

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Petitioner,

vs.

Case No. 14-5291F

BERNARD SPINRAD AND MARIEN
SPINRAD,

Respondents.

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 (DOAH), on Petitioner, Department of Environmental Protection's (DEP), "Motion for Attorney's Fees Pursuant to Section 57.105(5), Florida Statutes Against Petitioners, William and Christina Guerrero," served on Bernard and Marien Spinrad (Spinrads) on April 29, 2014, and filed with the DOAH on June 17, 2014. Despite the title of the Motion, attorney's fees are sought against the Spinrads, and against the Spinrads' counsel, Patricia Silver and John Annesser.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner, Department of Environmental Protection (DEP), is entitled to attorney's fees pursuant to section 57.105, Florida Statutes, from Respondents, Bernard Spinrad and Marien Spinrad (Spinrads), and their counsel, related to litigation between the parties in DOAH Case No. 13-2254.

PRELIMINARY STATEMENT

On February 20, 2013, the 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 William Guerrero and Christina Bang, a/k/a Christina Guerrero (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/2013/002254/130022540GEN-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, by video teleconference in Tallahassee and Marathon, Florida, and commenced as scheduled.

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 29, 2014, a full 25 days after the completion of the final hearing, the DEP filed a "Motion for Attorney's Fees, Costs, and Sanctions," which sought relief under the authority of section 120.595 and section 120.569(2)(e).

On June 17, 2014, the DEP filed its "Motion for Attorney's Fees Pursuant to Section 57.105(5), Florida Statutes Against Petitioners, William and Christina Guerrero [sic]." The DEP alleged that it served the Motion on the Spinrads on April 29, 2014, which allegation is accepted by the undersigned. The facts alleged by the DEP in support of its 57.105 Motion were identical to those alleged by the DEP in support of its April 29, 2014, "Motion for Attorney's Fees, Costs, and Sanctions," under section 120.595 and section 120.569(2)(e).

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 DEP's 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 DEP's 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.

The 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 DEP's lack of entitlement to relief under sections 120.569(2)(e) and 120.595.

On October 30, 2014, the undersigned entered a Final Order Denying Attorney's Fees, which denied an award of fees under section 57.105 to the Guerreros.

On November 13, 2014, the undersigned, being uncertain as to whether the DEP still sought attorney's fees given its Consolidated Final Order in Case No. 13-2254, and given the 66 days that had passed since the entry of that Order without any further request for relief, entered an Order to Show Cause in this case. The Order directed the DEP to show cause 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 (as adopted by the DEP in its Consolidated Final Order), and consistent with the Final Order Denying Attorney's Fees to the Guerreros in Case No. 14-4860F. The DEP 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.

* * *

(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. It is well established that "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 further 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. The DEP’s 57.105 Motion was not served until 25 days after the conclusion of the final hearing, and seeks fees for actions that had been completed well before the Motion was

served on the Spinrads. Issues regarding subpoenas for testimony at hearing, the allegedly overly inclusive witness list, and alleged procedural improprieties that arose during the hearing had long since passed, and any ability on the part of the Spinrads to “withdraw[] or appropriately correct[] issues” had long since passed with them.

9. The purpose of the “safe harbor” period established in section 57.105(4), which requires that a party first serve a motion seeking fees, followed by its filing 21 days later, is to afford a party a last clear chance to withdraw a frivolous claim. Global Xtreme, Inc. v. Advanced Aircraft Ctr., 122 So. 3d 487, 490 (Fla. 3rd DCA 2013). With regard to the element of section 57.105 that allows for the award of attorney’s fees when the action of the opposing party “was taken primarily for the purpose of unreasonable delay,” the Supreme Court has established that “the purpose of the safe harbor provision is ‘to give a pleader a last clear chance . . . to reconsider a tactic taken primarily for the purpose of unreasonable delay.’” Bionetics Corp. v. Kenniasty, 69 So. 3d 943, 949 (Fla. 2011) (citing Walker v. Cash Register Auto Ins. of Leon Cnty., Inc., 946 So. 2d 66, 70 (Fla. 1st DCA 2006)).

10. The failure of DEP to file a motion under section 57.105 contemporaneously with the allegedly offending actions or pleadings so as to allow the Spinrads a meaningful opportunity

to withdraw or correct the offending actions or pleadings does not comply with section 57.105(4).

11. The undersigned was directly involved in each of the incidents alleged to have caused unnecessary delay. Although the Spinrads could have approached their case in a more organized and succinct fashion, it was apparent that they presented testimony and evidence reasonably calculated to support the denial of the exemptions, permit, and state lands authorization. It was neither unreasonable, nor a tactic of delay, to include as part of their case the testimony of DEP personnel who were involved in the DEP's prior denial of 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 -- negotiations to which the Spinrads, though parties to the denial proceeding, were excluded by the DEP.

12. If parties being overly inclusive in their court-ordered witness lists, presenting witnesses and evidence that opposing parties believe to be irrelevant or cumulative, or exhibiting relatively minor non-compliance with prehearing orders is the standard for an award of fees, then courts and administrative tribunals should be prepared to clear their dockets for the flood of attorney's fees cases to follow. Fortunately, for all involved, the facts alleged in support of

an award of fees under section 57.105 must show conduct on the part of a litigant that is substantially more egregious than that exhibited by any party to DOAH Case No. 13-2254.

13. 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 upheld the DEP's proposed agency action, 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.

14. Based upon a full review and consideration of the record in DOAH Case No. 13-2254, including the basis 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.

15. Based on the findings of fact and legal authority set forth herein, DEP's June 17, 2014, "Motion for Attorney's Fees Pursuant to Section 57.105(5), Florida Statutes Against Petitioners, William and Christina Guerrero [sic]" is DENIED.

DONE AND ORDERED this 24th day of November, 2014, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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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.