

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE LIGHTSEY,

Petitioner,

vs.

Case No. 19-5210F

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

_____ /

RECOMMENDED ORDER

This cause comes before the undersigned on a motion for award of attorney's fees and costs filed by Petitioner, Lee Lightsey.

APPEARANCES

For Petitioner: Bert J. Harris, Esquire
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For Respondent: Bridget Kelly McDonnell, Esquire
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STATEMENT OF THE ISSUE

Is an Agency that settles a challenge to its denial of a license by agreeing to issue the license a "non-prevailing adverse party," as defined by section 120.595(1)(e)3., Florida Statutes (2019)? ¹

PRELIMINARY STATEMENT

This attorney's fees² matter began with three petitions of Mr. Lightsey, each requesting a formal administrative hearing to challenge the denial by Respondent, Florida Fish and Wildlife Conservation Commission (Commission), of three license applications. The disputes were about the Commission's denial of a Hunt Preserve License (DOAH Case No. 18-5428), a Game Farm License (DOAH Case No. 19-3187), and a Blanket Hunt Reserve License (DOAH Case No. 19-1298). On joint motion of the parties, jurisdiction of Case numbers 19-3187 and 19-1298 was relinquished to the Commission. Consequently, this matter involves only the fees motion filed in Case number 18-5428.

The parties eventually settled the licensing dispute. They agreed to sever the attorney's fees and costs dispute for resolution by the Division of Administrative Hearings (Division), if necessary. The facts material to the initial legal issues that the fees motion presents are not in dispute.

Mr. Lightsey seeks fees under section 120.569(2)(e).³ The undersigned rendered an Order requiring the parties to file memoranda relevant to specific threshold issues. The Order required each party to file a memorandum that, among other things:

¹ All citations are to the 2019 codification of the Florida Statutes unless otherwise noted. The 2018 statutes are identical.

² This Order will sometimes refer to attorney's fees and costs collectively as fees or attorney's fees.

³ His motion also seeks fees under section 120.569(2)(e). A separate order disposes of that claim.

(d) addresses the effect of the holding in *Johnson v. Department of Corrections*, 191 So. 3d 965 (Fla. 1st DCA 2016) upon Petitioner's claim for fees under section 120.595(1)(e).

The parties timely filed memoranda. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Commission denied an application by Mr. Lightsey for issuance of a Hunt Preserve License. A letter titled "Amended Notice of Denial" (Amended Notice), signed by Major Rob Beaton, Division of Law Enforcement, advised Mr. Lightsey that the Commission intended to deny his application.

2. The Amended Notice included this dispositive paragraph: "Due to the facts stated above, pursuant to 68-1.010, F.A.C, your application for a HPL has been denied. We are processing your application fee for a refund, and you should receive it within 21 days." The Amended Notice also advised Mr. Lightsey of his right to request a hearing to challenge the intended decision.

3. Mr. Lightsey challenged the proposed denial and requested a formal administrative hearing. Mr. Lightsey brought his challenge under section 120.57(1), which creates a right to a formal hearing to dispute a proposed agency action. The Commission referred the matter to the Division for assignment of an Administrative Law Judge and conduct of the hearing.

4. The parties settled the licensing dispute before the hearing. Their settlement agreement provided for the Commission issuing each of the denied licenses. The parties' agreement also provided for severing the attorney's fees and costs claim, leaving it pending for the Division to resolve if the parties could not agree. The order closing the file in this case severed the fees and costs claim and reserved jurisdiction over it. The parties could not agree. The

division re-opened the fees case as DOAH Case No. 19-5210F. This proceeding followed.

CONCLUSIONS OF LAW

Jurisdiction

5. Sections 120.569 and 120.57 grant the Division jurisdiction over the issues in and parties to this proceeding.

Section 120.595(1)

6. Section 120.595(1) permits an award of fees in actions brought under section 120.57(1). It provides for the Administrative Law Judge to determine in a recommended order whether a party participated in a proceeding for an improper purpose. The statute permits an award of fees in the following limited circumstances.

(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.

7. In order to recover under section 120.595(1), Mr. Lightsey must establish that he is a prevailing party, that the Commission is a "non-prevailing adverse party," and that the Commission participated in the proceedings "for an improper purpose." There is no dispute that Mr. Lightsey is the prevailing party.

8. Section 120.595(1)(e)3. defines "non-prevailing adverse party." It states:

"Non-prevailing 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 "non-prevailing 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.

9. The proposed agency action was denial of Mr. Lightsey's license application. The Commission sought to support the denial and never sought to modify or change the decision in any way. By choosing to settle, the Commission rescinded its proposed license denial. The facts in this case do not differ in any material way from the facts in *Johnson v. Department of Corrections*, 191 So. 3d 965 (Fla. 1st DCA 2016). In that case the Department of Corrections (Department) withdrew its proposed dismissal of Mr. Johnson and reinstated him to employment. The court held that, although Mr. Johnson was a prevailing party, the Department was not a "non-prevailing adverse party," as defined by section 120.595(1)(e)3., because it did not seek to modify or change an agency decision. The Commission in this case did not seek to change an agency decision and fail. *Johnson* governs and results in the conclusion that Mr. Lightsey cannot recover fees under section 120.595(1). *See also Batha v. Ag. for Health Care Admin.*, DOAH Case No. 16-5766 (Fla. DOAH Sept. 30, 2019) at Pg. 34; ("Stated differently, AHCA, 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.").

10. Mr. Lightsey argues that *Johnson* should not govern "because it was an appeal of agency action" that resulted in Mr. Johnson's reinstatement. The argument is groundless. The action giving rise to the fees dispute was not an appeal. It was a section 120.57(1) challenge to proposed agency action heard before the Division, just like this matter.

11. Mr. Lightsey also argues that application of *Johnson* would mean a party could never recover fees under section 120.595(1). This is not accurate. A few examples of situations where a party may be entitled to fees because it is victorious and another party is a "non-prevailing adverse party" come easily to mind. One example would be a case in which an advocacy group unsuccessfully challenged an agency's proposed issuance of a permit. *See Spanish Oaks of Cent. Fla., LLC v. Lake Region Audubon Soc'y, Inc.*, Case

No. 05-4644F (Fla. DOAH, July 7, 2006) (Audubon Society unsuccessfully challenged water management district decision to issue Environmental Resource Permit to Spanish Oaks and was a non-prevailing party; but no fee award because there was no proof of "improper purpose.")

12. Mr. Lightsey is not authorized to recover attorney's fees and costs under section 120.595(1).

Notice of Additional Authority

13. Mr. Lightsey filed a Notice of Additional Authority citing *Department of Elder Affairs v. Florida Senior Living Association, Inc.*, Case No. 1D18-4140 (Fla. 1st DCA 2020), *mot. for reh., clarification, & conflict cert. pending*. That was a case in which the First District Court of Appeal reversed a Final Order finding a total of 11 proposed rule amendments and existing rules in Florida Administrative Code Chapter 58A-5 invalid. The opinion concludes with a statement that the Department was partially successful and therefore was entitled to recover some attorney's fees. It does not support Mr. Lightsey's claim for a fees award.

14. The court's analysis of the fees issue appears at page 16 of the slip opinion. The court states:

As stated earlier, a trial court may award a reasonable award of attorney's fees to an agency if it prevails in an existing rule or proposed rule challenge. § 120.595(2)-(3), Fla. Stat. Additionally, attorney's fees pursuant to section 120.595 are authorized even if a party has limited success in the administrative proceedings. *See Bd. of Regents v. Winters*, 918 So. 2d 313, 314 (Fla. 2d DCA 2005) (ordering a reduction in the amount of attorney's fees awarded to appellee pursuant to lodestar approach due to appellee's partial success).

15. The statutory provisions the court cited and applied, sections 120.595(2) and (3), provide for recovery of attorney's fees in challenges to rules and proposed rules. This case does not involve a challenge to a rule or a proposed rule. Mr. Lightsey seeks fees under the authority of sections

120.569(2)(e) and 120.595(1). Mr. Lightsey does not seek fees under section 120.595(2) or (3).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that The Florida Fish and Wildlife Conservation Commission enter its Final Order denying Petitioner's Motion for Fees and Costs under section 120.595, Florida Statutes.

DONE AND ENTERED this 31st day of March, 2020, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2020.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.