

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM GUERRERO AND CHRISTINA  
BANG, a/k/a CHRISTINA GUERRERO,

Petitioners,

vs.

Case No. 14-4860F

BERNARD SPINRAD AND MARIEN  
SPINRAD,

Respondents.

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FINAL ORDER DENYING ATTORNEY'S FEES

This matter has come before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings, on Petitioners, William Guererro and Christina Bang, a/k/a Christina Guerrero's "Motion for Sanctions, Attorney's Fees, Costs, and Damages Against Petitioners, Spinrads, pursuant to Section 57.105(5), Florida Statutes," filed on May 2, 2014, and on their "Request for Evidentiary Hearing, and Entry of a Final Order, pursuant to its [sic] Amended Motion for Sanctions, Attorneys' Fees, Costs, and Damages, Against Petitioners, Bernard Spinrad and Marien Spinrad, pursuant to Sections 120.595(1), 120.569(2)(e), and 57.105(5), Florida Statutes," filed on October 8, 2014.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioners, William Guererro and Christina Bang, a/k/a Christina Guerrero, are entitled to attorney's fees pursuant to section 57.105, Florida Statutes, from Respondents, Bernard Spinrad and Marien Spinrad, related to litigation between the parties in DOAH Case No. 13-2254.

PRELIMINARY STATEMENT

On February 20, 2013, the Department of Environmental Protection (DEP) issued its proposed agency action with regard

to DEP File No. 44-0290794-001, which authorized certain activities to be conducted on property owned by the Guerreros.

On or about March 5, 2013, the Spinrads timely filed their Petition for Administrative Hearing. The DEP dismissed the Petition on April 26, 2013, with leave to amend. The Spinrads filed an Amended Petition for Formal Administrative Hearing on May 13, 2013. That Amended Petition was referred to the Division of Administrative Hearings on June 14, 2013, and was assigned to the undersigned for disposition as DOAH Case No. 13-2254.

As set forth in the Recommended Order issued in DOAH Case No. 13-2254, the regulatory history preceding the issuance of the DEP's proposed agency action was lengthy and complex, and included a previous DEP notice of proposed agency action denying the very activities that were the subject of DOAH Case No. 13-2254. A thorough recitation of the history of the cases related to DOAH Case No. 13-2254 was provided in the July 23, 2013, Order Denying Respondent's Motions to Dismiss and Motion for Attorney's Fees and Costs, which may be found at <https://www.doah.state.fl.us/DocDoc/2013/002254/13002254OGEN-072313-14385438.pdf>, and which is hereby adopted in this Final Order.

The final hearing in DOAH Case No. 13-2254 was initially scheduled to be held on August 26 and 28, 2013. The hearing was

continued several times for good cause, and was finally scheduled for four days, November 18-21, 2013, in Marathon, Florida, and commenced as scheduled.

On November 18, 2013, the Guerreros filed a "Motion for Attorney's Fees and Costs" against the Spinrads under the authority of section 120.595 and section 120.569(2)(e). Ruling on that motion was reserved. The Guerreros did not request attorney's fees pursuant to section 57.105 at that time.

The final hearing was not completed within the time allotted, and was thereafter scheduled to reconvene for an additional five days commencing on January 6, 2014.

On December 12, 2013, the Guerreros filed a Notice of Filing Proposed Changes to the Pending Agency Action, by which they agreed to several additional permit conditions to support the issuance of the permit, and proposed conforming modifications to the "Background Facts" of the proposed agency action.

The conclusion of the final hearing was continued at the behest of the undersigned, rescheduled for March 31 through April 4, 2014, and was completed as scheduled.

On April 10, 2014, after the completion of the final hearing, the Guerreros filed an "Amended Motion for Sanctions, Attorney's Fees, and Costs and Request to Retain Jurisdiction to Determine Amount of Sanctions, Attorney's Fees and Costs." The

motion reasserted the relief sought under the authority of section 120.595 and section 120.569(2)(e). With regard to entitlement to attorney's fees pursuant to section 57.105, the Amended Motion provided that the Guerreros intended to serve the Spinrads with a motion which would then be filed with the undersigned 21 days thereafter.

On May 2, 2014, Applicants filed a "Motion for Sanctions, Attorney's Fees, Costs, and Damages against Petitioners, Spinrads, pursuant to Section 57.105(5), Florida Statutes." The May 2, 2014, Motion included an exhibit demonstrating that the Motion had been served on the Spinrads on April 10, 2014.

On July 25, 2014, the Recommended Order was entered in DOAH Case No. 13-2254. In the Recommended Order, the undersigned made findings of fact and conclusions of law as to the Guerreros' entitlement to relief under section 120.569(2)(e) and section 120.595.

As to section 120.569(2)(e), which is not a prevailing party statute, the undersigned determined, based upon a full review and consideration of the record, and applying an objective standard based on reasonable inquiry regarding pertinent facts and applicable law, that no pleading, motion, or other paper filed by the Spinrads was interposed for any improper purpose.

As to section 120.595, which is a prevailing party statute, the undersigned made findings of fact, based upon a full review and consideration of the record, that the Spinrads did not participate in the proceeding for any improper purpose. In accordance with the procedure established in section 120.595(1)(d), the undersigned designated that determination in the Recommended Order.

The undersigned, having made the findings of fact and conclusions of law necessary under sections 120.569(2)(e) and 120.595, did not reserve jurisdiction to make further findings of fact or conclusions of law as to the Guerreros' entitlement to attorney's fees and other relief under those sections.

On September 8, 2014, the DEP entered its Consolidated Final Order, which adopted the Recommended Order as the Department's final agency action, with several changes not pertinent here.

On or about September 29, 2014, the Guerreros filed a notice of appeal of the Consolidated Final Order in the First District Court of Appeal, assigned as case number 1D14-4496, in which the Guerreros described the nature of the order being appealed as:

a Final Order following an administrative final hearing of the Division of Administrative Hearings before Administrative Law Judge ("ALJ") E. Gary Early entered in favor of the Respondent's

William Guerrero and Christina Bang, aka Christina Guerrero ("Guerreros"), wherein the ALJ denied the Guerrero's request for attorney fees, costs and sanctions under sections 120.569(2)(e) and 120.595, Fla. Stat.

Based on the foregoing, the undersigned declines to make further findings of fact or conclusions of law as to whether the Spinrads filed any pleading, motion, or other paper for any improper purpose, or participated in DOAH Case No. 13-2254 for an improper purpose. Those findings of fact and conclusions of law set forth in the Recommended Order and adopted in the Consolidated Final Order stand as the determination of the Guerreros' lack of entitlement to relief under those sections.

On October 8, 2014, the Guerreros filed the "Request for Evidentiary Hearing, and Entry of a Final Order, pursuant to its [sic] Amended Motion for Sanctions, Attorneys' Fees, Costs, and Damages, Against Petitioners, Bernard Spinrad and Marien Spinrad, pursuant to Sections 120.595(1), 120.569(2)(e), and 57.105(5), Florida Statutes." The Spinrads filed a response.

On October 17, 2014, the undersigned entered an order to show cause why the request for sanctions, fees, and other relief pursuant to sections 120.595(1) and 120.569(2)(e), Florida Statutes, should not be dismissed on the basis that the motions for relief under those sections were ruled upon and denied in the Recommended Order without any reservation of jurisdiction

for further action by the undersigned, and why the undersigned should not enter a final order as to the request for attorney's fees under section 57.105 consistent with the findings of fact and conclusions of law set forth in the Recommended Order. The Guerreros filed a response, which has been reviewed and considered by the undersigned.

#### FINDINGS OF FACT

1. The Recommended Order in DOAH Case No. 13-2254, including the Preliminary Statement, the Findings of Fact, and the Conclusions of Law contained therein, and the Department of Environmental Protection's Consolidated Final Order in OGC Case No. 13-0858 are incorporated herein by reference as the facts underlying this Final Order.

#### CONCLUSIONS OF LAW

2. Section 57.105 provides, in pertinent part, that:

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

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



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

(2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, . . . was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

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(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

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

3. In addition to the foregoing, "section 57.105 does not require a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in material facts or then-existing law." Martin Cnty. Conser. Alliance v. Martin

Cnty., 73 So. 3d 856, 858 (Fla. 1st DCA 2011); see also Gopman v. Dep't of Educ., 974 So. 2d 1208, 1210 (Fla. 1st DCA 2008).

4. The First District Court of Appeal has established that:

[S]ection 57.105 must be applied carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings.

In determining whether a party is entitled to statutory attorney's fees under section 57.105, Florida Statutes, frivolousness is determined when the claim or defense was initially filed; if the claim or defense is not initially frivolous, the court must then determine whether the claim or defense became frivolous after the suit was filed. In so doing, the court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law. An award of fees is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action. (internal citations omitted).

Wendy's v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003).

5. The standard under section 57.105 is to be applied on a case-by-case basis. In that regard:

While the revised statute incorporates the "not supported by the material facts or would not be supported by application of then-existing law to those material facts" standard instead of the "frivolous" standard of the earlier statute, an all encompassing definition of the new standard defies us. It is clear that the bar for imposition of sanctions has been lowered,

but just how far it has been lowered is an open question requiring a case by case analysis.

Wendy's v. Vandergriff, 865 So. 2d at 524 (citing Mullins v. Kennelly, 847 So. 2d at 1155, n.4. (Fla. 5th DCA 2003)).

6. The term "supported by the material facts" in section 57.105(1)(a), means that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." Albritton v. Ferrera, 913 So. 2d 5, 7, n.1 (Fla. 1st DCA 2005).

7. In conducting this evaluation, it must be determined if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the material facts necessary to establish the claim or defense or by the application of then-existing law to the material facts. Read v. Taylor, 832 So. 2d 219 (Fla. 4th DCA 2002). "An award of fees is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action." Id. at 222; see also Mason v. Highlands Cnty. Bd. of Cnty. Comm'rs, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) ("Failing to state a cause of action is not in and of itself a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105."); Pappalardo v. Richfield Hospitality Servs., Inc., 790 So. 2d 1226, 1228 (Fla. 4th DCA

2001) ("Whether fees should have been awarded in this case depends upon whether the underlying cause of action, which was dismissed by the trial court, was so clearly and obviously lacking as to be untenable.").

8. In their Motion, the Guerreros state that:

Spinrads have brought repetitive litigation against the Guerreros on the same issues related to the pending agency action before the ALJ in the Division of Administrative Hearings proceedings and a Circuit Court case. Spinrads have never demonstrated a basis for their vacuous factual allegations and legal argument.

To the contrary, the facts and law alleged by the Spinrads were not only worthy of serious consideration of their own accord, but at one time were sufficient to cause the DEP to deny the very same permits, exemptions, and state lands authorizations that were the subject of DOAH Case No. 13-2254, a denial reversed only after lengthy negotiations between the DEP and the Guerreros to which the Spinrads, though parties to the denial proceeding, were not made privy. Based on the DEP's contradictory positions as to the legality of the Guerreros' proposed structures, it was hardly unreasonable or unwarranted for the Spinrads to challenge the DEP's reversal of its position from denial to issuance.

9. Based upon a full review and consideration of the record in DOAH Case No. 13-2254, the undersigned concludes that,

although the Recommended Order in that case was favorable to the Guerreros, the material facts relied upon by the Spinrads and the application of then-existing law to those material facts by the Spinrads were not so lacking in merit as to warrant an award of attorney's fees or costs under section 57.105, Florida Statutes.

10. Based upon a full review and consideration of the record in DOAH Case No. 13-2254, including the bases of the numerous discovery, evidentiary, and procedural disputes raised -- by all of the parties -- and resolved throughout the course of the proceeding, the undersigned concludes that no action taken by the Spinrads in that case was primarily for the purpose of unreasonable delay.

11. Based on the findings of fact and legal authority set forth herein, the Guerreros' May 2, 2014, "Motion for Sanctions, Attorney's Fees, Costs, and Damages against Petitioners, Spinrads, pursuant to Section 57.105(5), Florida Statutes" is DENIED.

DONE AND ORDERED this 30th day of October, 2014, in  
Tallahassee, Leon County, Florida.



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E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing 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.