

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT PETITO, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 12-3154F  
 )  
 CONSTRUCTION INDUSTRY )  
 LICENSING BOARD, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

On December 11, 2012, an administrative hearing was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Rosemary Hanna Hayes, Esquire  
Hayes & Caraballo  
830 Lucerne Terrace  
Orlando, Florida 32801

For Respondent: Daniel R. Biggins, Esquire  
Department of Legal Affairs  
The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue in this case is whether the Petitioner is entitled to an award of attorney's fees and costs pursuant to the statutory provisions referenced herein.

PRELIMINARY STATEMENT

In 2009, Robert Petito (Petitioner) filed an application to transfer his air conditioning contractor's license from one business entity to another. The Construction Industry Licensing Board (Respondent) proposed to approve the transfer and impose restrictions on the Petitioner's license. The Petitioner challenged the imposition of the restrictions in DOAH Case No. 10-9444. The Respondent ultimately issued the license to the Petitioner in a Final Order dated September 11, 2011. This case involves a Motion for Attorney's Fees filed by the Petitioner in relation to DOAH Case No. 10-9444, the facts of which are incorporated herein as necessary.

At the hearing on December 11, 2012, the Petitioner presented the testimony of one witness and had Exhibits 1, 2, and 4 through 8 admitted into evidence. The Respondent presented the testimony of one witness and had Exhibits 1, 5, and 6 admitted into evidence.

No hearing transcript was filed. As agreed at the hearing, both parties filed proposed orders on December 21, 2012.

Also on December 21, 2012, the Petitioner filed a Request for Extension of Time to File Transcript & Notice of Submittal of Recommended Order, wherein the Petitioner requested an extension of 30 days for the Petitioner to obtain and file a transcript of

the hearing followed by an extension of ten additional days to submit a revised proposed order. The request is hereby denied.

FINDINGS OF FACT

1. The Petitioner is a prevailing small business party.

2. In 2009, the Petitioner filed an application with the Respondent to transfer his Class B air conditioning contractor's license from one business entity to another.

3. The application form required disclosure of an applicant's criminal history. The Petitioner responded to the inquiry with a cursory disclosure of prior criminal activity, indicating that he had been involved in such activity in the "late 1970's."

4. As part of the application review process, the Respondent conducted a background investigation that revealed the Petitioner's criminal history had extended well beyond the 1970's.

5. Rather than deny the Petitioner's transfer application, the Respondent issued a Notice that provided, in relevant part, as follows:

NOTICE OF INTENT TO APPROVE WITH CONDITIONS

You are hereby notified that the Construction Industry Licensing Board (Board) voted to permit, WITH CONDITIONS, your application for change of status from one business entity to another contractor's license.

The Board reviewed and considered the application at a duly-noticed public meeting held on September 10, 2009 in Tampa, Florida. The Board determined that the application should be approved with conditions based on the following:

1. The applicant failed to sufficiently demonstrate financial stability and responsibility, pursuant to section 489.115, Florida Statutes, and Rule 61G4-15.005, Florida Administrative Code.

2. The Board had issues with applicant's moral character, pursuant to section 489.111, Florida Statutes.

3. Pursuant to section 455.227(2)(f), Florida Statutes, Applicant shall hereby be placed on PROBATION for 6 years, with 12 satisfactory appearances, according to the following terms:

A) Applicant shall be required to appear before the Probation Committee of the Board at such times as directed by the Board Office, approximately every six (6) months. Respondent's first probationary appearance requires a full day attendance at the Board meeting. In connection with each probation appearance, Applicant shall answer questions under oath. In addition, applicant shall provide such other information or documentation as is requested by the Department, the Board, or the Probation Committee. Applicant shall forward said documentation to the Board at least 30 days in advance of the probation appearance or as otherwise directed.

B) The burden shall be solely upon Applicant to remember the requirement for said appearance and to take necessary steps in advance of said appearance to contact the Board office and ascertain the specific time, date, and place of said appearance. Applicant shall not rely on getting notice

of said appearance from the Board or the Department.

C) Should Applicant violate any condition of the probation, it shall be considered a violation of Section 489.129(1)(i), Florida Statutes, and shall result in further disciplinary action by the Board.

D) Should Applicant fail to make a satisfactory appearance as determined by the Board, the term of the probationary period shall be automatically extended by six (6) months. If there occurs a second such failure then the term of the probationary period will be extended an additional year. Should the Board determine a third failure of Applicant to make a satisfactory appearance, the stay of suspension of the Applicant's license to practice contracting shall be lifted and the license shall remain in suspended status unless and until a further stay is granted by the Board.

E) Should Applicant's license to practice contracting be suspended or otherwise placed on inactive status, the probation period shall be tolled and shall resume running at the time Applicant reactivates the license, and Applicant shall serve the time remaining in the term of probation.

F) To ensure successful completion of probation, Applicant's license to practice contracting shall be suspended for the period of probation, with the suspension stayed for the period of probation. The time of the suspension and the stay shall run concurrently with the period of probation. If Applicant successfully completes probation, the suspension shall terminate. If Applicant fails to comply with the requirements set forth in the Final Order imposed in this case, or fails to make satisfactory appearances as determined by the Board, the stay shall be lifted. Once the stay is lifted, the license shall remain

in suspended status unless and until a further stay is granted by the Board.

6. The Petitioner challenged the imposition of the conditions in DOAH Case No. 10-9444.

7. The Notice cited section 455.225, Florida Statutes, as providing authority for the imposition of the conditions to the Petitioner's license. The referenced statute identified the procedures through which the Respondent could commence a disciplinary action against a licensee.

8. There was no evidence that the Respondent had commenced or concluded a disciplinary proceeding against the Petitioner prior to the proposed imposition of the license conditions.

9. The Notice identified two reasons for the proposed imposition of license conditions.

10. First, the Notice stated that the Respondent "had issues with the [Petitioner's] moral character." Second, the Notice stated that the Petitioner "failed to sufficiently demonstrate financial stability and responsibility pursuant to section 489.115, Florida Statutes and Rule 61G4-15.006, Florida Administrative Code."

11. At the hearing on May 26, 2011, the Petitioner submitted evidence sufficient to demonstrate compliance with the cited provisions of statute and rule.

12. A Recommended Order was issued on July 1, 2011, recommending that the Petitioner's application be approved. As set forth in the Recommended Order, the Administrative Law Judge had determined that the Respondent lacked authority to impose disciplinary conditions absent commencement of a disciplinary proceeding, and the Petitioner had complied with the requirements related to financial stability and responsibility at the hearing.

13. By Final Order dated September 8, 2011, the Respondent granted the Petitioner's license transfer application. The Final Order adopted the Findings of Fact set forth in the Recommended Order.

14. The Final Order rejected four paragraphs from the Conclusions of Law section of the Recommended Order that addressed the Respondent's authority to impose disciplinary conditions under the circumstances of this case. The remaining Conclusions of Law in the Recommended Order were accepted.

15. The Petitioner is seeking an award of attorney's fees of \$41,554.00 and costs of \$1,702.96, for a total award of \$43,256.96.

16. The evidence fails to establish that the amount of the attorney's fees and costs sought by the Petitioner are reasonable, and there has been no stipulation by the parties thereto.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 57.107, 120.569 and 120.57(1), Fla. Stat. (2012).

18. The Petitioner has the burden of establishing by a preponderance of the evidence that he is entitled to an award of attorney's 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). The burden has not been met.

19. Section 57.105, Florida Statutes (2009), provides, in relevant part, as follows:

Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.--

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense;  
or



(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

\* \* \*

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

\* \* \*

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid

by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

20. The evidence fails to establish that the Respondent, or its attorney, knew or should have known that the action would not have been supported by facts or law. To the contrary, the Petitioner failed to disclose his criminal history accurately and did not comply with financial stability and responsibility requirements at the time he filed the application. There is no evidence that the Petitioner complied with the financial stability and responsibility requirements referenced herein prior to the May 2011 hearing.

21. The Respondent's Final Order of September 8, 2011, rejected the portion of the Recommended Order's Conclusions of Law related to its authority to impose disciplinary conditions under the circumstances of this case, and the Final Order remains the law of the case.

22. The evidence fails to establish that the Respondent took any action in this case for the purpose of unreasonable delay.

23. Section 57.111, Florida Statutes (2009), provides for an award of attorney's fees and costs to a "prevailing small business party" in an administrative proceeding, "unless the actions of the agency were substantially justified or special

circumstances exist which would make the award unjust." The referenced statute provides that a proceeding is substantially justified, "if it had a reasonable basis in law and fact at the time it was initiated by a state agency." Presuming that a party establishes that it is a "prevailing small business party," the agency has the burden of establishing that its action in initiating the proceeding was "substantially justified." Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998). The "substantially justified" standard falls somewhere between the "no justiciable issue" standard and an automatic award of fees to a prevailing party. Id.

24. In this case, the evidence establishes that the Respondent was substantially justified at the time it took action on the Petitioner's application. As previously noted, the Petitioner failed to disclose his criminal history accurately on his application and did not comply with financial stability and responsibility requirements when the application was filed. The Respondent had a reasonable basis in fact and law to support the proposed action at the time it was taken.

25. The Petitioner has also asserted entitlement to an award of fees and costs under Section 120.569(2)(e), Florida Statutes (2009), which provides as follows:

All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the

party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

26. The evidence fails to establish that the Respondent filed any pleading, motion, or other paper in this case for an improper purpose to harass or to cause unnecessary delay, for frivolous purpose, or to needlessly increase the cost of litigation.

27. Section 120.595, Florida Statutes (2009), provides for an award of reasonable attorney's fees and costs where a "nonprevailing adverse party" has been determined to have participated in the proceeding for an "improper purpose." In this case, the Respondent is the nonprevailing adverse party. Section 120.595(1)(e)1., Florida Statutes (2009), provides the following definition:

"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.

28. The evidence fails to establish that the Respondent participated in the proceeding for an improper purpose. Again, the Petitioner's application failed to disclose his criminal history accurately, and he did not comply with financial stability and responsibility requirements at the time it was filed.

29. The Respondent proposed to grant the application with conditions, rather than to deny the application for its deficiencies. There is no evidence that the Respondent did so primarily to harass or delay the Petitioner, for any frivolous purpose, or to needlessly increase the costs related to the application.

ORDER

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

1. The Petitioner's Motion for Attorney's Fees is hereby DENIED.

2. The file of the Division of Administrative Hearings is CLOSED.

DONE AND ORDERED this 17th day of January, 2013, in  
Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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Filed with the Clerk of the  
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this 17th day of January, 2013.

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 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.