

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRABBA-LEAF, LLC,

Petitioner,

vs.

Case No. 19-1057F

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Respondent.

_____ /

FINAL ORDER

This case arises from an unadopted rule challenge and subsequent appeal, in which the appellate court determined that the challenged agency statement was an unadopted rule. This proceeding, to determine and assess attorneys' fees and costs to be paid by Respondent to Petitioner, has been assigned to Elizabeth W. McArthur, Administrative Law Judge of the Division of Administrative Hearings (DOAH).^{1/} No hearing is necessary, because the parties have agreed to the amount to be assessed.

APPEARANCES

For Petitioner: Gerald J. Donnini II, Esquire
Jonathan W. Taylor, Esquire
Moffa, Sutton, & Donnini, P.A.
Suite 930
100 West Cypress Creek Road
Fort Lauderdale, Florida 33309

For Respondent: Elizabeth A. Teegen, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The amount of attorneys' fees and costs to be assessed against Respondent, to be paid to Petitioner pursuant to section 120.595(4), Florida Statutes, and the First District Court of Appeal's Order of Remand.

PRELIMINARY STATEMENT

Following the First District Court of Appeal's mandate issued in Grabba-Leaf, LLC v. Department of Business and Professional Regulation, Case No. 1D16-4273, Grabba-Leaf, LLC (Grabba-Leaf or Petitioner), filed Petitioner's Motion to Set Attorneys' Fees and Costs (Motion). The Motion was filed on February 11, 2019, in DOAH Case No. 16-3160RU, the underlying unadopted rule challenge proceeding.

The next day, February 12, 2019, Grabba-Leaf filed Petitioner's Notice of Withdrawal of Motion to Set Attorneys' Fees and Costs. Grabba-Leaf also filed a Notice of Filing, to which it attached a Joint Stipulation for Attorney's Fees and Costs (Stipulation), executed by counsel for Grabba-Leaf and counsel for Respondent, Department of Business and Professional Regulation (Department or Respondent). These Notices were also filed in the underlying unadopted rule challenge proceeding.

The Stipulation includes the following: "The parties jointly request entry of an order directing the department to pay petitioner the sum of \$150,000.00 in attorney's fees and costs[.]" Stipulation, ¶ 7.c.^{2/}

DOAH opened this separate "fee" case for the purpose of addressing attorneys' fees and costs. This Final Order is being issued on the basis of the parties' Stipulation, which renders a hearing unnecessary.

FINDINGS OF FACT

Based on the parties' Stipulation, the following facts are found:

1. On June 8, 2016, Petitioner filed a Petition to Determine Invalidity of Agency Statements (Petition), pursuant to section 120.56(4), Florida Statutes. In its Petition, Petitioner also sought reasonable trial-level attorneys' fees and costs under section 120.595.^{3/}

2. By Final Order dated August 26, 2016, the Administrative Law Judge dismissed the Petition, concluding that the challenged agency statement did not meet the definition of a rule under chapter 120. Grabba-Leaf, LLC v. Dep't of Bus. & Prof'l Reg., Case No. 16-3160RU (Fla. DOAH Aug. 26, 2016).

3. The Final Order was appealed to the First District Court of Appeal in Grabba-Leaf, LLC v. Department of Business and Professional Regulation, Case No. 1D16-4273. In the appeal,

Grabba-Leaf moved for appellate fees and costs pursuant to section 120.595.

4. On November 6, 2018, the First District Court of Appeal reversed the Final Order, and held that the challenged agency statement constitutes an unadopted and unenforceable rule.

Grabba-Leaf, LLC. v. Dep't of Bus. & Prof'l Reg., 257 So. 3d 1205 (Fla. 1st DCA 2018).

5. Also on November 6, 2018, the First District Court of Appeal issued an Order granting Grabba-Leaf's motion for appellate attorney's fees and costs under section 120.595, and remanding the matter to the lower tribunal with instructions to assess the amount (Order of Remand).

6. On November 27, 2018, the Mandate issued. The matter is now pending at DOAH on remand from the First District Court of Appeal to assess the amount of appellate attorneys' fees to Grabba-Leaf, as well as on Petitioner's request for attorneys' fees and costs for the administrative hearing, made in its unadopted rule challenge petition.

7. Petitioner's Motion to Set Attorneys' Fees and Costs was filed on February 11, 2019. The Motion represented that the parties had been trying to reach a settlement as to both the request for trial-level attorneys' fees and costs and the appellate attorneys' fees and costs ordered by the First District Court of Appeal. Grabba-Leaf represented that although it

believed that the parties had reached an agreement as to the total amount, the written agreement had not been executed by Respondent. Accordingly, Grabba-Leaf asked that a hearing be held to determine attorneys' fees and costs for the trial level and the appeal. Attached to the Motion was an affidavit attesting to the attorneys' fees and costs for both the administrative hearing and the appeal, documented by records attached to the affidavit.

8. The next day, on February 12, 2019, Grabba-Leaf filed Petitioner's Notice of Withdrawal of Motion to Set Attorneys' Fees and Costs. Petitioner also filed Petitioner's Notice of Filing to which the parties' Stipulation was attached.

9. By the Stipulation, Petitioner and Respondent agree to the entry of a final order assessing the sum of \$150,000.00 for attorneys' fees and costs for both the trial level and appeal, to be paid by the Department to Grabba-Leaf within 60 days of entry of the final order.

10. The agreed amount for fees and costs set forth in the Stipulation is generally consistent with the affidavit and records attached to Petitioner's Motion to Set Attorneys' Fees and Costs (later withdrawn), albeit in the context of a compromise by both parties to avoid the expense and risk associated with litigating the attorneys' fees and costs matter.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to the section 120.595 and the Order of Remand.

12. Petitioner sought attorneys' fees and costs in the underlying unadopted rule challenge pursuant to section 120.595(4), which provides 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)(f), 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) . . . Attorneys' fees and costs under . . . 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.

13. Petitioner has met the requirements in section 120.595(4)(b), and is entitled to attorneys' fees and costs for the administrative hearing under section 120.595(4)(a), to be assessed against Respondent and paid to Petitioner.

14. Petitioner has also been awarded appellate attorneys' fees and costs for successfully appealing the Final Order issued in DOAH Case No. 16-3160RU. As provided in the Order of Remand, Petitioner's entitlement has already been decided; the only remaining task is to assess the amount.

15. Based on the findings above, the sum of \$150,000.00 in attorneys' fees and costs, for both the administrative hearing and the appeal, is assessed against the Department to be paid to Grabba-Leaf within 60 days of the date of this Order, in accordance with the Stipulation.

ORDER

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

1. Respondent, Department of Business and Professional Regulation, shall pay Petitioner, Grabba-Leaf, LLC, the sum of \$150,000.00 in attorneys' fees and costs, made payable directly to Grabba-Leaf, LLC, and provided to Grabba-Leaf, LLC, in care of Moffa, Sutton, & Donnini, P.A.

2. Respondent, Department of Business and Professional Regulation, shall seek immediate approval of payment, and shall render payment within 60 days of the date of this Order.

DONE AND ORDERED this 1st day of March, 2019, in
Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 2019.

ENDNOTES

^{1/} The Administrative Law Judge who heard and decided the unadopted rule challenge has retired.

^{2/} The parties' joint request was not immediately discovered because it was buried in the Stipulation, which was attached to Petitioner's Notice of Filing that did not indicate any action was being requested, and because it was filed simultaneously with Petitioner's notice that it was withdrawing its Motion to set attorney's fees and costs. The joint request would have been more apparent had the Stipulation been attached to a joint motion filed in substitution for Petitioner's Motion as the vehicle to request that action be taken.

^{3/} The request for attorneys' fees and costs was made under section 120.595(4)(a), which is quoted in the Petition. Attached as Exhibit G to the Petition was the notice provided to Respondent more than 30 days before the petition was filed that the statement may constitute an unadopted rule, to demonstrate compliance with the condition precedent in section 120.595(4)(b) to an award of attorneys' fees and costs under section 120.595(4)(a).

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.