla. 3d DCA 2009).

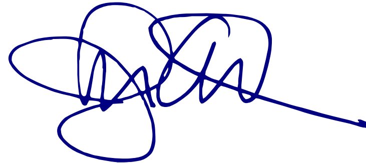
9. The Department has not identified any law, either, which authorizes the Department to initiate a new administrative proceeding by directly filing with DOAH a motion to recover the costs and fees incurred in a prior proceeding. In any event, no such authority is granted under section 185.05(5), which does not purport to create a freestanding administrative remedy. Nor has the Department cited any authority in support of its assertion that DOAH possesses final order authority to award costs and fees

pursuant to section 185.05(5)——a subject about which the statute, again, says nothing.

Upon consideration, therefore, the undersigned concludes that DOAH lacks jurisdiction to hear and decide the Motion, and it is

ORDERED that this proceeding is dismissed.[4]

DONE AND ORDERED this 11th day of July, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 11th day of July, 2011.

ENDNOTES

[1]/ It is a fundamental tenet of administrative law that when an agency determines a party's substantial interests, the agency must grant the affected party a clear point of entry into formal or informal proceedings under chapter 120, which point of entry cannot be "so remote from the agency action as to be ineffectual as a vehicle for affording [the affected party] a prompt opportunity to challenge" the decision. See, e.g., Gen. Dev. Util., Inc. v. Dep't of Envtl. Reg., 417 So. 2d 1068, 1070 (Fla. 1st DCA 1982). Moreover, unless and until a clear point of entry is offered, "there can be no agency action affecting the

substantial interests of a person." Fla. League of Cities, Inc. v. State of Fla., Admin. Comm'n, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). Indeed, absent a clear point of entry, "the agency is without power to act." Id. at 415; see also, e.g., Capeletti Bros., Inc. v. Dep't of Transp., 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978)("Absent [an express] waiver [of the right to an administrative hearing], we must regard an agency's free-form action as only preliminary irrespective of its tenor. . . . Until proceedings are had satisfying Section 120.57, or an opportunity for them is clearly offered and waived, [an agency] is powerless to" determine a party's substantial interests.)

[2]/ That DOAH is not a constitutional court suffices to distinguish Palm Beach Gardens Police Pension Fund Bd. of Tr. v. Beers, 842 So. 2d 911 (Fla. 4th DCA 2003), as do the unusual facts and circumstances of that case. In Beers, a municipal police officer named Mamak sought a disability pension under his employer's pension plan and was initially turned down. Id. at 912. Mamak requested a hearing before the plan's board of trustees to appeal the adverse decision. Mamak retained an attorney named Beers to represent him before the board and agreed to pay Beers a partial contingency fee. Id. As a result of the hearing, the board granted Mamak the disability pension he desired. Shortly thereafter, Beers demanded that Mamak be awarded attorney's fees pursuant to section 185.40, Florida Statutes (1997), which was the predecessor to section 185.05(5). The board denied the request. Id.

Following this setback, Mamak reneged on his agreement to pay Beers, prompting Beers to sue Mamak for breach of contract. Mamak filed a counterclaim alleging that Beers was in breach of contract for failing to seek costs and attorney's fees from the board. The court ultimately entered a summary judgment in Beers's favor on his claim, awarding the attorney approximately $60,000 in damages. Id. at 913.

After that, the board was made a party to the lawsuit, as both Mamak and Beers contended that the board was liable for costs and attorney's fees pursuant to section 185.40 (now section 185.05(5)). Id. The court ruled that the board was liable and ordered it to pay approximately $28,000 of Beers's fee. Both the board and Mamak appealed. Id.

The court of appeal defined the sole question for determination on the board's appeal as being "whether the proceeding before the Board [which everyone agreed had not been

an administrative proceeding under chapter 120] was a 'judicial proceeding' which, if it were, would entitle Mamak to recover his fees and costs." Id. (footnote omitted). No one, however, contended that the proceeding before the board had been a judicial proceeding. Id. Rather, Mamak and Beers argued that the term "judicial proceeding" as used in the statute should be construed to include quasi-judicial proceedings such as the hearing before the board. The appellate court rejected that contention and reversed the judgment for costs and attorney's fees against the board. Id. at 914.

The court in Beers did not address (and seems not to have considered) the question of whether the trial court should have refused to entertain Mamak's and Beers's claims that the board was liable for costs and attorney's fees under section 185.40, on the ground that the statute requires such an award to be made in the proceeding for which the recovery is sought. Curiously, moreover, the court gave no explanation for the failure of Mamak to seek judicial review of the board's refusal (which turned out to be legally correct) to award Mamak costs and fees as the prevailing party in the quasi-judicial proceeding. In any event, the trial court clearly had jurisdiction over the breach of contract actions that Beers and Mamak had brought, even if its jurisdiction over the board was suspect. As a result, Beers cannot reasonably be read as establishing the principle that section 185.05(5) authorizes the initiation of an independent administrative action before DOAH, which latter lacks even the colorable basis for acting that the trial court had in Beers.

[3]/ In this scenario, the City could have challenged, in the appeal of the Final Order determining the premium tax distribution dispute, the Department's entitlement to an award of costs and fees. Indeed, as it happens, the City argues that the Department waived its right to recover costs and fees by failing timely to plead its entitlement to such an award. The undersigned does not reach this issue because he lacks jurisdiction to decide it.

[4]/ The Department filed additional motions seeking costs and attorney's fees pursuant to sections 120.595 and 57.105, respectively. These motions, however, are based on the alleged frivolousness of the City's arguments in opposition to the Motion. As there is no jurisdiction to hear the original Motion, the subsequent motions cannot be heard either.

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.