

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM P. MCCLOSKEY,

Petitioner,

vs.

Case No. 13-3214F

DEPARTMENT OF FINANCIAL
SERVICES,

Respondent.

FINAL ORDER

On February 26, 2014, an administrative hearing was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: H. Richard Bisbee, Esquire
Danny L. Hart, Esquire
Law Office of H. Richard Bisbee, P.A.
Suite 206
1882 Capital Circle, Northeast
Tallahassee, Florida 32308-4568

For Respondent: James A. Bossart, Esquire
Michael Davidson, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

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 section 57.111, Florida Statutes (2011).^{1/}

PRELIMINARY STATEMENT

On August 20, 2013, William P. McCloskey (Petitioner) filed an Application for Attorney's Fees and Costs Pursuant to Section 57.111, Florida Statutes (the "fee case").

In 2011, the Department of Financial Services (Respondent) prosecuted the Petitioner for alleged violations of law in a disciplinary proceeding designated as Division of Administrative Hearings (DOAH) Case No. 11-3982PL (the "disciplinary case").

The Petitioner ultimately prevailed in the dispute following an appeal of a Final Order entered by the Respondent in the disciplinary case.

The fee case, designated as DOAH Case No. 13-3214F, was initially assigned to the Administrative Law Judge (ALJ) who conducted the hearing and rendered the Recommended Order issued in the disciplinary case. On August 27, 2013, the fee case was transferred to the undersigned ALJ, who scheduled a final hearing for November 25, 2013. Upon the request of the parties, the hearing was rescheduled to February 26, 2014.

At the hearing, the Petitioner testified on his own behalf and had Exhibits A through E, H, I, M and O admitted into

evidence. The Respondent had Exhibits 1 through 4 admitted into evidence. At the request of the parties, official recognition was taken of various portions of the record from the disciplinary case.

A Transcript of the hearing was filed on February 14, 2014. Both parties filed proposed orders that have been considered in the preparation of this Final Order.

Section 57.111(4)(d)2. provides that "[n]o award of attorney's fees and costs for an action initiated by a state agency shall exceed \$50,000." The Petitioner has identified total fees and costs in excess of \$50,000. Although the Respondent disputes the total amount sought by the Petitioner, the Respondent does not dispute that in the event that fees and costs are awarded in this proceeding, an award up to the \$50,000 cap would be reasonable.

FINDINGS OF FACT

1. By a three-count Administrative Complaint dated June 7, 2011, the Respondent charged the Petitioner with alleged violations of law related to the sale of certain products. The allegations of the Administrative Complaint were prosecuted in the disciplinary case.

2. A final hearing in the disciplinary case was conducted on January 24 and 25, 2012.

3. On April 18, 2012, the ALJ issued a Recommended Order determining that the products referenced in the Administrative Complaint were unregistered securities and that the Petitioner "violated section 626.611(16) [Florida Statutes,] by selling an unregistered security that was required to be registered pursuant to chapter 517."

4. The Administrative Complaint also charged the Petitioner with additional violations of statute including a "[d]emonstrated lack of fitness or trustworthiness to engage in the business of insurance," in violation of section 626.611(7). As set forth in the Recommended Order, the ALJ determined that the evidence failed to establish the additional violations.

5. Based on violation of section 626.611(16), the ALJ recommended that the Petitioner's license be suspended for a total of six months, two months for each product sale alleged in the three separate counts of the Administrative Complaint.

6. On July 6, 2012, the Respondent issued a Final Order determining that in addition to the violation of section 626.611(16) found by the ALJ, the Petitioner had also violated section 626.611(7). Despite finding the additional violation, the Respondent adopted the penalty recommended by the ALJ.

7. The Petitioner took an appeal of the Final Order to the District Court of Appeal for the Fifth District.

8. The Court determined that the products sold by the Petitioner were not securities that required registration at the time they were sold by the Petitioner, and, on June 21, 2013, issued an order reversing the Final Order issued by the Respondent.

9. The parties have stipulated that the Petitioner was the prevailing party in the disciplinary case and is a "small business party" as defined by section 57.111(3)(d).

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 57.111, 120.569 and 120.57(1), Fla. Stat (2013).

11. The sole issue presented for determination in this proceeding is whether the actions of the Respondent in the disciplinary case were substantially justified or whether special circumstances exist that would make an award of fees and costs unjust.

12. Section 57.111 provides in relevant part as follows:

(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.

13. Section 57.111(3) (e) 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." After 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. Accordingly, the issue here is whether the Respondent had a reasonable basis in law and fact to file the Administrative Complaint against the Petitioner.

14. A central issue in the disciplinary case and the appeal was whether the Petitioner sold products that were "securities" that were unregistered in Florida.

15. At the time the Respondent commenced prosecution of the disciplinary case, the existing case law (which is set forth in the Respondent's Proposed Final Order and not restated herein) supported the Respondent's determination that the products being sold by the Petitioner were securities that were not properly registered for sale in Florida and that such registration was required by law. Accordingly, there was a reasonable basis in law to prosecute the Administrative Complaint against the Petitioner for the sale of the products.

16. The Petitioner has asserted that the Respondent lacked a reasonable basis in fact to prosecute the Administrative Complaint. In the disciplinary case, the ALJ found that the product sales cited in the Administrative Complaint had occurred. Those findings have not been disturbed by any subsequent review of the Recommended Order.

17. The Petitioner has also asserted that the investigation conducted by the agency prior to filing the Administrative Complaint against the Petitioner was inappropriate and that the Petitioner had been "selectively" prosecuted. Nothing in section 57.111 authorizes an award of fees and costs as a sanction for anything other than an agency action that was not substantially justified, and even then, "special circumstances" may exist that could make an award "unjust." Accordingly, these assertions have not been addressed herein.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petitioner's Application for Attorney's Fees and Costs Pursuant to Section 57.111, Florida Statutes, is DENIED. The file of the Division of Administrative Hearings is CLOSED.

DONE AND ORDERED this 23rd day of May, 2014, in Tallahassee,
Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2014.

ENDNOTE

^{1/} Unless otherwise noted, all statutory references are to
Florida Statutes (2011).

COPIES FURNISHED:

H. Richard Bisbee, Esquire
Dannie L. Hart, Esquire
Law Office of H. Richard Bisbee, P.A.
Suite 206
1882 Capital Circle, Northeast
Tallahassee, Florida 32308-4568

James A. Bossart, Esquire
Michael Davidson, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

Julie Jones, Agency Clerk
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

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.