STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| FRANK CLEATON, P.E., | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 12-3640F |
| | ) | |
| FLORIDA BOARD OF PROFESSIONAL ENGINEERS, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

FINAL ORDER

On February 7, 2013, a duly-noticed hearing was held in this case in Tallahassee, Florida, before F. Scott Boyd, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael John McCabe, Esquire
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Jacksonville, Florida 32207

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For Respondent: John Jefferson Rimes, III, Esquire
Board of Professional Engineers
Florida Engineers Management Corporation
2639 North Monroe Street, Suite B 112
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## STATEMENT OF THE ISSUE

Whether Petitioner is entitled to attorneys' fees and costs as a prevailing small business party pursuant to section 57.111, Florida Statutes, and if so, in what amount.

## PRELIMINARY STATEMENT

On November 7, 2012, the Florida Board of Professional Engineers (FBPE or the Board) issued a Final Order dismissing disciplinary charges which had been filed against Petitioner in DOAH Case No. 12-000257PL (the merits case). Petitioner's Motion for Attorney Fees and Costs as a prevailing small business party was filed in the dismissed merits case on November 9, 2012. The Equal Access to Justice Act (EAJA) vests final order authority with the administrative law judge, so the Motion was treated as a Petition for Attorneys' Fees and Costs in a new proceeding, and docketed as DOAH Case No. 12-3640F.

Although Petitioner had not served Respondent with a copy of the Motion for Attorneys' Fees and Costs, he filed a Notice of Default and Request for Entry of Final Order on November 30, 2012. The Order Denying Petitioner's Request for Entry of Final Order was issued on December 10, 2012. On December 12, 2012, Petitioner filed a Motion to Disqualify Opposing Counsel and to Strike Improperly Filed Papers. Respondent filed a Motion for Sanctions under section 120.569(2)(e) on December 14, 2012, alleging that Petitioner had filed pleadings for an improper

purpose. The Order Denying Motion to Disqualify Opposing Counsel was issued on December 28, 2012. On January 2, 2013, Petitioner's Motion to Drop "Florida Engineers Management Corporation on Behalf of the Florida Board of Professional Engineers" as a Party/Respondent and to Restyle the Action was filed. On January 9, 2013, a Joint Motion for Sanctions alleging that Petitioner had filed pleadings for an improper purpose was filed by the Board and by the Department of Business and Professional Regulation. The two Motions for Sanctions were considered at the final hearing on February 7, 2013, and were denied.

At hearing, Petitioner offered the testimony of two witnesses and offered 18 exhibits, P-A through P-R, all of which were admitted with the exception of Exhibit P-G, which was found unduly repetitious and was not admitted. Respondent offered the testimony of two witnesses and offered 25 exhibits, R-A through R-Y, all of which were admitted without objection.

At the parties' request, a deadline of 20 days after receipt of the Transcript was established for filing Proposed Final Orders. The Transcript was received on March 18, 2013. Both parties timely submitted Proposed Final Orders on April 8, 2013, which were considered in the preparation of this Order.

## FINDINGS OF FACT

1. On or about January 14, 2011, an application to construct a swimming pool and spa with screen enclosure was filed with the City of Deland by Bill Coody Custom Pools (Coody), a construction contractor. The application was reviewed by Mr. Joe Crum, a Deland building official involved with construction permit approval. Mr. Crum rejected the application because the design criteria and details for the design of the screen enclosure appeared to constitute a master design manual, but did not indicate that the documents had been peer-reviewed and did not indicate the required training for users of the manual.

2. A master design manual is a generic engineering package prepared by a licensed engineer or architect, which provides engineering guidance for construction when used along with a contractor's own site-specific design drawing. The documents submitted to Mr. Crum included generic load and span tables for various framing elements and generic construction details for screen enclosures, and appeared to leave selection of various elements to contractors depending on the site-specific design.

3. The documents had been provided to Coody by Mr. Frank Cleaton, P.E. Mr. Crum contacted Mr. Cleaton on or about January 24, 2011, about the failure of the documents to meet the requirements for master-design-manual engineering.

4. After Mr. Crum's inquiry, Mr. Cleaton prepared a letter dated January 26, 2011, authorizing Coody to use "my sealed engineering set of design criteria and details for the design of aluminum structures." The letter further provided in relevant part:

> In accordance with Florida Statute 489.113(9), this sealed engineering set is intended to be used as a reference in conjunction with the contractor's own site-specific design drawing. The contractor's drawing is not required to be sealed by me as the engineer of record as per FS 489.113(9). It is only required to be in compliance with what is set forth in my sealed design set.

Design documents for the 135 Birchmont Drive screen enclosure were also signed and sealed by Mr. Cleaton on January 26, 2011, after the inquiry from Mr. Crum. These included only one site-specific document. All other drawings contained the same generic load and span tables, with some elements of those tables circled or otherwise identified for incorporation into the Birchmont structure.

5. The site-specific drawings for the Birchmont screen enclosure were submitted with a permit application filed by Coody.

6. According to the drawings of the Birchmont screen enclosure, the structure is less than 1,200 square feet in area and less than one story in height.

7. The Florida Engineers Management Corporation (FEMC) provides administrative, investigative, and prosecutorial services to the Board of Professional Engineers.

8. On or about February 9, 2011, FEMC received an e-mail from Mr. Crum alleging that Davis and Cleaton Engineering was providing a master design manual for aluminum structures that did not meet statutory requirements for the use of master design manuals.

9. The following day, Ms. Wendy Anderson,[1/] an investigator for FEMC, requested additional information from Mr. Crum.

10. On or about February 11, 2011, at about 11:47 a.m., FEMC received an e-mail from Mr. Crum referencing "improper master file engineering." Attached to the e-mail was a copy of the permit application package for the screen enclosure located at 135 Birchmont Drive, Deland, Florida, that had been submitted to the Deland Building Department by Coody. The permit application package included documents signed and sealed by Frank Cleaton, P.E.

11. The documents provided to FEMC by Mr. Crum did not identify any third-party peer reviewer or detail the training requirements for those using the manual.

12. The determination that there was enough information to open an investigation was made by Ms. Anderson in consultation with the FEMC prosecutor, Mr. John Rimes.

13. FEMC had reasonable cause to believe that Mr. Cleaton had violated section 489.113(9), Florida Statutes (2010), based upon the e-mails from Mr. Crum and the documents he provided.

14. After receiving the copy of the "file with the improper master engineering," Ms. Anderson opened a Complaint File with FEMC, Case No. 2011007349.

15. On March 22, 2011, Ms. Anderson provided notice of the investigation to Mr. Cleaton.

16. The only formal pre-Probable Cause Panel notification given to Mr. Cleaton of any pending complaint regarding the design for the Birchmont project was the letter sent on March 22, 2011.

17. The March 22, 2011, letter from Ms. Anderson advised Mr. Cleaton that he had the option to submit a written response to the complaint for consideration by legal staff and the Probable Cause Panel (PCP) of the Board. It also advised him that he could submit a written request for a copy of the investigative file that would be provided to him once the investigation was complete.

18. Mr. Cleaton never requested that he be provided a copy of the investigative file.

19. A letter dated March 31, 2011, from Mr. Cleaton to Ms. Anderson was received by FEMC on or about April 11, 2011. The letter stated that Mr. Cleaton had “clearly and specifically

told the building department" that the package was not to be considered a master design manual. The response also stated that a "signed and sealed drawing" had been provided "as if it were" a site-specific project. The letter concluded by saying that no further "packages" would be issued until the matter was resolved, and that if necessary, Mr. Cleaton would "participate in a peer review."

20. The construction documents that had been given to Coody appeared to be a master design manual to the Deland building officials, FEMC staff, and later to members of the PCP.

21. Mr. Joseph Berryman is a licensed professional engineer experienced in the design and analysis of commercial and industrial structures.

22. Mr. Berryman has never supervised construction or conducted a final inspection of an aluminum patio shelter or screen enclosure.

23. Mr. Berryman is an expert in structural engineering. He was well known to the members of the PCP as a consulting expert for the Board. He had rendered expert opinions to the Board in several recent license discipline proceedings involving aluminum screen enclosures.

24. At Ms. Anderson's request, Mr. Berryman reviewed the e-mail correspondence from Mr. Crum to FEMC, the correspondence from Mr. Crum to Coody, the January 26, 2011, authorization

letter from Mr. Cleaton for Coody, the two-page permit application, and a one-page drawing showing the framing plan and elevations for the Birchmont screen enclosure.

25. In a letter to Mr. Rimes dated April 15, 2011, Mr. Berryman concluded that the statements in the Coody authorization letter were consistent with the definition of master design manual system as addressed by section 489.113(9). He further concluded that if Mr. Cleaton wanted to continue to utilize a master design manual, he would need to obtain peer review and comply with the other requirements set forth in that statute.

26. On or about May 31, 2011, Mr. Crum sent an e-mail to Ms. Anderson with an attached copy of an unsigned Uniform Complaint Form, which is utilized by the Board to document complaints. The e-mail stated that Mr. Crum thought he had sent the complaint form earlier, but then realized he had not done so. The e-mail asked if FEMC needed him to fax another copy of the Uniform Complaint Form with his signature on it. The complaint form outlined Mr. Crum's earlier allegation that Mr. Cleaton was providing a master design manual for aluminum structures that did not meet the third-party peer review or training requirements of section 489.133(9), Florida Statutes.

27. There was no evidence that FEMC ever contacted Mr. Crum in response to his inquiry about the need for another

copy of the complaint form with his signature. Mr. Crum never provided a signed copy of his complaint to FEMC.

28. There was no evidence of any prejudice to Mr. Cleaton resulting from the fact that the complaint was not signed.

29. In light of Mr. Cleaton's April 11, 2011, representation to FEMC that the documents were not being utilized as a master design manual, FEMC decided to "take him at his word" and consider the documents to have been prepared as signed and sealed engineering for a site-specific project.

30. FEMC staff decided to investigate the engineering in the documents that had been provided to them, and asked Mr. Berryman to review them as part of the investigation. FEMC had no reasonable cause to believe that there was anything wrong with the engineering contained in the documents for the screen enclosure. Ms. Anderson did testify that, in her experience, a high percentage of construction plans for aluminum screen enclosures contained engineering flaws, but she was not familiar with either Mr. Cleaton or the Birchmont structure and did not have any information suggesting that these particular engineering documents were deficient.

31. FEMC's decision to investigate the engineering contained in the documents that had been given to them in connection with the complaint did not initiate a new investigation, but instead continued the investigation that had

already begun, albeit taking that investigation in a new direction.

32. Mr. Cleaton was not informed by FEMC of this change in the direction of the investigation.

33. Mr. Berryman completed calculations for his review of the construction plans for the screen enclosure prior to June 20, 2011, but he did not provide a copy of those calculations with his report.

34. In a letter addressed to Mr. Rimes dated June 20, 2011, Mr. Berryman identified various omissions of required information as well as flaws in the engineering designs and design assumptions contained in the construction documents, including the identification of several overstressed elements and violations of the Florida Building Code (FBC or the Code). Mr. Berryman concluded that, "As indicated above, Mr. Cleaton has failed to utilize due care in performing in an engineering capacity and has failed to have due regard for acceptable standards of engineering principles."

35. The June 20, 2011, report from Mr. Berryman was a competently prepared and adequately sourced engineering opinion.

36. Any procedural errors or irregularities in the investigative stage did not impair Petitioner's defense.

37. Based substantially upon Mr. Berryman's report, a proposed Administrative Complaint was prepared. Four counts

alleged that the engineering documents for the Birchmont structure failed to include required information (counts 4A through 4D); three counts alleged that specific elements used in the Birchmont structure were overstressed at 2007 FBC prescribed design loading (counts 4E through 4G), alleging, for example, that the "2x5 SMB roof beam elements of the subject structure are significantly overstressed at 2007 FBC (Table 2002.4) prescribed design loading"; four counts alleged elements in column and beam schedules that were not utilized for the Birchmont structure were overstressed at 2007 FBC prescribed design loading (counts 4H, 4J, 4L, and 4M); two counts alleged that elements contained in column and beam schedules, only some of which were used in the Birchmont Structure, were overstressed at 2007 FBC prescribed design loading (counts 4I and 4K); and the two remaining counts (4N and 4O) contained generic allegations that the elements of the screen enclosure and the elements in the span tables were not engineered in accordance with the strength requirements of the 2007 FBC.

38. On September 20, 2011, the PCP of the Board of Professional Engineers found probable cause to charge Mr. Cleaton with violating section 471.033(1)(g), Florida Statutes, by being negligent in the practice of engineering.

39. The transcript of the probable cause proceeding shows that Mr. Rimes summarized the case for the members of the PCP

and that they did not discuss the allegations prior to their vote finding probable cause. Mr. Rimes incorrectly stated that FEMC had received a complaint with regard to the quality of the work.

40. Each member indicated that he had thoroughly read and reviewed the materials provided prior to the meeting. The transcript also shows some discussion of the facts of the case, but only after the vote. Mr. Rebane's questions showed that he was aware that at different times during the investigation, issues regarding both master design omissions and deficient engineering in the signed and sealed engineering documents had been considered. Mr. Hahn's comments showed he was aware that Petitioner had asserted that the drawings were signed and sealed documents for the Birchmont structure and even indicated that he believed Petitioner "made things worse for himself" by doing so. The members of the PCP were generally familiar with the extensive materials that were provided to them, the details of the case, and Mr. Berryman's opinion.

41. The PCP had previously been provided copies of the Issue Analysis and Staff Recommendation; the Investigative Report; the letter from Mr. Crum to Coody regarding the plans for the Birchmont screen enclosure; several e-mails between Ms. Anderson and others, including Mr. Crum, Mr. Rimes, and Mr. Cleaton; the authorization letter for Coody from

Mr. Cleaton; the Application for Permit submitted for the Birchmont structure to the City of Deland; the engineering drawings for the structure; the letter dated March 31, 2011, from Mr. Cleaton to Ms. Anderson in response to the original complaint; the April 15, 2011, opinion letter from Mr. Berryman to Mr. Rimes, but without the second page; the unsigned Uniform Complaint Form submitted by Mr. Crum on or about May 31, 2011; the second opinion letter from Mr. Berryman to Mr. Rimes, dated June 20, 2011; and a draft of the proposed Administrative Complaint.

42. The missing second page from the April 15, 2011, opinion letter continued a list of the documents that had been reviewed by Mr. Berryman, set forth the allegations made by Mr. Crum, and contained the following statement: "The problem at the building department was apparently resolved by the submittal of signed and sealed site-specific engineering for the project by Mr. Cleaton." The missing page did not contain Mr. Berryman's opinion and contained no information contradictory to the conclusions in the opinion letter.

43. While Petitioner argues that the above-quoted sentence dispelled "any scintilla of justification" for the investigation, this conclusion is rejected. In fact, notwithstanding Mr. Cleaton's statement to the building department that the documentation was not to be considered a

master design manual, the opinion letter goes on to conclude that this statement of Mr. Cleaton's was inconsistent with other statements he made and that the documents fail to include elements required by section 489.113(9).

44. The absence of the missing page was not a material flaw in the probable cause proceedings. First, the two pages that were provided to the PCP accurately represented the entire opinion letter. Second, the April 15, 2011, opinion letter addressed Mr. Crum's original allegations as to the failure to comply with the requirements of section 489.113(9), relating to master design manuals, which was not the ultimate basis for the Administrative Complaint. It was Mr. Berryman's subsequent opinion letter dated June 20, 2011, also provided to the PCP, which provided the basis for the Administrative Complaint.

45. Mr. Berryman's calculations were not included among the materials given to the PCP.

46. An Administrative Complaint reflecting the September 20, 2011, findings of the PCP was issued on September 30, 2011, and was subsequently served upon Mr. Cleaton.

47. The Administrative Complaint was styled "Florida Board of Professional Engineers v. Frank Cleaton, P.E." It was accompanied by an Election of Rights form, headed with "State of Florida, Florida Engineers Management Corporation," advising

Mr. Cleaton of his right to request an informal or formal hearing within 21 days of receipt of the Administrative Complaint.

48. The complaint was filed by FEMC on behalf of the Board.

49. The Department of Business and Professional Regulation (the Department) played no active role in the investigation or prosecution of the case.

50. FEMC did not notify the Deland Building Department or the owner of the screen enclosure of its finding of "17 serious material deficiencies."

51. Pursuant to Mr. Cleaton's demand, an evidentiary hearing under sections 120.569 and 120.57(1), Florida Statutes, was scheduled to be heard on September 25, 2012.

52. On or about March 2, 2012, Mr. Berryman submitted to FEMC the calculations he had performed prior to his June 20, 2011, opinion letter to FEMC, so that they could provided to Petitioner.

53. Mr. Cleaton's expert, Mr. Thomas Campbell, submitted a report dated September 12, 2012, which was provided to FEMC the following day. Mr. Campbell concluded that the Birchmont screen enclosure plans met the "evolving" FBC (2007-2010)[2/] and the Aluminum Design Manual (2005). He concluded the screen enclosure was adequately built and safe. His report asserted

that any errors in the engineering tables that were not actually used in constructing the Birchmont structure should be considered irrelevant. The report stated that all maximum member moments were "well below allowable" and all member interaction ratios (axial and bending) were well below 1.0, with one exception. The 2 x 2 section exceeded that ratio by less than 9 percent and was in tension. The report concluded that this was well within the acceptable range for the conservative evaluation that was conducted.

54. Mr. Berryman reviewed Mr. Campbell's report and concluded that his analysis failed to determine allowable stresses for the aluminum framing members in accordance with the 2005 Aluminum Design Manual, as was required by the FBC. Mr. Berryman found that Mr. Campbell's opinions did not comply with accepted engineering practice and that his analyses were unreliable and replete with errors.

55. However, Mr. Berryman also examined some load test results for self-mating beams that had been prepared for "Aluminum Enclosures Suppliers Council" and "Town and Country Industries, Inc.," aluminum manufacturing companies in the State of Florida, which had been supplied along with Mr. Campbell's opinion. These test results were proprietary information that was not available to Mr. Berryman prior to Mr. Campbell's report. While these data were incomplete and had not been

verified by industry professionals and regulatory authorities, Mr. Berryman concluded that they suggested at least the possibility of an alternate method of determining allowable stresses that might be helpful to Mr. Cleaton's designs. Although the data in the test reports diverged from the design methodology described as acceptable in the FBC, the Code allows some departures from these standards when an alternative analysis has been reasonably justified. Mr. Berryman therefore recommended that many of the charges in the Administrative Complaint should not be pursued until the proprietary data could be validated or invalidated.

56. On September 21, 2012, Respondent filed an unopposed Motion to Cancel Hearing, Relinquish Jurisdiction and Close File. An Order Closing File was issued by the administrative law judge on September 21, 2012.

57. On September 27, 2012, Respondent filed a Motion to Dismiss Administrative Complaint and Close File with the Board. Petitioner did not respond to the Motion. On November 7, 2012, the Board entered its Final Order dismissing the Administrative Complaint filed against Petitioner.

58. Mr. Cleaton is a prevailing small business party within the meaning of section 57.111, Florida Statutes.

59. On November 9, 2012, Petitioner filed a Motion for Attorney Fees and Costs with DOAH seeking attorneys' fees and costs under the provisions of section 57.111.

60. Mr. Cleaton incurred attorneys' fees and costs in defending his license against the Administrative Complaint initiated by the Board. Attorneys' fees in the amounts of $11,456.25 for Sheppard, White, and Kachergus, P.A., and $30,247.50 for McCabe Law Group, P.A., are reasonable.

61. Mr. Cleaton retained the services of Mr. Campbell to be his expert witness. Mr. Campbell in turn enlisted the services of NuVision, an engineering company he owns, to assist in preparations for his testimony. Mr. Campbell is an expert in structural engineering. Mr. Campbell and NuVision are based in Pennsylvania.

62. The claimed expert witness fees of $48,037 are excessive. This amount reflected some 176 hours spent by three engineers, 16 hours for their administrative support, and $22 for travel expended at NuVision, as well as an additional 65 hours of time spent by Mr. Campbell, 30 hours of administrative support for him, and $715 in travel spent by Mr. Campbell's firm, TEC Enterprises. Testimony offered by Mr. Campbell indicated that the claimed hours represented only about half of those actually expended, and that none of the claimed costs were

for time spent in learning specific requirements unique to Florida, such as the FBC.

63. A reasonable cost for Petitioner's expert witness was $15,000. Mr. Berryman credibly testified that 100 hours of time would have been ample for the engineering work; that $250 per hour for a supervising engineer, $200 per hour for a senior engineer, and no more than $100 per hour for an entry-level engineer were reasonable rates; and that senior engineers were not required to do the necessary calculations. Allocating 25 hours to Mr. Campbell as supervising engineer and 75 hours for entry-level engineers to make the calculations, and applying the hourly rates mentioned in this paragraph would be reasonable. Adding another 5 hours of Mr. Campbell's time at the supervising engineer rate for the final preparation of his testimony and actual hours at the deposition is reasonable.

64. No special circumstances exist that would make an award of fees and costs unjust.

65. The documentation provided to the PCP was not misleading, was not missing critical information, and contained required allegations of fact. The PCP's finding was supported by expert opinion and had a solid basis in law and fact.

66. The PCP's actions in directing the filing of an Administrative Complaint were substantially justified.

## CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this case pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes (2012).[3/]

68. Respondent is charged with regulating the practice of engineering pursuant to chapter 471, Florida Statutes.

69. Pursuant to section 471.038, Florida Statutes, FEMC is charged with providing administrative, investigative, and prosecutorial services to Respondent in accordance with the provisions of chapters 455 and 471.

70. In light of the provisions of section 471.038, the Department plays no active role in the investigation or prosecution of professional engineers, and is only a nominal party in this proceeding.

71. Petitioner is a professional engineer licensed under chapter 471 who has incurred attorneys' fees and costs in defending his license against an Administrative Complaint.

72. Section 57.111, denominated the Florida Equal Access to Justice Act (FEAJA), is designed to offset expenses incurred by a small business successfully defending against "unreasonable governmental action" in an administrative proceeding. Dep't of HRS v. S. Beach Pharmacy, 635 So. 2d 117, 118 n.1 (Fla. 1st DCA 1994).

73. Section 57.111(4)(a) 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 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.

Petitioner's Burden

74. Initially, it is Petitioner's burden under the statute to show that he is a small business and is the prevailing party. Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Dep't of Prof'l. Reg. v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

75. The parties have stipulated that Petitioner is a prevailing small business party. Section 57.111(3)(c)3. provides in relevant part that a small business party is a "prevailing small business party" when the state agency has sought a voluntary dismissal of its complaint. The parties did not stipulate as to the state agency involved, and this was one of many disputes in pre-hearing pleadings.

76. Section 57.111(3)(f) provides that the term "state agency" has the meaning described in section 120.52(1).

77. The Florida Board of Professional Engineers is an agency within the meaning of section 120.52(1)(b), which includes each "governmental entity" in Florida having statewide

jurisdiction. Dep't of Prof'l Reg. v. Le Baron, 443 So. 2d 225 (Fla. 1st DCA 1983)(holding Board of Dentistry was agency head under chapter 120 for purposes of issuing order of dismissal in license disciplinary proceeding). As an agency under section 120.52, the Florida Board of Engineers is also a state agency under section 57.111(3)(f).

78. Section 57.111(3)(b) provides in relevant part that the phrase "initiated by a state agency" means that the state agency filed a request for an administrative hearing, or 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.

79. An Administrative Complaint styled "Florida Board of Professional Engineers v. Frank Cleaton, P.E.," was served on Petitioner shortly after the finding of probable cause. It advised Petitioner of his right to request an informal or formal hearing within 21 days of receipt. Petitioner was required to be advised of such a point of entry into administrative proceedings by Florida Administrative Code Rule 28-106.111. The Administrative Complaint was referred to DOAH on January 17, 2012.

80. The relationship between FEMC and the Board is unusual, and is not set forth in great detail in the statutes. The language of section 471.038(3) does make clear that FEMC is

not itself a state agency, but is a nonprofit corporation primarily acting as an instrumentality of the State in providing "prosecutorial services," among others, to the Board. It is the Board which exercises the power of the State to regulate the practice of engineering and which directs[4/] FEMC to prosecute. Under these circumstances, the Board is the state agency which "initiated" the Administrative Complaint against Petitioner within the meaning of section 57.111(3).

81. Petitioner's application for attorneys' fees and costs was timely. Section 57.111(4)(b)2. directs that application be made within 60 days after the date the small business party prevails. Dep't of HRS v. S. Beach Pharmacy, 635 So. 2d 117, 121 (Fla. 1st DCA 1994). Petitioner became the prevailing small business party on November 7, 2012, and filed his Motion for Attorney Fees and Costs on November 9, 2012.

Compensability of Fees and Costs

82. It is Petitioner's burden to show that attorneys' fees and costs claimed are compensable and in what amount. Lewis v. Thunderbird Manor, Inc., 60 So. 3d 1182, 1183 (Fla. 2d DCA 2011); Nasser v. Nasser, 975 So. 2d 531, 532 (Fla. 4th DCA 2008).

83. Respondent disputes that Petitioner is entitled to any attorneys' fees and costs under section 57.111, as discussed below. Should attorneys' fees be authorized, however,

Respondent does not contest the reasonableness of the amount of $11,456.25 for Sheppard, White, and Kachergus, P.A., or $30,247.50 for McCabe Law Group, P.A.

84. Respondent does object to the reasonableness of the $18,615 expert witness costs for Mr. Campbell, and the $29,422 claimed for NuVision's services.

85. The Florida Supreme Court has adopted Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, effective January 1, 2006. In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So. 2d 612 (Fla. 2005). The parties stipulated to the applicability of the guidelines in this section 57.111 proceeding. The guidelines are advisory only, however, and there is broad discretion as to the taxation of costs in any particular proceeding. Winter Park Imps., Inc. v. JM Family Enters., 77 So. 3d 227, 230 (Fla. 5th DCA 2011); Madison v. Midland Nat'l Life Ins. Co., 648 So. 2d 1226, 1228 (Fla. 4th DCA 1995) (deviation appropriate depending on facts of the case as justice may require).

86. The guidelines do not specify factors that should be considered when determining a reasonable fee for deposition or trial testimony. They do not necessarily restrict experts' fees to time actually spent testifying. Winter Park Imps., Inc. v. JM Family Enters., 77 So. 3d 227, 231 (Fla. 5th DCA 2011). In the instant case, where review of not only Petitioner's

engineering work product but also the report of Respondent's expert witness was required, it was appropriate to include adequate preparation time.

87. The time Petitioner's expert reasonably spent in preparing for deposition, including time necessary to formulate his opinion by investigating, testing, researching, and conferring with other professionals, is taxable as part of the expert's deposition fee. Cf. Brascom v. Hillsborough Cnty. Sheriff's Office, 65 So. 3d 619 (Fla. 1st DCA 2011)(new guidelines did not prohibit award for expert's time expended in pre-trial conference with counsel). Petitioner is required to provide evidence of a reasonable hourly rate and number of hours reasonably expended, just as in the case of attorneys' fees. Paravant, Inc. v. Langford, 79 So. 3d 75 (Fla. 5th DCA 2011); Elder v. Islam, 869 So. 2d 600, 602-03 (Fla. 5th DCA 2004).

88. The Florida Supreme Court has cautioned that discretion as to costs should be exercised "in a manner that is consistent with the policy of reducing overall costs of litigation and of keeping such costs as low as justice will permit." Winter Park Imps., Inc. v. JM Family Enters., 77 So. 3d 227, 232 (Fla. 5th DCA 2011)(quoting In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So. 2d at 614, 616 (Fla. 2005)). In light of this admonition and the credible testimony of Respondent's expert that 100 hours would have been

ample to prepare the engineering report, the claimed expert witness fees of $48,037 are excessive. Reasonable costs for expert witness preparation and testimony would include 30 hours for a supervising engineer at $250 per hour and 75 hours for an entry-level engineer at $100 per hour, for a total of $15,000. Petitioner failed to prove any greater costs were reasonable or necessary to prepare his expert for deposition.

89. Section 57.111(4)(d)2. provides that no award of attorneys' fees and costs for an action initiated by a state agency shall exceed $50,000.

90. Petitioner established a prima facie case of entitlement to attorneys' fees and costs as a prevailing small business party.

Respondent's Burden

91. Respondent may avoid an award of fees and costs if it proves that special circumstances exist which would make an award unjust or that its actions were "substantially justified" as that term is defined in section 57.111(3)(e). "It is the agency which must affirmatively raise and prove the exception." Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

92. Respondent does not suggest, and no evidence was presented to show, that special circumstances exist that would make an award of fees and costs unjust.

93. In order to prevail due to "substantially justified" actions, Respondent must prove that it had "a solid though not necessarily correct basis in fact and law for the position it took in the action." Casa Febe Ret. Home, Inc. v. Ag. for Health Care Admin, 892 So. 2d 1103, 1106 (Fla. 2d DCA 2004); Fish v. Dep't of Health, Bd of Dentistry, 825 So. 2d 421 (Fla. 4th DCA 2002).

94. An agency's action is not "substantially justified" simply because it is not frivolous; it must have a stronger foundation. Dep't of HRS v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). In Department of Insurance v. Florida Bankers Association, 764 So. 2d 660 (Fla. 1st DCA 2000), it was stated: "[I]n terms of Florida law, the 'substantially justified' standard falls somewhere between the no justiciable issue standard of section 57.105, Florida Statutes (1991), and an automatic award of fees to a prevailing party."

Investigatory Process

95. Before turning to the information that was before the PCP, Petitioner's contentions that the subsequent finding of probable cause had no solid basis in law because of FEMC's lack of authority or flaws in the investigatory process will be considered. First, Petitioner contends that FEMC has no authority to determine legal sufficiency. FEMC's citation to its statutory authority is persuasive on this point, however.

A finding that a complaint is legally sufficient is a preliminary step in the investigatory process. Wood v. Bd. of Prof'l Eng'rs and Dep't of Bus. & Prof'l Reg., Case No. 12-2900RU (Fla. DOAH Feb. 20, 2013)(setting forth legislative history of the statutes governing the relationship between FEMC and FBPE, outlining the steps of the investigatory process, and finding that the power to determine legal sufficiency was delegated to FEMC as part of the power to investigate). Section 471.038(3) vests FEMC with the power and responsibility to provide administrative, investigative, and prosecutorial services to Respondent "in accordance with the provisions of chapter 455" and chapter 471. Included among these powers and responsibilities are those usually performed by the Department pursuant to section 455.225, including the authority to make determinations as to the legal sufficiency of complaints and to initiate investigations.

96. Any further contention by Petitioner that the statute vesting FEMC with power to make legal sufficiency determinations constitutes an unconstitutional delegation of a sovereign function to a private entity is a question for the courts, not DOAH. The Administrative Procedure Act does not purport to confer authority on administrative law judges to invalidate statutes. Gulf Pines Mem'l Park v. Oaklawn Mem'l Park, 361

So. 2d 695, 699 (Fla. 1978); Comm. Workers, Local 3170 v. City of Gainesville, 697 So. 2d 167, 170 (Fla. 1st DCA 1997).

97. Second, Petitioner argues that the statutory criteria necessary for FEMC to undertake an investigation were not met. Specifically, Petitioner asserts that the complaint was never signed, and that there was therefore no basis for the investigation which preceded and supported the finding of probable cause. Petitioner showed that the complaint filed by Mr. Crum was never signed, but Petitioner's contention that this fact vitiates the finding of probable cause is not persuasive.

98. As noted earlier, FEMC's authority to initiate investigations of professional engineers parallels the authority of the Department with respect to professions regulated by other boards. Section 455.225(1)(a) provides:

> The department, for the boards under its jurisdiction, shall cause to be investigated any complaint that is filed before it if the complaint is in writing, signed by the complainant, and legally sufficient. A complaint is legally sufficient if it contains ultimate facts that show that a violation of this chapter, of any of the practice acts relating to the professions regulated by the department, or of any rule adopted by the department or a regulatory board in the department has occurred. In order to determine legal sufficiency, the department may require supporting information or documentation. The department may investigate, and the department or the appropriate board may take appropriate final action on, a complaint even though the original complainant

> withdraws it or otherwise indicates a desire not to cause the complaint to be investigated or prosecuted to completion. The department may investigate an anonymous complaint if the complaint is in writing and is legally sufficient, if the alleged violation of law or rules is substantial, and if the department has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true. The department may investigate a complaint made by a confidential informant if the complaint is legally sufficient, if the alleged violation of law or rule is substantial, and if the department has reason to believe, after preliminary inquiry, that the allegations of the complainant are true. The department may initiate an investigation if it has reasonable cause to believe that a licensee or a group of licensees has violated a Florida statute, a rule of the department, or a rule of a board.

99. Petitioner focuses on the first sentence above, concluding that because the complaint from Mr. Crum was not signed, FEMC had no authority to investigate. Yet further examination of this statute reveals multiple bases for beginning an investigation, and purposeful use of "shall" and "may." The statute requires the Department (and therefore FEMC) to investigate written, signed, legally sufficient complaints. It authorizes, but does not require, investigation of certain other complaints that are withdrawn, made anonymously, or made by confidential informants. Finally, and most broadly, the statute authorizes the Department to initiate an investigation whenever there is reasonable cause to believe that a statute or rule has

been violated. This last broad category does not require a formal complaint at all, so long as there is reasonable cause. Cf. Mercy Hosp. v. Dep't of Prof'l Reg., Bd. of Med. Exam'r, 467 So. 2d 1058, 1059 (Fla. 3d DCA 1985)(investigation begun upon notification under section 458.337(1)(a) that hospital had suspended staff privileges of physicians). While a formal complaint may be usual, FEMC is not helpless to proceed in the absence of formal complaint where reasonable cause exists.

100. Even if a formal complaint were required, Mr. Crum, whose responsibilities as a building official included construction permit review and approval, sent the e-mail from his City of Deland account. Under these circumstances, there is no indication that a procedural failure to sign the complaint prejudiced Petitioner in any way or would be anything but a harmless error. Since a formal complaint was not actually required, communication from a municipal building official alleging facts that would constitute violations of a Florida Statute, supported by copies of the documents which had been filed, provided reasonable cause for an investigation.

101. Third, Petitioner asserts that the investigation was fatally flawed because FEMC, after preliminary inquiry into the original complaint made by Mr. Crum, determined not to pursue it, and therefore needed reasonable cause to expand the investigation into any other areas. Petitioner responded to the

original complaint by indicating that the package provided to Coody was not to be considered a "master design manual," but was instead signed and sealed engineering for a site-specific project. Petitioner showed that this response was accepted by FEMC. Since Mr. Crum's complaint concerned procedural requirements for master design manuals, and FEMC had no information suggesting that the engineering involved was itself deficient, Petitioner argues that any further actions of Respondent were nothing more than a "fishing expedition" and that the investigation should have been closed.

102. On this point, Respondent cites Department of Insurance and Treasurer v. Bankers Insurance Company, 694 So. 2d 70, 73 (Fla. 1st DCA 1997), arguing that an agency's investigative decisions should be upheld "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." However, that case bears only a slight resemblance to the present one. It involved a statute granting the Department of Insurance power to "conduct such investigations into insurance matters, in addition to investigations expressly authorized, as it may deem proper to determine whether any person has violated any provision of this code." The court's conclusions there -- that no violation of the Insurance Code need be alleged as a prerequisite to investigation, and that the agency's power could

be compared to that of a grand jury -- were expressly predicated on that broad statutory grant. The argument that FEMC has similarly unrestricted investigatory authority is rejected as being contrary to the language of section 455.225.

103. On the other hand, section 455.225 is also quite different from section 106.25, Florida Statutes, pertaining to the Florida Elections Commission, which was also cited by Respondent. That statute expressly confines the Election Commission's investigative authority to only those alleged violations contained within a complaint. Jennings v. Fla. Elections Comm'n, 932 So. 2d 609 (Fla. 2d DCA 2006)(charges filed following complaint, but not specifically alleged in it, dismissed based upon subsequent enactment of statute restricting Commission's jurisdiction to those violations alleged).

104. Whether charges of an unwarranted "fishing expedition" might prevail under other circumstances -- where FEMC's change in investigatory direction involved the enforcement of new subpoenas, for example -- is a question for another day. In the instant case, FEMC did not even seek additional information. It merely re-examined information already provided to it as part of the original complaint.

105. Further, FEMC's viewing of this information in a different light was prompted by Petitioner's own response, provided to FEMC as part of the investigation, that his

engineering was "not to be considered as a master design manual" but was instead a "signed and sealed drawing." However disingenuous this response, in light of his other statements and his actions to immediately change the character of the documents based upon Mr. Crum's inquiry, if Petitioner now claimed to be the engineer of record of site-specific drawings, that altered his responsibilities and reasonably raised questions as to his compliance with statutes other than 489.113(9). It was not unreasonable or beyond its statutory authority for the Board to investigate all violations which reasonably arose from facts that the originally filed complaint and Petitioner's response had already put before it.

106. Fourth, Petitioner suggests that even if FEMC did have authority to redirect the investigation after receiving Petitioner's response to the original complaint, it was required to inform him of any new allegations before bringing his case before the PCP.

107. Section 455.225(1)(b) provides:

> When an investigation of any subject is undertaken, the department shall promptly furnish to the subject or the subject's attorney a copy of the complaint or document that resulted in the initiation of the investigation. The subject may submit a written response to the information contained in such complaint or document within 20 days after service to the subject of the complaint or document. The subject's written response shall be considered by the

> probable cause panel. The right to respond does not prohibit the issuance of a summary emergency order if necessary to protect the public. However, if the secretary, or the secretary's designee, and the chair of the respective board or the chair of its probable cause panel agree in writing that such notification would be detrimental to the investigation, the department may withhold notification. The department may conduct an investigation without notification to any subject if the act under investigation is a criminal offense.

108. Section 455.225(1)(b) thus does not give the subject of an investigation the right to be informed of each new development or change in scope of the investigation, but only to be provided a copy of the complaint or document which resulted in the initiation of the investigation. FEMC did this. Neither can this statutory opportunity to respond to the initiating document be expanded into a full-blown right to contest the allegations at any point prior to the hearing subsequently to be afforded pursuant to chapter 120. W. Frank Wells Nursing Home v. Ag. for Health Care Admin, 979 So. 2d 339, 341 (Fla. 1st DCA 2008)(parties not entitled to hearing to settle issues of fact in agency's investigation); Dep't of Prof'l Reg., Div. of Real Estate v. Toledo Realty, 549 So. 2d 715, 719 (Fla. 1st DCA 1989)(PCP process not subject to section 120.57, which is applicable only after the complaint has been filed).

109. Petitioner did have a statutory opportunity to make a written request to inspect, or make a copy of, the investigative

file once it was complete, and was advised of this right in the March 22, 2011, letter from Ms. Anderson. Section 455.225(10) provides in relevant part:

> Upon completion of the investigation and pursuant to a written request by the subject, the department shall provide the subject an opportunity to inspect the investigative file or, at the subject's expense, forward to the subject a copy of the investigative file. The subject may file a written response to the information contained in the investigative file.

There was no evidence that Petitioner ever availed himself of this opportunity to review the completed investigative file or respond to it.

110. Even assuming that Petitioner had been able to demonstrate error on the part of FEMC in opening the investigation without a signed complaint, in expanding the scope of the investigation, or in failing to advise Petitioner of its new direction, there was no evidence that any of these actions impaired Petitioner's defense. Procedural failures in the investigatory stage must be considered harmless error in the absence of evidence that they impaired the fairness of the proceedings or the correctness of the action. There was no such impairment here. Carter v. Dep't of Prof'l Reg., 633 So. 2d 3, 6 (Fla. 1994)(violation of procedural timeframes of section 455.225 was not jurisdictional; should be analyzed under harmless error rule); Carrow v. Dep't of Prof'l Reg., 453 So. 2d

842 (Fla. 1st DCA 1984)(failure to inform doctor of nature of complaint against him pursuant to section 455.225(1) was subject to harmless error rule); Beckum v. State, 427 So. 2d 276, 277 (Fla. 1st DCA 1983)(failure to record PCP proceedings was procedural error governed by 120.68(8) review, and was not jurisdictional in nature).

Probable Cause Panel

111. As noted earlier, Respondent must prove that it had a solid basis in both fact and law for the position it took in the action. The information before the PCP will be considered in light of each of these related requirements.

112. In determining whether there was substantial justification for filing an Administrative Complaint against a licensee, the focus is upon the facts that were before the PCP. Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002); Dep't of Prof'l Reg. v. Toledo Realty, 549 So. 2d 715, 716 (Fla. 1st DCA 1989); Kibler v. Dep't of Prof'l Reg., 418 So. 2d 1081 (Fla. 4th DCA 1982).

113. Petitioner first asserts that FEMC's prosecutor, Mr. Rimes, provided misinformation to the PCP when he stated that FEMC had "received a complaint with regard to the quality of the work." The evidence is uncontroverted that the original complaint was concerned with failure to follow statutory requirements for the use of master design manual engineering.

While Mr. Rimes may have intended his remark in a very general sense to include failure to meet procedural requirements, Petitioner is correct: the statement was not accurate in context. The original complaint from Mr. Crum had nothing to do with the quality of the engineering work, which was the basis for FEMC's recommended Administrative Complaint. It was only later that the investigation shifted to consider this, as discussed earlier. However, this misstatement by Mr. Rimes must be considered in light of all of the other information that had been provided to the PCP. The members had not only received a Investigative Report which set forth in detail the original complaint and the course of the investigation which followed, but also the e-mails that had passed between Mr. Crum and FEMC, the letter from Mr. Crum to Coody, two opinion letters from Mr. Berryman, and the unsigned Uniform Complaint Form. It is concluded that the members of the PCP were well aware of the nature of the original complaint and were not misled by Mr. Rimes' statement.

114. Petitioner next argues that the information before the PCP was incomplete because Mr. Berryman's calculations were not included. However, the panel did have Mr. Berryman's letter of June 20, 2011, which comprehensively reviewed the engineering drawings. That letter not only set forth his conclusions that there were omissions in Petitioner's construction documents and

failures to design in accordance with the 2007 FBC, but also identified the specific omissions and overstressed elements in great detail. Mr. Berryman was well-known to the members of the PCP as their consulting expert in structural engineering. The calculations themselves were not required.

> It is not necessary for the probable cause panel to go behind the opinions of consultants hired by the Department, and to make independently their own examination of records, duplicating the evaluation of the consultant. If they must do so, there is little purpose in retaining consultants to review cases and little utility in having lay members of probable cause panels.

Arias v. Dep't of Prof'l Reg., Bd. of Med. Case No. 90-3932F (Fla. DOAH July 1, 1991). See also Kayan v. Ag. for Health Care Admin, Case No. 96-2016F (Fla. DOAH Aug. 21, 1996).

115. Petitioner next asserts that "what the Probable Cause Panel reviewed was an investigative report that simply stated an opinion: 'Mr. Cleaton's work product did not meet acceptable standards of practice.'" But the Investigative Report did not contain only a bare opinion, it contained specific allegations of fact in support, asserting, for example, that the "2x5 SMB roof beam elements of the subject structure are significantly overstressed at 2007 FBC (Table 2002.4) prescribed design loading." This assertion, and others contained in the Investigative Report, is a detailed assertion of fact. Petitioner contests their accuracy, of course, but this does not

change their character as specific allegations of fact supporting charges of negligence. This report alone may have been sufficient to support a finding of probable cause. Dep't of Prof'l Reg., Div. of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715, 719 (Fla. 1st DCA 1989)(section 455.225 procedures suggest an investigative report may be the most substantial and relevant evidence necessary in deciding whether probable cause exists).

116. The PCP also had additional information before it, including copies of the engineering drawings for the structure; the letter dated March 31, 2011, from Mr. Cleaton to Ms. Anderson in response to the original complaint; the April 15, 2011, opinion letter from Mr. Berryman to Mr. Rimes, but without the second page; the unsigned Uniform Complaint Form submitted by Mr. Crum on or about May 31, 2011; the second opinion letter from Mr. Berryman to Mr. Rimes, dated June 20, 2011; and the proposed Administrative Complaint.

117. Petitioner argues next that the PCP did not consider the materials adequately. It is clear that no matter how comprehensive the materials available to the PCP, if those materials are not considered, the PCP's decision is not substantially justified. Thompson v. Dep't of Health, 7 So. 3d 1150, 1151 (Fla. 2d DCA 2009)("rubber stamping," as evidenced by lack of discussion of facts or issues by probable cause panel

and fact that no panel member noted that seven pages of materials were obscured, was insufficient). See also Kibler v. Dep't of Prof'l Reg., 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982)(determination of probable cause clearly implies the need for some form of evaluation by the panel).

118. The missing page in the instant case could have been detected by the members because of the page numbers and the flow of the narrative, but the fact that the Transcript of the probable cause hearing does not reflect that any member noticed this is not fatal under the circumstances. The missing page contained no information important to the recommended charges in the Administrative Complaint.

119. It is true there was no substantive discussion by the members of the panel before the vote in the instant case, and were that the sole evidence of evaluation, Kibler might well control. However, the PCP transcript reveals that the members were in fact generally familiar with the details of the case, as well as Mr. Berryman's conclusions. While more discussion on the record would have been desirable, the evidence showed that the members of the PCP were familiar with the extensive materials that had been provided to them and that they did not simply "rubber stamp" the proposed Administrative Complaint without evaluation.

120. Petitioner next turns to the basis in law for the board's action. First, it should be noted that the Administrative Complaint was drafted with precise attention to each factual conclusion in Mr. Berryman's opinion letter of June 20, 2011, with citation to appropriate rules and statutes governing negligence in the practice of engineering. The complaint did not cite to inapplicable or non-existent law or rules. Cf. Casa Febe Ret. Home, Inc. v. Ag. for Health Care Admin, 892 So. 2d 1103, 1106 (Fla. 2d DCA 2004).

121. Petitioner next argues that the information presented to the PCP provided no basis in law for some charges in the Administrative Complaint that had no application to the Birchmont structure. Petitioner asserts, "Respondent's expert did not view the site, did not review the as-builts, and did not perform any field analysis of the alleged defects." Mr. Campbell's expert report asserted that any errors in the engineering tables in the sealed documents that were not actually used in constructing the Birchmont structure should be considered irrelevant. As noted above, it is true that four counts (4H, 4J, 4L, and 4M) referred to engineering in column and beam schedules that were not utilized for the Birchmont structure. Petitioner argues that even if that engineering was defective, which Petitioner disputes, charges based on portions

of the documents unrelated to the Birchmont structure could not legally constitute negligence.

122. Florida Administrative Code Rule 61G15-19.001(4) provides in relevant part:

> (4) A professional engineer shall not be negligent in the practice of engineering. The term negligence set forth in Section 471.033(1)(g), F.S., is herein defined as the failure by a professional engineer to utilize due care in performing in an engineering capacity or failing to have due regard for acceptable standards of engineering principles. Professional engineers shall approve and seal only those documents that conform to acceptable engineering standards and safeguard the life, health, property and welfare of the public.

123. While 4 of the 15 charges in their entirety, and others in part, had no specific applicability to the Birchmont structure, only one site-specific drawing was submitted. The remaining pages of the documents which were signed and sealed were generic engineering documents with notations. Mr. Berryman asserted in his affidavit, which was available to the PCP, that "Mr. Cleaton certified compliance of his generic engineering package (Drawings D1 through D8 & D11) with the 2007 FBC just next to his seal and signature at the base of each page . . . ." Respondent's position is that Petitioner approved the documents and the engineering reflected in them, not just that engineering immediately applicable to the Birchmont structure, and that all

of his work therefore had to conform to acceptable engineering standards.

124. While either position is plausible, neither Petitioner nor Respondent cite to any Florida cases on the issue of whether a signed and sealed document containing generic engineering under the unusual circumstances of this case constitutes negligence.

125. Whether or not these sealed engineering documents constituted negligence in the practice of engineering need not be decided here.[5/] The issue is instead whether the PCP had a reasonable basis in law under section 57.111 to issue the Administrative Complaint based upon the information that was before it.

126. FEAJA is modeled after the EAJA, 5 U.S.C. section 504. Florida courts have looked to federal law in interpreting the Florida Act. Gentele v. Dep't of Prof'l Reg., Bd. of Optometry, 513 So. 2d 672, 673 (Fla. 1st DCA 1987)(citing federal law for the proposition that a determination to prosecute which turns on a credibility assessment has a reasonable basis in law and fact).

127. Federal courts have held that government action is substantially justified when it is premised upon a plausible interpretation of a statute that has not previously been ruled upon. See, e.g., TKB Int'l v. U.S., 995 F.2d 1460, 1468 (9th

Cir. 1993)(government's interpretation of tax law supportable where close question of law involved); Trahan v. Brady, 907 F.2d 1215, 1219 (D.C. Cir. 1990)(position substantially justified where government applied plausible interpretation of statute in absence of judicial interpretation). Even if the Board's interpretation of the statute should subsequently turn out to be incorrect, this would not mean that the action by the PCP was not substantially justified. Pierce v. Underwood, 487 U.S. 552, 569 (1988)(government could take a position that is substantially justified, yet lose in subsequent litigation).

128. Petitioner next asserts, as its primary argument that the charges were not substantially justified, that Mr. Cleaton's engineering is sound. Petitioner argues that consideration of the opposing expert testimony in this case reveals that engineering experts can disagree, and that FEMC could therefore never have proved the negligence charges by clear and convincing evidence. But attorneys' fees cases often arise after a hearing has proved exactly what Petitioner asserts here, that the government is unable to prove its case. That fact alone is not sufficient for the award of fees under section 57.111. In fact, Petitioner's assertion that this case is ultimately about conflicting expert opinions serves only to resolve the attorneys' fees issue here against Petitioner, for the PCP was entitled to rely upon the credibility of Mr. Berryman.

129. A decision to prosecute based upon the credibility of an expert opinion has a reasonable basis in fact and law. See Dep't of Health v. Thomas, 890 So. 2d 400, 401 (Fla. 1st DCA 2004); Gentele v. Dep't of Prof'l Reg., Bd. of Optometry, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

130. The PCP was justified in accepting the opinion of its expert that the engineering documents failed to include required information and provided for elements that were significantly overstressed and out of compliance with the FBC. The opinion letter identified specific facts concerning the engineering contained in the documents, which, if proven, demonstrated faulty engineering. If the PCP accepted Mr. Berryman's engineering opinion, as it was entitled to do, it could certainly have concluded that Mr. Cleaton was negligent, as defined in Florida Administrative Code Rule 61G15-19.001(4).

131. The PCP considered more than enough information to provide a reasonable basis in both law and fact for the charges in the Administrative Complaint. Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002)(some evidence considered by the panel must reasonably indicate violation, but need not be so compelling as that required at hearing).

132. While Respondent ultimately decided to dismiss the Administrative Complaint, the later information upon which it

based that decision is not relevant here. It is well-settled that in determining whether an agency's action was substantially justified, only the information available to the PCP at the time that it acted should be considered. Ag. For Health Care Admin v. MVP Health, Inc., 74 So. 3d 1141, 1144 (Fla. 1st DCA 2011). "Subsequent discoveries do not vitiate the reasonableness of the actions of the board at the time they made their probable cause determinations." Dep't of Health, Bd. of Phys. Therapy Practice v. Cralle, 852 So. 2d 930, 933 (Fla. 1st DCA 2003); Ag. for Health Care Admin v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995).

133. Respondent proved that its actions in directing the filing of an Administrative Complaint were substantially justified.

CONCLUSION

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

ORDERED:

The Motion for Attorney Fees and Costs filed by Petitioner pursuant to section 57.111, Florida Statutes, is DISMISSED.

DONE AND ORDERED this 24th day of April, 2013, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of April, 2013.

ENDNOTES

[1/] Ms. Wendy Anderson used to be known as Ms. Wendy Gregory and that name was used in some exhibits and pleadings. The name Anderson is used throughout this Order to minimize confusion.

[2/] The report noted that although the 2007 FBC did specify the use of a 300 pound load, there had been "significant discussions in the industry" that this load was too restrictive and that the appropriate load should be 200 pounds. It also asserted that it had become "accepted practice" to use 200 pounds, and that the 2010 FBC allowed some elements to be designed for a 200 pound load.

[3/] All references to statutes and rules are to the versions in effect in 2012, the time that the Administrative Complaint was dismissed and Petitioner became a prevailing small business party, except as otherwise indicated.

[4/] More commonly, the Department files complaints when directed to do so by the probable cause panels of the Boards assigned to it, as the language of section 455.225(4) makes clear. This statute clearly places the power and responsibility to make the decision to file a formal complaint with the probable cause

panel, not the Department, even when the Department acts as prosecutor. See Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421, 423 (Fla. 4th DCA 2002)(panel of the Board of Dentistry found probable cause and "directed the filing of an Administrative Complaint").

[5/] The United States Supreme Court has noted the danger in addressing previously undecided substantive legal questions arising from the merits case in an attorneys' fees award case where the law remains unsettled at the time of the EAJA appeal. " . . . a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion." Pierce v. Underwood, 487 U.S. 552, 561 (1988).

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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.