STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOCA VIEW CONDOMINIUM
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 16-0344F

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF FLORIDA
CONDOMINIUMS, TIMESHARES AND
MOBILE HOMES,

Respondent.
_____/

FINAL ORDER

On May 2, 2016, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert I. Rubin, Esquire
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For Respondent: Robin E. Smith, Esquire
Ryan N. Lumbreras, Esquire
Andrew Rubin Fier, Esquire
Department of Business and
Professional Regulation
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STATEMENT OF THE ISSUES

Whether Petitioner is entitled to attorney's fees and costs as a prevailing small business party pursuant to section 57.111, Florida Statutes (2015),[1/] and, if so, in what amount.

PRELIMINARY STATEMENT

On December 17, 2015, the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares and Mobile Homes (Division or Respondent), filed a Motion to Dismiss the Petition and Cancel Hearing in DOAH Case No. 15-6768 (the merits case). In the merits case, the Division had issued a Notice to Show Cause to Boca View Condominium Association, Inc. (the Association or Petitioner), alleging that the Association had failed to assess based upon proportionate share or as stated in the declaration of condominium, by improperly posting a $1,961.34 charge to complainant Alexander Boburka's unit owner account ledger.

After the Division voluntarily sought dismissal of its complaint, the Association filed a motion for attorney's fees on January 15, 2016, citing to the Florida Equal Access to Justice Act. The Association was recast as Petitioner and DOAH Case No. 16-0344F was established.

At hearing, Petitioner offered the live testimony of Ms. Diana Kuka, president of the Association, and Mr. Robert Rubin, attorney for the Association. Over objection, excerpts offered by Petitioner from the deposition testimony of Mr. Harry Hague, Ms. Sirlei Silveira, Mr. Harold Hyman, and Ms. Constance McCallum, all employees of Respondent, as well as excerpts from the deposition testimony of Mr. Alexander Boburka, unit owner and complainant in the merits case, were admitted. Documentary Exhibits P-1 through P-3 were also offered by Petitioner and accepted into evidence without objection. Petitioner's Exhibit P-4, a composite exhibit containing e-mails from Petitioner's counsel to Respondent and to Petitioner and copies of motions filed in this case and in the merits case, was objected to by Respondent on the ground that the exhibit had not been previously identified, as was required by the Order of Pre-hearing Instructions. No prejudice to Respondent being found, Exhibit P-4 was admitted.

Respondent offered the testimony of Mr. Hague, a lead investigator at the Division, and Mr. Peter Dunbar, an attorney accepted as an expert in reasonableness of attorney's fees and condominium association law. Respondent also offered Exhibits R-1 through R-4, which were admitted without objection.

The Transcript was received on May 19, 2016. Both parties timely submitted proposed final orders, which were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Division is the entity of the State of Florida empowered and required to ensure compliance with the Condominium Act, chapter 718, Florida Statutes, and implementing administrative rules.

2. The Boca View Condominiums complex comprises 72 residential condominiums in Boca Raton, Florida. The Association operates Boca View Condominiums and is subject to the Condominium Act. The Association is not under developer control, but is controlled by the unit owners.

3. Hurricane Wilma hit Florida in October of 2005. At that time, Mr. Alexander Boburka was a unit owner in Boca View Condominiums.

4. Ms. Diana Kuka has lived in Boca View Condominiums since 1998 and was the president of the Association at the end of 2005. She testified that the Association is a non-profit business incorporated by the State of Florida. This testimony was supplemented by Department of State records showing the Association as a not-for-profit corporation whose principal place of business is in Boca Raton. She testified the Association had only two employees at the time of the Notice to Show Cause and a

net worth of less than two million dollars. Boca View Condominium Association is a small business party.

5. Ms. Kuka testified that the first time she learned that Mr. Boburka claimed that his unit had been damaged by Hurricane Wilma was on June 11, 2006, when Mr. Boburka sent an e-mail to her, stating:

> I am writing to ease my mind and assure myself that the Association litigation through the developer is responsible for the faulty roof that allowed rain water from Hurricane Wilma to enter my condo along pipes (common areas/elements?) and caused damage to both bathroom ceilings last year.
>
> I do not have wind coverage and have not yet repaired damage and do not plan to do so until after this hurricane season ends.
>
> Please confirm my understanding of the situation as it occurred with other units above and below me.
>
> My condo insurance company said that my standard policy does not cover the damage due to the fact that the hurricane caused damages.
>
> Kindly respond at your convenience.

6. It is not clear if Ms. Kuka ever responded to Mr. Boburka, but a few months later, he wrote two checks, each in the amount of $1,000.00, to the order of Ricardo Salinas: one dated September 12, 2006, and the other dated September 15, 2006. The checks had the notation "repairs" written in the "For" space.

7. An e-mail from Mr. Boburka to Ms. Kuka dated August 2, 2007, referenced a conversation between them in Costco two weeks previously and stated that Mr. Boburka was "in the process of obtaining a breakdown of cost to repair damages in my unit bathrooms and kitchen." It stated that he had copies of checks paid to the contractor.

8. Ms. Kuka testified at hearing that the Association will not issue a check to a unit owner without an invoice:

> And we do not, we do not, absolutely not issue a check unless we have a backup, unless we have an invoice. Everybody can give us a check. Everybody can say, I spent this or I spent that. so I made it clear, because the board wanted to have some backup, wanted to have – you know, if he can't provide proof of damages but at least give us – we wanted to, you know, like give him the benefit of the doubt, but at least give us some breakdown, like an invoice that said, I repaired such and such, and it cost such and such.

9. Notwithstanding Ms. Kuka's testimony that a check would not be issued without an invoice, the Association did not follow that policy with respect to Mr. Boburka in this case. Mr. Boburka did not provide a breakdown to the Association. The Association paid Mr. Boburka the amount of $1,961.34 by check dated November 28, 2007.

10. Although the Association argued at hearing that the payment to Mr. Boburka was "contingent" and subject to his later

providing proof regarding the amount and cause of his damages, the evidence does not support this claim.

11. About five and one-half years later, a letter from the Association to Mr. Boburka, dated June 14, 2013, referenced an attached copy of the reimbursement check given to him in 2007 and requested him to "advise, as soon as possible, in detail, the nature of this expense." An almost identical letter, with the addition of the words "Second Request," and dated July 3, 2013, was sent to Mr. Boburka. Mr. Boburka did not provide the requested information.

12. An "expense adjustment" in the amount of $1,961.34 was entered upon Mr. Boburka's account ledger from the Association, dated May 2, 2014. A note indicated, "Charge back for monies recd from association due to hurricane damages used for others [sic] purposes."

13. Mr. Boburka filed a complaint with the Division on May 12, 2014. He alleged that the Association improperly applied a charge of $1,961.34 to his account ledger. Case No. 2014020742 was opened and assigned to Ms. Sirlei Silveira, a financial examiner in the Division's Bureau of Compliance.

14. In response to Division inquiries, counsel for the Association e-mailed Ms. Silveira on Monday, July 28, 2014, setting forth reasons that it was believed Mr. Boburka was not entitled to the money that the Association gave him earlier,

alleging generally that the Association believed the original claim by Mr. Boburka in 2006 was fraudulent.

15. A data entry was made on Ms. Silveira's case file at the Division dated May 11, 2015. It indicated "Closing Order" and reflected a Code of "368." About a month later, a notation was made in the case indicating "Memorandum Prepare/Revise/Review" dated June 16, 2015.

16. On July 28, 2015, Mr. Boburka, through counsel, filed a complaint with the Division alleging that the Association failed to include him on the ballot for election to Association office, despite proper notice of his intent to be a candidate. Mr. Boburka alleged that the reason he was not permitted to be a candidate was that he had not paid the improper charge that had been posted to his account earlier.

17. The Division opened Case No. 2015033369 and assigned it to Mr. Harry Hague, the lead investigator for the Miami and Fort Lauderdale sections for the Bureau of Compliance.

18. An entry dated July 29, 2015, was made on Ms. Silveira's case indicating "Case File Review." An entry dated August 19, 2015, indicating "Case File Review" was also made.

19. At some point Mr. Hague was directed to merge Ms. Silveira's case into his own, because, as Mr. Hague testified, "it was part and parcel" to his own case. Mr. Hague

testified that "[w]e wouldn't maintain two active investigations with a single issue." An entry on September 2, 2015, indicates "Case Reassigned" and the note "case reassigned to Hague for combining with investigation 2015033369 and preparation of aa." After a few more data entries indicating further reviews, an entry dated October 19, 2015, on the earlier case indicates "Case Closed Duplicate."

20. Ms. Silveira's case was not closed on May 11, 2015, based upon a determination by the Division that there was no violation. Had that been done, the file would have reflected a "UF" disposition code, indicating that the charge was determined to be unfounded. Had the case actually been closed, the parties would have been notified of that fact.

21. Contrary to the argument of the Association, Ms. Silveira's case was not closed because it was determined to be unfounded and then reopened by the Division as an act of retribution against the Association in response to other election concerns that had been the subject of an earlier complaint. The evidence did not show that the Division acted in bad faith.

22. Mr. Hague prepared an investigative report dated September 1, 2015. The report concluded that the Association improperly posted a $1,961.34 charge to complainant Mr. Boburka's account ledger and improperly failed to include Mr. Boburka's name as an eligible candidate for the election of the

Association's directors, in violation of provisions of chapter 718.

23. On October 2, 2015, the Division filed a Notice to Show Cause against the Association regarding the $1,961.34 charge to Mr. Boburka's account ledger. The Notice to Show Cause provided the Association with a clear point of entry to request administrative proceedings, as it was required to do by law.

24. The Association filed a "petition" requesting an administrative hearing on November 13, 2015.

25. A little over one month later, on December 17, 2015, the Division filed a Motion to Dismiss the Petition and Cancel Hearing in DOAH Case No. 15-6768. The motion was granted.

26. The Association was the prevailing small business party in DOAH Case No. 15-6768.

27. The Association incurred attorney's fees and costs in defending against the Notice to Show Cause filed by the Division.

28. The Association submitted an affidavit describing the nature and extent of attorney services and the costs incurred. Expert testimony by the Association's attorney provided additional detail and generally supported the reasonableness of the fees, except as further discussed below. The hourly rate of $375.00 was not contested by the Division's expert, and is found to be reasonable and customary.

29. The Division presented the testimony of Mr. Peter Dunbar, accepted by the Association as an expert in reasonable and customary attorney's fees and in condominium association law. Mr. Dunbar's testimony as to reasonable and customary attorney's fees was credited on several matters of dispute.

30. It would be reasonable and customary to bill only .6 hour for the telephone call from attorney Thomas Morton and computer communication to the client--the entry on the invoice dated October 19, 2015. On the entry dated November 9, 2015, to prepare and serve the response to the Administrative Complaint, 3.0 hours would be reasonable and customary, in addition to .4 hour to correct a mistake in the Petition. It is accepted that it was prudent for the Association to prepare a Motion to Dismiss as indicated on the invoice entry dated December 7, 2015, even though it seemed likely that Petitioner was going to dismiss without it, and in fact did so. However, Mr. Dunbar's contention that 3.9 hours to prepare the Motion to Dismiss was unreasonable is accepted. As Mr. Dunbar testified, the document substantially duplicated the content of the Petition Involving Disputed Issues of Material Fact that had been prepared earlier; no additional research was required. One hour is reasonable and customary. On the three entries dated December 9, 2015, related to preparation and service of subpoenas, this is a task customarily conducted by an assistant or paralegal; attorney time of .1 hour would be

reasonable and customary to oversee this work. On the entry dated December 16, 2015, for an e-mail exchange with attorney Robin Smith, .1 hour would be reasonable and customary. On the three entries dated December 17, 2015, to prepare and serve routine Notices of Cancellation, .1 hour would be reasonable and customary. Finally, a reasonable and customary time to prepare a motion for prevailing party fees and affidavit from existing information, reflected in the January 4, 2016, entry, would be 1.5 hours.

31. The Association showed that attorney's fees in the amount of $13,050.00 were reasonable and customary, based upon the adjusted total of 34.8 hours.

32. With respect to costs, the claimed amount of $174.00 for "Electronic Records Fee" was vague and non-specific; it was not shown to be reasonable. The remaining costs, in the amount of $320.00, were proven by the Association.

33. As the parties stipulated, no special circumstances exist that would make an award of fees and costs unjust.

34. The action of the Division in filing the Notice to Show Cause was substantially justified on the facts and the law.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this case pursuant to sections 57.111(4), 120.569, and 120.57(1), Florida Statutes.

36. Section 57.111, denominated the Florida Equal Access to Justice Act (FEAJA), was designed to offset expenses incurred by a small business successfully defending against "unreasonable governmental action" in an administrative proceeding. Dep't of HRS v. S. Beach Pharmacy, 635 So. 2d 117, 118 n.1 (Fla. 1st DCA 1994).

37. At the time of the Notice to Show Cause, section 57.111(4)(a) provided:

> 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 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.

Petitioner's Burden

38. Initially, it is Petitioner's burden under the statute to show that it was a small business and was the prevailing party. Helmy v. Dep't of Bus. & Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998); Dep't of Prof'l Reg. v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st DCA 1989).

39. Section 57.111(3)(d)1.b. defined a "small business party" to include a corporation which had its principal office in Florida and at the time action was initiated by a state agency had not more than 25 full-time employees or a net worth of not more

than $2 million. Petitioner proved that it was a small business party.

40. The parties have stipulated that Petitioner is a prevailing party. Section 57.111(3)(c)3. provides, in relevant part, that a small business party is a "prevailing small business party" when the state agency has sought a voluntary dismissal of its complaint.

41. Petitioner complied with the requirements of section 57.111(4)(b)1. by submitting an affidavit setting forth costs and the nature and extent of services rendered by the attorneys. Section 57.111(4)(b)2. provides: "The application for an award of attorney's fees must be made within 60 days after the date that the small business party becomes a prevailing small business party." S. Beach Pharmacy, 635 So. 2d at 121. Petitioner became the prevailing small business party on December 17, 2015, and Respondent's Motion for Prevailing Party Attorney's Fees and Evidentiary Hearing to Determine Reasonable Attorney's Fees was timely filed on January 15, 2016.

42. Petitioner established a prima facie case of entitlement to attorney's fees and costs as a prevailing small business party.

Respondent's Burden

43. Respondent may avoid an award of fees and costs if it proves that special circumstances exist which would make an award unjust or that its actions were "substantially justified" as that

term is defined in section 57.111(3)(e). "It is the agency which must affirmatively raise and prove the exception." Helmy, supra. As noted above, the parties stipulated that no special circumstances existed here that would make an award of fees and costs unjust.

44. In order to prevail because its action was "substantially justified," Respondent must prove that it had "a solid though not necessarily correct basis in fact and law for the position that it took" in the action. Casa Febe Ret. Home, Inc. v. Ag. for Health Care Admin., 892 So. 2d 1103, 1106 (Fla. 2d DCA 2004); Fish v. Dep't of Health, Bd. of Dentistry, 825 So. 2d 421 (Fla. 4th DCA 2002).

45. An agency's action is not "substantially justified" simply because it is not frivolous; it must have a stronger foundation. Dep't of HRS v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). In Department of Insurance v. Florida Bankers' Association, 764 So. 2d 660 (Fla. 1st DCA 2000), it was stated, "[I]n terms of Florida law, the 'substantially justified' standard falls somewhere between the no justiciable issue standard of section 57.105, Florida Statutes (1991), and an automatic award of fees to a prevailing party."

46. In determining whether there was substantial justification for filing the Notice to Show Cause, the focus is upon the information available to Respondent at the time the

complaint was filed. Fish, 825 So. 2d at 423; Toledo Realty, Inc., 549 So. 2d at 716; Kibler v. Dep't of Prof'l Reg., 418 So. 2d 1081 (Fla. 4th DCA 1982).

47. Respondent argues that at the time the action was filed, it had an adequate basis for its action in both fact and law. As for a basis in fact, Mr. Hague's report stated that the sum of $1,961.34 had been charged to Mr. Boburka's unit owner account ledger as a "charge back." The Association had been contacted by Mr. Hague and did not dispute this. No other unit owners were similarly assessed. The Association asserted that it had provided this amount to Mr. Boburka earlier as compensation for claimed damage to common elements resulting from Hurricane Wilma several years before. Petitioner maintained that it had reason to believe the original claim was fraudulent. Under those circumstances, Petitioner argued that it was legally permitted to post the "charge back." Mr. Hague discussed Petitioner's position in his report, without investigating the issue of whether Mr. Boburka's original claim was in fact fraudulent, concluding that, in the absence of a civil judgment, the "charge back" was an illegal assessment prohibited under the provisions of chapter 718. There are thus few material facts in dispute; the controversy in the merits case was almost completely a question of law.

Basis in Law

48. It is unnecessary to determine the underlying issue in the merits case as to whether a "charge back" by the Association is in fact authorized under chapter 718 several years after a claim was originally paid.[2/] The issue is instead whether the Division had a reasonable basis in law under section 57.111 to issue the Notice to Show Cause based upon the information that was before it.

49. FEAJA is modeled after the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. S.G., supra (persuasive federal authority in defining the scope of the statutory definition of "substantially justified" in Federal EAJA should be followed).

50. Federal courts have held that government action is substantially justified when it is premised upon a plausible interpretation of a statute on a question that has not previously been decided. See, e.g., Abramson v. U.S., 45 Fed. Cl. 149, 152 (1999)("Several circuits have adopted a presumptive rule that the Government is substantially justified within the meaning of the EAJA when a question is being addressed for the first time."); Marcus v. Shalala, 17 F.3d 1033, 1037 (7th Cir. 1994) ("uncertainty in the law arising from conflicting authority or the novelty of the question weighs in the government's favor when analyzing the reasonableness of the government's litigation position"); TKB Int'l v. U.S., 995 F.2d 1460, 1468 (9th Cir.

1993)(government's interpretation of tax law supportable where close question of law involved); Trahan v. Brady, 907 F.2d 1215, 1219 (D.C. Cir. 1990)(position substantially justified where government applied plausible interpretation of statute in absence of judicial interpretation). Even if Respondent's interpretation of the statute should not ultimately be ratified by the courts, this would not necessarily mean that its action was not substantially justified. Pierce v. Underwood, 487 U.S. 552, 569 (U.S. 1988)(government could take a position that is substantially justified, yet lose in subsequent litigation).

51. Petitioner offered testimony that "the question involved is difficult. This is not an easy issue, and that's why we're probably at trial, because it's not an easy issue to resolve."[3/]

52. Either party's argument as to the authority of an association seems plausible. Importantly, neither Petitioner nor Respondent cite to any Florida cases or Division orders on the issue of whether such a late "charge back" to a unit owner's account is authorized under the statute, under circumstances where the original claim was fraudulent or otherwise. The question is unsettled.

53. In his report, Mr. Hague concluded that chapter 718 prohibited the Association's "charge back" of $1,961.34 to Mr. Boburka's unit owner account ledger. That report may be considered in determining substantial justification. Cf. Toledo

Realty, Inc., 549 So. 2d at 719 (section 455.225, Florida Statutes, procedures suggest an investigative report may be the most substantial and relevant evidence necessary in deciding probable cause). Respondent was entitled to evaluate Mr. Hague's position and proceed to proposed agency action based upon his expertise and credibility. Gentele v. Dep't of Prof'l Reg., Bd. of Optometry, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

54. Under all of the circumstances, the Division was justified in accepting the facts and conclusions set forth in Mr. Hague's report and concluding that use of the "charge back" procedure violated the provisions of chapter 718.

55. The Division had before it adequate information to provide a reasonable basis in both law and fact for the allegations in the Notice to Show Cause. Fish, 825 So. 2d at 423 (some evidence considered must reasonably indicate violation, but need not be so compelling as the evidence required at hearing).

56. While Respondent ultimately decided to dismiss its action, the basis of that decision is not relevant here. It is well settled that in determining whether an agency's action was substantially justified, only the information available at the time the action was initiated should be considered. Ag. for Health Care Admin. v. MVP Health, Inc., 74 So. 3d 1141, 1144 (Fla. 1st DCA 2011).

57. Respondent proved that its actions in filing the Notice to Show Cause were substantially justified.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

The petition for attorney's fees filed pursuant to section 57.111, Florida Statutes, is DISMISSED.

DONE AND ORDERED this 14th day of June, 2016, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2016.

ENDNOTES

[1/] All references to statutes and rules are to the versions in effect in 2015, at the time that the Notice to Show Cause was filed, except as otherwise indicated.

[2/] The United States Supreme Court has noted the danger in addressing previously undecided substantive legal questions arising from the merits case in an attorney's fees award case

where the law remains unsettled at the time of the EAJA appeal. "[A] ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion." Pierce v. Underwood, 108 S. Ct. 2541, 2548 (U.S. 1988).

[3/] Petitioner properly offered testimony as to the "novelty and difficulty" of the case as a factor that should be considered in determining a reasonable fee amount, but the novelty and difficulty of a case is also relevant to the determination of whether the Division was substantially justified, as discussed.

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.