

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF DESTIN,

Petitioner,

Case No. 20-2123F

vs.

THOMAS WILSON, DAVID H. SHERRY,  
REBECCA R. SHERRY, AND JOHN S.  
DONOVAN,

Respondents.

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FINAL ORDER DENYING ATTORNEY'S FEES

On July 27, 2020, oral argument was held by Zoom Teleconference before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH), on Petitioner, City of Destin's (Destin) Motion for Attorney's Fees, Expenses and Costs (Motion), filed on November 15, 2019, and its Amended Motion for Attorney's Fees, Expenses and Costs (Amended Motion), filed on December 18, 2019, by which Destin has moved for an award of attorneys' fees, expenses and costs to be assessed against Respondents, Thomas Wilson, David H. Sherry, Rebecca R. Sherry, and John S. Donovan (collectively, Respondents) pursuant to section 120.569(2)(e), Florida Statutes, for pleadings filed in DOAH Case No. 19-3356.

APPEARANCES

For Petitioner: Kenneth G. Oertel, Esquire  
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STATEMENT OF THE ISSUE

The issue to be determined is whether Destin is entitled to attorney's fees pursuant to section 120.569(2)(e), from Respondents related to litigation between the parties in DOAH Case No. 19-3356.

PRELIMINARY STATEMENT

On February 20, 2020, a Recommended Order was entered in DOAH Case No. 19-3356 that approved the issuance of a permit for the U.S. Army Corps of Engineers (Corps), to maintenance dredge a section of East Pass in Destin, Florida, and to place the spoil material onto critically eroded beaches to the east of East Pass. Destin had previously moved for sanctions, including costs and attorney's fees, pursuant to section 120.569(2)(e). The Recommended Order reserved jurisdiction with DOAH to resolve the issue of sanctions by separate final order, provided Destin renewed its motion within 30 days of the Department of Environmental Protection's (DEP) entry of its final order.

The Final Order in DOAH Case No. 19-3356 was entered on April 6, 2020. On May 1, 2020, Destin timely filed its Renewed Motion for Attorney's Fees, Expenses and Costs (Renewed Motion). The Renewed Motion was assigned

for disposition as Case No. 20-2123F. On May 12, 2020, Respondents filed their Response. Upon notice, oral argument was scheduled and held on July 27, 2020.

#### FINDINGS OF FACT

1. On November 14, 2016, DEP issued a Permit Modification to the Corps which modified the location upon which spoil from the dredging of East Pass in Destin, Florida could be placed, from being on “a portion of the beach on Eglin Air Force Base (to the west of East Pass),” to “the Gulf-front beaches on the eastern and western sides of East Pass.” The modification deleted language from an original permit that prohibited, with minor exception, placement of dredged material “on any beach east of the Main Channel.”

2. On November 16, 2018, John S. Donovan, David H. Sherry, and Rebecca R. Sherry filed a Petition for Administrative Hearing challenging the Permit Modification, which was referred to DOAH and assigned as DOAH Case No. 19-1915. The Petition in Case No. 19-1915 was dismissed as not being timely filed. A full account of the procedural history of that case is contained in the docket of Case No. 19-1915.

3. On June 5, 2019, Thomas Wilson filed his Petition for Formal Administrative Hearing (Wilson Petition). The Wilson Petition was substantively identical to that filed in Case No. 19-1915. The Wilson Petition was referred to DOAH on June 19, 2019, and assigned as DOAH Case No. 19-3356. On June 28, 2019, David H. Sherry, Rebecca R. Sherry, and John S. Donovan filed a Motion for Leave to Intervene in Case No. 19-3356, which was granted on July 8, 2019.

4. On August 20, 2019, Destin moved to intervene in DOAH Case No. 19-3356, which was granted on August 26, 2019.

5. On August 21, 2019, DEP filed a proposed amendment to the Permit Modification, which changed the condition directing placement of dredged

material to “the eastern and western sides of East Pass” to one requiring that “[b]each compatible material dredged from the initial maintenance dredge event following issuance of [the Permit Modification], shall be placed to the east of East Pass” (the Proposed Change). The Proposed Change also extended the term of the Permit.

6. On September 4, 2019, John S. Donovan, David H. Sherry, and Rebecca R. Sherry filed a Petition for Formal Administrative Hearing to challenge the Proposed Change, which was referred to DOAH and assigned as DOAH Case No. 19-4979. On September 20, 2019, Case No. 19-4979 was consolidated with Case No. 20-3356.<sup>1</sup>

7. On October 21, 2019, Petitioners filed a First Amended Petition for Formal Administrative Hearing (Amended Petition) to address the August 21, 2019, Proposed Change. On November 5, 2019, the Amended Petition was accepted as filed.

8. On November 15, 2019, Destin filed its Motion for attorney’s fees pursuant to the authority in section 120.569(2)(e).

9. Also on November 15, 2019, Petitioners filed a Second Amended Petition for Formal Administrative Hearing.<sup>2</sup>

10. The final hearing was convened on November 20, 2019, as scheduled.

11. Issues related to the disposition of DOAH Case No. 19-1844 were taken up at the final hearing as a preliminary matter. Case No. 19-1844 involved the issuance of a permit to Destin to perform maintenance dredging of East Pass north of the U.S. Highway 98 bridge, with placement of dredged material to the beaches to the east of East Pass. A Recommended Order had

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<sup>1</sup> At the commencement of the final hearing, DOAH Case No. 19-4979 was severed, and a written Order Granting Renewed Motion to Dismiss, Relinquishing Jurisdiction, and Closing File was entered on January 29, 2020. Since the May 1, 2020, Renewed Motion was filed only with regard to Case No. 19-3356, further discussion of Case No. 19-4979 is unnecessary.

<sup>2</sup> The purpose of the Second Amended Petition was primarily to drop Petitioners’ objection to the extended term of the Permit authorized by the Proposed Change, and is of no consequence to the disposition of this proceeding.

been entered on October 14, 2019, which determined that dredged material from the maintenance dredging of East Pass should, to be compliant with section 161.142, Florida Statutes, be placed on adjacent eroding beaches east of the inlet. It also determined that the East Pass IMP is not an unadopted rule as described in section 120.57(1)(e). At the commencement of the final hearing, a Final Order in Case No. 19-1844 had not yet been entered. The substantial similarities in the issues of law and fact between Case No. 19-1844 and this case were discussed, and it was determined that if the Final Order in Case No. 19-1844 substantially adopted the Recommended Order, an Order to Show Cause would be entered, asking the parties to address whether collateral estoppel applied to some or all of the issues in this case.

12. During the pendency of Case No. 19-1844, Destin filed a Motion for Attorney's Fees, Expenses and Costs pursuant to sections 120.569(2)(e) and 120.595. The Recommended Order in Case No. 19-1844 reserved ruling on Destin's Motion for Attorney's Fees, Expenses and Costs under section 120.569(2)(e), "provided [Destin] renews its Motion within 30 days of DEP's entry of the final order" in Case No. 19-1844. No renewed motion was filed. With regard to section 120.595 fees, the Recommended Order included a "determination" that John S. Donovan, David H. Sherry, and Rebecca R. Sherry did not participate in Case No. 19-1844 "for an improper purpose, i.e., 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..." and recommended that the motion for attorney's fees be denied.

13. On November 20, 2019, after the final hearing in Case No. 19-3356 had convened, DEP entered its Final Order in Case No. 19-1844. The Final Order adopted the Recommended Order with minor modifications that are not pertinent here.

14. An Order to Show Cause was issued on November 22, 2019, as to whether disposition of issues in Case No. 19-1844 would collaterally estop the challengers to the Permit in Case No. 19-3356 as to some or all of the issues in that case. It was thereafter determined, for reasons set forth in the Recommended Order in Case No. 19-3356, that Respondents were not estopped from challenging the Corps' Permit Modification and Proposed Change.

15. The Recommended Order in Case No. 19-3356 was entered on February 20, 2020. The Recommended Order considered the evidence offered by Destin, DEP, and Respondents, primarily expert in nature except for testimony as to standing, and found and concluded that the Corps was entitled to the Permit Modification as modified by the Proposed Change.

16. Destin filed its Renewed Motion as authorized in the Recommended Order, and Respondents filed a Response.

17. On July 27, 2020, oral argument was held on the Motion and Amended Motion as renewed. It was noted by the undersigned during a series of questions that the Motions did not identify a specific "pleading, motion, or other paper" alleged to have been filed for an improper purpose. Counsel for Destin thereupon stated that the pleadings alleged to have been signed for an improper purpose were the June 5, 2019, Wilson Petition, and the October 21, 2019, Amended Petition. No other pleadings, motions, or papers were identified as having been signed for an improper purpose. Thus, the analysis in this Order is limited to those pleadings.

#### CONCLUSIONS OF LAW

18. Attorney's fees in Florida are awarded by applying the "American Rule," meaning that they may only be awarded by statute or by agreement of the parties. *Dade Cty. v. Peña*, 664 So. 2d 959 (Fla. 1995); *Fla Pt.'s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla.1985). As a general rule, adjudicative bodies should apply the plain and unambiguous language of a

statute. It is also well-established that “statutes awarding attorney's fees must be strictly construed.” *Peña* at 960.

19. Section 120.569(2)(e) provides that:

(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.

20. Section 120.569(2)(e) authorizes the imposition of a sanction, which may include reasonable attorney's fees and expenses, if a determination is made that a party signed a paper in a proceeding for an improper purpose. DOAH has jurisdiction to resolve that issue by separate final order. *See, e.g., Friends of Nassau Cty., Inc. v. Nassau Cty.*, 752 So. 2d 42, 44-45 (Fla. 1st DCA 2000).

21. A frivolous claim is not merely one that is likely to be unsuccessful. Rather, it must be so clearly devoid of merit that there is little, if any, prospect of success. *French v. Dep't of Child. & Fams.*, 920 So. 2d 671, 679 (Fla. 5th DCA 2006). “[A] finding of improper purpose could not stand ‘if a reasonably clear legal justification can be shown for the filing of the paper.’” *Procacci Commer. Realty v. Dep't of HRS*, 690 So. 2d 603, 608, n.9 (Fla. 1st

DCA 1997)(quoting *Mercedes Lighting & Electrical Supply v. State, Dep't of Gen. Servs.*, 560 So. 2d 272, 277 (Fla. 1st DCA 1990)).

22. An objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under section 120.569(2), and its predecessor statutes. *See, e.g., Friends of Nassau Cty., Inc. v. Nassau Cty.*, 752 So. 2d at 50-51.

23. The fundamental question for determination under section 120.569(2)(e) is not whether the evidence is ultimately sufficient to support the allegations in a pleading, but whether, *at the time the pleading is signed*, counsel conducted reasonable inquiry prior to signing the pleading at issue. Furthermore, counsel is entitled to “rely on the opinions of experts, when it is reasonable to do so.” *Friends of Nassau Cty., Inc.*, 752 So. 2d at 52.

24. Destin argues that Respondents could have responded to its Motion and Amended Motion by withdrawing the Wilson Petition (and presumably the Amended Petition) “prior to: (1) the Final Hearing; (2) the Post-Hearing Arguments on December 19, 2019; (3) the Proposed Recommended Orders; (4) the Recommended Order; or (5) the filing of exceptions to that Order. A withdrawal at any of those points would have expedited the resolution of the case and mitigated the amount of time and resources expended by the City.” (Renewed Motion at ¶ 11). However, sanctions under section 120.569(2)(e) are not imposed when a party continues to maintain a proceeding after evidence of its “frivolous purpose” emerges, as is the case with fees under section 120.595, and do not take into consideration whether a party withdraws an offending pleading after notice, as is the case with fees under section 57.105, Florida Statutes. Rather, as set forth above, the analysis of “improper purpose” is fixed on the date the pleading is signed, regardless of what comes after.

25. Despite Destin’s intervention on August 26, 2019, the original Motion was not filed until November 15, 2019, more than five months after the filing of the Wilson Petition, almost three months after Destin intervened, and less



than three full business days prior to the commencement of the final hearing. The seven-day time period for filing a response under Florida Administrative Code Rule 28-106.204 did not run until after the final hearing was complete.

26. The Amended Motion filed on December 18, 2019, served only to note that the findings made in the Recommended Order “were not disturbed in the Final Order.”

27. As was the case in *French*, Destin “filed a general notice of intent to seek attorney's fees pursuant to [section 120.569(2)(e)] prior to the hearing in this case, [but] the notice did not identify any ‘pleadings, motions, or other papers’ it believed had been filed for an improper purpose.” Rather, the Motion and the Amended Motion were designed “[t]o determine whether a proceeding was initiated for an improper purpose” (Motion and Amended Motion at ¶ 4); requested consideration of issues related to “participation in a proceeding” (Motion and Amended Motion at ¶ 5); and concluded that “the maintenance of this case is done for an improper and frivolous purpose and an appropriate sanction should be applied.” (Motion and Amended Motion at ¶ 14)

28. Section 120.595(1), which is not the basis for fees or sanctions in this case, allows for an award of costs and attorney’s fees when “the nonprevailing adverse party has been determined by the administrative law judge to have *participated in the proceeding* for an improper purpose.” Section 120.569(2)(e) establishes no comparable standard. Rather, section 120.569(2)(e) is directed to whether “a pleading, motion, or other paper is signed” for an improper purpose. As stated by Judge Daniel Manry:

14. Section 120.569(2)(e) is aimed at deterring parties from filing “pleadings, motions, and other papers” for improper purposes. The statute is not intended to shift fees and costs to compensate the prevailing party. Section 120.569(2)(e) is aimed at the conduct of counsel and not the outcome of the proceeding. *See Mercedes Lighting and Electrical Supply, Inc. v. State, Department of General*

*Services*, 560 So. 2d 272, 276 (Fla. 1st DCA 1990)(involving former Section 120.57(1)(b)5 that is now codified in Section 120.569(2)(e)).

15. A party seeking sanctions under Section 120.569(2)(e) is required to take action to mitigate the amount of resources expended by the party in defense of a pleading that the party claims is filed for an improper purpose. *Mercedes*, 560 So. 2d at 277. The party must give prompt notice to the opposing party and allow the ALJ an opportunity to promptly punish an offending party. The purpose of Section 120.569(2)(e) is not well served if an offending party is not sanctioned until the end of the administrative hearing. *Id.*

*Beverly Health and Rehab. Servs-Palm Bay v. Ag. for Health Care Admin.*, Case No. 02-1297F (Fla. DOAH Apr. 25, 2003).

29. Judge Donald Alexander provided an even more detailed analysis of the requirements and limitations of section 120.595(2)(e) in the following lengthy, but pertinent and comprehensive, discussion:

Several broad tenets govern a sanctions request. First, an essential element of a claim for sanctions is for the moving parties to identify a specific pleading, motion, or other paper interposed for an improper purpose, “such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation.” § 120.569(2)(e), Fla. Stat.; *French v. Dep't of Child. & Fams.*, 920 So. 2d 671, 676-77 (Fla. 5th DCA 2006). To determine whether a paper is filed for an improper purpose, it is necessary to determine whether the filing is reasonable under the circumstances. *Mercedes Lighting & Elec. Supply Co. v. Dep't of Gen. Servs.*, 560 So. 2d 272, 276 (Fla. 1st DCA 1990). The determination must be based on an objective evaluation of the circumstances existing at the time the papers were filed. *See Friends of Nassau Cnty.*, 752 So. 2d at 57. (Unlike claims under sections 57.111 and 57.105(5), liability under section 120.569(2)(e) is determined only based on the circumstances as of the time of

the filing of the offending document, not subsequently.) The issue is not whether the non-moving party would ultimately prevail on the merits. Rather, the question is whether a party or attorney made a reasonable inquiry of the facts and law prior to signing and filing a pleading, motion, or other paper. *Id.* at 52. Finally, and especially relevant here, if an obvious offending paper is filed, a party is obligated to promptly take action to mitigate the amount of resources expended in defending against the offending paper. *See Mercedes*, 560 So. 2d at 276-77. A delay in seeking sanctions undermines the mitigation principle that applies to the imposition of sanctions. *Id.* The purpose of the statute is to deter subsequent abuses, a purpose not well-served if an offending pleading is fully litigated and the offender is not punished until the end of the trial. *Id.*

\* \* \*

Accepting the City's invitation to rule otherwise would encourage a party to sit back and fully litigate a case, and depending on the final outcome, to then seek sanctions under section 120.569(2)(e); clearly, this process is not contemplated by the statute. *See, e.g., Spanish Oaks of Cent. Fla., LLC v. Lake Region Audubon Soc'y, Inc.*, Case No. 05-4644F, 2006 Fla. Div. Adm. Hear. LEXIS 294 at \*48 (Fla. DOAH July 7, 2006)(where moving party did not file request for sanctions until “just prior to the final hearing,” delay warranted denial of request); *Rustic Hills Phase III Prop. Owners Ass'n v. Olson*, Case No. 00-4792, Order Denying Sanctions Under Section 120.569(2)(e), (Fla. DOAH July 31, 2001)(where moving parties waited until final hearing to seek sanctions, and the basis for sanctions was the weakness of the evidentiary presentation, sanctions not awarded); *Hasselback v. Dep't of Env'tl. Prot.*, Case No. 07-5216, 2011 Fla. ENV. LEXIS 63 (Fla. DOAH June 14, 2011)(failure to timely take action to mitigate the amount of resources expended in litigating the permit criteria warranted denial of request for sanctions); *Still v.*

*New River Solid Waste Ass'n*, Case No. 01-1033, 2001 Fla. Div. Adm. Hear. LEXIS 2720 (Fla. DOAH Aug. 7, 2001)(request denied where moving party waited until final hearing to seek sanctions directed to non-moving party's amended petition for hearing); *Alfonso v. Constr. Indus. Licensing Bd.*, Case No. 05-4711, Order Denying Motion for Attorney's Fees, (Fla. DOAH July 26, 2006)(sanctions denied as being untimely where request was filed two weeks after proposed recommended orders were submitted by parties). The moving parties have cited no contrary authority on this issue. Accordingly, as to all papers filed prior to the filing of the Motion, the request for sanctions is denied.

*David and Cynthia Cope v. Dep't of Env'tl Prot. and City of Gulf Breeze*, Case No. 10-8893 (Fla. DOAH Oct. 26, 2011).

#### The Wilson Petition

30. The Wilson Petition was signed on June 5, 2019. At that time, Case No. 19-1844, which involved substantially similar conditions regarding Destin's maintenance dredging permit as were being applied in the Corps' Permit Modification, was being actively litigated. Case No. 19-1844 was still almost two months from final hearing. At the time the Wilson Petition was signed, the issue of the propriety of depositing dredged spoil to the east of East Pass was very much in the air, and was the subject of opposing but firmly held expert opinions. It was not unreasonable for Respondents' counsel to sign the Wilson Petition challenging the Corps Permit Modification in Case No. 19-3356 on the same grounds that Respondents challenged Destin's permit in Case No. 19-1844.

#### The Amended Petition

31. The Amended Petition was signed on October 21, 2019, one week after the entry of the Recommended Order in Case No. 19-1844. Destin's

suggestion that Respondents should have known that their arguments were doomed to failure at that time disregards the process by which the agency, DEP, has authority to consider the Recommended Order, review exceptions, and enter its own Final Order. That process did not run its course until November 20, 2019, well after the Amended Petition was signed, after the Amended Motion was filed, and after the final hearing in Case No. 19-3356 had been convened and was ongoing.

32. Furthermore, when the Amended Petition was signed, Respondents knew that the undersigned had determined, though with regard to section 120.595, that Respondents had not participated in Case No. 19-1844 “for an improper purpose, i.e., 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....”

33. Since Case No. 19-1844 was ongoing, and since it had been determined that Case No. 19-1844 had not been maintained for the comparable section 120.595 “improper purpose,” it was not unreasonable or unwarranted on October 21, 2019, for counsel for Respondents to maintain their challenge to the placement of dredged material to the east of East Pass.

34. In Case No. 19-3356, as with Case No. 19-1844, Respondents ultimately did not prevail. Nonetheless, they presented testimony and evidence in support of the issues raised in the Wilson Petition and the Amended Petition, including expert testimony that was not offered in Case No. 19-1844. The undersigned did not find the testimony to have been without substance, but instead found the testimony to have been outweighed by other competent, substantial evidence offered by DEP and Destin. (DOAH Case No. 19-3566, R.O. at ¶¶ 36-39). Thus, there was nothing to suggest that, on October 21, 2019, it would have been unreasonable for Respondents’ counsel to rely on Respondents’ experts when concluding that the Amended Petition was not being interposed to harass the Corps or to cause

unnecessary delay in the issuance of the Corps' Permit Modification, for frivolous purpose, or for needless increase in the cost of litigation.

Failure to Identify a "Pleading, Motion, or Other Paper"

35. As indicated herein, neither the Motion nor the Amended Motion specified any particular pleading, motion, or other paper that was signed for an improper purpose. It was not until oral argument that the specific pleadings that warranted imposition of a sanction, i.e., the Wilson Petition and Amended Petition, were identified. To the extent section 120.569(2)(e) requires such identification, which the undersigned believes to be the standard, then the failure to identify a particular pleading in the Motion or Amended Motion constitutes a separate and independent ground for denial.

Timing of the Motion

36. As set forth herein, the Motion was filed on November 15, 2019, almost three months after Destin intervened in Case No. 19-3356, and less than three full business days prior to the commencement of the final hearing. The Amended Motion was filed on December 18, 2019, almost a month after the completion of the final hearing. "The delay in seeking sanctions also militates, in and of itself, against granting the request for sanctions."

*Spanish Oaks of Cent. Fla., LLC v. Lake Region Audubon Soc'y, Inc.*, Case No. 05-4644F, F.O. at ¶ 51 (Fla. DOAH July 7, 2006)(underlying DOAH Case No. 05-2606 referred to DOAH on July 20, 2005; Motion for Attorney's Fees filed on September 7, 2005; final hearing held on September 22, 2005). The delay on the part of Destin in filing its Motion and Amended Motion constitutes a separate and independent ground for denial.

CONCLUSION

37. Based upon a full review and consideration of the record in this proceeding, the undersigned finds that the Wilson Petition and the Amended

Petition were not, on the dates upon which they were signed, 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.

38. Based on the Findings of Fact and Conclusions of Law set forth herein, the City of Destin's Motion for Attorney's Fees, Expenses and Costs, and Amended Motion for Attorney's Fees, Expenses and Costs, as renewed by the Renewed Motion for Attorney's Fees, Expenses and Costs, are collectively DENIED.

DONE AND ORDERED this 6th day of August, 2020, in Tallahassee, Leon County, Florida.



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E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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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.