

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

PATSY BRADLEY, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
DREW KAISER,

Petitioner,

vs.

Case No. 22-1561F

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

JOHN WILSON,

Petitioner,

vs.

Case No. 22-1562F

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

FINAL ORDER

A duly-noticed final hearing was held in these cases on August 8, 2022, in Tallahassee, Florida; and on August 22, 2022, via Zoom Conference, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Kenneth G. Oertel, Esquire
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For Respondent: Rhonda E. Parnell, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioners are entitled to attorney's fees and costs, pursuant to sections 120.569(2)(e) and 120.595(1), Florida Statutes, relating to the underlying permit revocation action, Case Nos. 21-2139 and 21-2140.

PRELIMINARY STATEMENT

By letters dated June 4, 2021, the Florida Fish and Wildlife Conservation Commission ("Commission") notified Drew Kaiser and John Wilson of the Commission's intent to revoke, and deny renewal of, their individual authorized gopher tortoise agent permits ("Agency Action letters"). The Agency Action letters informed them of their right to request a hearing to contest the Commission's decision within 21 days of receipt of the letters.

On June 25, 2021, Mr. Kaiser and Mr. Wilson each filed a Petition for Formal Administrative Hearing with the Commission contesting the revocation and non-renewal of their licenses. On July 7, 2021, the Commission forwarded the Petitions to the Division of Administrative Hearings ("Division") for assignment of an Administrative Law Judge to conduct a disputed fact-finding hearing. The cases were assigned Case Nos. 21-2139 and 21-2141 and assigned to the undersigned, who consolidated them for final hearing.

On September 3, 2021, Petitioners filed separate Motions for Attorney's Fees, Expenses, and Costs ("Motions") pursuant to both sections 120.569(2)(e) and 120.595(1).

The undersigned conducted a final hearing on the consolidated cases on October 12 through 14, 2021, and, on February 14, 2022, issued a Recommended Order recommending dismissal of the Agency Action letters. In the Recommended Order, the undersigned reserved jurisdiction to rule on the Motions following entry of the Final Order in the consolidated cases, provided that renewed Motions were filed within 30 days of entry of the Final Order.

The Commission entered its Final Order on May 16, 2022, adopting the undersigned's Recommended Order with the exception of one footnote, and dismissed the Agency Action letters. Petitioners filed their Renewed Motions on May 24, 2022.

The Renewed Motions were consolidated for final hearing, which was conducted in person on August 8, 2022, and continued via Zoom conference on August 22, 2022. At the final hearing, Petitioner, John Wilson, testified on his own behalf and Petitioner's Exhibits 2, 8, 9, 12, 29, 32, 43 through 45, and 48 were admitted into evidence. Respondent offered the testimony of Claire Sundquist-Blunden, the leader of the Commission's wildlife diversity conservation section, and stipulated to the introduction of all of the admitted exhibits in the underlying license revocation case, which were officially recognized by the undersigned.

The proceedings were not recorded, by a court reporter or otherwise, thus no transcript of the proceedings is available. At the conclusion of the final hearing, the parties requested an extension of time—30 days instead of 10 days—to file their proposed orders.

The parties timely filed their proposed orders on September 21, 2022.

Unless otherwise noted, all citations to the Florida Statutes are to the 2021 version.

FINDINGS OF FACT

1. The Commission is the state agency with the authority to exercise regulatory and executive powers of the state with respect to wild animal life. *See* Art. IV, § 9, Fla. Const.; § 379.1025, Fla. Stat. (2022).

2. The Commission has designated the gopher tortoise as a State Threatened Species, subject to protective provisions adopted by Commission rule. *See* Fla. Admin. Code R. 68A-27.003(2)(f)5. Both the tortoise and its burrow are protected under state law, and gopher tortoises must be relocated before any land clearing or development takes place on property where gopher tortoises are located.

3. The Commission's Gopher Tortoise Program governs the capture and removal of gopher tortoises from development sites and relocation of those tortoises to Commission-permitted recipient sites, as well as monitoring and maintenance of recipient sites.

4. The Commission has adopted extensive Gopher Tortoise Permitting Guidelines ("the Guidelines") governing the requirements to survey a potential development site for gopher tortoises and burrows, regulating the capture and trapping of gopher tortoises, as well as the transport of tortoises to a recipient site, and the release of the tortoises to the recipient site. *See* Fla. Admin. Code R. 68A-27.003(2)(f)5.

5. Prior to his death, Drew Kaiser held Authorized Gopher Tortoise Agent permit number GTA-09-00005E, issued by the Commission and effective March 18, 2019 through March 31, 2021. The permit was issued to Drew Kaiser, Kaiser Consulting Group, LLC, 931 South Ridgewood Avenue, Suite B3, Edgewater, Florida.

6. The permit authorized Mr. Kaiser to undertake the following activities:

1. conduct gopher tortoise surveys;
2. capture gopher tortoises using bucket traps and hand shovel excavation of gopher tortoise burrows;
3. mark, transport, and release captured gopher tortoises at recipient sites; and
4. supervise backhoe excavation of gopher tortoise burrows to capture gopher tortoises.

7. John Wilson holds Authorized Gopher Tortoise Agent permit number GTA-19-00123, issued by the Commission and effective November 4, 2019 through November 4, 2021. The permit is issued to John Wilson, Kaiser Consulting Group, 4323 Kezar Court, Orlando, Florida.

8. Mr. Wilson's permit authorizes him to undertake the following activities:

1. conduct gopher tortoise surveys, and
2. mark, transport, and release captured gopher tortoises at recipient sites.

9. Both permits contain conditions and provisions governing the authorized activities, including the requirement to comply with the Guidelines.

10. Mr. Kaiser's permit also provided that the "activities authorized under this Permit must be carried out by the Permittee or the Assistants" designated by the permittee, and that the "[p]ermittee shall be as fully responsible for activities conducted by Assistants ... to the same extent as if they had themselves carried out those activities."

11. Mr. Kaiser listed Mr. Wilson as one of his Assistants on his 2019 application for renewal of his Authorized Gopher Tortoise Agent permit.

12. Mr. Kaiser owned Kaiser Consulting Group ("KCG") and Mr. Wilson is employed by KCG as a project manager.

13. Recipient sites are privately or publicly-owned lands of 25 acres or more subject to permitting by the Commission to accept gopher tortoises needing relocation out of harm's way from development.

14. The allegations in the Agency Action letters in the underlying permit discipline cases relate to activities that occurred at the following Commission-permitted recipient sites:

1. Padgett Creek, Long-Term Gopher Tortoise Recipient Site permit number GTLR-18-00001;
2. C. Herman Beville Ranch, Long-Term Gopher Tortoise Recipient Site permit number GTLR-10-00003D;
3. Highlands Ranch, Long-Term Gopher Tortoise Recipient Site permit number GTLR-17-00001;
4. Triple S Ranch, Long-Term Gopher Tortoise Recipient Site permit number GTLR-20-00001;
5. Russakis Investments, Long-Term Gopher Tortoise Recipient Site permit number GTLR-13-00005;
6. Russakis Ranch, Long-Term Gopher Tortoise Recipient Site permit number GTLR-11-00003C; and
7. Williamson Cattle Company, Long-Term Gopher Tortoise Recipient Site permit number GTLR-19-00003A.

15. KCG prepared the application for each of the recipient site permits. KCG also prepared the Gopher Tortoise Habitat Management Plan for each of the recipient sites. Each of the subject recipient site permits is issued to the landowner.

16. Applicants for a recipient site permit must identify an Authorized Gopher Tortoise Agent associated with the permit. Each permit names Drew

Kaiser as the authorized agent, with an address of Kaiser Consulting Group, LLC, 931 South Ridgewood Avenue, Suite B3, Edgewater, Florida.

17. The Guidelines require Commission staff to conduct site visits at recipient sites after initial permitting and after receipt of monitoring reports from the permittee's authorized agent. Additionally, random site visits are conducted every year to 18 months; ideally, during different seasons.

18. Erik Seckinger, a senior gopher tortoise conservation biologist for the Commission, conducted a site visit at the Padgett Creek recipient site ("Padgett Creek") on March 11, 2021. Mr. Wilson met Mr. Seckinger at Padgett Creek and accompanied him during the site visit.

19. During the site visit, Mr. Seckinger made several observations of concern, including multiple deceased tortoises in varying states of decay; evidence of silt fencing (the enclosure material used for soft release "pens" of gopher tortoises at recipient sites) that had been breached; portions of silt fencing which had fallen down; and piles of silt fencing lying on the ground. He also found evidence leading him to conclude that one pen on the recipient site had been overstocked.

20. Mr. Seckinger submitted an inspection report to the Commission noting that the conditions observed violated specific provisions of both the Guidelines and the Padgett Creek permit.

21. Samantha Cobble, gopher tortoise conservation biologist with the Commission, conducted site visits at the Beville Ranch recipient site ("Beville Ranch") on March 10 and May 19, 2021, where she was met by Mr. Wilson, who accompanied her for the site visits.

22. During the March 10, 2021 site visit, Ms. Cobble made several concerning observations including: numerous gopher tortoise carcasses in various stages of decay, evidence of feral hog rooting, and exotic flora species in need of management. Ms. Cobble noted the absence of silt fence pens, which was inconsistent with after-action reports from Beville Ranch that

gopher tortoises had been released there in February 2021.¹ She also observed old silt fence material piled on the ground.

23. Based on Ms. Cobble's familiarity with the Beville Ranch management plan, she concluded that several provisions had been violated, including the duty to manage feral hogs and exotic vegetation.

24. During the May 19, 2021 site visit, Ms. Cobble found three newly-installed silt fence pens. Ms. Cobble noted inconsistencies with the Beville Ranch monitoring report and raised concerns with overstocking of pens.

25. Ms. Cobble prepared an inspection report documenting her observations and alleged violations of both the Guidelines and the Beville Ranch permit.

26. Kyle Brown is a gopher tortoise conservation biologist for the Commission. In March 2021, Mr. Brown met with Mr. Kaiser and Mr. Wilson at the Triple S Ranch recipient site ("Triple S Ranch") for an annual site inspection. During the site visit, Mr. Brown observed "roller chopping" at the site. Roller chopping is a method for clearing out canopy cover and woody vegetation, and is not an approved management activity in the Triple S Ranch habitat management plan.

27. In 2019, Mr. Seckinger, along with another Commission employee, had conducted the pre-application site visit in conjunction with KCG's application for permitting Triple S Ranch as a recipient site. At that site visit, Commission employees visited about 70 percent of the site to ground-truth the habitat maps and vegetation surveys submitted with the 2019 application.

28. During the March 21, 2021 site visit, Mr. Brown observed habitat types on the ground that differed from the habitat noted on the habitat maps submitted with the application. He also noted areas where the habitat differed from that described in the application. Specifically, Mr. Brown noted

¹ The Guidelines require silt fence pens to be maintained for six months after release of gopher tortoises.

that some areas classified as palmetto prairie and shrub and brushland (ideal habitat for gopher tortoises) were actually improved pasture (not appropriate habitat for gopher tortoises). Mr. Brown concluded that some habitat had been improperly classified in the permit application. The result of improperly classifying the habitat, if proven, would be overallocation of the amount of acreage available for gopher tortoise habitat.²

29. Mr. Brown conducted a second site visit at Triple S Ranch on May 19, 2021, to verify that silt fence pens were in place to receive gopher tortoises. Mr. Brown was met at the site by Mr. Wilson, who accompanied him during the site visit. Mr. Brown observed, and documented with photographs, holes in silt fencing and a gap under the silt fence in one area. The pen enclosure is required to be buried below ground to prevent gopher tortoises, which are home-seeking, from escaping from the enclosure, where they are required to be regularly observed and monitored for six months after release.

30. Mr. Brown submitted a report to the Commission documenting his concerns and alleged violations of the Guidelines and Triple S Ranch permit.

31. Nicole Savona is a conservation easement and monitoring compliance biologist for the Commission. She conducts pre-application visits and annual site visits of recipient sites.

32. On September 23, 2020, Ms. Savona and Mr. Seckinger conducted a site visit at the Highlands Ranch recipient site (“Highlands Ranch”). Mr. Kaiser and Mr. Wilson were onsite for this visit. Mr. Wilson provided Ms. Savona with the most recent monitoring report (dated March 31, 2020) and transect map of the ranch.³

² The allegation of improperly classifying habitat, or falsifying the application, was not proven at the final hearing in the underlying case.

³ A transect map reflects the linear rows, or transects, on a particular section of the recipient site which were walked by the gopher tortoise agent to document existing, active, and abandoned gopher tortoise burrows, as well as any deceased tortoises.

33. During this site visit, Ms. Savona walked a subset of the transects on the map to ground-truth the number and location of burrows, as well as the number of carcasses, noted in Mr. Wilson’s report. Ms. Savona observed many more “readily apparent” gopher tortoise carcasses than were noted in the monitoring report. Given the state of disarticulation of the gopher tortoise shells, Ms. Savona determined that many of the carcasses she observed—which she was literally “stepping over” to match with those mortalities noted in the monitoring report—were older than those noted in the monitoring report. Thus, she concluded that the permittee had failed to report observed mortalities, as required by the Guidelines and the Highlands Ranch permit.

34. Claire Sundquist-Blunden is the section leader of the Commission’s wildlife diversity conservation section. Based on the reports from Mr. Seckinger, Ms. Cobble, Mr. Brown, and Ms. Savona, Ms. Sundquist-Blunden drafted the Agency Action letters issued to Mr. Kaiser and Mr. Wilson on June 4, 2021.⁴ The Agency Action letters, which initiate the underlying permit discipline case, cite Petitioners with multiple violations of the Guidelines in management of the recipient sites, including the following:

Failing to regularly monitor and maintain temporary fencing at several of the recipient sites to repair damage and maintain the integrity of the temporary enclosures;

Overstocking gopher tortoises at Padgett Creek and Triple S Ranch;

Failing to report observed tortoise mortalities to the Commission, which would trigger development of a contingency or adaptive management plan;

Failing to monitor Padgett Creek Ranch and Beville Ranch for feral pig activity and take steps to curb feral pig damage to tortoise burrows; and,

⁴ Initially, the Commission issued revocation letters dated March 19, 2021, which were insufficient, and dismissed, without prejudice, by the undersigned in consolidated Case Nos. 21-1317 and 21-1318 on May 12, 2021.

Allowing use of rollerchopping at Triple S Ranch, when that land management technique is not authorized in the management plan.

35. The Agency Action letters cite Florida Administrative Code Rule 68-1.010(2)(d) as the basis for revocation of Petitioners' licenses, which provides, in pertinent part, as follows:

(2) The Commission shall revoke or deny the renewal of any license, permit or other authorization based on any one or more of the following grounds:

* * *

(d) The licensee, permittee or other holder of authorization is *conducting activities under the license, permit or authorization* in a manner that endangers the health, safety or welfare of the public, wild animal life, fresh water aquatic life or marine life. (emphasis added).

36. In the underlying case, the undersigned did not reach the specific allegations of the Agency Action letters, finding that the alleged violations were not related to activities undertaken by Petitioners under their individual gopher tortoise agent permits. *See Kaiser v. Fla. Fish & Wildlife Conser. Comm'n*, Case No. 21-2139 (Fla. DOAH Feb. 14, 2022; Fla. FWC May 16, 2022). Rather, the activities they were conducting were under the license, permit, or authorization of the recipient site permits. *Id.*

37. In addition to alleged violations of the Guidelines on the recipient sites, the Commission charged Mr. Kaiser with submitting false information in connection with the Triple S Ranch recipient site permit application.

38. The Commission cited in the Agency Action letters, as the basis for revocation, rule 68-1.010(2)(c), which provides, in pertinent part, as follows:

The Commission shall revoke or deny the renewal of any license, permit or other authorization based on any one or more of the following grounds:

* * *

(c) The licensee, permittee or other holder of authorization has submitted materially false information in any previously submitted or pending application or supporting documentation relating to the application, or documentation or reports required by the license, permit or authorization.

39. The undersigned made findings pertinent to the allegation of falsifying information on the Triple S Ranch permit application and found that the Commission did not prove that allegation by clear and convincing evidence. *See Id.*

CONCLUSIONS OF LAW

40. The Division has jurisdiction of this matter, and the parties thereto, pursuant to sections 120.57, 120.569(2)(e), and 120.595(1), Florida Statutes (2022).

Fees Pursuant to Section 120.569(2)(e)

41. Petitioners seek attorney's fees and costs under section 120.569(2)(e), alleging that the Commission filed the Agency Action letters in this case for an "improper purpose."

42. Section 120.569(2)(e) provides:

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. (emphasis added).

43. The statute requires the presiding officer to impose an appropriate sanction, which may include payment of expenses incurred because of the pleading, including reasonable attorney's fees. The imposition of sanctions is a final order subject to judicial review. *See Friends of Nassau Cnty. v. Nassau Cnty.*, 752 So. 2d 42, 43-4 (Fla. 1st DCA 2000).

44. A party's motion for attorney's fees must identify the specific "pleadings, motions, or other papers" allegedly filed for an improper purpose. *French v. Dept. of Child. & Fams.*, 920 So. 2d 671, 677 (Fla. 5th DCA 2006).

45. In their Renewed Motion for Attorney's Fees, Expenses, and Costs, Petitioners identify "administrative complaint letters" as the pleadings filed for an improper purpose pursuant to section 120.569(2)(e).

46. Respondent's Agency Action letters are not pleadings, motions, or other papers filed in the underlying proceeding. *See Lightsey v. Fla. Fish & Wildlife Conser. Comm'n*, Case No. 19-5210 (Fla. DOAH Mar. 31, 2020); *aff'd, per curiam, Lightsey v. Fla. Fish & Wildlife Conser. Comm'n*, 324 So. 3d 473 (Fla. 1st DCA 2021) (notice of intent of administrative action does not become a legal proceeding until the affected party invokes the procedural rights created by chapter 120 and requests a hearing). The administrative complaint affords reasonable notice to the licensee "of facts or conduct which warrant the *intended action*," and a licensee must be given "an adequate opportunity to request *a proceeding* pursuant to ss. 120.569 and 120.57." § 120.60(5), Fla. Stat. (emphasis added).

The proceeding was initiated when Petitioners filed their Petitions for Administrative Hearing.⁵

47. Petitioners are not entitled to attorney's fees for Respondent's Agency Action letters under section 120.569(2)(e) because the Agency Action letters were not filed in the proceeding. The notice of intent to revoke Petitioners' gopher tortoise agent licenses is "a statement of an agency's proposed action ... [and] only bec[ame] a 'proceeding' at the Division [when the Petitioners] request[ed] a hearing." *Lightsey*, at ¶ 12.

48. Assuming, *arguendo*, the Agency Action letters are considered to be "filed in the proceeding," the undersigned includes the following analysis of whether the Agency Action letters were actionable pursuant to section 120.569(2)(e).

49. In determining whether a party is entitled to statutory attorney's fees under section 120.569(2)(e), the Division must evaluate whether Respondent had an "improper purpose" based on an objective standard. *See Procacci Comm'l Realty, Inc. v. Dep't of HRS*, 690 So. 2d 603, 608 n.9 (Fla. 1st DCA 1997); *Friends of Nassau Cnty.*, 752 So. 2d at 50-1; *Blanco v. SW. Fla. Water Mgmt. Dist.*, Case No. 08-1972 at ¶¶ 73-5 (Fla. DOAH Nov. 17, 2008; Fla. SFWMD Dec. 8, 2008).

50. The court in *Procacci* explained the objective standard as follows:

Eschewing a subjective good faith-bad faith test, *see Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194 (7th Cir. 1985), the *Mercedes* court concluded that a finding of improper purpose could not stand "if a reasonably clear legal justification can be shown for the filing of the paper." 560 So. 2d at 278. The use of an objective standard creates a requirement to make a reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct

⁵ Petitioners as much as admitted that the Agency Action letters were not *filed in the proceeding* in paragraph 63 of their Proposed Recommended Order, wherein they state, "Those [administrative complaints] became a Section 120.57(1) proceeding when Petitioners availed themselves of their statutory and constitutional rights to due process by demanding an evidentiary hearing."

evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." *Pelletier v. Zweifel*, 921 F.2d 1465, 1515 (11th Cir. 1991).

Id. (citing *Mercedes Lighting and Elec. Supply, Inc. v. State*, 560 So. 2d 272, 277 (Fla. 1st DCA 1990)).

51. Whether section 120.569(2)(e) authorizes sanctions for the Agency Action letters in this case turns on the question of whether the signer could have concluded that a justiciable controversy existed under the pertinent statute and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate. *Procacci*, 690 So. 2d at 608 n.9; *Mercedes*, 560 So. 2d at 278.

52. The greater weight of the evidence supports that the Commission had reasonably clear legal justification to cite Mr. Kaiser and Mr. Wilson with violations of the Guidelines and the recipient site permits.

53. In the case at hand, the Commission was confronted with voluminous evidence of unreported gopher tortoise mortalities, silt fence pens improperly installed, silt fence pens in disrepair, overstocking of soft-release pens, and unauthorized management activities on the relevant recipient sites, as well as evidence of habitat disturbance by gopher tortoise predators which should have been mitigated according to the relevant habitat management plan. If proven, these conditions would have constituted violations of either the Guidelines or the relevant receiving site permits, or both.

54. Mr. Kaiser was listed as the authorized gopher tortoise agent on each of the recipient site permits, and either he, or his employee, Mr. Wilson, met with Commission staff at the recipient sites for each of the site visits. Mr. Kaiser's company, KCG, prepared the recipient site application for each of the recipient sites, as well as the habitat management plans, and either

Mr. Kaiser or Mr. Wilson submitted after-action reports to the Commission following release of gopher tortoises at those sites. The Commission had abundant evidence of both Mr. Kaiser and Mr. Wilson's responsibility for gopher tortoise management activities on the sites.

55. The revocation action below appears to have been a case of first impression. The undersigned was unable to find any other case in which the Commission sought to discipline a licensed gopher tortoise agent for his or her actions relating to management of a recipient site. There exists no precedent contrary to the Commission's position, and no case at the Division wherein the legal issue could have been analyzed.⁶

56. The Commission clearly has regulatory authority over Petitioners in the form of their gopher tortoise agent permits. Further, Petitioners are subject to the Guidelines in carrying out their duties as relocation agents, and employees for the Commission noted numerous violations of the Guidelines at the recipient sites managed by Petitioners. Under these circumstances, applying the objectively-reasonable standard, the undersigned concludes that the Commission had a reasonably-clear legal justification for prosecuting Petitioners.

Attorney's Fees Pursuant to Section 120.595(1)

57. Petitioners also seek attorney's fees and costs under section 120.595(1), alleging that the Commission participated in the underlying revocation action for an "improper purpose."

58. Section 120.595(1) provides, in pertinent part, as follows:

(1) CHALLENGES TO AGENCY ACTION
PURSUANT TO SECTION 120.57(1).—

* * *

⁶ After reasonable inquiry, the undersigned has been unable to locate any case at the Division wherein the Commission sought to discipline a gopher tortoise agent for any reason.

(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 nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

59. The statute defines "nonprevailing adverse party" as the "party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of [the] proceeding." § 120.595(1)(e)3., Fla. Stat. The Commission is not a nonprevailing adverse party because it is not "a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of the proceeding." *Id.* Attorney's fees are, by definition, not recoverable against an agency under this statute. *See Johnson v. Dep't of Corr.*, 191 So. 3d 965, 968 (Fla. 1st DCA 2016) (agency that sought to dismiss employee, but rescinded that dismissal after employees' appeal to the Public Employees Relations Commission (PERC), was not "nonprevailing adverse party" because it did not seek to change outcome of proceeding. It was employee who changed outcome of proceeding by succeeding in overturning his termination at PERC.)

60. The Commission is not a nonprevailing adverse party subject to attorney's fees pursuant to section 120.595(1).

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petitioners' Renewed Motions for Attorney's Fees, Expenses, and Costs are DENIED.

DONE AND ORDERED this 12th day of October, 2022, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 2022.

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.