

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANDALL B. JOHNSON,

Petitioner,

vs.

Case No. 15-1803F

DEPARTMENT OF CORRECTIONS,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on July 28, 2015, in Tallahassee, Florida, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: M. Linville Atkins, Esquire
Theresa A. Flury, Esquire
Flury & Atkins, LLC
725 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Todd Evan Studley, Esquire
Pamela Leatrice Hatcher, Esquire
Florida Department of Corrections
The Carlton Building
501 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether pursuant to section 120.595, Florida Statutes (2015),^{1/} Petitioner, Randall B. Johnson (Johnson), should be

awarded reasonable costs and attorney's fees incurred in defense of an administrative proceeding initiated by Respondent.

PRELIMINARY STATEMENT

This matter came before the Division of Administrative Hearings (DOAH) on April 2, 2015, when the Public Employees Relation Commission (PERC) referred an "Order Vacating Agency Action and Referring Attorney's Fees Petition to the Division of Administrative Hearings" (PERC Order). The referral transmittal letter accompanying the PERC Order stated in pertinent part that:

This order grants Randall B. Johnson's request that his petition for attorney's fees and costs filed pursuant to Section 120.595, Florida Statutes, against the Department of Corrections be referred to the Division of Administrative Hearings (DOAH) for resolution. This petition arises from a career service appeal in which Mr. Johnson challenged his dismissal from the Department of Corrections. The dismissal action was subsequently rescinded by the Department of Corrections.

On May 5, 2015, the undersigned issued a Notice of Hearing setting this matter for final hearing on June 25, 2015, in Tallahassee, Florida. However, on June 8, 2015, Respondent filed an unopposed motion for continuance. That motion was granted, and the hearing was rescheduled for July 8, 2015. Prior to the hearing, Petitioner filed affidavits of reasonable attorney's fees and costs from M. Linville Atkins and Theresa A.

Flury. Billing records were attached to each of the affidavits. On July 27, 2015, the Department of Corrections (DOC or Agency) filed a unilateral prehearing statement.

The hearing convened on July 28, 2015, as scheduled. Petitioner called Christopher Atkins, James Padgett, Marcia Johnson, Todd Studley, and Elizabeth Willis. In addition, Johnson testified on his own behalf and offered five exhibits which were received in evidence. Official recognition was taken of Florida Administrative Code Rule 60L-36.005. Respondent did not call any witnesses or offer any exhibits in evidence.

A court reporter was not present at the hearing, and accordingly, no hearing transcript has been filed with DOAH.

At the conclusion of the hearing, the parties requested that they be given 15 days from the date of hearing to file proposed orders. That request was granted, and both parties subsequently timely filed proposed orders.

FINDINGS OF FACT

1. The procedural history of the underlying action is set forth in the PERC Order, and includes a majority of the relevant facts, which are not in dispute. Findings of Fact 2 through 9 below are taken directly from the PERC Order.

2. On September 19, 2014, the Department of Corrections (Agency) dismissed Randall B. Johnson pursuant to the extraordinary dismissal procedure in section 110.227(5)(b),

Florida Statutes. The final action letter (September 19 Letter) alleged that, four years earlier, on or about September 19, 2010, Johnson inappropriately participated in a use of force incident that resulted in the death of an inmate. Johnson was also informed that a copy of the investigation upon which the charge was based would be available when it was completed.

3. On September 24, 2014, Franklin Correctional Institution Warden, Christopher G. Atkins, contacted Johnson and informed him that the September 19 Letter was inaccurate and the Agency needed to send him a corrected final action letter (September 24 Letter). Atkins did not read the letter to Johnson or tell him the substance of the allegations against him. The amended final action letter was sent to Johnson by certified mail.

4. On September 29, 2014, Johnson filed an appeal with the Commission challenging his dismissal, based on the September 19 Letter. Johnson stated in his appeal: "I was not involved in a use of force incident that resulted in the death of an inmate, as I was not working on September 19, 2010." A hearing officer was appointed and a hearing was scheduled.

5. On October 1, 2014, the Agency filed a Notice of Corrected Final Action Letter with the Commission asserting "that due to a clerical error, certain information contained in the letter issued to the Employee on September 19, 2014, was

incorrect" The amended final action letter, dated September 24, 2014, deleted the factual allegations from the September 19 Letter and substituted the following:

Specifically, on or about June 6, 2013, the Office of the Inspector General received information alleging improper conduct of some of its officers. Further investigation into the allegation revealed that you submitted an inaccurate or untruthful report, introduced contraband into Franklin Correctional Institution, and engaged in an unprofessional relationship with former inmate and current supervised offender, Luke Gruver/U01117.

The basis for these charges is contained in an on-going investigation by the Inspector General's Office, Case Number 13-7092; copy available upon completion.

6. On October 6, 2014, Johnson filed a motion for summary judgment and/or judgment on the pleadings and a motion for attorney's fees and costs. On October 22, 2014, the hearing officer issued an order which, among other things, denied the motions filed by Johnson on October 6, 2014. On October 28, 2014, Johnson filed a motion to dismiss and motion for attorney's fees. This pleading was followed on November 4, 2014, by an amended motion to dismiss and motion for attorney's fees. A hearing on Johnson's motions was held on February 2, 2015.

7. On February 4, 2015, the hearing officer issued an order concluding that the September 24 Letter was vague and that

Johnson was prejudiced in his ability to defend himself by its vagueness. Therefore, he denied the Agency's attempt to amend the September 19 Letter with the September 24 Letter. The hearing officer also determined that the September 19 Letter was sufficiently detailed to provide Johnson with notice of the charges against him. The Agency was directed to respond and state whether it intended to proceed to a hearing on the allegations in the September 19 Letter. Finally, the hearing officer deferred ruling on whether the Agency violated section 112.532(6), Florida Statutes, the Law Enforcement Officers' and Correctional Officers' Bill of Rights, and whether Johnson was entitled to an award of attorney's fees pursuant to section 120.595.

8. On February 11, 2015, the Agency filed a notice with the Commission that it was rescinding the September 19 Letter, marking it void, and reinstating Johnson on February 13, 2015, to the position of correctional officer at Franklin Correctional Institution. The Agency also requested that the Commission schedule a back-pay hearing. On February 13, 2015, Johnson filed an objection to the Agency's request for a back-pay hearing and renewed his request for an award of attorney's fees and costs.

9. On February 17, 2015, the hearing officer issued his recommended order concluding that Johnson was entitled to

reinstatement, back pay, and other benefits, as well as interest at the lawful rate, commencing on September 19, 2014. He also determined that the Commission did not have jurisdiction to consider the issue of attorney's fees pursuant to section 120.595, because that statute only authorizes fee awards to be made by an Administrative Law Judge (ALJ). However, he recommended two alternative methods for the attorney's fees issue to be referred to an ALJ at DOAH. On February 25, 2015, Johnson filed five exceptions to the recommended order. A transcript of the February 2, 2015, motion hearing was filed.

10. In one of his exceptions to the recommended order, Johnson challenged the hearing officer's conclusion that PERC does not have jurisdiction to award attorney's fees and costs pursuant to section 120.595, because such a determination can only be made by an ALJ. The PERC Order sustained the hearing officer's conclusion that PERC does not have the authority to consider an attorney's fees request made pursuant to section 120.595. It also adopted the hearing officer's recommendation that the request for attorney's fees and costs be referred to DOAH for consideration by an ALJ. Accordingly, the PERC Order "shall serve as the Commission's referral to DOAH of Johnson's request for attorney's fees and costs from the Agency pursuant to Section 120.595, Florida Statutes."

11. The Notice of Corrected Final Action Letter filed by DOC with PERC dated October 1, 2014, sought to replace the September 19 Letter with the September 24 Letter. The Corrected Final Action Letter stated DOC was filing a "corrected final action" necessitated by a "clerical error." In fact, the September 24 Letter does not correct clerical errors but rather makes completely different factual allegations and charges against Johnson and references the date of the incident (or incidents) as 2013.

12. The extensive procedural history of this case, which includes a recitation of all the pleadings filed by the parties and the arguments therein, is set forth in the Commission's Order Vacating Agency Action and Referring Attorney's Fees Petition to DOAH. As noted, the PERC Order refers this case to DOAH for consideration of the issue of attorney's fees and costs.

13. All pleadings filed by Johnson in both the disciplinary case and the back-pay case before PERC were prepared and filed on his behalf by the law firm of Flury & Atkins. The billing statements admitted into evidence during the DOAH proceeding reflect the time spent by counsel researching and drafting motions and proposed orders in the discipline and back-pay cases, as well as the time spent

reviewing the pleadings of the Agency, and the orders of the PERC hearing officer.

14. Attorney Elizabeth Willis, a former PERC hearing officer, testified that the issues presented in Johnson's cases before PERC were unique and difficult. Ms. Willis testified she reviewed the pleadings and orders of the underlying cases before PERC, as well as the Billing Statement of Flury & Atkins, LLC. Based upon her review and her knowledge of PERC proceedings and the law in this area, she concluded the hours expended by counsel and the hourly rates charged were reasonable.

15. While DOC asserted in its Proposed Recommended Order that the amount of attorney's fees and costs being sought by Johnson is excessive, it presented no evidence to support its contention. Rather, the unrebutted evidence of record established that the reasonable attorney's fees and costs incurred by Johnson in the proceedings before PERC was \$12,431.00.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. S. 120.57(1) and 120.595(1), Fla. Stat.

17. This matter was referred by PERC to DOAH to determine Johnson's entitlement to attorney's fees and costs pursuant to section 120.595,^{2/} which provides:

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the non-prevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the non-prevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the non-prevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the non-prevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.
2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.
3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a non-prevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

18. When construing a statute, one looks first to the statute's plain meaning. Moonlit Waters Apts., Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). Furthermore, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v.

Auld, 450 So. 2d 217, 219 (Fla. 1984) (citing A.R. Douglass, Inc. v. McRaney, 137 So. 157, 159 (1931)).

19. Attorney's fees and costs in a case such as this cannot be awarded against DOC as a non-prevailing adverse party. In section 120.595(1)(e)3., a "nonprevailing adverse party" is defined as "a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding." DOC is the agency proposing to take action against Johnson (dismissal).^{3/} Therefore, even though Johnson was arguably the prevailing party in the underlying administrative action, DOC is not a "nonprevailing adverse party." See Ernest Sellars v. Broward Cnty. Sch. Bd., Case No. 97-3540F (Fla. DOAH Sept. 25, 1997). Stated differently, DOC, by definition, cannot be a non-prevailing adverse party since it is the agency that is proposing to take action, not a party that is trying to change the proposed action. See Rafael R. Palacios v. Dep't of Bus. and Prof'l Reg., DOAH Case No. 99-4163, et seq. (November 20, 2000).^{4/}

20. Inasmuch as Respondent cannot be a non-prevailing adverse party in this instance, it is unnecessary for the undersigned to determine whether Respondent participated in the proceeding for an improper purpose as that term is defined in section 120.595(1)(e)1.

21. Johnson is not entitled to attorney's fees pursuant to section 120.595.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED the claim of Petitioner for attorney's fees and costs pursuant to section 120.595 is dismissed.

DONE AND ORDERED this 30th day of September, 2015, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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 30th day of September, 2015.

ENDNOTES

^{1/} Unless otherwise noted, statutory references are to the 2015 version of the Florida Statutes.

^{2/} In his Motion for Attorney's Fees and Costs filed October 6, 2014, Petitioner also cited section 120.569, Florida Statutes (2014), as authority for an award of attorney's fees and costs. Section 120.569(2)(e) provided:

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the

party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Unlike section 120.595, the above provision authorized the "presiding officer" (who is not necessarily an ALJ) to award attorney's fees against a party who has filed a pleading, motion, or other papers for an improper purpose. Thus, had the PERC hearing officer determined that any of the papers filed by DOC in the dismissal appeal were interposed for any improper purpose, she would have been authorized by section 120.569(2)(e) to impose sanctions, including the award of reasonable attorney's fees, while that matter was pending before her.

^{3/} The billing records of Flury & Atkins reflect 6.25 billable hours (\$2,187.50) following issuance of the hearing officer's Recommended Order on February 17, 2015, recommending reinstatement, back pay, other benefits, and interest. Those legal efforts appear to be related to a back-pay hearing. However, the record is devoid of any evidence as to who the prevailing or non-prevailing party at the back-pay hearing may have been, or even if the parties disagreed as to the appropriate amount of back pay.

^{4/} The inherent unfairness of an agency being immunized from an award of attorney's fees and costs where, as here, a Petitioner successfully contests the proposed agency action is troubling. However, as noted, ALJs are required to apply the law as written, not as they would have it written. Rather, correcting the current inequity of section 120.595(1)(e)3. is solely within the province of the Legislature.

COPIES FURNISHED:

Theresa A. Flury, Esquire
Flury & Atkins, LLC
725 East Park Avenue
Tallahassee, Florida 32301
(eServed)

M. Linville Atkins, Esquire
Flury & Atkins, LLC
725 East Park Avenue
Tallahassee, Florida 32301
(eServed)

Pamela Leatrice Hatcher, Esquire
Florida Department of Corrections
The Carlton Building
501 South Calhoun Street
Tallahassee, Florida 32399
(eServed)

Todd Evan Studley, Esquire
Florida Department of Corrections
The Carlton Building
501 South Calhoun Street
Tallahassee, Florida 32399
(eServed)

Barry E. Dunn, Clerk of Commission
Public Employees Relations Commission
Suite 300
4708 Capital Circle Northwest
Tallahassee, Florida 32303
(eServed)

Stephen Meck, General Counsel
Public Employees Relations Commission
Suite 300
4708 Capital Circle Northwest
Tallahassee, Florida 32303
(eServed)

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.