



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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November 16, 2000

SPECIAL MASTER'S FINAL REPORT	DATE	COMM	ACTION
President of the Senate Suite 409, The Capitol Tallahassee, Florida 32399-1100	11/16/00	SM RI FR	Unfavorable

Re: SB 60 – Senator Charlie Clary
Relief of Santa Rosa County

THIS CLAIM BILL, AS FILED, REPRESENTS AN EQUITABLE CLAIM BY SANTA ROSA COUNTY ("COUNTY") AGAINST THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION ("DEPARTMENT") FOR \$54,757.10 IN COSTS AND ATTORNEY'S FEES INCURRED BY THE COUNTY IN DEFENSE OF FOUR OF ITS EMPLOYEES AGAINST ALLEGED PROSECUTORIAL AND INVESTIGATIVE MISCONDUCT BY THE DEPARTMENT. DURING THE CLAIMS PROCESS THE COUNTY DECIDED TO FOREGO SEEKING RECOVERY FOR COSTS AND FEES INCURRED IN DEFENSE OF ONE OF ITS EMPLOYEES (CHARLES HOODLESS), THEREBY REDUCING THE AMOUNT OF RELIEF SOUGHT TO \$26,756.39.

FINDINGS OF FACT:

On or about September 10, 1997, staff of the Department of Business and Professional Regulation questioned Santa Rosa County employees Randy Jones, George Parker, and Martin Riley ("employees") regarding the Tiger Lake Townhouse construction project, in Santa Rosa County, Florida ("Tiger Lake").

Tiger Lake is a townhouse development of approximately 60 units constructed by Edwin A. Henry, a state registered and locally licensed general and registered contractor.

The county employees were not advised that they were the targets of a department investigation at the time of the interviews. Mr. Jones was specifically advised that he was not the subject of such investigation. The employees were advised that the questioning related to an investigation of Mr. Henry's actions as the contractor of Tiger Lake.

On September 10, 1997, the employees received a Notice of Complaint from the department advising them that they were under investigation in relation to their inspections of Tiger Lake. The department and not a homeowner initiated the investigation, as Tiger Lake was still under construction at the time.

On December 1, 1997, the department issued an Administrative Complaint against contractor Edwin Henry in relation to this action as the contractor for Tiger Lake.

As part of Santa Rosa County's internal review of the inspection department's actions in connection with Tiger Lake, it retained Sam Johnson, a Florida Licensed Engineer. Mr. Johnson submitted a written report to the county and testified at two Santa Rosa County Building Code Board of Adjustments hearings.

In his August 24, 1998, letter to the Santa Rosa County Administrator, Mr. Johnson stated in part:

My opinion, after review of all the data and proceedings, is that the Tiger Lake Estates project is sound. I find no evidence of improper procedures by the Building Department and in fact believe they are doing an above average job in inspection work, protecting the general public, while trying to work with contractors.

As of August 20, 1998, over 11 months after the department served the original notice of complaint, the employees and Santa Rosa County had received no information regarding the status of the department's investigation or whether charges would be filed.

The Santa Rosa County Building Code Board of Adjustments held a hearing on June 24, 1998, to determine if probable cause existed to charge contractor Edwin Henry

in relation to Tiger Lake. At the meeting, counsel for the department cautioned that the Board did not have before it all of the evidence necessary to make a proper decision. In response, the Board continued the probable cause hearing for 5 weeks in order to give the department adequate time to present its evidence.

On July 27, 1998, 2 days before the continued hearing, the department advised Santa Rosa County that the department would not attend the continued hearing. On July 28, 1998, Santa Rosa County requested in writing that the department reconsider its decision not to attend the probable cause hearing, noting that the hearing had been continued for the specific purpose of receiving the additional evidence that the department had referenced.

On July 29, 1998, the Board conducted its second hearing regarding Tiger Lake. Counsel for the department did not make an appearance. At the conclusion of the hearing, the Board voted unanimously to dismiss the case for lack of probable cause.

On August 13, 1998, the Board transmitted a letter to the Santa Rosa County Board of County Commissioners. In the letter, the Board expressed its strong concern with the manner in which the department was conducting its investigation of the employees. Specifically the Board noted the conclusions of Sam Johnson, P.E., and the fact that the investigation had continued for 11 months with no information on the status being given by the department.

On August 20, 1998, the Santa Rosa County Attorney sent a letter to the department inquiring as to the status of the investigation. Santa Rosa County indicated that if problems existed, that they needed to be corrected as soon as possible. Additionally, Santa Rosa County stated that if charges were not going to be filed, that the employees needed to be advised in order to “avoid the incurrence of more attorney’s fees.”

The letter ended with an offer for the employees to waive any applicable confidentiality if required in order to receive the information from the department.

On or about November 3, 1998, Santa Rosa County was contacted by the State Comptroller's Office inquiring into Santa Rosa County's decision to provide legal representation for its employees. The Comptroller's inquiry appears to have resulted from inquiries to said office by department staff. Santa Rosa County transmitted to the Comptroller's Office an Attorney General Opinion confirming the propriety of Santa Rosa County providing such defense for its employees.

At the claims hearing, Santa Rosa County introduced a memorandum dated September 1, 1998, from its County Attorney to the Board of County Commissioners. The memorandum noted that, at that time, the employees had already incurred \$8,500.00 in attorney's fees, and that some of the fees had been required due to certain "unusual" practices of the department. The memo referenced that the department had held a subpoena for deposition for a month and then served it on one of the employees shortly before the deposition without notifying the employee's attorney. The employee's attorney was required to request a hearing to quash the subpoena, which was granted by the hearing officer.

On November 4, 1998, 10 weeks after Santa Rosa County's initial request to the department, the department responded by letter to the County Attorney's August 20 request for more information on the status of the investigations, by simply stating that it could not comment on "the status of the matter you referenced in your letter."

On November 6, 1998, Santa Rosa County transmitted a letter to the Comptroller's Office confirming that the Comptroller agreed with Santa Rosa County's actions regarding the provisions of legal representation for its employees.

On November 9, 1998, Santa Rosa County transmitted a second request for information to the chief legal counsel for the department. The letter expressed the county's disappointment that the department had taken 10 weeks to reply to its initial inquiry and that said reply had been unresponsive. The letter indicated that the investigation at that point was 15 months old. The letter stated that Santa Rosa County simply wanted to know if the investigation was

ongoing, if any problem that needed to be addressed had been revealed, and when or if the department would provide Santa Rosa County with the information. The letter indicated that the department had previously given a personal briefing to Escambia County officials regarding an investigation of Escambia's employees, and that the same courtesy had not been shown to Santa Rosa County.

On January 14, 1999, Santa Rosa County faxed to the Department Secretary its third request complaining about the failure of the department to respond to its earlier inquiries regarding the then 18-month-old investigation. This letter detailed that the open-ended investigation had disrupted the operation of the building inspection department including barring the employees from taking examinations to upgrade their state certifications. Additionally, the letter noted the fact that Santa Rosa County was incurring thousands of dollars in legal fees in defense of its employees because of the investigation.

The next day, January 15, 1999, the department's chief counsel sent a letter responding to the Santa Rosa County Chairman's letter of November 9, 1998. The letter noted that the employees should file a waiver of confidentiality. It should be noted that such waiver was offered 5 months earlier in Santa Rosa County's initial request to the department.

In response, on January 21, 1999, the Santa Rosa County Chairman sent a letter to the Department Secretary acknowledging the Chief Counsel's letter but indicating that the department still had not indicated the status of the investigation. The letter again related that the department had previously communicated the status of an investigation to Escambia County Officials without the need for a waiver of confidentiality. The letter concluded with a specific request for the Secretary to inquire and determine whether in her opinion the time frame for the investigation had been reasonable.

In a letter dated February 10, 1999, in response to Santa Rosa County's letter of January 21, 1999, the Department's Acting General Counsel stated that while these investigations were particularly complex, his review of §455.225, F.S., indicated that:

. . .investigations normally should be completed within six months and I assure you that the current administration will be directing its staff to meet this standard.

The County Attorney transmitted a letter dated March 5, 1999, to the employees' private attorney detailing how the department had based some of its charges against the employees on a misinterpretation of a county ordinance, noting that the department had never contacted the County Attorney regarding the proper interpretation of said ordinance.

On May 28, 1999, the County Attorney sent a letter to the Department's Acting General Counsel referencing the action of prior department staff contacting the Comptroller's office to question Santa Rosa County's paying the legal fees for its employees, expressing the opinion that such action was unusual and made in bad faith.

Finally, on July 20, 1999, the employees' private attorney received written notice from the department that the Building Code Administrators and Inspectors Board had dismissed the complaints against all three employees with a finding of no probable cause.

The three affected employees testified at the claims hearing as follows.

Martin Riley testified that:

He had been the Santa Rosa County Chief Building Official for 13 years. He had since the late 1950's worked in commercial construction for three large commercial contractors. He had been a supervisor for one half of that time. He had been involved with the construction of prisons, banks, Sheriff's offices, and commercial renovations. He held state certifications in: a) standard building code; b) standard building plans review; c) one and two family dwellings; and, d) building code administrator.

He was not advised that he was the target of an investigation at the time he was interviewed by department staff on July 9, 1999. The allegations

contained in the department's investigation report regarding Tiger Lake were not true. He and his department had properly and in good faith reviewed the plans and conducted inspections of Tiger Lake.

The department investigation report indicated that the department had reached negative conclusions regarding the Santa Rosa County Inspections Office's role in the Tiger Lake project before the relevant inspections had ever been made.

From his review of the department investigative file, it was clear that the department had obtained all of the relevant information in 1997. Therefore, there was no justification for the 2-year delay.

The open-ended investigation impacted him negatively. He and his wife suffered anguish due to the public nature of the investigation with no status given by the department. After one year, he was forced to retain counsel, who advised that the defense could cost \$125,000. At the time, Santa Rosa County had not decided to pay for said defense.

The protracted investigation delayed pay raises that will permanently reduce his retirement benefits.

George Michael Parker testified that:

He had been employed as a building inspector for 4½ years.

He had 25 to 30 years of construction experience prior to his employment with Santa Rosa County. He had built over 500 homes and 15 to 20 commercial buildings, including townhouses.

He had properly and in good faith conducted inspections at Tiger Lake. The protracted investigation caused much stress to he and his wife. He started taking blood pressure medication and considered resignation. He had told department consultants that their conclusions were premature because the relevant inspection had not even been conducted.

Randy Jones testified that:

He had been a building inspector for 4½ years. Prior to his employment, Mr. Jones had 20 years of building experience, including the construction of 1,000 homes and townhouse projects.

He held state certifications in: 1) standard building code; 2) one and two family dwellings; 3) building plans examiner; 4) coastal construction; 5) zoning and property standards; 6) legal and management; 7) chief building analyst; and, 8) housing rehabilitation.

Department personnel lly advised him that he was not the target of an investigation. He and his wife suffered mental stress due to the protracted nature of the investigation. He was prevented from taking examinations to upgrade his state certifications. He was delayed in receiving pay raises with no recourse.

He properly and in good faith conducted inspections at Tiger Lake.

The department presented no evidence as to why the investigation was not prosecuted and completed within a reasonable time. The Department's Acting General Counsel concluded that the investigation should probably have been completed within 6 months.

The failure of the department to timely complete the investigation resulted in real damage to the subject employees and Santa Rosa County. The employees, without hearing, were delayed in taking examinations to upgrade their professional certifications, were delayed in the receipt of pay increases, and suffered significant personal stress and hardship due to the open-ended investigation.

The county incurred \$26,756.39 in attorney's fees and costs in defending its three employees in these actions.

CONCLUSIONS OF LAW:

As the county was advised early on in these proceedings, claim bills have historically been for the relief of private individuals who are aggrieved by the state or its agents, and not the method of balancing inter-governmental equities. Such considerations should be addressed in the General

Appropriations process, where the various governmental entities and programs vie for otherwise limited state funds. Claim bills traditionally are reserved for the relief of private individuals who have no recourse against the State Treasury.

OTHER ISSUES:

Issue 1: Claims Case Management and Status

Prior to the hearing, the parties through their counsel executed a "Joint Notice of Resolution." According to the parties, the resolution would involve the county withdrawing its claim for costs and attorney's fees in the case of Charles Hoodless and the department's agreement to pay Santa Rosa County costs and attorney's fees in the amount of \$26,756.39 in the investigation of employees Randy Jones, George Parker, and Martin Riley. However, the Governor's office, which apparently must approve the proposed settlement, refused to do so. It is the Special Master's understanding that the Governor's office may yet approve the settlement upon a review of the Findings of Fact in this report.

Consequently, the county presented no evidence in regard to the Charles Hoodless case and waived its right to seek recovery for fees and costs incurred in his defense. Likewise, the department elected to stand silent in response to Santa Rosa County's presentation of evidence regarding the investigation of Jones, Parker, and Riley.

Should all parties in interest execute an enforceable settlement agreement, no further action by the Senate would be required on this claim bill.

Issue 2: New Florida Law Enacted

During the relevant time period, no statutory authority existed for the county to pursue a civil claim. However, the 2000 Florida Legislature enacted the "Building Code Enforcement Officials Bill of Rights," codified at §468.619, F.S. Among other items, this statutory Bill of Rights provides:

1. That a building inspector may not be subjected to an interview without first receiving written notice of sufficient details of the complaint in order to be reasonably

apprised of the nature of the investigation and of the substance of the allegations made, and that the inspector be advised whether the complaint originated from the department or from a consumer.

2. The department must submit its investigation, whether complete or not, to the probable cause panel no longer than 180 days from the date of the complaint. If the investigation is incomplete, the panel will instruct the department to complete the investigation by a date certain not to exceed 90 days or dismiss the complaint with prejudice.
3. If the department does not comply with the time frames contained in the statute, any charges shall be dismissed and may not be reopened.
4. The building inspector *shall* be defended by the agency employing him or her.
5. If any action taken against the inspector is found to be without merit, the department shall reimburse the inspector or the inspector's employer for costs and attorney's fees.
6. An inspector shall have a civil action for violation of the inspector's civil right.

While an investigation is pending, an inspector shall not be denied any rights and privileges of a licensee in good standing.

ATTORNEY'S FEES:

The 25 percent cap on attorney's fees in §768.28(8), F.S., does not apply because this claim is wholly equitable in nature.

RECOMMENDATIONS:

Accordingly, taking no position on the merits of the county's claim, I recommend that Senate Bill 60 be reported UNFAVORABLY.

Respectfully submitted,

Jonathan Fox
Senate Special Master

cc: Senator Charlie Clary
Faye Blanton, Secretary of the Senate
House Claims Committee