APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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[1] Due to the order being issued in PDF format, its exact formatting could not be preserved in the editing software (Microsoft Word) because the text size and margins could not be made to match exactly. However, the text of the order is exactly as it appeared when issued.

FIRST DISTRICT COURT OF APPEAL STATE OF FLORIDA

No. 1D19-3343

ARTEM M. JOUKOV,

Appellant,

v.

OFFICE OF THE STATE ATTORNEY
SECOND JUDICIAL CIRCUIT OF
FLORIDA,

Appellee.

On appeal from a Final Order of the Division of Administrative Hearings.
Suzanne Van Wyk, Administrative Law Judge.

May 19, 2020

PER CURIAM.

AFFIRMED.

LEWIS, ROWE, and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Artem M. Joukov, pro se, Appellant.

Michael P. Spellman and Mitchell J. Herring of Sniffen & Spellman, P.A., Tallahassee, for Appellee.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

June 17, 2020

CASE NO.: **1D19-3343**
L.T. No.: 2018-5833F

Artem M. Joukov	v.	Office of the State Attorney Second Judicial Circuit of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion docketed May 27, 2020, for rehearing, rehearing en banc, clarification, written opinion, and/or certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Michael P. Spellman Mitchell J. Herring
Artem M. Joukov

th

KRISTINA SAMUELS, CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARTEM M. JOUKOV,

Petitioner,

vs. Case No. 18-5833F

OFFICE OF STATE ATTORNEY SECOND JUDICIAL CIRCUIT OF FLORIDA,

Respondent.
_____/

FINAL ORDER

A duly noticed final hearing was held in this matter on May 30, 2019, in Tallahassee, Florida, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Artem Mikhailovich Joukov, Esquire
2651 Ellendale Place, Apartment 304
Los Angeles, California 90007

For Respondent: Michael P. Spellman, Esquire
Mitchell J. Herring, Esquire
Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to attorneys' fees, pursuant to sections 57.105, 57.111, and 120.595, Florida Statutes, for defending the underlying overpayment claim filed by Respondent.

PRELIMINARY STATEMENT

On August 28, 2018, Petitioner filed a Motion for Attorneys' Fees with the Division of Administrative Hearings ("the Division" or "DOAH") in Case No. 18-4235. In that case, Respondent herein sought the return of an overpayment to Petitioner following Petitioner's separation from Respondent's employment ("the underlying overpayment claim"). The undersigned dismissed the underlying overpayment claim, with leave to amend, on October 2, 2018. On October 18, 2018, Respondent filed a Notice in Response to the October 2, 2018, order, in which Respondent essentially withdrew its claim for overpayment for reasons set forth therein. On October 25, 2018, jurisdiction over the underlying overpayment claim was relinquished to Respondent, and the case was closed. Petitioner filed an Amended Motion for Attorneys' Fees on October 29, 2018 ("Amended Motion"), and an Addendum to the Amended Motion on November 19, 2018.

Petitioner's Amended Motion was assigned case number 18-5833F, and a final hearing was scheduled for February 11, 2019. Following the undersigned's denial of Petitioner's motion to appear telephonically at the final hearing, the undersigned granted Petitioner's Motion for a Continuance and continued the final hearing to May 30, 2019, to coincide with Petitioner's planned travel to the area from California.

The hearing commenced as rescheduled on May 30, 2019. Petitioner testified on his own behalf and proffered the testimony of Jack Campbell, State Attorney for the Second Judicial Circuit of Florida. Petitioner's Exhibits 2 through 4, 10 through 22, 24, 35 through 38, and 45 were admitted in evidence. Petitioner also proffered exhibits 26 through 34, which were not admitted, but travel with the record of this case.

Respondent presented the testimony of Jennifer Peddicord, Government Operations Consultant III for the Department of Financial Services, Bureau of State Payroll. Respondent's Exhibits 3 through 5, 7, 8, 16, and 17 were admitted in evidence.

The one-volume Transcript of the final hearing was filed on June 14, 2019. Pursuant to the undersigned's Order Granting Extension of Time, the parties' proposed final orders were due 30 days after the date on which the Transcript was filed, or July 15, 2019.[1/]

Both parties timely filed proposed final orders,[2/] and the undersigned has considered Respondent's entire submittal in preparing this Final Order. Petitioner's post-hearing submittal exceeded the 40-page limit and Petitioner did not seek leave from the undersigned to exceed the page limit. See Fla. Admin. Code R. 28-106.215. Therefore, the undersigned only considered

the first 40 pages of Petitioner's 68-page submittal in preparing this Final Order.

Unless otherwise noted, all citations to the Florida Statutes are to the 2018 version.

FINDINGS OF FACT

Parties

1. Petitioner, Artem Joukov, is a member of the Florida Bar, and was employed as an Assistant State Attorney in the Office of the State Attorney of the Second Judicial Circuit ("State Attorney's Office" or "SAO") from April 29, 2016, to February 20, 2018.

2. Petitioner claims to be the sole proprietor of an unincorporated investment company, of which he is the only employee. In support of this claim, Petitioner introduced in evidence the 2016, 2017, and 2018 account activity statements from his individual stock portfolio and other equity investments made through the platform, Interactive Brokers, LLC, whose business address is in Greenwich, Connecticut.

3. The year-end value of Petitioner's account did not exceed $250,000 in any of the three referenced years.

4. Respondent, the State Attorney's Office, is a government entity which qualifies as a state agency pursuant to section 120.52, Florida Statutes (2019).

5. Respondent did not employ Petitioner as an investment advisor or otherwise utilize Petitioner's investment skills.

Underlying Overpayment Claim

6. Respondent terminated Petitioner's employment on February 20, 2018. Respondent paid Petitioner through the end of the pay period on February 28, 2018. Petitioner's final paycheck included $940.04 for days subsequent to his termination (days on which he did not work).

7. As of the date of the final hearing, Petitioner had not reimbursed Respondent for the overpayment.[3/]

8. Carol Houck is the Human Resource Administrator and Purchasing Administrator for the State Attorney's Office. Ms. Houck's primary job duties include administration of both the personnel hiring and separation processes.

9. Ms. Houck discovered the pending overpayment while processing payroll records after Petitioner was terminated.

10. On February 26, 2018, Ms. Houck notified Petitioner of the overpayment, via electronic mail ("email"), and requested Petitioner repay that amount as soon as possible via check to the SAO.

11. On February 27, 2018, Petitioner responded, "Of course!" Petitioner then inquired whether Respondent could retrieve the overpayment from his deferred compensation account. Petitioner explained that, as he had not yet obtained new

employment, he would not be in a position to repay that amount if the scheduled deduction from his final paycheck had been made to his deferred compensation account. Petitioner requested Respondent "give [him] some additional time" to repay the money if it could not be pulled from his deferred compensation account.

12. Ms. Houck discussed the issue with Mary Dean Barwick, the Executive Director for the State Attorney's Office. Ms. Barwick is primarily responsible for the overall administrative management of the SAO, including oversight and management of the budget and expenditures.

13. The following day, February 28, 2018, Ms. Houck responded to Petitioner with an offer to use Petitioner's accrued leave hours to cover the overpayment, rather than disrupt his deferred compensation account. She explained that, after deduction for the overpayment, Petitioner would have a balance of approximately 12 hours of accrued leave, which Respondent could either transfer, or pay out, to Petitioner.

14. Petitioner responded on the same date rejecting Respondent's offer to recoup the overpayment from his accrued leave. Instead, Petitioner explained that he preferred reversal of the automatic deposit to his deferred compensation account rather than recoupment from his accrued leave. In lieu of

accepting that method, Petitioner requested more time to submit the repayment.

15. The following day, March 1, 2018, Ms. Houck replied, "We will give you until March 31st to remit payment." Petitioner immediately replied, "Ok, thank you."

16. On March 12, 2018, Petitioner became employed by the Department of Business and Professional Regulation ("DBPR"). On that same date, Petitioner sent an email to Ms. Houck stating that he no longer wished Respondent to secure repayment from his deferred compensation account and that the best method of repayment would be in installments by the end of April. He proposed to pay $337.05 by March 31, 2018, and the remaining balance by April 30, 2018.

17. On March 28, 2018, Ms. Houck rejected this offer and replied with a request that Petitioner pay the amount in its entirety by March 31, 2018, in accordance with the payment plan agreed to on March 1, 2018. Ms. Houck further stated that she would transfer his accrued leave hours to DBPR once Respondent received the repayment.

18. Petitioner made no payment to Respondent on March 31, 2018, or on any date thereafter.

19. On April 6, 2018, Ms. Barwick sent the following email to Petitioner:

> We have received guidance from the Bureau of

> State Payrolls [sic]. Their procedures are [sic] immediate collection of the overpayment. Once the deadline we establish is not met and you have been notified twice (by certified mail), then we can proceed with the collection process. The Bureau of State Payrolls would proceed by collecting the overpayment from your current wages and remitting the funds directly to us. We feel it would work better for both parties to reach an agreement on the repayment date. Please advise us on the most current date you can remit your overpayment. I will be glad to answer any questions you may have on this matter. Thank you.

20. On April 7, 2018, Petitioner responded, recounting the various communications he had received regarding repayment of the overpayment, and requesting Respondent to cite the applicable administrative rules under which it was pursuing repayment. He also requested contact information for a representative at the Bureau of State Payroll (the "Bureau") to help him understand his rights as an employee.

21. In the same response, Petitioner stated that he did not believe Respondent's action withholding Petitioner's leave hours was permissible and requested Respondent to transfer the leave hours to DBPR.

22. On April 9, 2018, Ms. Barwick requested Petitioner's telephone number in an effort to discuss a repayment schedule. Petitioner responded that he wished to continue using email communication to have a record of their correspondence.

Petitioner reiterated his requests for transfer of his leave hours and contact information for someone at the Bureau.

23. On April 10, 2018, Ms. Barwick replied, "Your overpayment of wages is due immediately." She stated that the governing regulations were the Classification and Pay Plan for State Attorneys of Florida. Ms. Barwick offered to transfer Petitioner's leave hours if they could agree to a repayment schedule, and expressed that she would rather avoid the collection process outlined in her prior email. Finally, she requested a good time to call and discuss the issue.

24. In his response that same day, Petitioner reiterated his desire to keep discussions in writing via email, for recordkeeping purposes. He further stated he had contacted the DBPR Human Resources Department to determine whether a portion of his wages could be redirected to the Respondent on a monthly basis. Petitioner stated he was unable to discuss a repayment plan with Ms. Barwick until he had that information. Petitioner again requested Respondent either transfer his leave hours or provide the statute authorizing Respondent to withhold his accrued leave.

25. On April 12, 2018, Ms. Houck, transferred Petitioner's accrued leave to DBPR.

26. Petitioner filed a complaint regarding Respondent's efforts to recoup the overpayment with the Florida Commission on

Human Relations ("FCHR") some time between April 11 and 19, 2018.[4/]

27. On April 19, 2018, Ms. Barwick emailed Petitioner a proposed reimbursement agreement for his review. The proposed agreement would have required Petitioner to repay the overpayment in two installments--on June 1 and July 1, 2018. Petitioner responded that he would not be engaging in repayment negotiations until the FCHR had the opportunity to conclude its investigation.[5/]

28. After the parties failed to reach an amicable repayment plan via email, Respondent initiated the formal collection process. On May 2, 2018, Respondent sent the following letter to Petitioner via certified mail to his home address in Tallahassee:

> Dear Mr. Joukov:
>
> As we have outlined in numerous email correspondence, you were overpaid by the Office of the State Attorney for 48 unearned hours in the amount of $940.04. This overpayment occurred as a result of your separation from the office after payroll had closed in February 2018.
>
> Despite repeated requests, to date, we have not received any monies due back to the State for this overpayment. Please accept this letter as our demand to repay this full amount by the close of business, May 21, 2018.
>
> You may be entitled to a hearing under

> Section 120.57, F.S., or other rights under Section 120.569, F.S. However, please note that employees of the Office of the State Attorney are exempt from Career Service System provided in Ch. 110, F.S., and are governed by the Classification and Pay Plan for the State Attorneys of Florida. You will be expected to repay the net amount received plus federal taxes due if the net amount is not fully repaid in the same calendar year in which it was paid.
>
> This letter represents the notice required by and is in compliance with the process for collecting salary overpayments issued by the Bureau of State Payroll.

29. Petitioner intentionally failed to retrieve the certified letter from the post office.

30. On May 15, 2018, Respondent sent the letter again by certified mail to the General Counsel's Office at DBPR. The letter was identical except that it set a deadline of May 31, 2018, for Petitioner to repay the full amount. Petitioner received this letter via interoffice mail at DBPR. Petitioner did not respond to the letter.

31. On June 15, 2018, Respondent personally served the letter via sheriff's deputy to Petitioner at his office at DBPR. Again, the letter was identical to the May 2 and 15 letters, with the exception of a June 28, 2018, due date for full payment. Copies of the May 2 and 15 letters were included with the June 15, 2018 hand-delivered letter.

32. Petitioner did not respond to the June 15, 2018 letter.

33. On or about July 19, 2018, Petitioner filed a complaint with the Florida Bar against one of his former colleagues at the SAO.

34. On July 30, 2018, Petitioner alerted the Florida Bar to a pending address change, notifying the Bar of his intent to move to California on August 1, 2018. In this correspondence, he included his parent's address in Gulf Shores, Alabama, as the interim contact while he established a permanent address in California.

35. Having had no response from Petitioner, Respondent forwarded the demand letters and other information to the Bureau to execute the process for garnishing Petitioner's DBPR wages.

36. On July 30, 2018, Constance Hosay, Financial Administrator with the Bureau, sent a letter to DBPR authorizing miscellaneous deductions from Petitioner's paycheck beginning with the next bi-weekly payroll. The letter directed DBPR to remit the monies to the SAO once collected via miscellaneous deduction.

37. Ms. Hosey informed Petitioner, via email on July 31, 2018, that the Bureau would begin garnishing his wages to reimburse Respondent.

38. Petitioner then reached out to the Division to determine how to request a hearing on the matter. At the direction of Division staff, Petitioner sent an email to Mr. Campbell that same date requesting an administrative hearing.

39. Petitioner voluntarily separated from employment with DBPR on August 2, 2018.

40. On August 9, 2018, Respondent forwarded Petitioner's request for hearing to the Division. On August 15, 2018, Respondent followed up with a letter to the Division attaching, as the agency action letter, the personnel action request documenting Petitioner's termination date, the salary refund calculations made by payroll, and the payroll calendar.

41. None of the documents forwarded to the Division from the SAO contained an address for Petitioner.

42. Respondent filed the first pleading--a Notice of Appearance by Eddie Evans on behalf of Respondent. The certificate of service noted an address for Petitioner in Gulf Shores, Alabama. The SAO had knowledge that Petitioner had moved from Florida to California. The SAO had knowledge of Petitioner's parents' address as an interim contact from the separate Florida Bar complaint.

43. The Division entered the Gulf Shores, Alabama address in its case information system as the address for Petitioner.

44. Petitioner's first pleading was filed on August 23, 2018, and contained his address in Los Angeles, California, in his signature line. However, Petitioner never filed a notice of change of address or otherwise notified the Division of his correct address.

45. Throughout the underlying repayment claim, the Division mailed all orders to the Gulf Shores, Alabama address.

46. On August 28, 2018, Petitioner filed a motion to dismiss the underlying overpayment claim on grounds that the documents upon which his request for hearing were predicated did not constitute a valid agency action letter and point of entry. Following a telephonic hearing on the motion, the undersigned granted the motion on October 2, 2018, and dismissed the case, with leave to amend. The undersigned gave Respondent 15 days to serve Petitioner with a notice of agency action which complied with Florida Administrative Code Rule 28-106.111 and section 120.569(1), Florida Statutes.

47. On October 18, 2018, Respondent's current counsel entered a notice of appearance and a Response to the Order Granting the Motion to Dismiss ("Response").

48. In the Response, Respondent explained that, subsequent to the Order, it had determined that the State of Florida "is no longer withholding any [of Petitioner's] funds which represented the underlying basis of this proceeding." Respondent stated

that the proceeding was initiated with Respondent's notice that it intended to collect "funds held by the State of Florida" as reimbursement for the overpayment. Further, Respondent explained, "Because the State of Florida no longer holds those funds, the due process to be afforded the Respondent through this forum is no longer applicable."

49. On October 19, 2018, Petitioner filed a Motion for Extension of Time to File Motion for Costs and Attorneys' Fees, seeking an extension of 30 days to file a motion for attorneys' fees to comply with the safe harbor provision under section 57.105. The undersigned denied the motion and indicated that Petitioner could subsequently file a motion for fees and costs which would initiate a new case separate from the underlying overpayment claim.

50. The undersigned closed the file of the underlying overpayment claim and relinquished jurisdiction of same to the SAO on October 25, 2018.

51. Petitioner filed a Notice of Service of a Motion for Sanctions pursuant to section 57.105 on October 26, 2018. On October 29, 2018, Petitioner filed his Amended Motion seeking fees under sections 120.595 and 57.111. On November 19, 2018, Petitioner filed an addendum to his Amended Motion seeking fees pursuant to section 57.105.

52. Petitioner engaged in the underlying overpayment claim in his individual capacity as a former employee, not as a small business entity or investment company.

CONCLUSIONS OF LAW

Parties and Standing

53. The Division has jurisdiction over the parties to, and the subject matter of, this proceeding. See §§ 120.569, 120.57(1), 120.595(1), 57.105(5), and 57.111(4)(b), Fla. Stat. (2019).

54. Respondent is a state agency pursuant to section 120.52, Florida Statutes (2019).

55. Petitioner may recover attorneys' fees for selfrepresentation. See Albritton v. Ferrera, 913 So. 2d 5, 12-13 (Fla. 1st DCA 2005)(citing Friedman v. Backman, 1984 Fla. App. LEXIS 14676 *2 (Fla. 4th DCA 1984)("In a frivolous suit against a lawyer, he is entitled to attorney's fees for his time and effort under section 57.105, just as he is for services rendered by counsel he employs to represent him."); see also Maulden v. Corbin, 537 So. 2d 1085, 1087 (Fla. 1st DCA 1989).

56. In seeking attorneys' fees, Petitioner must prove he is entitled to attorneys' fees by a preponderance of evidence. See § 120.57(1), Fla. Stat.

Section 57.105

57. Petitioner is entitled to an award of attorneys' fees under section 57.105 if (1) Petitioner is the prevailing party;

(2) Respondent is the losing party; and (3) Respondent knew or should have known that its claim was not supported by the material facts or the application of existing law to those facts. See § 57.105, Fla. Stat.

58. "[A] party who receives affirmative judicial or equitable relief is clearly considered a prevailing party under the law." Coconut Key Homeowner's Ass'n v. Gonzalez, 246 So. 3d 428, 434 (Fla. 4th DCA 2018). Petitioner received affirmative relief when the undersigned granted his motion to dismiss the underlying overpayment claim. Petitioner is the prevailing party in the underlying overpayment claim.

59. Respondent is the non-prevailing, or losing, party in the underlying overpayment claim.

60. While Petitioner has proven the first two elements of the fees inquiry, he has not proven the third element. See Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501, 505-506 (Fla. 1982)(holding that Progressive was not entitled to attorneys' fees because the initial claim was not frivolous). Attorneys' fees should only be awarded when the non-prevailing party's claim was frivolous, lacking any justiciable issue. Id. When the non-prevailing party presents a frivolous claim and it "is so readily recognizable that there is little if any prospect whatsoever that it can succeed," payment of attorneys' fees to

the prevailing party is warranted. See Whitten, 410 So. 2d at 505.

61. The underlying overpayment claim was not frivolous. It was not obvious that Respondent's claim, attempting to recoup an overpayment, would not succeed. The undisputed fact is that Petitioner was overpaid by Respondent in the amount of $940.04. Respondent's claim to recoup the overpayment was supported by the material facts. Petitioner cited no authority to support a conclusion that Respondent's pursuit of the overpayment was not supported by existing law.[6/]

Section 57.111

62. Petitioner is entitled to attorneys' fees under section 57.111 if (1) Petitioner qualifies as a prevailing "small business party"; (2) Respondent initiated the proceedings in the underlying case; and (3) the initial proceedings were substantially unjustified. See § 57.111, Fla. Stat.

63. Section 57.111 defines a "small business party" as follows:

> A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in the state, who is domiciled in the state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of more than $2 million, including both personal and business investments.

64. Petitioner did not establish that he operates a small business with a principal office in the State of Florida. To the extent that his personal stock trades and other equity investments qualify as a small business, the evidence does not support a finding that the business has a principal office in the State of Florida. Further, Petitioner resides in California and did not introduce evidence that he has established domicile in Florida.

65. Assuming, arguendo, Petitioner's personal portfolio investments through an investment platform in Greenwich, Connecticut, qualifies as a small business domiciled in Florida, Petitioner's 57.111 claim still fails. The underlying overpayment claim was brought against Petitioner in his personal, not business, capacity. "The owner of a partnership or corporation who prevails in an administrative proceeding initiated by a state agency is not entitled to attorneys' fees and costs under [57.111] when the complaint is filed against the owner in his or her individual capacity." Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 63 (Fla. 2005); see also Fla. Real Estate Comm'n v. Shealy, 647 So. 2d 151 (Fla. 1st DCA 1994) (holding that while Shealy was the sole proprietor of a small business, he was not entitled to attorneys' fees under section 57.111 because he was not sued in his business capacity).

66. Assuming, again, arguendo, that Petitioner was a prevailing small business party, pursuant to section 57.111, his claim still fails because Respondent was substantially justified in pursuing the underlying overpayment claim. According to section 57.111, a claim is substantially justified when it has a reasonable basis in law and fact at the time the proceeding was initiated. Gentele v. Dep't. of Prof'l Reg., Bd. of Optometry, 513 So. 2d 672, 672 (Fla. 1st DCA 1987)(holding that appellee was substantially justified and therefore not liable for attorneys' fees).

67. Petitioner owed Respondent money and had initially agreed to a repayment plan, but did not follow through with repayment. Further, Petitioner would not negotiate with Respondent on other possible repayment plans when the initial repayment plan was unsuccessful. Respondent, having exhausted other routes, sought to garnish Petitioner's wages. Respondent's initial claim had a reasonable basis in both fact and law. Unfortunately, due largely to the passage of time, caused by Petitioner's delay and voluntary separation from DBPR, by the time the underlying overpayment claim came before DOAH, the State of Florida no longer held funds from which to recoup the overpayment.

Section 120.595

68. Petitioner is entitled to attorneys' fees under section 120.595 if (1) Petitioner is the prevailing party; (2) Respondent is the "non-prevailing adverse party"; and (3) Respondent participated in the proceeding for an improper purpose. See § 120.595, Fla. Stat.

69. For the same reason Petitioner qualifies as the prevailing party under section 57.105, he also qualifies as the prevailing party under section 120.595. See §§ 57.105 and 120.595, Fla. Stat.

70. It is well-settled that when an agency is the party taking action, it does not qualify as a non-prevailing adverse party. See Johnson v. Dep't of Corr., 191 So. 3d 965 (Fla. 1st DCA 2016); Rafael R. Palacios v. Dep't of Bus. Prof'l Reg., Case No. 99-4163 (Fla. DOAH Nov. 20, 2000); Ernest Sellars v. Broward Cnty. Sch. Bd., Case No. 97-3540 (Fla. DOAH Sept. 25, 1997). As explained in Johnson v. Department of Corrections, Case No. 15-1803F (Fla. DOAH Jan. 1, 2010), when an agency is the party proposing to take action against another, the agency, "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."

71. In the underlying overpayment claim, Respondent was the party proposing to take action (i.e., collection of the

overpayment), and as such cannot qualify as a non-prevailing adverse party pursuant to section 120.595.

72. Therefore, even though Petitioner in this case "prevailed" in the underlying overpayment claim, he cannot recover attorneys' fees under section 120.595.

73. Assuming, arguendo, Respondent was the non-prevailing adverse party, Petitioner must show that Respondent brought its claim for an improper purpose in order to prevail in his attorneys' fees claim. See § 120.595, Fla. Stat.

74. A party participates in a matter for an improper purpose when he or she participates "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." See § 120.595, Fla. Stat.

75. Whether a party engaged in an action for an "improper purpose" is analyzed under an objective reasonableness standard based on the applicable facts and relevant law. See Procacci Commercial Realty, Inc. v. Dep't of HRS, 690 So. 2d 603, 608 n.9 (Fla. 1st DCA 1997). In applying the improper purpose standard, courts should not, as urged by Petitioner throughout this proceeding, "delve into an attorney's or a party's subjective intent or into a good faith-bad faith analysis." Friends of Nassau Cnty. v. Nassau Cnty., 752 So. 2d 42, 50 (Fla. 1st DCA

2000)(citing Mercedes Lighting and Elec. Supply, Inc. v. Dep't of Gen. Servs., 560 So. 2d 272, 278 (Fla. 1st DCA 1990)). "[I]f a reasonably clear legal justification can be shown for [the action], improper purpose cannot be found and sanctions are inappropriate." Id.

76. Respondent had a clear legal justification for pursuing the underlying overpayment claim--Respondent was owed money paid to, but not earned by, Petitioner. Even if Respondent were the non-prevailing adverse party, fees are inappropriate because Respondent did not file the underlying overpayment claim for an improper purpose.[7/]

Inequitable Conduct Doctrine

77. Petitioner also claims entitlement to attorneys' fees under the inequitable conduct doctrine. Under this rarely applied doctrine, one party may be entitled to attorneys' fees if the other party exhibited egregious conduct or acted in bad faith. See Bitterman v. Bitterman, 714 So. 2d 356, 365 (Fla. 1998)(holding that attorneys' fees could be awarded when counsel's conduct was egregious). Petitioner argues the undersigned has inherent authority under this common law principle to award attorneys' fees.

78. The undersigned has no such inherent authority. The Division is limited to the powers, duties, and authority conferred by statute. See Fla. Elec. Comm'n v. Davis, 44 So. 3d

1211 (Fla. 1st DCA 2010); Dep't of Rev. v. Selles, 47 So. 3d 916 (Fla. 1st DCA 2010); City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973). The undersigned cannot invoke the inequitable conduct doctrine for an award of attorneys' fees.[8/]

Constitutional Issues

79. In Petitioner's Motion Raising Constitutional Challenges to Portions of Florida Attorney's Fees Statutes, Petitioner raised facial constitutional challenges to section 57.111 (i.e., definition of "small business party"); section 120.595 (i.e., definition of "non-prevailing adverse party"); any provisions, statute, regulation, rule "or other legal authority" which fails to extend to the undersigned the inherent authority to impose attorneys' fees under the inequitable conduct doctrine; and "any of the statutes above that might prevent recovery of costs or fees based on domicile, state of origin, or the location of the party," under the Privileges and Immunities clause of the United States Constitution.

80. Contrary to Petitioner's insistence, the undersigned does not have the authority to rule on Petitioner's constitutional claims. As stated in the undersigned's Order on Petitioner's Motion Raising Constitutional Challenges, an administrative agency does not have jurisdiction to address the constitutionality of a statutory provision. See B&B Steel Erectors v. Burnsed, 591 So. 2d 644, 648 (Fla. 1st DCA 1991).

Nor is a claimant required to argue the facial constitutionality of a statute before an administrative tribunal for the issue to be cognizable on appeal. See Key Haven Assoc. Enterprises, Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund, 427 So. 2d 153, 157 (Fla. 1982). However, a party may choose to complete the administrative process and then challenge the facial constitutionality in the district court on direct appeal. Id. This "process [] allow[s] all issues to be decided in the least expensive and time-consuming manner." Id.

81. During the final hearing, Petitioner was given the opportunity to build a record to support his constitutional claims on appeal. The undersigned makes no conclusions regarding the constitutionality of the statutes cited by Petitioner.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner, Artem Joukov, is not entitled to attorneys' fees incurred in Case No. 18-4235.

DONE AND ORDERED this 19th day of August, 2019, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings

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Filed with the Clerk of the Division of Administrative Hearings this 19th day of August, 2019.

ENDNOTES

1/ By agreeing to an extended deadline for filing their proposed final orders, the parties waived the requirement that this Final Order be issued within 30 days of the date the Transcript ~~was~~ received. See Fla. Admin. Code R. 28-106.216(2).

2/ The undersigned's Order Granting Extension of Time erroneously refers to the parties' post-hearing filings as proposed recommended orders.

3/ Petitioner disputes that he is indebted to Respondent for the overpayment. Petitioner has pending claims against Respondent for unlawful discharge and, on that basis, claims Respondent owes him (i.e., for damages), not vice versa.

4/ Respondent suggested this occurred on April 16, 2018, but Petitioner did not affirm the specific date, agreeing only that it occurred between April 11 and 19, 2018.

5/ The FCHR concluded its investigation in September 2018, finding that it did not have jurisdiction in the matter.

6/ Instead, Petitioner points to the error in Respondent's Notice of Agency Action, which excluded an explanation of the method to exercise his right to a hearing and the timeframe for doing so. Petitioner argues that the case was dismissed for that exact error, thus making the SAO's claim frivolous--the SAO knew or should have known that its claim would be dismissed for failure to meet the procedural requirements for a notice of agency action.

Petitioner's argument erroneously equates the undersigned's order granting the motion to dismiss with an order granting a motion for summary judgment or other order passing on the substance of the underlying claim. The fact that the SAO fumbled in crafting the document by which it sought return of the overpayment does not render the overpayment claim itself unsupported by fact and law. The fact remains that Petitioner was overpaid and Respondent had a legal right to recover that overpayment.

7/ Here, Petitioner argues that improper purpose can be inferred from the way the SAO attempted to collect the overpayment. Petitioner points to the personal service of the demand letter by sheriff's deputy at his place of business, pleadings and orders mailed to his parents' address, and preparation of multiple demand letters that fell short of the requirements for a notice of agency action, as evidence that Respondent initiated the proceeding to harass Petitioner. None of those facts undermines the conclusion that Respondent had a clear legal right to recoup the overpayment. Whether Respondent blundered in its attempts to recoup the overpayment is irrelevant. Further, Petitioner glosses over his own behavior which contributed to the increasingly hostile character of the underlying overpayment claim. For example, if Petitioner had not avoided service of the demand letters by certified mail, Respondent would not have had to resort to personal service.

8/ Assuming the undersigned had the inherent authority to apply the inequitable conduct doctrine, the undersigned would find that the doctrine does not to support an award of fees in the instant case. Respondent, seeking to recoup an overpayment, attempted to reach an amicable repayment plan over a period of two months by email and only began pursuing repayment by other means after Petitioner failed to comply with an agreed upon repayment plan, and subsequently refused to negotiate a new repayment plan. It was neither egregious, nor in bad faith, for Respondent to proceed with garnishment of wages after negotiations had failed.

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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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARTEM M. JOUKOV,

Petitioner,

vs. Case No. 18-5833F

OFFICE OF STATE ATTORNEY SECOND JUDICIAL CIRCUIT OF FLORIDA,

Respondent.
_____/

ORDER DENYING MOTION FOR REHEARING

This cause came before the undersigned on Petitioner's Motion for Rehearing (Motion), filed on August 22, 2019. The undersigned being fully advised, it is, therefore,

ORDERED that the Motion is Denied.

DONE AND ORDERED this 22nd day of August, 2019, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, Florida 32399-3060
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Filed with the Clerk of the Division of Administrative Hearings this 22nd day of August, 2019.

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FLA. STAT. 57.105 (2020) Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.—

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing 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) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

(2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:

(a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.

(c) Under paragraph (1)(b) against a represented party.

(d) On the court's initiative under subsections (1) and (2) unless sanctions are awarded before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(4) 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.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's 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 s. 120.68. If the losing party is an agency as defined in s. 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.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

(8) Attorney fees may not be awarded under this section in proceedings for an injunction for protection pursuant to s. 741.30, s. 784.046, or s. 784.0485, unless the court finds by clear and convincing evidence that the petitioner knowingly made a false statement or allegation in the petition or that the respondent knowingly made a false statement or allegation in an asserted defense, with regard to a material matter as defined in s. 837.011(3).

History.—s. 1, ch. 78-275; s. 61, ch. 86-160; ss. 1, 2, ch. 88-160; s. 1, ch. 90-300; s. 316, ch. 95-147; s. 4, ch. 99-225; s. 1, ch. 2002-77; s. 9, ch. 2003-94; s. 1, ch. 2010-129; s. 4, ch. 2019-167.

FLA. STAT. 120.595 (2020) Attorney's fees.—

(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 nonprevailing 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 nonprevailing 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 nonprevailing 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 nonprevailing 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.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) 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.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing 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 nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing 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.

(2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).—If the appellate court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $50,000.

(3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3) AND (5).—If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose

as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $50,000.

(4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).—

(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) Upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rulemaking under s. 120.54(3)(a), such notice shall automatically operate as a stay of proceedings pending rulemaking. The administrative law judge may vacate the stay for good cause shown. A stay of proceedings under this paragraph remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule. The administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves to the administrative law judge that it did not know and should not have known that the statement was an unadopted rule. Attorneys' fees and costs under this paragraph and 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. Notice to the agency may be satisfied by its receipt of a copy of the s. 120.56(4) petition, a notice or other paper containing substantially the same information, or a petition filed pursuant to s. 120.54(7). An award of attorney's fees as provided by this paragraph may not exceed $50,000.

(c) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to

payment of an award or reimbursement for payment of an award under any provision of law.

(d) If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and attorney's fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose as defined in paragraph (1)(e) or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(5) APPEALS.—When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) OTHER SECTIONS NOT AFFECTED.—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney's fees and costs in administrative proceedings. Nothing in this section shall affect the availability of attorney's fees and costs as provided in those sections.

History.—s. 25, ch. 96-159; s. 11, ch. 97-176; s. 48, ch. 99-2; s. 6, ch. 2003-94; s. 13, ch. 2008-104; s. 3, ch. 2017-3.