

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

Ocala Herlong, LLC,

Petitioner,

vs.

Case No. 17-3348RU

DEPARTMENT OF TRANSPORTATION,

Respondent.

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FINAL ORDER ON AWARD OF ATTORNEY'S FEES AND COSTS

This matter came before Cathy M. Sellers, a designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on Petitioner's Motion for Attorney's Fees and Costs filed by Petitioner, Ocala Herlong, LLC, on October 6, 2017, seeking an award of attorney's fees and costs against Respondent, Department of Transportation, pursuant to section 120.595(4), Florida Statutes (2017).

APPEARANCES

For Petitioner: D. Ty Jackson, Esquire  
GrayRobinson, P.A.  
301 South Bronough Street, Suite 600  
Post Office Box 11189  
Tallahassee, Florida 32301

For Respondent: Susan Schwartz, Esquire  
Department of Transportation  
605 Suwannee Street, Mail Stop 58  
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Petitioner is entitled to an award of attorney's fees and/or costs, pursuant to section 120.595(4); and (2) if so, the amounts of attorney's fees and/or costs to which it is entitled.

PRELIMINARY STATEMENT

On September 6, 2017, the undersigned issued a Final Order in Case No. 17-3348RU, determining that a provision published on page 20 of Respondent's 2014 Median Handbook is an unadopted rule that violates section 120.54(1)(a).

The Final Order retained jurisdiction to conduct further proceedings as necessary to award attorney's fees and costs, as applicable, pursuant to section 120.595(4), upon the timely filing of a motion by Petitioner, supported by necessary documentation, requesting an award of attorney's fees and costs. The Final Order afforded Respondent the opportunity to file a response in opposition, disputing Petitioner's legal entitlement to an award of attorney's fees and costs and/or the amount of fees and costs sought by Petitioner. The Final Order was not appealed.

On October 6, 2017, Petitioner timely filed Petitioner's Motion for Attorney's Fees and Costs ("Motion"), seeking an award from Respondent of \$39,477.50 in attorney's fees and \$2,271.66 in

costs, for a total award of \$41,749.16 incurred in prosecuting Case No. 17-3348RU.

On October 30, 2017, Respondent filed Department of Transportation's Response to Petitioner's Motion for Attorney's Fees and Costs ("Response"). The Response conceded that Petitioner is legally entitled to an award of attorney's fees and costs pursuant to section 120.595(4), and did not dispute the amounts of fees and costs sought by Petitioner.

Based on the Motion and supporting documentation and the Response, the undersigned makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

1. On June 30, 2017, Petitioner filed a Petition for the Administrative Determination of the Invalidity of an Agency Statement ("Petition") with DOAH, challenging a provision in Respondent's August 2014 Median Handbook, section 1.3.8, on page 20 (the "Challenged Statement"), as an unadopted rule that violates section 120.54(1)(a).

2. The case was assigned Case No. 17-3348RU. The final hearing in Case No. 17-3348RU was held on July 13, 2017.

3. On September 6, 2017, DOAH entered a Final Order in Case No. 17-3348RU, determining that the Challenged Statement is an unadopted rule that violates section 120.54(1)(a).

4. In the Final Order, DOAH retained jurisdiction to conduct further proceedings as necessary to award attorney's fees and costs, as applicable, pursuant to section 120.595(4).

5. Petitioner was given 30 days from the date of the Final Order in which to file a motion for attorney's fees and costs, supported by documentation demonstrating that the 30-day notice provision in section 120.595(4)(b) was provided; appropriate affidavits, including those attesting to the reasonableness of the fees and costs sought; and other documentation, such as timesheets, bills, and receipts, to support the claims for attorney's fees and costs.

6. If such motion was timely filed, Respondent was given 21 days in which to file a response, disputing Petitioner's legal entitlement to an award of attorney's fees and costs and/or the amount of those fees and costs sought by Petitioner.

7. On October 6, 2017, Petitioner timely filed its Motion, seeking an award of \$39,477.50 in attorney's fees and \$2,271.66 in costs incurred in prosecuting Case No. 17-3348RU.

8. The Motion was supported by appropriate documentation to support the amounts of the attorney's fees and costs sought.

9. Specifically, attached to the Motion was a letter dated May 11, 2017, to Richard E. Shine, Assistant General Counsel for Respondent, accompanied by the draft Petition for the Administrative Determination of the Invalidity of an Agency

Statement ("Draft Petition"). The letter stated that the Draft Petition "is being submitted in advance of any filing with [DOAH] as notice to [Respondent] that the [Challenged Statement] may constitute an unadopted rule as provided for in section 120.54(4), Florida Statutes." The Draft Petition specifically identifies the Challenged Statement and sets forth Petitioner's grounds for its position that the Challenged Statement constitutes an unadopted rule.

10. The Draft Petition is substantially similar or identical to the Petition that was filed with DOAH on June 13, 2017, initiating this proceeding.

11. The Draft Petition provided notice to Respondent that the Challenged Statement may constitute an unadopted rule that violates section 120.54(1)(a).

12. The Draft Petition was provided to Respondent more than 30 days before the Petition was filed at DOAH.

13. Accordingly, it is determined that Petitioner satisfied the requirement, set forth in section 120.595(4)(b), that the agency receive notice, at least 30 days before an unadopted rule challenge is filed at DOAH, that the agency statement being challenged may constitute an unadopted rule.

14. Petitioner's counsel's timesheets were attached to the Motion. These timesheets consist of detailed descriptions of the itemized tasks performed in this proceeding, billed in .10-hour

increments and reflecting the total amount billed for each itemized task. The total amount of attorney's fees billed for the 116.60 hours of work performed by Petitioner's counsel was \$39,477.50. As noted above, Petitioner is seeking to recover that amount in this proceeding.

15. Petitioner also provided an itemized list documenting that \$2,271.66 of costs were incurred in this proceeding.

16. Also attached to the Motion was an Affidavit of Reasonableness of Attorney's Fees and Costs ("Affidavit") prepared and executed by David J. Metcalf, Esquire, attesting to the reasonableness of the attorney's fees and costs sought in this proceeding.<sup>1/</sup>

17. On October 30, 2017, Respondent filed its Response to the Motion. The Response acknowledges that Petitioner, as the prevailing party in this proceeding, is entitled to recovery of attorney's fees and costs under section 120.595(4). Further, the Response does not dispute the amounts of attorney's fees or costs that Petitioner seeks to recover in this proceeding.

18. It is determined that the amounts of attorney's fees and costs sought to be recovered by Petitioner in this proceeding are reasonable, as required by section 120.595(4)(a).

CONCLUSIONS OF LAW

19. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.595(4), 120.569, and 120.57(1).

20. This proceeding concerns whether Petitioner is entitled to an award of attorney's fees and costs under section 120.595(4), for successfully challenging the Challenged Statement under section 120.56(4); and, if so, the amounts of attorney's fees and costs to which Petitioner is entitled.

21. Section 120.595(4) states in pertinent part:

(a) If the appellate court or administrative law judge determines that all or part of an agency statement violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement and any substantially similar statement pursuant to s. 120.56(4)(e), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney's fees unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law

judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph and paragraph (a) shall be awarded only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition under s. 120.56(4) was filed and that the agency failed to publish the required notice of rulemaking pursuant to s. 120.54(3) that addresses the statement within that 30-day period. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7). An award of attorney's fees as provided by this paragraph may not exceed \$50,000.

22. Based on the foregoing findings that the amounts of attorney's fees and costs incurred by Petitioner in this proceeding are reasonable, and that Petitioner provided the notice to Respondent required by section 120.595(4) as a condition precedent to entitlement to an award of attorney's fees and costs, it is concluded that Petitioner is entitled to an award of \$39,477.50 in attorney's fees and \$2,271.66 in costs, to be paid by Respondent.

ORDER

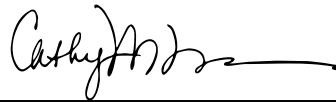
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:



1. Pursuant to section 120.595(4), Petitioner is entitled to an award of attorney's fees in the amount of \$39,477.50 in this proceeding.

2. Pursuant to section 120.595(4), Petitioner is entitled to an award of \$2,271.66 in costs in this proceeding.

DONE AND ORDERED this 21st day of November, 2017, in Tallahassee, Leon County, Florida.



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CATHY M. SELLERS  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of November, 2017.

ENDNOTE

<sup>1/</sup> The Affidavit establishes that Mr. Metcalf is an attorney having extensive practice experience in administrative law, among other areas. In preparing the Affidavit, he reviewed the Petition, Final Order, time and billing entries submitted by Petitioner's counsel and the Transcript of the final hearing. Mr. Metcalf's conclusion that the amounts of attorney's fees and costs sought by Petitioner are reasonable for the services rendered also was based on his familiarity with legal precedent regarding the computation of attorney's fees and with his familiarity with the standard hourly rates customarily charged by attorneys and paralegals of comparable skill level and practice longevity to those of Petitioner's counsel in this proceeding. The undersigned finds the Affidavit credible and persuasive in

determining that the amounts of attorney's fees and costs sought by Petitioner in this proceeding are reasonable, as required by section 120.595(4).

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.