by Diane S. Perera

Fee Awards in Administrative Proceedings, Part I

This is the first article in a two-part series on the recovery of attorneys' fees in administrative proceedings. This article will discuss the recovery of attorneys' fees pursuant to F.S. §§57.105 and 468.619. The second part of the series, which will address the recovery of attorneys' fees pursuant to F.S. §§57.111 and 120.595, will appear in the next issue of the *Journal*.

Recovery of Fees Pursuant to F.S. §57.105

In 2003, the Florida Legislature amended F.S. §57.105, to allow parties in F.S. Ch. 120[1] (APA) administrative proceedings to seek attorneys' fees when the administrative law judge (ALJ) concludes that a party or a party's attorney "knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) [w]as not supported by the material facts necessary to establish the claim or defense; or (b) [w]ould not be supported by the application of then-existing law to those material facts."[2] Sanctions are also authorized by F.S. §57.105 for filing pleadings, discovery, demands, claims or defenses, which are done mainly to cause delay.[3] Since the 2003 amendment, the Division of Administrative Hearings (DOAH) and Florida appellate courts have interpreted and applied F.S. §57.105 in a variety of administrative cases. These cases provide guidance to practitioners seeking to recover attorneys' fees in administrative hearings.

F.S. §57.105(5) provides:

> In administrative proceedings under [Ch.] 120, an administrative law judge shall award a reasonable attorneys' fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to [§]120.68. If the losing party is an agency as defined in [§]120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

Although the 2003 amendment[4] to F.S. §57.105 extended sanctions to proceedings conducted under the APA, F.S. §57.105 does not apply to all proceedings conducted by a DOAH ALJ. For example, due process proceedings under F.S. §1003.57, which governs specialized instruction for exceptional students' public education, is specifically exempt from F.S. §§120.569 and 120.57.[5] Although F.S. §1003.57(1)(c) provides that the due process hearing "must be conducted by an administrative law judge from the Division of Administrative Hearings... and the decision of the administrative law judge is final,"[6] the proceeding is not conducted under F.S. Ch. 120.[7]

F.S. §57.105 contains a safe harbor provision that requires the moving party to serve its F.S. §57.105 motion 21 days prior to filing, which gives the targeted party time to withdraw its meritless pleading or abandon its meritless position. F.S. §57.105(4) provides: "A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

The F.S. §57.105 motion must be served in administrative proceedings by the agency or the responding party while the underlying DOAH hearing is ongoing and prior to DOAH's entry of the recommended order. If the targeted pleading is not withdrawn within 21 days after service of the F.S. §57.105 motion, the motion must then be filed with DOAH, prior to the ALJ's issuance of the recommended order. Failure to timely serve or file the motion is fatal to an otherwise valid claim for fees. In *Anchor Towing and Miguel De Grandy, P.A. v. Florida Department of Transportation and Sunshine Towing, Inc.*, 10 So. 3d 670 (Fla. 3d DCA 2009), the appellate court reversed the ALJ's award of fees to Sunshine Towing because it did not comply with the mandatory notice requirements set forth in F.S §57.105(4). In the underlying DOAH proceeding, the ALJ entered a recommended order finding that the detailed letter Sunshine Towing's attorney sent to Anchor Towing's attorney prior to the commencement of the DOAH hearing placed Anchor Towing on notice of its intent to seek fees pursuant to F.S. §57.105.[8] The recommended order and the *Anchor Towing* court did not address the court's ability to impose fees upon its own initiative.

F.S. §57.105(1) allows the court, upon its own initiative, to award fees for F.S. §57.105 violations. In administrative proceedings, either DOAH or the appellate court can award fees upon its own initiative. In *Martin County Conservation Alliance and 1000 Friends of Florida Inc. v. Martin County, Dept. of Community Affairs, Martin Island Way*

LLC and Island Way LC, 73 So. 3d 856 (Fla. 1st DCA 2011), the First District, sua sponte, issued an order to show cause as to why §57.105 sanctions should not be imposed upon petitioner for filing an administrative appeal in which it lacked standing.[9]

In *Mavis R. Gorgalis v. Department of Transportation*, Case No. 04-2339 (Fla. DOAH Dec. 1, 2005), Gorgalis did not file her motion for fees until after the ALJ entered the recommended order and did not allow DOT the mandatory 21-day cure period. The ALJ entered findings that DOT was on notice of its untenable position from Gorgalis' initial petition for hearing and from subsequently filed documents. The ALJ further commented that "[a]s noted in *Dept. of Revenue v. Yambert*, 883 So. 2d 881, 884 n. 3 (Fla. 5th DCA 2004), the failure to comply with the procedural requirements of F.S. §57.105(4) could be excused by the [c]ourt in any event because the statute permits the award of such fees on the court's own initiative."[10] In *Department of Revenue v. Yambert*, 883 So. 2d 881 (Fla. 5th DCA 2004), the Fifth District commented that although Yambert did not comply with the 21-day notice and cure requirements of F.S. §57.105(4) the argument was not preserved for appeal but that the "language of the statute specifically authorizes the trial court to award [§]57.105(1) fees on its own 'initiative'; therefore, the trial court did not abuse its discretion in overlooking Yambert's purported procedural error."[11] Although the final order awarding fees to *Gorgalis* was entered prior to the Third DCA's ruling in *Anchor Towing* finding that failing to serve and file the 21-day motion is fatal to a F.S. §57.105 claim, the *Gorgalis* final order recognized the ALJ's authority to enter an award of F.S. §57.105 fees upon its own initiative.

Fees under F.S. §57.105 may be assessed against the agency or the responding party and either party's attorney in equal amounts. In *Department of Management Services, Division of Retirement v. George Tamalavich*, Case No. 08-1770 (Fla. DOAH August 4, 2008), DOAH issued a final order awarding fees to the Department of Management Services for three post-hearing and post-proposed recommended order submittals.[12]

Although administrative and appellate tribunals have the authority to award F.S. §57.105 fees upon the tribunal's own motion, practitioners cannot rely on the court's initiative.

Another consideration in seeking fees in an APA proceeding is to be certain not to confuse the F.S. §57.105 procedure with seeking fees under F.S. §§120.569(2)(e) and 120.595(1). The F.S. Ch. 120 provisions for fees require the ALJ to make findings that a party participated in the proceeding for an improper purpose, harassment, or delay. In *Action Instant Concrete, LLC v. Paul and Barbara Corbiey*, Case No. 06-1552 (Fla. DOAH August 14, 2006), the parties requested that the ALJ retain jurisdiction to enter a final order for fees pursuant to F.S. §57.105. The ALJ retained jurisdiction and entered its recommended order in favor of the action. Subsequently, the Department of Environmental Protection entered a final order adopting the recommended order and action and filed its motion for fees pursuant to F.S. §57.105. The ALJ denied the motion for fees because the action did not comply with the 21-day requirement and did not serve or file its motion for fees prior to the submission of its proposed recommended order. Although the ALJ had retained jurisdiction to consider and award F.S. §57.105 fees, as it typically does under F.S. Ch. 120 petitions for fees, the reservation did not dispense with the statutory requirement for action to serve and file its F.S. §57.105 motion and allow the Corbieys an opportunity to cure. "Had AIC served its motion before filing it and the Corbieys had not withdrawn or appropriately corrected those claims, AIC would have been entitled to a reasonable attorneys' fee for defending against those claims."[13]

In administrative proceedings conducted pursuant to the APA, F.S. §57.105 motions for fees must be served and the other party must be allowed 21 days to withdraw the targeted pleading or abandon its position if either is not supported by material facts or by the application of law to the facts; is not a good faith argument to extend, reverse, or modify law; or is intended for delay. Administrative practitioners must serve and file the F.S. §57.105 motion in the underlying DOAH litigation prior to the ALJ's entry of the recommended order. After the agency enters its final order based upon the recommended order, the petition for fees under F.S. §57.105 must be filed with DOAH. Failure to serve and wait 21 days before filing the motion is fatal to an otherwise valid claim for fees. Although administrative and appellate tribunals have the authority to award F.S. §57.105 fees upon the tribunal's own motion, practitioners cannot rely on the court's initiative and must serve and file the motion when it is necessary to do so.

Recovery of Fees Pursuant to F.S. §468.619

F.S. §468.619 is titled the "Building Code Enforcement Officials' Bill of Rights."[14] The Building Code Enforcement Officials' Bill of Rights became effective July 1, 2000, and applies to disciplinary proceedings against building code administrators, inspectors, and plan examiners licensed by the Florida Department of Business and Professional Regulation (DBPR), Building Code Administrators and Inspectors Board (BCAIB). The Florida Legislature made a specific finding that building code enforcement officials are employed by local jurisdictions to exercise police powers of the state in the course of their duties and are in that way similar to law enforcement personnel, correctional officers, and firefighters. The legislature further found "building code enforcement officials are thereby sufficiently distinguishable from other professionals regulated by the department so that

their circumstances merit additional specific protections in the course of disciplinary investigations and proceedings against their licenses."[15]

The Building Code Enforcement Officials' Bill of Rights applies to disciplinary proceedings initiated by DBPR and subjects such proceedings to strict time constraints.[16] The agency's failure to adhere to the time constraints results in the dismissal of the complaint.[17]

F.S. §468.619(7) reads:

> If any action taken against the enforcement official by the department or the board is found to be without merit by a court of competent jurisdiction, or if judgment in such an action is awarded to the enforcement official, the department or the board, or the assignee of the department or board, shall reimburse the enforcement official or his or her employer, as appropriate, for reasonable legal costs and reasonable attorney's fees incurred. The amount awarded shall not exceed the limit provided in [§]120.595.

Pursuing a meritless disciplinary complaint or pursuing a complaint beyond the time limits may result in an award of fees pursuant to F.S. §468.619. Interestingly, F.S. §468.619 also provides that the building code enforcement official shall be defended by the employing governmental agency in disciplinary actions filed by the DBPR or BCAIB, if the official is working within the scope of the official's employment.[18] If the code enforcement official is employed by a building department and is working within the scope of a license issued by the BCAIB, the enforcement official is entitled to a legal defense at the employing building department's expense, and the employing agency would be entitled to reimbursement of its costs and fees in defending the employee from a licensing complaint. Recovery of fees is limited to $50,000.[19]

Because F.S. §468.619(7) provides that a "court of competent jurisdiction"[20] must find that the action taken by DBPR or BCAIB against the code enforcement official is meritless, or that a judgment in such an action must be entered in favor of the enforcement official, recovering fees under F.S. §468.619 begins in the administrative forum where the disciplinary action is initiated pursuant to F.S. Ch. 120, and concludes in an appellate forum.

Shortly after the implementation of the Building Code Enforcement Officials' Bill of Rights, DOAH issued a final order dismissing a petition for fees filed under F.S. §468.619(7), finding that it did not have jurisdiction to award fees and costs pursuant to F.S. §468.619.[21] In *James L. Brown v. Department of Business and Professional Regulation, Building Code Administrators and Inspectors Board*, Case No. 01-1331 (Fla. DOAH May 24, 2001), the ALJ noted that the underlying disciplinary proceeding had resulted in the issuance of a [r]ecommended [o]rder of dismissal and a [f]inal [o]rder of dismissal in favor of the code enforcement official. However, the ALJ "presumed that the legislature in enacting the section contemplated the difference between the courts (an instrument of the judicial branch) and DOAH (a quasijudicial division of the executive branch)."[22] Further, in *Brown*, the ALJ concluded that in order for fees to be awarded under F.S. §468.619(7), a court had to determine that the underlying action was meritless and that the agency's failure to meet the burden of proof did not render the action meritless.[23]

In conclusion, a party's ability to recover fees in an administrative hearing can be based on one or more statutes. In the initial response to an administrative complaint, a defending party should reserve its right to seek fees under every statutory basis available so that the right is not waived. Both parties to the administrative proceeding must be aware of the time constraints applicable to each statutory basis for fees and remember that fees can be awarded in favor of either party for a variety of reasons authorized by the various statutes.❑

[1] FLA. STAT. Ch. 120 is the Administrative Procedure Act.

[2] FLA. STAT. §57.105(1)(a)-(b) (2014).

[3] FLA. STAT. §57.105(2) (2014).

[4] Ch. 2003-94, §9, LAWS OF FLA.

[5] FLA. STAT. §1003.57(1)(c).

[6] *Id.*

[7] *See A.L., by his parent, P.L.B., and P.L.B. for herself, and Rosemary N. Palmer, attorney v. Jackson County School Board*, 127 So. 3d 758 (Fla. 1st DCA 2013).

[8] *Sunshine Towing, Inc. v. Anchor Towing, Inc. and Dept. of Transportation*, Case No. 04-4481 (Fla. DOAH June 6, 2008).

[9] Initially the First District withdrew *Martin Cnty. Conservation Alliance v. Martin Cnty.*, 35 Fla. L. Weekly D2765 (Fla. 1st DCA Dec. 14, 2010), and replaced it with *Martin Cnty. Conservation Alliance v. Martin Cnty.*, 73 So. 3d 856 (Fla. 1st DCA 2011), and denied the appellants' motion for rehearing and motion for rehearing en banc. The appellants requested Florida Supreme Court review, which the Florida Supreme Court initially granted in *Martin Cnty. Conservation Alliance v. Martin Cnty.*, 90 So. 3d 272 (Fla. 2012), and later dismissed for lack of jurisdiction in *Martin Cnty. Conservation Alliance v. Martin Cnty.*, 113 So. 3d 837 (Fla. 2013).

[10] *Mavis Gorgalis v. Department of Transportation*, Case No. 04-2339, n. 4 (Fla. DOAH Dec. 1, 2005).

[11] *Department of Revenue v. Yambert*, 883 So. 2d 881, 884, n. 3 (Fla. 5th DCA 2004).

[12] *Department of Management Services, Division of Retirement v. George Tamalavich*, Case No. 08-1770 (Fla. DOAH August 4, 2008). However, in *Tamalavich* fees were awarded pursuant to FLA. STAT. §120.569. *See also Gopman v. Department of Education*, 974 So. 2d 1208 (Fla. 1st DCA 2008), where the appellate court, on its own motion, imposed appellate fees in favor of the Department of Education upon Gopman and Gopman's attorney for raising issues on appeal that were not supported by the facts.

[13] *Action Instant Concrete, LLC v. Paul and Barbara Corbiey*, Case No. 06-1552, 11 (Fla. DOAH August 14, 2006). *See also Department of Environmental Protection v. Bernard Spinrad and Marien Spinrad*, Case No. 14-5291 (Fla. DOAH Nov. 24, 2014), in which the Department of Environmental Protection did not file its FLA. STAT. §57.105 motion until 25 days after the DOAH final hearing.

[14] FLA. STAT. §468.619.

[15] FLA. STAT. §468.619(1).

[16] FLA. STAT. §468.619(4).

[17] *Id.*

[18] FLA. STAT. §468.619(5).

[19] FLA. STAT. §120.595.

[20] FLA. STAT. §468.619(7).

[21] *James L. Brown v. Department of Business and Professional Regulation, Building Code Administrators and Inspectors Board*, Case No. 01-1331 (Fla. DOAH May 24, 2001).

[22] *Id.* at 5. The ALJ also noted that FLA. STAT. §468.619 could not be retroactively applied to acts that occurred prior to the effective date of the statute.

[23] *Id.* at 6. The ALJ noted that FLA. STAT. §468.619(7) fees could be awarded if a recommended order in favor of a licensee were rejected by the BCAIB and successfully appealed by the licensee with a finding by the appellate court that the disciplinary action was meritless.

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This column is submitted on behalf of the Administrative Law Section, Daniel E. Nordby, chair, and Stephen Emmanuel, editor.