

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BAYHEAD LANDINGS PROPERTY OWNERS
ASSOCIATION, INC., A FLORIDA
NOT-FOR-PROFIT CORPORATION;
KIMBALL LEE; WILLIAM BARTHLE;
AND TONY KOLKA,

Petitioners,

vs.

Case No. 13-2438F

FLORIDA COMMISSION ON HUMAN
RELATIONS,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on December 5, 2013, by video teleconference in St. Petersburg and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH), pursuant to the authority set forth in sections 120.569 and 120.57(1), Florida Statutes. The parties were represented as set forth below.

APPEARANCES

For Petitioners: Gary M. Schaaf, Esquire
Stuart Jessup Barks, Esquire
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For Respondent: David A. Organes, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Florida Commission on Human Relations (FCHR), should pay Petitioners' attorney's fees and costs under section 57.111, Florida Statutes (2013),^{1/} the Florida Equal Access to Justice Act, for initiating DOAH Case No. 12-2074.

PRELIMINARY STATEMENT

On May 2, 2013, FCHR entered a Final Order adopting the Findings of Fact and Conclusions of Law contained in the Recommended Order entered by the undersigned in DOAH Case No. 12-2074 (the underlying proceeding). In that Recommended Order, the undersigned found that Petitioner, FCHR on behalf of John and Kimberly Whitt, failed to prove their claim of discrimination.

On July 1, 2013, Bayhead Landings Property Owners Association, Inc., a Florida not-for-profit corporation; Kimball Lee; William Barthle; and Tony Kolka (Association) filed a Petition to Award the Association Attorneys' Fees as the Prevailing Party (Fees Petition) against FCHR, seeking an award

of attorney's fees and costs as a prevailing small business party, pursuant to section 57.111(4) (a).

On July 1, 2013, the case was referred to DOAH, and assigned DOAH Case No. 13-2438F. Following the granting of an FCHR Amended Motion for Extension of Time to Respond to the Petition, the case was scheduled for hearing on December 5, 2013, and heard on that date.

At hearing, as a preliminary matter, FCHR made an ore tenus motion to change the style of the case to reflect that John and Kimberly Whitt were not parties to this proceeding. The Association did not object to this motion and it was granted. FCHR asked that judicial notice be taken of DOAH Case No. 12-2074, chapter 760 of the Florida Statutes, and FCHR Case No. 2012H0038 (the underlying FCHR case matter). The Association did not object to this request and it was granted. The parties filed a pre-hearing stipulation which contained several "Admitted Facts." To the extent any of those admitted facts are relevant, they are included in this Order.

Petitioners presented the testimony of Graeme Woodbrook. Petitioners' Exhibits 1 and 2 were offered and admitted into evidence. Respondent presented the testimony of Cheyanne Costilla.^{2/} Respondent's Exhibits 1 through 3 were offered and admitted into evidence.

The Transcript of the proceeding was filed on December 19, 2013. Petitioners asked to file the proposed order 15 days after the filing of the Transcript. Respondent did not object. Prior to the filing date, the parties filed a Joint Motion for Extension of Time to File Proposed Recommended Orders.^{3/} The extension was granted and the parties timely filed their Proposed Final Orders.

On January 10, 2014, Petitioners' Notice of Filing Additional Documentation in Support of Their Proposed Final Order on Petition to Award the Association Attorneys' Fees as Prevailing Party (additional notice) was filed. Petitioners averred that the documents contained in the additional notice (the Complaint and Final Judgment in the Sixth Circuit Court Case No. 51-2010-CA-5795) were discussed during the hearing. A review of the Transcript reflects that other "litigation" with the Whitts was discussed, but not a specific court case or a specific court case number. Official court records may be reviewed. However, the documents were not produced or noticed during the hearing, and have not been reviewed in the preparation of this Final Order.

FINDINGS OF FACT

1. On August 15, 2011, John and Kimberly Whitt (Whitts) filed a complaint of housing discrimination with the United

States Department of Housing and Urban Development alleging disability discrimination.

2. FCHR conducted an investigation of the complaint. During the investigation, the investigator obtained statements and documents from both parties. The investigator's final investigative report (Determination, found within Respondent's Exhibit 1) detailed the investigation.

3. The Determination dated December 21, 2011, concluded that "there [was] reasonable cause to believe that a discriminatory housing practice occurred in violation of 804(f) (3) (A) of the Fair Housing Act, as amended."

4. On March 2, 2012, FCHR issued a Legal Concurrence: Cause. The Legal Concurrence, drafted by FCHR's senior attorney, concluded that "there [was] reasonable cause to believe that Respondents [Association] discriminated against Complainants [the Whitts] in violation of 42 U.S.C. §§ 3604(b) and (f) (2) (A) and section 760.23(2) and (8) (a), Florida Statutes."

5. On March 5, 2012, FCHR's executive director executed the Notice of Determination (Cause), charging that there was reasonable cause to believe that the Association had engaged in a discriminatory housing practice.

6. The Whitts elected to have FCHR represent them to seek relief in an administrative proceeding against the Association. On June 14, 2012, FCHR filed a Petition for Relief (Relief

Petition) with DOAH seeking an order prohibiting the Association from engaging in any unlawful housing practices, and granting damages.

7. The final hearing in the underlying case was held before the undersigned on December 12, 2012. The undersigned entered a Recommended Order on February 15, 2013, recommending the dismissal of the Relief Petition filed on behalf of the Whitts. On May 2, 2013, FCHR entered a Final Order dismissing the petition for relief filed on behalf of the Whitts.

8. The Association was the prevailing party in the underlying case. The Association is a not-for-profit corporation that does not have any employees. The Association relies solely on volunteers to run its operations. It has never had a net worth of two million dollars or more.

9. The Association was represented by counsel and co-counsel in both proceedings. In the Fees Petition, the Association alleged it had incurred \$75,657.00 in legal fees. At hearing, the Association provided a document which reflected that \$5,945.00 in fees should not have been attributed to the instant case, thus setting the amount the Association was seeking at \$69,712.00. However, the Association acknowledged that section 57.111(4)(d) 2., Florida Statutes, limited the recovery of attorney's fees and costs to \$50,000.

10. FCHR is a "state agency" for the purposes of this proceeding. See §§ 120.57(1) and 57.111(3)(f), Fla. Stat.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 57.111, 120.569 and 120.57, Florida Statutes.

12. Section 57.111 provides in pertinent part:

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

(3) As used in this section:

(a) The term "attorney's fees and costs" means the reasonable and necessary attorney's fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding.

(b) The term "initiated by a state agency" means that the state agency:

* * *

2. Filed a request for an administrative hearing pursuant to chapter 120; or

* * *

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

* * *

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

* * *

1.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

* * *

(e) 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.

(f) The term "state agency" has the meaning described in s. 120.52(1).

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

* * *

(d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an

evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order in the case of an administrative law judge. The final order of an administrative law judge is reviewable in accordance with the provisions of s. 120.68. If the court affirms the award of attorney's fees and costs in whole or in part, it may, in its discretion, award additional attorney's fees and costs for the appeal.

* * *

2. No award of attorney's fees and costs for an action initiated by a state agency shall exceed \$50,000.

13. Petitioners established that the Association is a small business. The Association was the prevailing party in the underlying action. Therefore, the only issue remaining is whether Respondent, on behalf of the Whitts, had a reasonable basis for filing the petition for relief against the Association.

14. FCHR initiated the original matter by filing its Petition for Relief on June 14, 2012. § 57.111(3)(b), Fla. Stat.

15. 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. § 57.111(3)(e), Fla. Stat.

16. In order to authorize an administrative complaint, the basis must be solid, but not necessarily correct.

The evidence, however, need not be as compelling as that which must be presented at the formal administrative hearing on the charges to support a finding of guilt and the imposition of sanctions. See Dep't of Prof'l

Reg., Div. of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715 (Fla. 1st DCA 1989).

Fish v. Dep't of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002).

See also, Ag. for Health Care Admin. v MVP Health, 74 So. 3d 1141, 1143-44 (1st DCA 2011). In Fish, the Florida Board of Dentistry filed an administrative complaint after its probable cause panel examined the complete investigative file and found probable cause to believe a violation had occurred.

17. FCHR does not use a probable cause panel process as found in the Fish case. However, the underlying case went through FCHR's investigatory and review processes. FCHR investigated and evaluated the evidence to determine whether the information provided reasonable cause to believe a violation had occurred.

18. In the underlying case, FCHR's Legal Concurrence: Cause, detailed a reasonable basis in law and in fact to issue the Notice of Determination (Cause). FCHR considered evidence such as the final investigation report, its statutory authority, and relevant case law, which indicated that a discriminatory act had occurred. Hence, FCHR had "some evidence [it] considered . . . that would reasonably indicate that the violation had indeed occurred." Fish, 825 So. 2d 423.

19. The Association argues that the evidence presented to FCHR was unreasonable. Such is not the case. FCHR only

considers whether some evidence exists to proceed, while the burden at hearing is determining whether the evidence supports the alleged violation. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The two standards are not equal.

20. In the underlying case, the evidence presented at hearing was not sufficient to sustain the allegation. That does not mean it was insufficient to initiate the proceeding. The fact that the charges were ultimately dismissed does not form a basis for fees and costs to be awarded in the instant case pursuant to section 57.111.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the petition for attorney's fees and costs in this case is denied.

DONE AND ORDERED this 17th day of January, 2014, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of January, 2014.

ENDNOTES

^{1/} All references to Florida Statutes are to the 2013 version, unless otherwise indicated.

^{2/} As both parties listed Ms. Costilla as a witness, the undersigned allowed wide latitude in the examinations conducted by each counsel.

^{3/} Proposed final orders were to be submitted, not proposed recommended orders as listed in the motion.

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.