

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AHMAD LABIB BALTAGI, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 12-2312F  
 )  
 DEPARTMENT OF BUSINESS AND )  
 PROFESSIONAL REGULATION, BOARD )  
 OF ACCOUNTANCY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on October 12, 2012, and on February 22, 2013, in Tallahassee, Florida, before Jessica E. Varn, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Frederick R. Dudley, Esquire  
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For Respondent: Gautier Kitchen, Esquire  
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STATEMENT OF THE ISSUE

Whether Petitioner, Ahmad Labib Baltagi (Mr. Baltagi), should be awarded attorney's fees and costs pursuant to section 57.111, Florida Statutes (2011), and section 57.105, Florida Statutes (2011).

PRELIMINARY STATEMENT

On July 3, 2012, the Florida Board of Accountancy entered Final Order No. 2010-031881, adopting the Findings of Fact and Conclusions of Law contained in the Recommended Order entered by the undersigned in DOAH Case No. 11-6262PL (the underlying disciplinary proceeding). In that Recommended Order, the undersigned found that the Department of Business and Professional Regulation (Department) had failed to prove by clear and convincing evidence that Mr. Baltagi (Petitioner) committed the violations that had been alleged in the Administrative Complaint.

On July 6, 2012, Mr. Baltagi filed a Petition for Attorneys Fees and Costs, seeking an award of attorney's fees and costs as a prevailing small business party, pursuant to section 57.111, Florida Statutes (2011). The instant case was assigned DOAH case

No. 12-2312F. On September 6, 2012, Mr. Baltagi filed a Motion for Sanctions pursuant to section 57.105, Florida Statutes (2011). The Department filed its Response to the Motion for Sanctions on September 18, 2012.

The parties stipulated that the disciplinary action against Mr. Baltagi was instituted by a state agency, that the Department was not a nominal party, that Mr. Baltagi was the prevailing party in the disciplinary proceeding, and that the amount of fees and costs (\$69,417.50, and \$4,725.15, respectively) being sought was reasonable.

The final hearing was scheduled for September 25, 2012. During a telephonic hearing held on September 19, 2012, Petitioner requested a continuance, which was granted. The hearing was rescheduled for October 12, 2012. On October 4, 2012, the Department filed a Motion to Compel Discovery, requesting that Mr. Baltagi produce all the documents that had been requested, on September 24, 2012, via a properly served subpoena duces tecum.

The final hearing commenced on October 12, 2012, as scheduled. During the hearing, the parties presented argument on the Motion to Compel. The Motion was granted by the undersigned, and due to the granting of the Motion, the final hearing was continued, and rescheduled for November 16, 2012.

On November 13, 2012, Petitioner filed an Emergency Motion to Continue Final Hearing, indicating that the Department had no objection to the continuance. The parties were ordered to advise the undersigned of the status of the case by December 14, 2012. A status report was filed by the parties on December 13, 2012, and the final hearing was rescheduled for February 22, 2013.

At the final hearing, Mr. Baltagi testified on his own behalf, and presented Exhibits A-S into evidence. The Department offered the testimony of Daniel Hevia, Eric Hurst, Kathleen Brown-Blake, and Alphonse Cheneler; Exhibits 1-20, and 22-26 were admitted into evidence.

A Transcript of the proceedings consisting of three volumes was filed on March 11, 2013. The parties timely filed Proposed Final Orders which have been considered by the undersigned in the preparation of this Final Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2011).

#### FINDINGS OF FACT

1. At all times relevant to this proceeding, Mr. Baltagi had been a licensed public accountant and the owner of a business known as Baltagi Business Services, Inc.

2. In 2006, the United States, on behalf of the Internal Revenue Service (IRS), filed a complaint against Baltagi, alleging that he had prepared 32 federal tax returns for Native

Americans that failed to include per-capita distributions from gaming proceeds in their taxable income.

3. Mr. Baltagi signed a Stipulated Judgment of Permanent Injunction, which provided as follows:

Pursuant to 26 U.S.C. §§ 7402(a), 7407 and 7408, defendants and their employees are permanently enjoined from:

a. preparing or assisting in the preparation of, or counseling of or advising the preparation of filing of, federal tax returns which assert that per capita distributions of gaming proceeds paid to Native Americans are exempt from federal income tax;

b. preparing or assisting in the preparation of, or counseling or advising of federal tax returns that assert any position for which there is not a realistic possibility of being sustained on its merits that results in the understatement of tax liability, or that evinces a willful, intentional, or reckless disregard for the applicable laws, rules, and regulations;

c. engaging in any fraudulent or deceptive conduct which interferes with the proper administration of the internal revenue laws.

4. In summary, the Stipulated Judgment prohibited Mr. Baltagi from preparing federal income tax returns that asserted that per capita gaming proceeds were exempt from federal income taxes, and from preparing federal income tax returns that understate tax liability by asserting any other frivolous or unrealistic position.

5. Also in 2006, Fast Cash Services, one of Mr. Baltagi's businesses, entered into a contract with iStream Financial Services, Inc., and its affiliate, Kenny Bank. Fast Cash Services was tasked with verifying identification via current driver's licenses or other appropriate form of identification for clients who sought to cash a check.

6. In July and August of 2009, Kenny Bank received multiple Department of Treasury reclamation claims from Fast Cash Services. Someone other than the named payee cashed the reclamation checks, and one of Mr. Baltagi's employees failed to notice the discrepancy.

7. As a result of these checks being cashed, the Circuit Court for Waukesha County, Wisconsin, entered a default judgment against Mr. Baltagi in the amount of \$276,160.42 in response to a complaint filed by iStream Financial Services and Kenny Bank.

8. On May 27, 2010, the Department received a complaint from the general counsel of Kenny Bank about the default judgment entered against Mr. Baltagi in Wisconsin. The complaint also included a copy of charges brought against Mr. Baltagi by the United States Department of Justice, and included the Stipulated Injunction that Mr. Baltagi had entered into with the United States government.

9. The Department conducted an investigation, which resulted in an Investigative Report. During the investigation,

the Department reviewed the IRS investigation of Mr. Baltagi for filing fraudulent tax returns; an allegation that Mr. Baltagi had failed to cooperate with the IRS during the IRS investigation; the charges brought by the Department of Justice against Mr. Baltagi for filing fraudulent tax returns; the Stipulated Judgment between Mr. Baltagi and the U.S. government; Mr. Baltagi's failure to report the injunction to the Department; a Secret Service investigation regarding Mr. Baltagi's check cashing business; the allegations made by Kenny Bank in a civil suit against Mr. Baltagi relating to his check cashing business; and the civil judgment entered against Mr. Baltagi in the civil case filed by Kenny Bank.

10. A copy of the investigative file, the investigative report, and a one-count complaint were presented to the probable cause panel on May 5, 2011. The panel members were all licensed public accountants.

11. The standard used by the probable cause panel is whether there is a reasonable belief that the allegations, if proven true, would constitute a violation of applicable law or rules.

12. The panel members engaged in a detailed discussion regarding the allegations, and questioned Mr. Baltagi at length regarding the circumstances that led to the default judgment and the permanent injunction issued by the IRS. Mr. Baltagi

testified under oath, and answered questions presented by the panel members.

13. The Complaint at this juncture only contained one count: failure to maintain good moral character, based on the circumstances that led to the default judgment in the civil case.

14. Counsel for the Board of Accountancy provided legal counsel to the panel, and recommended that a second count be added to the Complaint, based on the allegation that Mr. Baltagi's license had been acted upon by the IRS, by way of the Stipulated Judgment. The panel found probable cause for the original count, and added the second charge.

15. On June 16, 2011, the probable cause panel once again addressed the Complaint against Mr. Baltagi. The panel received advice from the Board Attorney, and also heard from Mr. Hurst, counsel for the Department. The panel believed that the IRS was a licensing authority, and that in entering a Stipulated Judgment which included a permanent injunction, the IRS had disciplined Mr. Baltagi's license. Accordingly, probable cause was once again found for two charges.

16. The materials attached to the Investigative Report, the testimony provided by Mr. Baltagi, and the legal advice provided to the panel would lead a reasonable person to conclude that there was probable cause to file the charges in the administrative complaint against Mr. Baltagi.



17. Daniel Hevia, a certified public accountant and one of the Department's expert witnesses, opined that because the allegations against Mr. Baltagi involved fraud, for both the civil suit involving the check cashing business, and the fraudulent preparation of tax returns, it was reasonable for the Department to charge Mr. Baltagi with a failure to maintain good moral character.

18. On July 5, 2011, the Department filed an Administrative Complaint, charging Mr. Baltagi with the two counts that the probable cause panel had approved.

19. On November 29, 2011, Mr. Baltagi filed a Petition for Formal Administrative Hearing, and the file was sent to DOAH. The final hearing was held before the undersigned on February 1, 2012. The undersigned entered a Recommended Order on April 12, 2012, recommending the dismissal of both charges. On July 3, 2012, the Department entered a Final Order adopting the undersigned's Recommended Order in its entirety.

20. At the final hearing in the instant attorney's fees case, Mr. Baltagi testified that his net worth was less than \$2,000,000.00 at all times during 2011.

21. However, Mr. Baltagi failed to disclose his individual tax return for 2011; evidence of jointly owned properties owned in 2011; personal and business bank accounts held in 2011; evidence of satisfied mortgages in 2011; or stocks and dividends

received in 2011 from his multiple businesses. Mr. Baltagi's testimony during the hearing was evasive, self-serving, and not credible.

22. Mr. Cheneler, a certified public accountant and attorney who reviewed all documents provided by Mr. Baltagi regarding his net worth, credibly testified that Mr. Baltagi's net worth was understated, and that it was absolutely possible that in 2011, Mr. Baltagi's net worth was in excess of \$2,000,000.00.

23. Mr. Baltagi failed to meet his burden of proving his net worth was less than \$2,000,000.00 in 2011, and therefore did not establish his status as a small business party.

24. The greater weight of the evidence demonstrates that, when initiating the disciplinary proceedings against Mr. Baltagi, the Department was substantially justified in doing so, and did not act in a frivolous manner.

#### CONCLUSIONS OF LAW

25. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111, 120.569, and 120.57(1).

26. Mr. Baltagi has the burden of proving by a preponderance of the evidence that he is entitled to an award of attorney fees and costs. See Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla.

1st DCA 1977) and Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

27. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

28. Section 57.111(4)(a), Florida Statutes, provides:

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.

29. Subsections 57.111(3)(b) and (c), provide:

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

30. Section 57.111(3)(d) defines the term "small business party" as follows:

(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

c. An individual whose net worth did not exceed \$2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade . . .

31. To prevail in this proceeding for an award of costs and fees, Mr. Baltagi must first establish that he was a small business party at the time the Department initiated the disciplinary proceedings against him. Mr. Baltagi failed to meet his burden of proof in this proceeding. He provided no credible evidence that his net worth was less than \$2,000,000.00 in 2011.

32. Substantial justification is defined in section 57.111(3) (e), as "a reasonable basis in law and fact at the time it was initiated by a state agency." Substantial justification requires that the probable cause panel had a "solid though not

necessarily correct basis in fact and law for the position it took." Fish v. Dep't of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002) (citing McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983)).

26. Although it is unnecessary to reach this level of inquiry given the fact that Petitioner failed to meet his burden of proof, the Department did establish that it was substantially justified in filing the Administrative Complaint in the disciplinary proceeding.

27. In relevant part, subsection 57.105(1) authorizes fees and costs when the losing party knew or should have known its claim was not supported by material facts at the time the claim is initially presented or at any time before trial.

28. In Murphy v. WISU Properties, 895 So. 2d 1088, 1094 (3d DCA 2004), the court explained that the standard for awarding fees under this section requires the undersigned to find the action "to be frivolous or so devoid of merit on both facts and the law as to be completely untenable."

29. Mr. Baltagi failed to show that the Department knew or should have known that the charges were not supported by material facts, or by the application of then-existing law to those facts. The greater weight of the evidence did not demonstrate that the Department's actions were frivolous or devoid of merit.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Mr. Baltagi's Motion for Attorney's Fees and Costs is denied, and his Motion for Sanctions is also denied.

DONE AND ORDERED this 22nd day of May, 2013, in Tallahassee, Leon County, Florida.



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JESSICA E. VARN  
Administrative Law Judge  
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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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.