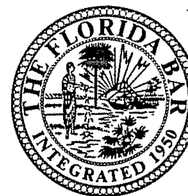
ADMINISTRATIVE LAW SECTION NEWSLETTER



Vol. VII, No. 2 **THE FLORIDA BAR** **FEBRUARY 1986**

Chairman's Corner

At the outset, I want to extend my heartfelt appreciation to the newsletter committee and Florida Bar staff for their collective efforts in publishing this *Newsletter*. A special note of appreciation goes out to Patrick L. "Booter" Imhof for actively seeking out involvement in this most vital communications effort undertaken by the Section.

Recently, I had the opportunity to appear before the Board of Governors and report on the state of the Section. I informed them of the Section's growth (approximately 600 members functioning through 13 committees) and my study priorities, including

—an administrative evidence code
—certification for administrative practitioners
—the impact of growth management legislation
—a model administrative procedure act ordinance for local government

I also informed the Board of Governors of our efforts in working closely with the Governor's Task Force on the Division of Administrative Hearings and, to this end, expressed my fervent hope that the Section will be viewed as the forum for the expression of and debate over ideas and suggestions designed to strengthen that Division, which is the heart of the APA process.

I also expressed the Section's appreciation to the officers and Board members for their support and encouragement, and requested them to provide any input they may wish to help us better perform our job and accomplish our mission.

An issue of major importance carried over from the 1985 Legislature is whether Division of Administrative Hearings hearing officers should be given final order authority respecting §120.57(1), Fla. Stat., formal hearings. This issue has been debated over the past couple of years and all members are urged to follow legislative activities on this matter. One possible approach is to permit agencies to opt for having a DOAH hearing officer enter the final order; but if the agency, in referencing the case to DOAH, wants the hearing officer to enter a recommended order, the agency must specify its reasons, which statement is subject to evidentiary considerations and review.

Finally, the Fourth Annual Administrative Conference held in February, 1986 will, once again, function as an administrative law think-tank. The results and recommendations flowing from that conference will be reported in both The Florida Bar *News* and *Journal*.

George L. Waas

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The Florida Equal Access to Justice Act: A Sword for Small Business in Civil Proceedings Initiated by State Agencies

by E. Clint Smawley, J.D., Cumberland School of Law; B.S., Florida State University

I. Introduction

The 1984 Legislature passed the Florida Equal Access to Justice Act (the Act), (Section 57.111, Florida Statutes (1985)), which took effect on July 1, 1984. The Act states, in part, "The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state". In a very general sense the Act is patterned after its federal counterpart;[1] however, the similarities between the two statutes are deceiving when it comes to interpretation.

This article will focus on the relationship between the Act, the Administrative Procedure Act, (Chapter 120, Florida Statutes) and (S.57.105.) Particular attention will be devoted to the provisions of (S.57.105, F.S.,) relating to attorney's fees and costs, in light of the fact that the Act sets a different and more liberal standard for those persons and entities which fall within its new provisions. In addition, this article will review the substantive and procedural aspects of seeking an award of attorney's fees and costs under the provisions of the Act.

II. Attorney's Fees and Costs Under the Administrative Procedure Act.

A. The Standard Before 1984

The availability of attorney's fees and costs to private litigants under the Administrative Procedure Act can be characterized as very limited, at best. This conclusion results from a review of the history of the statutory language and of the court decisions interpreting those provisions.

When the legislature first enacted the current Administrative Procedure Act they provided, "In the event a court, in reversing an agency's order, finds that such agency action was done in bad faith or maliciously, the court may award attorney's fees and costs to the aggrieved prevailing party."[2] Thus, the legislature had created a narrowly circumscribed area in which private litigants could be awarded attorney's fees and costs. An agency was excluded from seeking an award under this language.

The Administrative Procedure Act also operated as a limitation on the award of costs. In *Bryan v. Department of Business Regulation, Division of Beverage*, (316 So.2d 637 (Fla. 1st DCA 1975)), the petitioner Bryan sought an award of costs following the reversal of the Department's order which had assessed a civil penalty. The court noted that the granting of such costs was the usual procedure but the provisions of the then newly enacted Administrative Procedure Act dictated otherwise.

In reaching this conclusion the court wrote, "By clearly specifying the instances in which costs may be awarded by a court reversing an agency's order, the Legislature by implication, disallowed such awards in other cases." (316 So.2d at 638.) This decision, as well as the plain language of the statute undoubtedly accounts for the paucity of reported cases seeking such awards.

The 1977 Legislature amended this provision to read "In the event a court reverses an agency's order, the court in its discretion may award attorney's fees and costs to the aggrieved prevailing party."[3] This new language was to represent the standard for the ensuing seven years.

The language was utilized in *Capeletti Bros. v. Department of Transportation*, (362 So.2d 346 (Fla. 1st DCA 1978)), in which the court awarded the appellant $50 in costs and $1,500 in attorney's fees following the Department's failure to provide *Capeletti Bros.* a clear point of entry into either a formal or informal hearing pursuant to the Administrative Procedure Act. The court premised its assessment upon the finding that the Department knew of the requirements of Chapter 120 but did not follow them when the Department refused to grant the opportunity for a hearing. Still, the court provided little explanation relating to the reason for its decision which could be utilized as a guide in other cases.

A further examination of the requisites for such awards was made in *Jess Parrish Hosp. v. Public Employees Relations Commission*, 364 So.2d 777 (Fla. 1st DCA 1978)). Although the court denied the award in this particular case the court explained their views at length concerning

the significance of the change to the law in 1977. The court noted that the removal of the "bad faith on malicious" language from the statute did not imply that a party opposing an agency would be on the same footing as a litigant in any other civil action.

In reaching this conclusion the court observed that state agencies are charged with administering policy and that such policy is refined through the adjudicatory process. Further, remand was the proper appellate court response to an agency's failure to sufficiently articulate why, in a manner permitting judicial review, a policy was within an agency's discretion. The court went on to write, "It would be difficult to conceive an instance where mere remand to an agency might also occasion the imposition of fees and costs." (364 So.2d at 782.)

The court did explore the circumstances which might lead to such an award. In so doing it relied on *Dalehite v. United States*, (346 U.S. 15 (1953)), a case which arose under the Federal Tort Claims Act. That statute exempts claims against federal government agencies and their employees which are based upon the failure to exercise or perform a discretionary function. In relying heavily on this case, the court was grafting the principles of sovereign immunity,[4] onto the statute regarding the award of attorney's fees and costs.

The court recalled that previous awards had been assessed when an agency flagrantly violated the requirements of the Administrative Procedure Act by denying a hearing and refusing to promulgate statutorily mandated procedural rules. The court then wrote "[W]e conclude that an agency's actions may more often be subject to the harsher sanctions of fees and costs if either the fairness of the proceedings or the correctness of the action was impaired by material error in procedure or by a failure to follow prescribed procedure." (364 So.2d at 782.)

While the court contended that the rule set forth in *Jess Parrish Hosp.* was not an inflexible one, it is difficult to conclude other than that the net for closing such awards was cast widely. Thus, it was in this posture that the statutory language rode into the 1984 regular session of the Legislature.

B. 1984 Legislature Revisions

Notwithstanding the narrow construction which had been placed upon the award language, the 1984 Legislature amended the statute to read:

> When there is an appeal, the court in its discretion may award reasonable attorney's fees and 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.[5]

This language has two principal affects. First, the "frivolous" or "meritless" standard is very similar in effect to the pre-1977 "bad faith or maliciously" standard. As a consequence, the reasonable expectation is that the courts will cast the net of nonavailability of such awards even more broadly. Second, the statute for the first time allows agencies to recover such awards and arguably establishes two different standards, one for private litigants, and another for agencies.

This observation is supported by the legislative addition of the disjunctive phase, "or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion" in Section 120.57(1)(b)9., with respect to awards to non-agency parties.

It is interesting to note that the language, with respect to agency abuse, directs itself to abuses of discretion when the courts had heretofore erected significant barriers to awards in "discretionary" type cases. What is clear, however, is that the language of the statute further constructs the ability of private parties to successfully seek an award of attorney's fees and costs given the "frivolous" or "meritless" language.

This leads to the conclusion that the Legislature was moving briskly to foreclose the possibility of such awards to private parties in all

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but the most egregious circumstances. The Legislature, however, with the passage of the Act made that conclusion premature.

III. Attorney's Fees and Costs Under the Florida Equal Access to Justice Act

The Act provides that prevailing small businesses are entitled to an award of attorney's fees and costs in actions initiated by state agencies unless the agency action is substantially justified in law and fact, or the award, under the circumstances, would be unjust.

A. Standard for the Award

With respect to the award of Attorney's fees and costs, the Act clearly rejects the pre-1977 standard applied under the Administrative Procedure Act as well as the "New" 1984 language in those instances to which the Act applies. Specifically, the Act provides in its operative part:

> Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. (Section 57.111(4)(a).)

The most obvious feature of the above language is that it is not cast in the familiar language which has heretofore been present in the Administrative Procedure Act, e.g. "meritless"; "frivolous", etc. In fact, the structure of the paragraph creates a general rule that attorney's fees and costs are recoverable by a prevailing small business party unless one of three conditions is present: (1) Another law provides otherwise or (2) The agency action was substantially justified or (3) Special circumstances exist which would make the award unjust. The Act supplies definitions of these words and phrases and it is to these we now turn.

B. Eligibility

The definitions section of the Act, (Section 57.111(3)), is not only useful but essential to an understanding of the effect of its provisions. Each definition is important because all of the terms are, properly, at variance with either the conventional understanding of their meaning or serve to set the limit of the Act's applicability.

1. "Initiated by a State Agency"

The Act applies to adjudicative or administrative proceedings "initiated by state agencies" and provides that this requirement can be met in one of three ways. First, the state agency filed the first pleading in any state or federal court in Florida. Second, the state agency filed a request for an administrative hearing pursuant to the Administrative Procedure Act. Third, and most important, the state agency "[w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency." (Section 57.111(3)(b).)

The first two provisions are aimed at identifying the state agency as the initiator of proceedings in common situations. That is they filed the initial complaint in a state or federal court in Florida or they made a request for a hearing under the Administrative Procedure Act.

The Act makes no dramatic change in the concept of initiation in either case. For example if an agency files a complaint in circuit court seeking an injunction against a private litigant we would expect to find that the Act treats the agency as having "initiated" the action.

The third prong of the initiation test transforms the nominal "initiator" into the "initiatee" and vise versa. This statutory slight of hand is required because it is often the burden of the small business to request a hearing, or pursue an action in circuit court, after the state agency has taken or refused to take some action to which the small business feels it is entitled.

If the Act did not take this aspect of the Administrative Procedure Act into account then the small business would be the initiator and thus ineligible for an award under the Act. Consequently in many cases the state agency will be considered to have "initiated" the proceeding, for the purposes of the Act, even though it was the small business which requested the hearing or filed an action in circuit court.

To convert the state agency to the "initiator" the Act states that the agency is the *initiating* party when they are required by either law or rule to advise a small business party of a clear point of entry after some recognizable event in the state agency's free form proceedings. (Section 57.111(3)(b).) Undoubtedly, this language was not plucked out of the air and an examination of *Capeletti Bros. v. Department of General Services* supports this contention.

In that case, the Department of Transporta-

tion had entered an order which affected the substantial rights of Capeletti Bros. without compliance with S.120.57, F.S. The department had sent several letters to Capeletti Bros. advising them that the department had suspended their certificate of qualification to bid on construction work for the department. The department relied on the provision of S.337.16, F.S.[6] for the support of its position that a hearing under Ch. 120.57 is in the nature of an appeal from its decision to suspend the certificate. The court rejected this argument and noted that the requirements of the Administrative Procedure Act supplanted the provisions of S.337.1, F.S.

On the subject of free-form proceedings and their role with respect to the Administrative Procedure Act the court wrote:

> 'Free-form' proceedings are nothing more than the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business.... The vast majority of an agency's free-form decisions become conclusive because they are not challenged in Section 120.57(1) or (2) proceedings. Yet the agency's rules must clearly signal when the agency's free-form decisional process is completed or at a point when it is appropriate for an affected party to request formal proceedings, if authorized, or to accept his statutory opportunity for informally structured proceedings under Section 120.57(2). In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57. (362 So.2d at 348.)

In the context of the Act this means that an agency is the initiating party when they are required by law or rule to advise a small business party of this clear point of entry to the Administrative Procedure Act regardless of who actually requests a hearing pursuant to Section 120.57. Conceivably a state agency could be an initiator even though it did not so advise the small business of this clear point of entry. The failure of the state agency to do this acts to toll the time limits of S.120, F.S., and concomitantly of the Act itself absent a waiver by the small business.

Thus, a state agency is the initiator if, it files the first pleading, requests a hearing pursuant to the Administrative Procedure Act, or is required to advise a small business of a clear point of entry into Ch. 120, F.S.

2. Small Business Party

The Act establishes two classifications for "small business party." The first applies to a sole proprietor of an unincorporated business, including a professional practice; and the second, to a partnership or corporation, including a professional practice. (Section 57.111(3)(d)).

As can be seen from the chart below there are differences in the Act's test for a small business with respect to the sole proprietor of an unincorporated business and that used for a partnership or corporation.

Sole Proprietor of an Unincorporated Business

1. Principal office located in Florida.

Partnership or Corporation

1. Principal office located in Florida.

2. Sole proprietor domiciled in Florida.

3. At the time the action is initiated by a state agency.
   A. Not more than 25 fulltime employees.

   B. Sole proprietor can not have more than $2 million in net worth including *both* business and personal investments.

2. No equivalent requirement.

3. At the time the action is initiated by a state agency.

   A. Not more than 25 fulltime employees.

   B. Partnership or corporation can not have more than $2 million in net worth.

Consequently, these differences center on the requirement that (1) the sole proprietor must himself be domiciled in Florida and (2) his personal investments (assets?) are included in calculating the $2 million net worth ceiling. Of course, more is required than simply being a small business party to be eligible for an award of costs and fees. The small business must be a "prevailing" small business.

3. "Prevailing" Small Business Party

This Act, in Section 57.111(3)(c), sets forth three circumstances in which a small business party is deemed a "prevailing" small business

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party in any civil action or administrative proceeding pursuant to Ch. 120:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;
2. A settlement has been obtained by the small business party which is favorable to the small business party on the majority of issues which such party raised during the course of the proceeding; or
3. The state agency has sought a voluntary dismissal of its complaint.

As can be seen from this language, the first criterion provides that a small business prevails when a final judgment or order has been entered in its favor and this has not been reversed on appeal or the time for such an appeal has expired. The only issue here is "entered in *favor*" of the small business.

Presumably no difficulty would be encountered if the action brought by the agency had been dismissed on motion of the small business, absent some stipulation contained therein. A more difficult problem arises, however, if, for example, the agency sought revocation of a license and instead the penalty which was upheld was reprimand. Did the small business prevail? The Act itself provides no ready answer. It could be that by separating the definition elements of prevailing into those resulting from litigation and settlement the Act makes a distinction on the availability of attorney's fees and costs. On the other hand, the fact that the small business was not totally successful might not preclude an award in light of the fact that this overlaps into the issue of whether the state agency's actions were substantially justified.

A further reason for this is that in Section 57.111(3)(2), subparagraph 2, the Act expressly contemplates the award of attorney's fees and costs after a settlement between the small business and the state agency. All that is required is that the terms of the settlement must be favorable to the small business on the majority of the issues which the small business raised during the course of the proceeding.

Thus, there is no language suggesting that no award could be made if the small business did not prevail on all of the issues it raised during the proceedings. As a result there is nothing in the statute to suggest that a more restrictive reading should be made of the provisions relating to judgments on orders than that given to settlements. These questions will have to wait resolution in the courts.

The final provision relating to the definition of "prevailing" small business party provides that if the state agency seeks voluntary dismissal of its complaint the small business prevails. Since the language of this subparagraph is couched in terms of the action of the state agency, and not that of the court, it is quite possible that a proceeding which terminated in a voluntary dismissal without prejudice could be the subject of an award under the provisions of the Act.

4. Limitation of the Award

The Act provides that attorney's fees and costs are those reasonable and necessary fees and costs which result from all preparations, motions, hearings, trials and appeals which occur in a proceeding. (Section 57.111(3)(a).) Thus, to be eligible as a fee or cost the charge must have resulted from preparations for, or actual pursuit of a motion, participation in a hearing, a trial, or appeal, which occurred in the overall proceeding. Presumably discovery is considered an integral preparation for a motion hearing or trial, although the reasonable and necessary phrase requires that the applicant demonstrate a connection between the two. Accordingly fees and costs associated with fruitless discovery are not recoverable.[7]

The amount of reasonable attorney's fees and costs which can be awarded can not exceed \$15,000. (Section 57.111(4)(d).) There are three other essential factors which should be considered by counsel for a small business party when evaluating the possibility of pursuing an award. These are discussed in the following section.

IV. "Substantial Justification," "Special Circumstances" and Exclusions

The Act provides that no award can be made when the state agency's initiation of the proceedings is substantially justified or where special circumstances exist which would make the award unjust. In addition, no award can be made when the state agency was merely a nominal party; the proceeding involved the establishment of a rate or rule; or the action sounded in tort. Each of these provisions is examined below.

A. Substantial Justification

The Act establishes the general rule that attorney's fees and costs are recoverable by a

prevailing small business party in any proceeding initiated by a state agency unless the action of the state agency was substantially justified. The Act further provides that, "A proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time it was initiated by a state agency." (Section 57.111(3)(e).)

The use of the conjunctive "and" in this definition is important because it means that the state agency may not escape liability for an award merely on the basis that its actions had substantial factual or legal justification. Rather, they must ultimately carry the burden of persuasion that their actions were substantially justified both in law and in fact. This observation stems from the cases which have been decided under a Florida Statute which is aimed at discouraging frivolous lawsuits and appeals.[8] This particular statute, in deceptively simple language, provides, "The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a *complete absence of a justiciable issue of either law or fact* raised by the losing party." Section 57.105. The Equal Access to Justice Act provides, in roughly comparable language, that the proceeding must have a [R]easonable basis in law and fact. . .

In *Allen v. Estate of Dutton*, (384 So.2d 171 (Fla. DCA 1980)), the stepdaughter of the testatrix appealed final judgment on the pleadings and the award of attorney's fees under S.57.105, F.S. The appellant had taken the position in the trial court that an oral agreement to not revoke a will was effective even though the applicable statute provided that a contract to make a will must be in writing, signed and witnessed to be enforceable. The statute of that time contained no express requirement that a contract not to revoke a will be in writing to be enforceable.

The court was not long delayed in reaching the conclusion that the silence of the statute did not imply that such oral contracts were enforceable. They reasoned that if such were the law it would create a distinction without a difference because, "Would a contract to make a will be fulfilled if the contracting party executed a will one day and revoked it the next?"

In answering this question in the negative, the court cited cases for Massachusetts and California which had also rejected the type of argument presented in the present case and affirmed the judgment on the pleadings.

The court next turned to the issue of whether the trial court was correct in directing the appellant to pay the attorney's fees, pursuant to §57.105, F.S., of the estate and devisee. The court held that the award of such fees is a part of court costs and thus outside the scope of the Florida Rules of Appellate Procedure.[9] The court then paraphrased the position of the prevailing party as follows: "Appellee would have us hold that if the court finds the non-existence of a justiciable issue of fact or the non-existence of a justiciable issue of law, the award of fees is proper." The court is assessing the implications of this, wrote:

> If we were to accept that interpretation, then any party prevailing in a summary judgment hearing would be entitled to such award, and similarly a party whose pleadings were finally dismissed for failure to state a course of action or who suffered a judgment on the pleadings would be subject to the assessment of such fees. (384 So.2d at 175.)

The court held that the legislature's use of the adjective "complete" with respect to the noun "absence" means that there must be an absolute lack of a justiciable issue in the case. It equated this with a "frivolous" cause of action and quoted from a 1935 case to expand upon the meaning of this term. At this point, the court wrote, "[W]e hold that a trial court must find that the action is so clearly devoid of merit *both* on the facts and the law as to be completely untenable." It found that a justiciable issue of law was presented in this case and that the award of attorney's fees was improper.

The Florida Supreme Court first examined Section 57.105, F.S. in *Whitten v. Progressive Casualty Ins. Co.* (410 So.2d 501 (Fla. 1982).) In this case, the court upheld the finding of constitutionality of the statute as well as affirming the summary judgment entered below but reversed the award of attorney's fees. The appellant had instituted an action contesting the effectiveness of a written rejection of uninsured motorists coverage.

The applicable statute, (Section 627.721(1), F.S. (1977)), provided that such coverage could be rejected by any insured named in the policy. The appellant countered that the rejection was not effective because the insurance applicant and not the principal operator (the applicant's son) had rejected this coverage, it being contended that the son was a named insured for the purposes of rejecting the uninsured motorist coverage. The court found that the rejection or acceptance of such coverage by the named insured was binding on all additional insureds under the policy.

The court first rejected the constitutional argument that the attorney's fee statute impinged

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upon the court's rulemaking authority.[10] With respect to the lower court's award of attorney's fees in the case, the Supreme Court noted that, "statutes authorizing an award of attorney's fees are in derogation of the common law, therefore such statutes must be strictly construed.

With this principle in mind the court approved the holding of *Allen v. Estate of Dutton* that for an award to be proper, the action must be devoid of merit both as to the facts and the law, and accordingly frivolous.

The court buttressed this finding with the reasoning that, "the purpose of Section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." The court also decided that the statute would not be invoked automatically when a party lost on the pleadings or on a motion for summary judgment. They also found, in a conclusionary fashion, that the appellants had raised a justiciable issue of law and that the award of attorney's fees by the lower court was therefore improper.

The importance of this decision and others under Section 57.105 is that they serve as a strong indication of the approach which will be taken with respect to the Act and, more important, whether the court will apply the Act literally and require that a state agency's actions be substantially justified in both law and fact in order to avoid the payment of attorney's fees.

The implication of the latter observation being that the burden of showing substantial justification will shift to the agency whenever a small business party prevails by a judgment on the pleadings or summary judgment. As to the meaning of "substantially justified", the act makes it clear that such justification exists when the state agency had a reasonable basis in law and fact at the time they initiated the proceeding. Obviously the question will resolve itself into what is "reasonable", a standard which has meaning only when applied on a case-by-case basis.

B. Special Circumstances

The Act provides that, in addition to the substantial justification exception outlined above, no award can be made if special circumstances exist which would make the award unjust. (Section 57.111(4)(a).) The fact that this provision is set forth separately and given its particular language implies that the legislature had equitable notions in mind when it drafted the provision.

This conclusion is buttressed by the fact that the similar federal provision has been so interpreted. The courts in these cases have found that an award is not proper when the action was occasioned by a taxpayer's failure to file tax returns, when the court's own delay in issuing an opinion opened the door for an award, and when the party seeking the award did not afford the government an opportunity to correct a mistake prior to filing suit.[11]

Other situations can be envisioned in which an action was not substantially justified but the award of fees and costs would be unjust.

For example if, in a complex area of law, the state agency asserted a novel legal position which was justified in fact but not in law, an award might be improper.[12] The courts, however, should be careful to not confuse this equitable safety valve with substantial justification because a novel legal position is without such justification as a matter of definition. The determination of whether an award would be unjust because of special circumstances doubtless lies with the discretion of the court.

C. Exclusions

There are four exclusions under the act which are worth noting. The first is that no award is allowable when the state agency is a nominal party. (Section 57.111(4)(d)1.) The act does not apply in any proceeding to establish a rate[13] or a rule.[14] Nor does it apply to "any action sounding in tort." (Section 57.111(6)(a).)

An argument can be made that the exclusion with respect to establishing a rule would not apply in cases in which the small business party sought an administrative determination of a rule under the Administrative Procedure Act. Of course, if the state agency did not initiate the action, as defined in the Act, then an award could not be made. Having examined the basic elements of the substantial issues under the act we now turn to the procedural aspects of importance.

V. Procedures For Applying For an Award

A. Filing Affidavit and Contents

To seek an award of attorney's fees and costs, the attorney for the prevailing small business party must file an affidavit with the court "[W]hich first conducted the adversarial pro-

ceeding in the underlying action, or to the Division of Administrative Hearings which should assign a hearing officer, in the case of a proceeding pursuant to Chapter 120..." (Section 57.111). The language suggests, but does not require, that the same judge or hearing officer hear the petition for fees and costs.

The act provides that the affidavit of the prevailing small business party must reveal the "nature and extent of the services rendered by the attorney as well as the costs incurred in the preparations, motions, hearings and appeals in the proceeding." (Section 57.111(4)(b)1.) The state agency may oppose the application by affidavit. (Section 57.111(4)(c).) Presumably, this opposition could be based upon the applicants' ineligibility or on the ground that the agency action was substantially justified on an award would be unjust in light of the surrounding special circumstances.

The Act provides that the application for the award must be made within 60 days from the time that the small business party prevails. (Section 57.111(4)(b)2.) No express time limitation for submission of the state agency's responsive affidavit in opposition is set forth.

The Act does provide that the "court, or the hearing officer in the case of a proceeding under Chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment or a final order in the case of a hearing officer."[15] The final order is reviewable as is any final order under Section 120.68.

Additional fees and costs may be awarded to the prevailing small business party if the appellate court affirms the award. Additional amounts would be subject to the act's overall limit of $15,000, however. The payment of awards is subject to a writ of mandamus should the state agency not tender payment within 30 days after the award becomes final. The application for the writ must be filed in the circuit court where the underlying action arose. Fees and costs incurred for issuance of the writ may be awarded by the court. (Section 57.111(4),(5).)

VI. Summary

The standard for the award of attorney's fees and costs under the Administrative Procedure Act has been altered several times over its eleven year history. These changes have essentially been from a bad faith test to discretion of the court standard and back to bad faith. The standard under the Equal Access to Justice Act is devoid of these moral underpinnings. Simply put, it provides that attorney's fees and costs in civil actions initiated by state agencies against small businesses shall be awarded to the prevailing small business unless the state agency's actions are substantially justified in law and fact or special circumstances exist which would make the award unjust. The similarity between this standard and that contained in Chapter 120 ends with the fact that both are pertinent to proceedings in Chapter 120. It is well to note that the Equal Access to Justice Act applies to actions initiated by state agencies in the courts as well. As a consequence, diligent counsel should be mindful of its provisions whenever they represent a small business in a proceeding which has been initiated by a state agency.

Footnotes:

[1] 5 U.S.C.§504; 28 U.S.C.§2412, as amended by Pub. Law 99-80. An analysis of the federal act's provisions are beyond the scope of this article. For the legislative history of the 1985 amendments See, 6 U.S. Code, Congressional and Admin. News, 132 (1985).

[2] §1 Ch. 74-310, L.O.F.

[3] §5, Ch. 77-453, L.O.F.

[4] Florida's sovereign immunity statute is found at §768.28, F.S. (1985). That statute has also received a narrow construction, see, *Trianon Park Condominium Assoc. Inc., v. City of Hialeah* 468 So.2d 912, 923 (Fla. 1985) (Ehrlich, J. Dissenting) but see *Reddish v. Smith*, 468 So.2d 929 (Fla. 1985); *Everton v. Willard* 468 So.2d 936 (Fla.1985); *Duvall v. City of Cape Coral* 468 So.2d 961 (Fla.1985).

[5] §2 Ch. 84-173 and §4 Ch. 84-203, L.O.F. Both laws contain identical amendatory language.

[6] S. 337.16, F.S. (1977) allowed the department to suspend a contractor's certificate of qualification for delinquency or for good cause. It further provided that any person found delinquent on a contract or whose certificate is revoked or suspended would be provided the same hearing as was provided to persons whose application for a certificate was denied. The reference to the hearing was removed by S.56, Ch. 78-95, L.O.F..

[7] *Wilkins v. Super X Drugs of Florida, Inc.*, 232 So.2d 19 (Fla.Dist.Ct.App.1970).

[8] §57.105, F.S. (1985) See also, Note, Attorney's Fees: Florida Statute 57.105, 5 Nova L.J. (1980) with respect to attorney's fees for a frivolous appeal see, *T.I.E. Communication v. Toyota Motors Center, Inc.*, 391 So.2d 697 (Fla. Dist. Ct. App. 1980) (such appeals may give rise to an award of attorney's fees).

[9] This is significant because the Equal Access to Justice Act is located in the same chapter and the chapter placement was important to the court. Id. at 174.

[10] *Art. v. §2, Florida Constitution.* Because of this it is likely that a challenge to the Equal Access to Justice Act on similar constitutional grounds would also be unsuccessful.

[11] *Aules v. United States*, No. 82-M-43 (D. Colo. March 30, 1982); *Mattews v. United States*, 526 F. Supp. 993 (M.D. Ga. 1981); *Metropolitan Nat. Bank of Farmington v. United States*, No. 81-71842 (E. D. Mich. March 16, 1982).

[12] See, *Bermon v. Schweiker*, 531 F. Supp. 1149 (N.D. Ill. 1932), in which the reader can infer this is what the court meant when they wrote, "There is nothing novel or innovative in the government's position; it argued that the

continued...

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plaintiff should be classified as a contractual service employee despite the fact that no such category existed at the time plaintiff rendered the services for which he was compensated." Id. at 1154.

[13] See, e.g. §350.80 (1985), F.S., (Coal Slurry Pipeline Companies); Ch. 351, F.S. (1985) (Railroads); Ch. 363, F.S. (1985) (Telegraph and Cable Companies); Ch. 364, F.S. (1985) (Telephone Companies); Ch. 366, F.S. (1985) (Public Utilities); Ch. 367, F.S. (1985) (Water and Sewer Systems); Ch. 627, F.S. (1985) (Insurance Rates and Contracts).

[14] See §120.54, F.S. (1985) which provides procedures for rule adoption under the Administrative Procedure Act.

[15] §57.111(4)(d), F.S. (1985). The rules of the Division of Administrative Hearings appear to make this optional, however, the statute provides that the evidentiary hearing is mandatory. See, Ch. 221-6.35, F.A.C.

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New DOAH Officers Assume Duties

Three new hearing officers have begun their duties at the Division of Administrative Hearings.

W. Matthew "Matt" Stevenson an FSU Law School graduate, had previously served as a law clerk to Judge Joseph Hatchett on both the Florida Supreme Court and the U. S. Court of Appeals for the Fifth Circuit. Prior to that, Mr. Stevenson was an officer in the Judge Advocate Generals Court of the U.S. Navy.

Mary Clark received her J.D. degree from FSU and previously served as an attorney for HRS, DOA, and as General Counsel for the Department of Community Affairs.

Bill Dorsey graduated from the University of Florida in 1977 and was with the firm of Bedell, Bedell, Dittmar and Zehmer in Jacksonville for 5 years. For the last three years, he was the Assistant General Counsel of the Department of Education and was involved in the defense of the functional literacy test.

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Governor's Task Force on DOAH Prepares Report

The Governor's Task Force on the Division of Administrative Hearings, chaired by Betty Steffens, has been meeting since October and will be submitting its final report to the Governor in February.

The group, which includes administrative practitioners, legislators and staff, and agency officials, has considered the following issues:

- The impact of growth management legislation upon DOAH.
- The possibility of establishing regional branch offices within DOAH.
- Subdividing hearing officers according to subject matter of hearings.
- Location of DOAH within state government. (It is now within the Department of Administration.)
- Whether hearing officers' orders should be final orders and not subject to agency review.
- Whether the system for the selection and retention of hearing officers should be modified.
- Physical space needs of DOAH.
- The establishment of a code of conduct for persons appearing before DOAH.
- The budgetary needs of the Division and the manner in which they should be presented to and considered by the Legislature.

Many of the issues spring from the fact that although the hearing officers perform judicial or dispute resolution functions, they are housed within the executive branch of government. For example, during the appropriations process the DOAH budget is considered by a different appropriations sub-committee than the one that considers the judicial branch.

Therefore, statistics which reflect the level of activity, such as cases filed and disposed of, are not commonly considered within that part of the appropriations process. Similar problems occur in the presentation of the needs for library funds, and other support services.

Out of the discussion of the finality of hearing officer's orders came consideration of recommending amendments to the Equal Access to Justice Act, discussed elsewhere in this Newsletter, to inhibit agency reversal of recommended orders. The possible amendments suggested included expanding the act to apply to all private persons, as opposed to "small business."

Consideration was also given to different treatment for recommended orders, depending on the agency from which they arose.

In the area of space needs, investigation is being made into space in facilities which can be added to as the staff of the Division grows.