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FLORIDA'S EQUAL ACCESS TO JUSTICE ACT: HOW THE COURTS AND DOAH HAVE INTERPRETED IT

MARY W. CHAISSON

I. INTRODUCTION

FLORIDA'S Equal Access to Justice Act\(^1\) provides for the award of reasonable attorney's fees and costs up to $15,000 incurred defending in any adjudicatory or administrative proceeding to a prevailing small business party. The proceeding must have been initiated by a state agency, and the actions of the agency must not have been substantially justified. Additionally, there must have been no special circumstances that would make the award unjust.\(^2\)

The Act was designed to encourage small business parties to seek review of or defend against unwarranted government action by providing for attorney's fees and costs against the State in certain situations.\(^3\) The Legislature sought to provide "a partial remedy for those too frequent situations where small businesses find opposing state agency action too expensive even when the state agency action may appear to be totally unjustified."\(^4\) By requiring each state agency to report annually any awards under the Act to the Legislature,\(^5\) the statute also curbs any tendency of state agencies to wield their substantial regulatory powers unwisely or unfairly.

Although the Act became effective in 1984, there have been only a handful of appellate cases\(^6\) and surprisingly few petitions filed with the Division of Administrative Hearings (DOAH).\(^7\) No one need fear that the floodgates of litigation were opened by its enactment. One commentator has called the Equal Access to Justice Act a "sword for

2. \textit{Id.} § 57.111(4)(a), (4)(d)(2).
3. \textit{Id.} § 57.111(2).
6. There have been only five cases discussing the Act to any significant extent. See Department of Prof. Reg. v. Toledo Realty, 549 So. 2d 715 (Fla. 1st DCA 1989); Thompson v. Department of HRS, 533 So. 2d 840 (Fla. 1st DCA 1988); Department of HRS v. A.F., 528 So. 2d 87 (Fla. 5th DCA 1988); Gentile v. Department of Prof. Reg., 513 So. 2d 672 (Fla. 1st DCA 1987); City of Naples Airport Auth. v. Collier Dev. Corp., 515 So. 2d 1058 (Fla. 2d DCA 1987).
7. Many of these petitions will be discussed in this Comment.
small business."\textsuperscript{8} Another expressed doubt that the Act provided any real remedy to small businesses forced to defend against agency actions.\textsuperscript{9}

This Comment will examine the Act's requirements and the procedure to be followed by parties petitioning for attorney's fees and costs, the appellate cases and DOAH final orders issued interpreting the terminology of the Act, and the persuasive value of the interpretations given in these final orders. It will ultimately address whether the Act is truly a "sword" or whether it is a waste of space in the statute books.

II. OVERVIEW

A. Legislative History

The Florida Equal Access to Justice Act\textsuperscript{10} was originally enacted by the Florida Legislature in 1984\textsuperscript{11} and has received two minor revisions since then, both in 1987. Section 43 of chapter 87-6\textsuperscript{12} added a paragraph codified at section 57.111(3)(d).\textsuperscript{13} This addition expanded the Act to allow recovery by a new class of small business parties. This has triggered few, if any, additional petitions. Section 7 of chapter 87-224\textsuperscript{14} reworded one sentence in order to improve clarity and promote proper interpretation.\textsuperscript{15}

B. Impact of the Act on Related Statutes

Even before the Act's enactment in 1984, a party recovering a judgment against the State or a state agency could recover costs under sec-


\textsuperscript{9} David L. Powell, \textit{Rights and Duties of Vendors and Government Agencies Under Florida's New Public Contracting Law}, 17 FLA. ST. U. L. REV. 481, 510 n.181 (1990). The Act's bar to recovery if the agency's actions were substantially justified or if special circumstances exist that would make the award unjust was seen as rendering the remedy "more theoretical than real." \textit{Id.}

\textsuperscript{10} FLA. STAT. § 57.111 (1989).

\textsuperscript{11} Ch. 84-78, §§ 1-6, 1984 Fla. Laws 200, 200, 202.

\textsuperscript{12} Ch. 87-6 § 43, 1987 Fla. Laws 9, 66.

\textsuperscript{13} It stated:

3. Either small business party as defined in subparagraph 1, without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section and s. 120.575(1)(b) to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor. FLA. STAT. § 57.111(3)(d)(2) (1989).

\textsuperscript{14} 1987 Fla. Laws 1375, 1380.

\textsuperscript{15} "(3)(c) A small business party is a 'prevailing small business party' when: . . . ." \textit{Id.}
Section 57.111 is an alternative for small businesses that might otherwise recover fees and costs under section 57.041. The $15,000 maximum established for recovery under section 57.111 does not limit a cost award under section 57.041. Nor does section 57.111 have any impact on the award of costs in a juvenile proceeding. Rather the Act provides for the award of costs and attorney’s fees in some situations where such awards were not previously available. For instance, section 57.111 provides for costs and attorney’s fees in purely administrative actions, while section 57.041 awards are available only in judicial actions.

C. Summary of the Act

Section 57.111(4)(a) succinctly summarizes the main thrust of the Act as follows:

(4)(a) 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.

The remainder of the Act explicates and implements this legislative goal. The rest of subsection 4 sets out the procedures to be followed both by petitioners in applying for attorney’s fees and costs, and by state agencies in responding to an application. Section 57.111(3) defines the terms used in section 57.111(4)(a), including “attorney’s fees and costs,” “initiated by a state agency,” “prevailing small business party,” “small business party,” and “substantially justified.” Subsection 5 sets out the procedure the petitioner should follow if the agency fails to pay the award within thirty days, and subsection 6 excludes certain State actions from application of the Act. Finally, subsection 7 establishes the procedure to be followed by state agencies in reporting the amounts paid to the Legislature.

Failure to comply with the procedural guidelines set out in the Act or to conform to one of the defined categories can be fatal to a peti-

18. Id.
19. Department of HRS v. A.F., 528 So. 2d 87, 88 (Fla. 5th DCA 1988).
20. Id.
tioner's application. Practitioners advising clients who have already successfully challenged agency actions, as well as those who are only considering opposing agency action in the hope of being at least partly reimbursed once they are vindicated, are exhorted to consider each section as it has been laid out by the Legislature, as it has been more broadly explained in Rule 221-6.035 of the Florida Administrative Code, and as it has been interpreted by the courts and DOAH in applicable case law and administrative decisions.

D. Persuasive Value of DOAH Final Orders

Before there can be a petition for attorney's fees and costs under the Act, there must have been some underlying agency action that was "initiated" by the agency.

Section 57.111(3)(b) contemplates that the underlying action to a petition will originate either in a court or in an administrative proceeding under chapter 120. Section 57.111(4)(b)(1) requires the prevailing party's attorney to submit an itemized affidavit to the court that conducted the underlying proceeding or, for chapter 120 proceedings, to the Division of Administrative Hearings. Therefore, the petition for fees is submitted to the tribunal that presided over the action giving rise to the petition. The Act further provides for a prompt evidentiary hearing on the application. The court then issues a judgment or, in the case of an administrative hearing, the hearing officer issues a final order. A final order of a hearing officer is reviewable in accordance with the provisions of section 120.68. A petition under the Act, then, may end up with either a judgment (if the underlying cause was in court) or a final order (if the underlying cause was administrative action).

As there are so few appellate decisions that even discuss the Act, much less devote much time to interpreting it, and most of the decisions interpreting the Act are final orders, the issue of how much persuasive value such a final order has is relevant in deciding how much weight to accord to these administrative determinations. This is a multifaceted issue involving: (1) what binding effect the interpretation of

22. See infra notes 34-187 and accompanying text.
24. Chapter 120, Florida Statutes, is the Administrative Procedure Act (APA). The APA establishes the procedures to be followed by state agencies in adopting rules and by parties affected by agency actions in seeking review of a wide range of agency actions.
26. Id.
a DOAH hearing officer has on a subsequent interpretation of the same provision by the same or a different DOAH hearing officer, and (2) what standard of judicial review is proper on appeal.

Section 57.111(4)(d) provides some guidance on the latter concern. It specifies: "[T]he final order of a hearing officer is reviewable in accordance with the provisions of s. 120.68."27 Section 120.68(2) in turn provides for appellate review by the district court of appeal in the appellate district where the state agency has its headquarters or where a party resides, except for those matters calling for judicial review by the supreme court. Proceedings are conducted under the Florida Rules of Appellate Procedure.28

The reviewing court deals separately with disputed issues of agency procedure, interpretations of law, fact determinations, or policy within the agency's discretion.29 Additionally, section 120.68 requires the court to remand the case to the agency for further action if a material error in or a failure to follow procedure may have impaired the fairness of the proceedings or the correctness of the action. The court must either set aside or modify the agency action or remand the case to the agency for further action under a correct interpretation of the provision of law if it finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action.30

The Legislature then, by providing that final orders of hearing officers are reviewable in accordance with section 120.68, has established a restrictive scope of judicial review of these orders.31

Additionally, the Florida courts have applied "certain well established judicial principles" to administrative proceedings.32 Department of Health and Rehabilitative Services v. Barr33 established that final orders of agencies are stare decisis to later actions of the agency.34 The principles of res judicata and collateral estoppel also are applicable to final agency action.35

27. Id.
29. Id. § 120.68(7) (1989).
30. Id. § 120.68(8), (9) (1989).
31. See Florida Real Estate Comm’n v. Webb, 367 So. 2d 201, 203 (Fla. 1978); see also Fort Pierce Util. Auth. v. Florida Pub. Serv. Comm’n, 388 So. 2d 1031 (Fla. 1980).
33. 359 So. 2d 503, 505 (Fla. 1st DCA 1978).
34. Accord Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973); UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); City of Miami Beach v. Miller, 122 So. 2d 578, 580-81 (Fla. 3d DCA 1960).
35. Department of HRS v. Professional Firefighters, 366 So. 2d 1276, 1277 (Fla. 1st DCA 1979); see also Thomson v. Department of Envlt. Reg., 511 So. 2d 989, 991 (Fla. 1987); DeBusk v. Smith, 390 So. 2d 327, 328-29 (Fla. 1980); Jet Air Freight v. Jet Air Freight Delivery, 264 So. 2d 35, 40 (Fla. 3d DCA), cert. denied, 267 So. 2d 833 (Fla. 1972).
Generally, while a previous final order of a hearing officer does not have the binding effect on an administrative hearing officer as does the decision of a court, it does have some precedential value in guiding the officer’s conclusions of law. Indeed, the final orders in the area show that hearing officers frequently cite to the final orders of other hearing officers interpreting the statute.\(^3\) When an apparent conflict with a previous final order arises, an officer often will distinguish the cases in order to maintain consistency of interpretation, much like a court would with conflicting case law.\(^3\)

Therefore, while much of the case law interpreting Florida’s Equal Access to Justice Act is not case law at all, but final orders of DOAH hearing officers, these orders are indicative of how hearing officers and appellate courts are likely to interpret the Act in the future.

### III. TERMINOLOGY

The statute uses words in common usage but with specialized meanings under the Act. Therefore, to more accurately predict one’s chances of a recovery under the Act, it is necessary to examine how the Act, the applicable case law, and the applicable administration decisions have defined these terms.

#### A. "Attorney’s Fees and Costs"

Subsection 57.111(3)(a) defines “attorney’s fees and costs” as “the reasonable and necessary attorney’s fees and costs incurred for all preparations, motions, hearings, trials and appeals in a proceeding.” The precise meaning of this definition was at issue in *Heisler v. Department of Professional Regulation*.\(^3\) There the Board filed an administrative complaint against a contractor, alleging statutory violations. Five days before the scheduled formal hearing in the matter the Board filed a Notice of Voluntary Dismissal Without Prejudice with DOAH.\(^3\) Six months later the Board filed an amended administrative complaint alleging additional statutory violations based upon the same set of facts.\(^3\) After a formal hearing on the amended administrative complaint, the complaint was dismissed with prejudice and the

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39. *Id.* at 3310.

40. *Id.* at 3310-11.
contractor petitioned for the fees and costs he incurred in defending against both the original and the amended administrative complaints. 41

The hearing officer awarded only those fees and costs incurred in defense of the amended complaint. 42 She reasoned that the sixty days statutory filing time had elapsed between the time the original complaint was dismissed and the time the amended complaint was filed. Therefore, the contractor was barred from recovering his attorney's fees and costs in defending against the original administrative complaint by the statute itself. 43 More importantly, however, the contractor might have been reimbursed for attorney's fees and costs incurred before the date on which the second complaint was issued if he had presented evidence that specific services, although performed during the pendency of the first case, were used in the defense of the second case. 44 In addition, those expenses incurred for services performed after the issuance of the recommended order as well as attorney's fees incurred in litigating entitlement to attorney's fees and costs, were also awarded. 45

Therefore, a prevailing party may be reimbursed for all necessary and reasonable attorney's fees and costs incurred in defending against agency action. The party may even recover fees and costs incurred in an earlier action never clearly resolved if the attorney's work product is used in a later successful defense. The key is presenting adequate evidence of the use and adequate documentation of the time spent on the various motions and pleadings.

B. "Initiated by a State Agency"

Under section 57.111(3)(b), a state agency initiated the underlying proceeding if it:

1. Filed the first pleading in any state or federal court in this state;
2. Filed a request for an administrative hearing pursuant to chapter 120; or
3. Was 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. 46

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41. Id. at 3311.
42. Id. at 3317, 3322.
43. Id. at 3321. Subparagraph 57.111(4)(b)2 provides: "The application for an award of attorney's fees must be made within 60 days after the date that the small business party becomes a prevailing small business party." Fla. Stat. § 57.111(4)(b)2 (1989).
45. Id.
When a state agency initiates an action by filing in court or requesting an administrative hearing, it is easy to determine that the agency has initiated the action. The issue, when it has come up, is usually whether the state agency was required to advise a small business party of a clear point of entry. Therefore, if a party is entitled to a clear point of entry under chapter 120, as this has been interpreted by the courts and DOAH, the resulting formal proceeding was "initiated by a state agency."

The language in paragraph (3) has been equated to an agency's filing of an administrative complaint with an election of rights form. In *Department of Professional Regulation v. Andrews*, the hearing officer dismissed the petition for attorney's fees and costs for lack of subject matter jurisdiction because the complaints against petitioners were filed on June 7 and 11, 1984, and the Act applies only to actions initiated by state agencies after July 1, 1984. In a closer case, the hearing officer declined to decide whether an action had been initiated before or after the effective date when the administrative complaint had been issued before July 1, 1984, but the election of rights form had not been signed nor the cause transmitted to DOAH until after that date. She chose instead to dismiss because the petition had been filed more than sixty days after the agency filed its voluntary dismissal.

The question of whether an administrative complaint filed before the effective date of the Act with an election of rights form dated after that date would be covered remains open and is quite probably moot. The amount of time that has passed since the effective date of the Act makes it increasingly less likely that a petitioner will seek to recover fees and costs for state action initiated before or near that date. This does not mean, however, that the issue of whether an action was initiated by a state agency is no longer important, for in order to recover under the Act, the petitioner must plead and prove that the agency was the initiator.

47. Capeletti Bros. v. Department of Transp., 362 So. 2d 346, 348 (Fla. 1st DCA 1978). This language is further evidence that a strong link between chapter 120 and the Act was intended by the Legislature. The close relationship between the two statutes was quite likely motivated by a desire to provide some extra measure of protection to those who must rely on the fairness of state agencies. See City of Naples Airport Auth. v. Collier Dev. Corp., 515 So. 2d 1058, 1059 (Fla. 2d DCA 1987).


49. *Id.* at 1300-01; FLA. STAT. § 57.111(6)(b) (1989).


51. *Id.* at 305.

52. See Department of Prof. Reg. v. Toledo Realty, 549 So. 2d 715, 717 (Fla. 1st DCA 1989).
Home Health Care v. Department of Health and Rehabilitative Services established that a party applying for a permit or other certification, although taking the first action, is not initiating the subsequent state action so as to be excluded from recovery under the Act. There, a home nursing facility's initial application for a certificate of need from the Department of Health and Rehabilitative Services was denied, but it was later granted after a formal administrative hearing. The Department of Health and Rehabilitative Services argued that it had not initiated the underlying proceeding, but the hearing officer ruled that the denial of the certificate constituted initiation of the action by the Department.

An agency may initiate action in proposing to grant or deny an application. In Rudloe v. Department of Environmental Regulation, a laboratory specimen company, and Rudloe, an individual, petitioned after successfully challenging in formal administrative proceedings DER’s intent to grant a dredge and fill permit to Dickerson Bayshore, Inc. The Department argued that it had furnished Gulf notice of its intent to grant solely because Gulf had requested notice and not because it was required to advise Gulf of a clear point of entry pursuant to chapter 120. The hearing officer disagreed. He found that Gulf and Rudloe had pleaded and proved special, substantial interests differing from those of the public at large and that a "party whose substantial interests are to be determined by agency action has a legal right to participate in formal adjudicatory proceedings before action is taken, when material facts are disputed."

It is likely then that parties with adequate standing to obtain a section 120.57 hearing to protest or support agency action will later be able to show that the agency "initiated" the action within the meaning of section 57.111(3)(b)3. This is a natural and, no doubt, intended result of the Legislature’s choosing to use the "clear point of entry" language.

C. "Small Business Party"

Three classes of individuals or companies are classified as small business parties under the Act:

54. Id. at 171-72.
55. Id. at 176.
57. Id. at 208.
58. Id. at 209 (citing Surface Water Management Permit No. 50-01420-S, 515 So. 2d 1288 (Fla. 4th DCA 1987)); NME Hospitals, Inc. v. Department of HRS, 492 So. 2d 379 (Fla. 1st DCA 1986); Capeletti Bros. v. Department of Transp., 362 So. 2d 346 (Fla. 1st DCA 1978); Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977).
1. a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this 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 not more than $2 million, including both personal and business investments; or
b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million; or
2. Either small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section and s. 120.575(1)(b) to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor. 59

*Department of Professional Regulation v. Toledo Realty, Inc.* 60 established that an employee of a small business party is not himself or herself a small business party. The court relied on *Thompson v. Department of Health and Rehabilitative Services.* 61 While the court did not address the apparent conflict between its decision and the decision in *McCallister v. Department of State,* 62 the hearing officer in *Alfert v. Division of Real Estate,* 63 whose conclusion that Alfert was not a small business party was affirmed by the court in *Toledo,* stated that "*McCallister* is either distinguishable from the facts herein or is founded on an erroneous construction of the law." 64

In *McCallister* the petitioner was a licensed polygraph examiner and the sole proprietor of McCallister Polygraph Service, Inc. He was also employed by the Polk County Sheriff’s Office as a sworn officer serving as staff polygraphist. Although the actions giving rise to the administrative complaint took place when he was performing his duties for the Sheriff’s office, he incurred the attorney’s fees and costs as a result of the Division of Licensing seeking to revoke his detection of deception examiner’s license. The legislative intent of the Equal Access to Justice Act was to encourage professionals licensed by the

59. FLA. STAT. § 57.111(3)(d) (1989). The Act is not the only statute providing for attorney’s fees or costs to successful litigants against state agencies. See FLA. STAT. §§ 57.041, .105 (1989).
60. 549 So. 2d 715 (Fla. 1st DCA 1989).
61. 533 So. 2d 840 (Fla. 1st DCA 1988) (A State employee involved in a regulatory proceeding to determine his eligibility for continued employment is not a small business party.).
64. Id. at 5208.
State to seek administrative review of agency actions. In seeking to revoke his license, the Division sought to discipline him as a “sole proprietor of a professional practice.” The hearing officer concluded that “a literal interpretation of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion” and found that Mr. McCallister was a small business party as required by the statute.

McCallister and Toledo are distinguishable on their facts. In Toledo Mr. Alfert was a licensed real estate broker, but he did not own his own business. He was simply an employee. Mr. McCallister, however, was the sole proprietor of his own business and so met the statutory definition for a small business party.

In another case it was found that a person who seeks an initial license to care for agency-assigned children is a small business party. The hearing officer in Miller v. Department of Health and Rehabilitative Services reasoned: “It is clearly the legislative intent... that a sole proprietor, with a net worth not exceeding $2 million, offering his services to the general public would qualify as a ‘small business party’ if disciplinary proceedings against his license were instituted by the State.” She then went one step further and addressed whether a license applicant denied licensure is a small business party if going into business is dependent upon the grant of the license that has been denied. Reading sections 57.111(3)(d) and (3)(b)3 in conjunction, she found that the statute “provides a ‘window,’ for those sole proprietors, such as Petitioner whose license applications have been denied. Concomitantly, they are likewise entitled to attorney’s fees and costs where all other criteria are met.”

Finally, in determining whether a corporation is a small business party within the meaning of the statute, the corporate party need only show that it had twenty-five or fewer full-time employees at the time the agency action was initiated or that its net worth was $2,000,000 or less. “Or” is the operative word. Exceeding only one of these maximums is not enough to disqualify the corporation as a small business party under the Act.

66. Id. at 4069 (citations omitted).
67. Id.
69. Id. at 5165.
70. Id. at 5166.
While Toledo provides that licensed realtors employed by real estate companies are not small business parties within the meaning of the Act, at least to the extent that they do not own their own small business on the side, its applicability to other licensed professionals employed by others remains unsettled. It is clear that a party may qualify as a small business if it meets either the economic or size criterion.

D. "Prevailing Small Business Party"

A small business party is "prevailing" when:

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.72

Briggs v. Department of Professional Regulation73 addressed the question of when a final judgment or order is favorable to a small business party. In the case giving rise to the petition, the Real Estate Commission's final order found the subsequent petitioners guilty of violating chapter 475 by forging a client's signature on a contract74 and imposed a six-month license suspension. The suspension was dependent upon payment of a $1,000 civil penalty.75 This penalty was imposed for violation of one count of a two count complaint; the parties were found not guilty on the remaining charges. Nevertheless, the hearing officer dismissed the petition for fees and costs, concluding that "neither the Recommended Order or Final Order reflects any 'approval' of Respondent's conduct as reflected by the penalty assessed."76

A real estate broker's petition for attorney's fees and costs was similarly denied because she had not prevailed in the initial proceeding.77 She had asserted that the final order was favorable to her because two of the charges against her had been dismissed. She was found guilty

74. id. at 796-97.
75. Id.
76. Id. at 799.
on two other counts and assessed penalties. The hearing officer ruled that the criterion of prevailing on a majority of the issues litigated applies only in cases where a settlement has been obtained and has no application to cases where a final order has been issued.78

Assad v. Department of Professional Regulation,79 like Briggs80 and Ruffin,81 was based on a license discipline proceeding, but the Board and Assad entered into a settlement before the hearing on the administrative complaint in which the Board agreed to dismiss all of its charges against him. The final order on Assad’s petition addressed the issue of when a settlement is favorable as well as demonstrating the overlap between 57.111(3)(c)2 and (3)(c)3. In denying Assad’s petition, the hearing officer found “a settlement wherein the Petitioner agrees to be subjected to four (4) of the six (6) possible penalties . . . is not a ‘favorable settlement’ . . . .”82

Therefore, a party is not necessarily “prevailing” if the agency dismisses all of its complaints pursuant to a settlement agreement in which the party does not prevail on a majority of the issues. When the party is a professional licensee and the underlying agency action is the filing of an administrative complaint, the standard is probably close to complete victory or failure.

The decision in Rudloe83 illustrates how the cases have dealt with the issue of when a settlement is “favorable” on a “majority of issues” outside of the license discipline context. There the petitioners applied for attorney’s fees and costs after they successfully opposed the Department of Environmental Regulation’s intent to grant a dredge and fill permit to a company hoping to build a marina. DER argued that the petitioners were not prevailing small business parties because they did not prevail on every issue litigated. The hearing officer rejected this argument, stating: “Although Gulf did not prevail on every issue litigated, it obtained a favorable result. This is not a case where a party prevailed on one, but not all, of multiple counts litigated in a single proceeding.”84

A different standard seems to be used in license discipline cases than in other areas for determining whether a particular outcome was favorable to a small business party. A licensee must be more unequivocally the winner than other parties taking on state agencies in order

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78. Id. at 1316.
84. Id. at 210.
to be found the "prevailing" party. This is balanced by a heavier burden being placed on state agencies in proving substantial justification for their actions. 85

*Heisler v. Department of Professional Regulation* 86 stands for the proposition that a small business party can prevail even before the state agency files its final order in the underlying cause. Mr. Heisler, a residential air conditioning contractor, filed a petition for fees and costs after the Construction Industry Licensing Board adopted the recommended order in his favor at its board meeting but before the Board issued its final order. 87 After the period for responding to the petitioner's allegations had expired, DPR alleged that the petitioner was not yet a prevailing party because no final order had yet been issued. The hearing officer found that the petitioner became a prevailing small business party when the Board adopted the recommended order and, therefore, his filing the petition before the filing of the final order was not fatal to his petition. 88

The hearing officer reasoned that allowing a state agency or board to insulate itself from paying attorney's fees by failing to enter a final order would run counter to legislative intent. 89 Significantly, the hearing officer found that the Board was "violating Section 120.59(1), Florida Statutes, by failing and/or refusing to enter its final order . . . ." 90

The applicable standard used in determining whether a party prevailed then may depend on the nature of the underlying cause of action, with a stricter standard being applied in license discipline cases than in other cases. Further, there is some flexibility built in as to when a party becomes a prevailing party. Filing before the agency issues its final order will not defeat a valid claim.

**E. "Substantially Justified"**

By far the most frequently disputed issue in cases under the Act is whether the initial proceeding was substantially justified. 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." 91 This has been equated by the courts and DOAH with a valid probable cause deter-

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85. See infra notes 87-136 and accompanying text.
87. Id. at 3319.
88. Id.
89. Id. at 3318.
90. Id.
mination before issuance of an administrative complaint or other action by the state agency.92

In the license discipline context at least, a valid probable cause determination rests upon consideration of some evidence "that would reasonably indicate that the violations alleged had indeed occurred."93 In order to determine whether agency action was substantially justified then, several threshold issues must first be addressed. At what point during the evaluation of the underlying cause must the agency's actions have been substantially justified? How substantial is substantial? Who bears the burden of proving substantial justification?

1. When Must the Agency's Actions be Substantially Justified?

The Act specifies that the agency action must have a reasonable basis in law and fact "at the time it was initiated" to be substantially justified.94 In the license discipline and permitting settings, the relevant period is the point at which the agency made the decision to issue an administrative complaint against a licensee or to grant or deny a permit application.95

In one of the few appellate cases in this area, the First District Court of Appeal affirmed the hearing officer's denial of attorney's fees and costs to an optometrist who won in the underlying cause. In the formal hearing on the administrative complaint against the optometrist, the Board of Optometry presented the testimony of a DPR investigator who had visited Dr. Gentele in the guise of a patient after an actual patient lodged a complaint against him. The hearing officer recommended that the Board dismiss the count of its complaint based on the investigator's testimony, finding that her testimony was not credible. However, this finding did not mean that the agency's actions in initiating the complaint were not substantially justified. The court reasoned that DPR's decision to prosecute the complaint was based on a credibility assessment of the investigator's testimony. As such, its action had a reasonable basis in law and fact.96

The hearing officer in Romaguera v. Department of Professional Regulation97 explained what is statutorily required in an agency's determination of probable cause:

92. See, e.g., Department of Prof. Reg. v. Toledo Realty, 549 So. 2d 715 (Fla. 1st DCA 1989); Gentele v. Department of Prof. Reg., 513 So. 2d 672 (Fla. 1st DCA 1987).
93. Kibler v. Department of Prof. Reg., 418 So. 2d 1081, 1084 (Fla. 4th DCA 1982); see, e.g., Gentele v. Department of Prof. Reg., 513 So. 2d 672 (Fla. 1st DCA 1987).
96. Gentele, 513 So. 2d at 673.
In clear terms, then, the legislature has directed the trier of fact to determine what data or advice the agency relied upon when it *initiated* a proceeding against a licensee . . . . Under the existing statutory scheme . . . a probable cause panel, made up of three members of the Board, has the statutory duty of examining complaints brought to its attention and determining whether they warrant a finding of probable cause against a licensee. Therefore, it is this phase of a Board proceeding, and not the final hearing on the merits, that Subsection 57.111(3)(c) mandates be reviewed in order to adjudicate a claim for attorney's fees and costs.98

The hearing officer found that the agency's actions were not substantially justified because the agency presented no evidence to show what information, if any, the probable cause panel had considered when making its determination that probable cause existed to believe Dr. Romaguera had violated the licensing statute. Although the agency was able to procure expert witnesses after the proceeding was initiated to support its position, this was insufficient to "sanitize its failure" to "document the probable cause phase (initiation) of the proceeding."99

However, the probable cause requirement is a two-edged sword. The agency's decision to initiate an action is substantially justified even if the agency presents little or no evidence at the final hearing on the merits. If it can show that the decision of its probable cause panel was substantially justified, the agency will be statutorily insulated against a claim for fees and costs.100

For purposes of the grant or denial of permits or applications then, the relevant time period to consider is the time of the agency's grant or denial. Subsequent changes in the law or agency rules or policies that would render previously justified actions unjustifiable have no impact on the determination of substantial justification.

For example, in *Union Trucking, Inc. v. Department of Transportation*,101 a trucking company that had initially been denied certification as a minority business enterprise was later granted the certification after a change in the agency's rules. However, the Department did not formally decide to grant the certification until five months after the rule change and, as a result, the trucking company was "forced to proceed for several months in preparation for an action which [the Department] admits it had no basis for after the rule

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99. *Id.* at 934.
100. *Id.* at 934 n.5.
change took effect." Nevertheless, the hearing officer found that
the agency's denial was justified under the old rules as of the date it
first denied the company's request for certification. Because the truck-
ing company "failed to demonstrate any facts regarding the likelihood
of adoption of the rule change" at that time, its petition for attor-
ney's fees and costs was denied.

In Rudloe v. Department of Environmental Regulation petition-
ers had successfully blocked the grant of a dredge and fill permit to
another company. Because the questions DER had to address in
reaching a grant or deny decision were so complex, the absence of any
evidence to the contrary was sufficient to support a finding that
DER's actions were substantially justified. In finding that DER's
actions had been substantially justified because "[n]othing in the record
supports the view that the original intent to grant was irrational or
unconsidered," the hearing officer reasoned that, "[t]he Act is de-
signed to discourage unreasonable governmental action, not to para-
lyze agencies doing the necessary and beneficial work of
government."

2. How Substantial is Substantial?

"[T]he mere existence of a justiciable issue is not . . . sufficient ba-
sis to avoid an award of fees and costs." Nevertheless, "[t]he fact
that the government lost its case does not raise a presumption that the
government's position was not substantially justified. Nor is the gov-
ernment required to establish that its decision to litigate was based on
a substantial probability of prevailing."
The hearing officer in Alario v. Department of Professional Regulation\textsuperscript{110} described the appropriate standard for award as "less strict than the '... complete absence of a justiciable issue of either law or fact'" found in section 57.105\textsuperscript{111} as being "somewhere between the Section 57.105, F.S. standard and the automatic award of fees to a prevailing party."\textsuperscript{112} In the case giving rise to Alario, the Florida Real Estate Commission filed an administrative complaint against a broker and a real estate company for alleged violations of chapter 475 and Commission rules.\textsuperscript{113} A large part of the Commission's evidence against the broker was the complaint and judgment from a prior civil case in which the broker and the real estate company had been sued for share of a commission.\textsuperscript{114}

The Commission failed to prove that its actions were substantially justified because DPR presented no independent evidence that a co-broker agreement between the plaintiffs in the underlying civil action and the petitioners even existed or that the petitioners ever received the disputed commission.\textsuperscript{115} The hearing officer reasoned that the stricter standard of proof in a license proceeding made the agency's reliance on a prior civil judgment inappropriate as evidence of a license violation.\textsuperscript{116}

Substantiality may vary depending on the kind of agency action involved. There will be a heavier burden to prove substantial justification in a license discipline case because of the interests involved than in a permit denial or grant.\textsuperscript{117}

Attorney's fees and costs were awarded in Fieber v. Department of Banking & Finance\textsuperscript{118} to a licensed mortgage solicitor after the Department of Banking and Finance dismissed its administrative complaint against her. The hearing officer found that the only basis for proceeding against Ms. Fieber had been one telephone interview fourteen months earlier with a man who lodged a complaint against the investment company for whom Ms. Fieber had been working.\textsuperscript{119} This phone

\textsuperscript{111} Id. at 2145; Fla. STAT. § 57.105 (1989).
\textsuperscript{113} Alario, 10 Fla. Admin. L. Rep. at 2137.
\textsuperscript{114} Id. at 2137-38.
\textsuperscript{115} Id. at 2144.
\textsuperscript{116} Id. at 2139.
\textsuperscript{117} See McCallister v. Department of State, 9 Fla. Admin. L. Rep. 4064, 4070 (1987). "[I]n a disciplinary case against one's license, the test of reasonableness is measured against different elements than are appropriate for an environmental case or where a party is denied retirement benefits." Id.
\textsuperscript{119} Id. at 5244-45.
call was the full extent of the Department’s investigation before its issuance of the administrative complaint.

The hearing officer was blunt:

A modicum of diligence would have disclosed Ms. Fieber’s lack of involvement in the alleged illegal practices. . . . It is apparent that in its zeal to bring to justice the various individuals responsible for State Capital’s misdeeds, the Department cast its net of enforcement far and wide, ensnaring the innocent, as well as the guilty.\textsuperscript{120}

The hearing officer concluded that the Act was precisely intended to remedy such overreaching by an agency.\textsuperscript{121}

Nevertheless, the burden on the agency to show substantial justification is by no means insurmountable. The First District Court of Appeal reversed the hearing officer’s award of attorney’s fees and costs in \textit{Department of Professional Regulation v. Toledo Realty}\textsuperscript{122} because the hearing officer had improperly concluded “that only the transcript of the probable cause panel’s proceeding was admissible in a determination of whether the agency was substantially justified in initiating the disciplinary complaint.”\textsuperscript{123} The court held that the hearing officer should have taken the Division’s investigative file into account in determining whether the Department’s actions were substantially justified, disagreeing with the initial finding that “there was no evidence that the investigative report was reviewed by the probable cause panel.”\textsuperscript{124} It was sufficient that the probable cause memorandum of the panel contained a statement that the panel reviewed the investigative file in reaching a determination.\textsuperscript{125}

Elsewhere, HRS was found to be substantially justified in denying a child care license to an applicant on the basis of three indicated reports of neglect and abuse that had not been substantiated.\textsuperscript{126} The Division of Licensing was likewise found to be substantially justified in seeking to revoke the detection of deception license of a polygraph examiner on the strength of a department investigation, which the parties stipulated was adequate, and the sworn statements of three

\textsuperscript{121} \textit{Fieber}, 9 Fla. Admin. L. Rep. at 5245.
\textsuperscript{122} 549 So. 2d 715 (Fla. 1st DCA 1989).
\textsuperscript{123} \textit{Id.} at 716; \textit{see also} Assad v. Department of Prof. Reg., 9 Fla. Admin. L. Rep. 4076, 4083 (1987).
\textsuperscript{124} \textit{Toledo}, 549 So. 2d at 717.
\textsuperscript{125} \textit{Id.}
women alleging that the examiner had "strayed well beyond the ethical standards required of a polygraph examiner." 127

Although an agency has a heavier burden of showing substantial justification in the license discipline area, an agency must operate within certain limits of reasonableness even in the permitting context. To illustrate, fees and costs were awarded to a home health agency in *Home Health Care v. Department of Health & Rehabilitative Services* 128 because HRS had not been substantially justified in denying Home Health's application for a certificate of need to operate a home health agency in Bay County. HRS had denied the certificate because Home Health had failed to demonstrate the existence of an unmet need for such a facility in the community. 129 The hearing officer found "a policy requiring an applicant to meet a negative burden of proof is unreasonable. It imposes a standard which is virtually impossible for an applicant to meet." 130 Both the hearing officer in the underlying proceeding and in the proceeding for attorney's fees and costs concluded that "DHRS' preliminary decision had no reasonable basis in law or fact at the time it was made." 131

3. **Who Bears the Burden of Proving Substantial Justification?**

Section 57.111(3)(e), Florida Statutes, 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." However, no mention is made of who must prove substantial justification. The final order in *Department of Professional Regulation v. Webster* 132 elaborated on the different burdens of proof of the parties under the Act. The hearing officer concluded that the petitioner must establish that he is a small business party and that he prevailed in the original proceeding. The burden then shifts to the agency, which must prove that its actions were substantially justified or that special circumstances would make an award of fees and costs unjust. 133

The First District Court of Appeal in *Gentele* agreed and elaborated. The court held that placing the burden of proof on the agency

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129. *Id.*
130. *Id.* at 173.
131. *Id.*
was justified by the plain language of the statute. Section 57.111(4)(a) provides that "fees and costs 'shall' be awarded to a prevailing small business party." The Act creates only two exceptions to a mandatory award—the actions were substantially justified or special circumstances would make an award unjust. The court reasoned that the agency is in the best position to know the facts and the legal basis for its prior actions. Likewise, it is also in the best position to know whether special circumstances exist that would make an award unjust. Therefore, it is proper to place the burden on the agency.

Green v. Department of Professional Regulation is troublesome on this point. There the hearing officer stated that:

petitioners have the burden of establishing entitlement to the fees and costs. Other than reciting that they were the prevailing party, they have failed to point to any aspect of the complaint or proceeding which would demonstrate that the agency action was an 'unreasonable governmental action' or had no basis in law or fact.

This seems to be placing the burden on the petitioner to show that the agency's action was not substantially justified. To the extent that this is a proper interpretation, the hearing officer was mistaken. A proper interpretation of this case, however, is that the factual allegations contained in the recommended order in the underlying case were sufficient to meet the agency's burden of presenting some evidence to show a reasonable basis in law or fact. Therefore, the agency satisfied its burden while the petitioner failed to present any evidence whatsoever to rebut the agency's evidence. Consequently, the petitioner lost.

4. What is Meant by Special Circumstances?

The issue of what is meant by "special circumstances which would make an award unjust" was addressed in Robaina v. Division of Professional Regulation. There a barber was charged in an administrative complaint with operating a barber shop without a shop license. Although he had the necessary barber's license and occupational licenses, he did not obtain a shop license because he did not understand that this license was also required. When he was visited by a DPR

134. Gentele v. Department of Prof. Reg., 9 Fla. Admin. L. Rep. 310, 327 (1986); see also Toledo Realty, 549 So. 2d at 717.
136. Id. at 334.
138. Id.
investigator who explained the requirement, he applied for and obtained a shop license.\textsuperscript{139}

An element of the charge to be proved was that the violation was "willful or repeated."\textsuperscript{140} The agency argued that each day Mr. Robaina operated his shop without the necessary license was a separate violation, and the violation was therefore repeated.\textsuperscript{141} It further contended that "the novelty of the argument should be considered a 'special circumstance' defined in Federal case law as the good faith advancement of a novel but creative extension and interpretation of the law."\textsuperscript{142}

The hearing officer was unconvinced. She reasoned that the effect of such an argument would be to apply retroactively a subsequent amendment to the barber licensing statutes that made it illegal to own or operate an unlicensed barbershop. "Special circumstances making the award unjust do not exist," she wrote.\textsuperscript{143}

Good faith arguments for changes in established interpretations of law that act to make current statutes retroactively applicable are not "special circumstances" under the Act. Little else can be said, for an agency is yet to be successful with this exception. Overall, agencies rely instead on the "substantially justified" exception. The parameters of the second exception remain to be defined.

IV. PROCEDURAL ISSUES

The prevailing small business party has sixty days after becoming the prevailing party to file a petition for an award.\textsuperscript{144} Included with the petition must be copies of all relevant documents and an itemized affidavit executed by the attorney in the initial proceeding that reveals the nature and extent of the services rendered by the attorney as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding.\textsuperscript{145}

The agency has twenty days to file a response identifying those issues it wishes to dispute and a counteraffidavit specifying each item of cost and fee in dispute.\textsuperscript{146} Facts supporting its position must be stated with particularity.\textsuperscript{147} It must request an evidentiary hearing if it so de-
sires. The petitioner then has ten days to request an evidentiary hearing if neither party has done so up to this point.\textsuperscript{148}

If no hearing has been requested, the hearing officer may schedule a hearing \textit{sua sponte}.\textsuperscript{149} Otherwise, the officer assigned will decide for or against the award and the amount based on the pleadings and supporting documents.\textsuperscript{150}

Either party may appeal an adverse decision.\textsuperscript{151} If an award is granted and the agency does not appeal, the agency has thirty days to tender payment to the petitioner or the petitioner may petition the circuit court for a writ of mandamus.\textsuperscript{152} Any additional costs and fees incurred in doing so may be added to the award.\textsuperscript{153}

\textbf{A. Filing}

A petition for an award of attorney's fees must be made within sixty days after the small business party becomes a prevailing small business party.\textsuperscript{154} Exactly when to start and stop counting has been a problem. For example, a medical doctor's petition for attorney's fees and costs was dismissed as untimely in \textit{Tully v. Department of Professional Regulation}\textsuperscript{155} because the Department filed its voluntary dismissal on March 10, 1987, and the doctor's petition was not filed until May 21, 1987. The hearing officer found that the sixty days began to run when the voluntary dismissal was filed because "a Voluntary Dismissal by the party bearing the burden of proof dismisses a cause by operation of law as of the date of filing of the Voluntary Dismissal."\textsuperscript{156} Petitioner then argued that the sixty-day time limit applied only to attorney's fees and not to costs. The hearing officer was unconvinced. "[A]ccepted rules of statutory construction support the concept that the drafters of such specific legislation clearly intended that failure to claim costs within 60 days is as fatal to the untimely Petition as is the failure to claim attorneys' fees within 60 days."\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{148} Id. r. 22I-6.035(6).
\item \textsuperscript{149} FLA. STAT. § 57.111(4)(d) (1989); FLA. ADMIN. CODE r. 22I-6.035(7) (1990).
\item \textsuperscript{150} FLA. ADMIN. CODE r. 22I-6.035(7) (1990).
\item \textsuperscript{151} FLA. STAT. § 57.111(4)(d) (1989).
\item \textsuperscript{152} Id. § 57.111(5).
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id. § 57.111(4)(b)2; see, e.g., Heisler v. Department of Prof. Reg., 11 Fla. Admin. L. Rep. 3309 (1989); Rindley v. Department of Prof. Reg., 9 Fla. Admin. L. Rep. 302 (1986); Ruffin v. Department of Prof. Reg., 8 Fla. Admin. L. Rep. 1312 (1986).
\item \textsuperscript{155} 10 Fla. Admin. L. Rep. 5182 (1987).
\item \textsuperscript{156} Id. at 5183; See also Rindley v. Department of Prof. Reg., 9 Fla. Admin. L. Rep. 302, 305 (1986).
\item \textsuperscript{157} \textit{Tully}, 10 Fla. Admin. L. Rep. at 5188-89.
\end{itemize}
The issue of exactly when a party becomes a prevailing party also arose in *Alario v. Department of Professional Regulation*. There the Commission filed its final order on December 11, 1986. However, the Department of Professional Regulation appealed the order and, when the order was affirmed, petitioned for rehearing. The appellate court's Mandate was issued on September 3, 1987. The petition was filed fifteen days later. The hearing officer found that the petitioners became prevailing parties the date the Mandate was issued. However, this original petition was deficient in several respects; the hearing officer granted permission to amend. Subsequently, the amended petition was filed more than sixty days after the petitioner became a prevailing small business party, but the officer ruled that it would have been a "gross abuse of discretion to have denied the amendment and ignored the general rule liberally allowing amendment of pleadings" in "the absence of any showing of prejudice to DPR."159

Elsewhere, the petitioner did not receive a copy of the final order or notification of its filing until after the sixty days had already passed.160 The hearing officer ruled that the time limit did not begin to run until the petitioner or the petitioner's attorney received a copy of the final order, relying on the doctrine of equitable tolling. The hearing officer found the doctrine applicable in situations where the litigant is not at fault for any untimeliness in filing.161

The sixty-day filing deadline is not interpreted as jurisdictional by DOAH. The petitioner in *Ruffin v. Department of Professional Regulation*162 was granted leave to amend her petition even though the original petition had been filed sixty-two days after the agency's final order. She subsequently filed her amended petition more than three days after the ten days she had been granted. Notwithstanding these two late filings, the hearing officer proceeded to explain the other reasons that made the dismissal of her complaint appropriate.163

The information that must be set forth in a petition for attorney's fees and costs is detailed in Rule 22I-6.035 of the *Florida Administrative Code*. The rule also specifies the documents that should be copied and attached to the petition. Along with the petition and copies of documents submitted, the petitioner must include an itemized affida-

159. Id. at 2143.
163. Id. at 1315.
vit executed by the attorney in the initial proceeding. The affidavit must state the nature, extent, and monetary value of the services rendered by the attorney as well as the costs incurred in preparation, motions, hearings, and appeals in the proceeding. For example, in *Tully*, schedules itemizing costs incurred were attached to Dr. Tully's petition. However, the petition was not verified and no affidavit was attached. Although decided on other grounds, the hearing officer stated that the submission was insufficient to satisfy the requirements of the statute.

Apparently, filing a petition before the clock begins to tick on the sixty-day limit is permissible as long as it has become relatively certain who will prevail. In *Heisler v. Department of Professional Regulation*, a contractor filed a petition for attorney's fees and costs within sixty days after the Board met and adopted the order recommending dismissal of the administrative complaint but before entry of a final order. The final order, in fact, was not entered for more than six months. The hearing officer found that the petitioner's filing was timely "under the facts of this case," although it was still necessary for the petitioner to file a copy of the Board's final order in order to perfect his claim.

**B. Agency's Response**

"The state agency may oppose the application for the award of attorney's fees and costs by affidavit." The agency has twenty days after the filing of the petition in which to file a response. The response must state whether the agency seeks an evidentiary hearing and on what grounds it opposes the award of attorney's fees and costs. Grounds for opposing the award include:

1. That costs and attorney's fees claimed in the affidavit are unreasonable;
2. That the petitioner is not a prevailing small business party;
3. That the agency's actions were substantially justified;

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166. *Id.* at 5183.
168. *Id.* at 3311.
169. *Id.* at 3312.
170. *Id.* at 3319.
171. *Id.*
4. That circumstances exist which would make the award unjust; or
5. That the agency was a nominal party only.\textsuperscript{174}

In \textit{Heisler},\textsuperscript{175} the Construction Industry Licensing Board failed to file a response as required under the statute and the rules. The agency, by its omission, failed to place in dispute any allegation in the petition and waived its right to dispute any of the allegations.\textsuperscript{176} The hearing officer found that the Department failed to file the required response because it had improperly decided for itself that the petition was legally deficient and chose to ignore it.\textsuperscript{177} Similarly, in \textit{Jewell} the petitioner's attorney's fees and costs were found to be reasonable because the Division of Real Estate failed to file a counteraffidavit or response questioning their reasonableness.\textsuperscript{178}

The agency must state the facts supporting its grounds with particularity.\textsuperscript{179} Additionally, the agency must either admit to the reasonableness of the fees and costs claimed or file a counteraffidavit along with its response. The counteraffidavit must specify each item of cost and fee in dispute.\textsuperscript{180} If the agency does not request an evidentiary hearing and petitioner has not yet done so, the petitioner has ten days from the time the agency's response is filed to request a hearing.\textsuperscript{181}

If no hearing is requested, the hearing officer may schedule a hearing \textit{sua sponte}. Otherwise, the officer assigned will decide for or against the award and the amount, if any, based on the pleadings and supporting documents.\textsuperscript{182} Any hearing, whether requested or scheduled \textit{sua sponte}, is to be conducted promptly. If the court is conducting the hearing, the court shall issue a judgment. If a hearing officer conducts the hearing, the hearing officer shall issue a final order that is reviewable under chapter 120. However, if the agency appeals an award and the court affirms in whole or in part, it may, in its discretion, award additional attorney's fees and costs for the appeal.\textsuperscript{183}

\textsuperscript{174} Id.
\textsuperscript{176} Id. at 3320. See also Department of Prof. Reg. v. Webster, 11 Fla. Admin. L. Rep. 3016 (1988).
\textsuperscript{177} Id. at 3319-20.
\textsuperscript{179} F.L.A. ADMIN. CODE r. 221-6.035(5)(b) (1990).
\textsuperscript{180} Id. r. 221-6.035(4).
\textsuperscript{181} Id. r. 221-6.035(6).
\textsuperscript{182} Id. r. 221-6.035(7).
C. Exceptions

There are some situations specifically precluding or limiting recovery under the statute. First, no award will be made in any case in which the state agency was only a nominal party. Second, no award can be made in excess of $15,000. Third, the statute is not applicable to any proceeding establishing a rate or a rule or any action sounding in tort. Finally, the statute applies only to actions initiated by a state agency after July 1, 1984.

D. The Award

If an award is made, the state agency has thirty days after the date that the order or judgment becomes final to pay the judgment. If it fails to do so, the petitioner may petition the circuit court where the subject matter of the underlying action arose for enforcement of the award by writ of mandamus. If this becomes necessary, the state may also be required to pay any additional attorney's fees and costs incurred for issuance of the writ.

V. Conclusion

This Comment has examined Florida's Equal Access to Justice Act, as well as the court cases and DOAH final orders interpreting it. As stated earlier, the Act was designed to deter unwarranted state agency action against small business parties who must deal with them. It is relatively short and straightforward with few hidden dangers. Why then are there so few cases? And of those who have petitioned, why are there so few recoveries?

The small number of petitions may be an indication that the Act is effective in accomplishing its goal—detering unjustified agency action. The Act draws a line beyond which agencies may not go without leaving themselves open to petitions under the Act. The agencies have

186. Id. § 57.111(6)(a).
187. Id. § 57.111(6)(b). See also Rindley v. Department of Prof. Reg., 9 Fla. Admin. L. Rep. 302 (1986). In Weller, 11 Fla. Admin. L. Rep. at 5183-84, an employer petitioned for attorney's fees and costs after successfully defending against a claim for unemployment compensation filed against it by a former employee. The hearing officer found the Department had been only a nominal party, in that it had done no more than provide a forum in which the parties could resolve an unemployment compensation dispute as required by law and dismissed the petition.
189. Id.
learned where that line is and are staying behind it. Or is it that the line is drawn in a place that renders the Act practically useless to those who must deal with state agencies? Perhaps the agencies have learned to leave the necessary paper trail to validate their actions. Is the commentator190 who expressed doubt of the Act’s efficacy on to something?

Determining just where the truth lies would be difficult, if not impossible. However, it is certain that the protection afforded by the Act, while dubious, is certainly better than nothing at all. To the extent the Act forces state agencies to at least have the necessary paperwork to justify their actions, it does serve as a sword for small business parties.191 A small sword perhaps, but a sword nevertheless. But if iron rusts from disuse,192 it remains important for the competent practitioner to remember that the Act is available lest the agencies forget where the line is or that the line exists.