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IN THE SUPREME COURT OF FLORIDA

BOARD OF TRUSTEES,
JACKSONVILLE POLICE
AND FIRE PENSION FUND,

Case No.: SC13-1315

Petitioner,

L.T. Case No.: 1D12-587

vs.

CURTIS W. LEE,

Respondent.
_____/

RESPONDENT'S APPENDIX TO ANSWER BRIEF

1. Final Declaratory Judgment, entered June 24, 2011, *Curtis W. Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, Duval County Circuit Court Case No. 16-2010-CA-000667. (00001 – 00014)

2. Order Denying Plaintiff's Motion for Attorney's Fees Under § 119.12, Fla. Stat., & Granting Taxable Costs Under § 57.041, Fla. Stat., entered December 19, 2011, *Curtis W. Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, Duval County Circuit Court Case No. 16-2010-CA-000667. (00015 – 00018)

3. Appellant's Motion for Appellate Attorney's Fees and Costs dated June 14, 2012, *Curtis W. Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, Case No. 1D12-587. (00019 – 00024)

4. First District's Order Denying Appellant's Motion for Appellate Attorney's Fees and Costs, dated April 22, 2013, *Curtis W. Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, Case No. 1D12-587. (00025)

5. Appellant's Motion for Rehearing as to Denial of Attorneys' Fees, dated May 7, 2013, *Curtis W. Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, Case No. 1D12-587. (00026 – 00029)

6. First District's Order Denying Appellant's Motion for Rehearing as to Denial of Attorneys' Fees dated June 3, 2013, *Curtis W. Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, Case No. 1D12-587. (00030)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the *8th* day of August, 2014, the foregoing was filed with the Clerk of the Court via the Florida Court's E-Filing Portal, which will notify and serve a copy of the electronic filing to:

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: **16-2010-CA-0667**
DIVISION: **CV-A**

CURTIS W. LEE,

Petitioner(s),

vs.

BOARD OF TRUSTEES, JACKSONVILLE POLICE & fire pension fund,

Defendant(s).

FINAL DECLARATORY JUDGMENT

Plaintiff seeks a declaratory judgment against the Board of Trustees, Jacksonville Police & Fire Pension Fund (hereafter "the Pension Fund") determining that the Pension Fund violated Plaintiff's rights to inspect and copy public records under the provisions of Chapter 119, Fla. Stat., and Art. I, §24(a), Fla. Const. Plaintiff's claim is based upon a series of public records requests beginning on November 23, 2009 through September 5, 2010. After hearing testimony and receiving evidence at trial, considering the written submissions from counsel, conducting research, and reviewing relevant portions of the transcript, the court finds that the Pension Fund committed two violations of §119.07(1)(a), Fla. Stat., which mandates that "every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records."

At the outset, there is no dispute that the Pension Fund qualifies as an "agency" under §119.011(2), Fla. Stat., and that its documents and files are subject to the requirements of Chapter

119. There is also no dispute that the documents requested by the Plaintiff were "public records" under §119.011(11), Fla. Stat., and subject to the inspection and copying provisions of §119.07(1)(a). Furthermore, none of the records fell within any statutory exemption. Instead, the issue is limited to whether or not the Pension Fund, under the facts and circumstances of this case, imposed reasonable conditions upon Plaintiff's ability to inspect and copy the requested records.

A. November 23, 2009 Request

The dispute began when Plaintiff presented a broad public records request to the Pension Fund dated November 23, 2009. Plaintiff and the Executive Director for the Pension Fund, John Keane, had several exchanges concerning the breadth of the request and the possibility of assessing a service charge and copying charges. Suffice it to say that Plaintiff did not agree that he should incur such charges, but narrowed his request to the following two categories of documents:

- Plan and Fund structure – related documents – e.g. trust agreements, amendments thereto, and all other structural and related documents and explanations.
- All investment manager/advisor, consulting, audit, accounting, attorney/law firm/legal, custodian, employee/official, committee, board and other Plan and Fund - related agreements and fee schedules/reports, and documents related thereto, since 10/1/07.

After some further communications, the Pension Fund's Deputy Executive Director, Richard Cohee, compiled the requested documents. Plaintiff traveled to the Pension Fund offices on December 14, 2009 to inspect the records. When he arrived, he first met with Mr. Keane where Plaintiff was advised that he could not view the documents until he executed forms agreeing to 1) pay $326.40 for the time spent by Richard Cohee to compile the requested documents and 2) pay $27.66 per hour for the services of the Executive Assistant, Roberta Gorman, to copy any of the documents.

Plaintiff registered his disagreement with the conditions imposed by the Pension Fund and left without viewing the documents.

Plaintiff has the burden of proof to demonstrate that the conditions imposed at the December 14, 2009 meeting were unreasonable and in violation of this statute. *Grapski v. City of Alachua*, 31 So.3d 193, 196 (Fla. 1st DCA 2010)("On their claim under Chapter 119, [plaintiffs] had to prove they made a specific request for public records, the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner."). While access to public records is a matter of such extreme importance that it is constitutionally guaranteed in this state, "Florida has long required those who seek such records to defray the extraordinary costs associated with their requests." *Board of County Commissioners of Highlands County v. Colby*, 976 So.2d 31, 35 (Fla. 2nd DCA 2008). Thus, §119.07(4)(d), Fla. Stat., authorizes a public agency to assess a service charge if the size of the public records request requires an extensive amount of clerical assistance to comply with the request. The language of the statute specifies the following conditions:

> (d) If the nature and volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.

"A determination of whether the nature or volume of the public records requires such extensive assistance must be made on a case-by-case basis, such that a special service charge may not be routinely imposed." *Op. Att'y Gen. Fla.* 2000-11. Because an excessive charge "could well serve to inhibit the pursuit of rights conferred by the Public Records Act," the statute requires special service charges to be "reasonable." *Carden v. City of Clewiston Police Department*, 696 So.2d 772,

773 (Fla. 2nd DCA 1996). The cost of labor, which is the statutory basis for the special service charge, is in addition to actual duplication charges and may include both salary and benefits for the agency employee providing clerical or supervisory assistance. *Board of County Commissioners of Highlands County v. Colby*, 976 So.2d at 32. The special service charge applies to requests for both inspection and copies of public records when extensive clerical assistance is required. *Id.* at 37. The agency may collect a deposit before beginning the research, as long as it is reasonable and based on the labor cost that is actually incurred by or attributable to the agency. *Id.*

In the instant case, the court finds that the charge of $326.40 was reasonable and authorized by §119.07(4)(d) as a special service charge. Plaintiff's request was broadly worded and sought a large number of records. Mr. Cohee testified that it took him 8 hours to pull together all of the documents, but the Pension Fund decided to only charge Plaintiff for 4 hours. The amount charged was based upon Mr. Cohee's salary of $170,000.00 per year which was calculated at an hourly rate of $81.60. All of this was permissible under Chapter 119 given the nature of Plaintiff's public records request.

Plaintiff takes issue with the charge by arguing that his public records request did not require someone at Mr. Cohee's level of responsibility and salary to compile the records. He contends that the fund could have had someone at the clerical level perform the research. The court disagrees. The Pension Fund only has 8 employees and most of these employees have duties that are not considered clerical in nature. More importantly, Plaintiff's request was broadly worded in a manner similar to a discovery request in a legal action. There is nothing wrong with presenting a public records request in this fashion, but it required the person responding to analyze the request with an understanding of the Pension Fund's operations, compare it to the documents known to be kept on file, and exercise judgment as to what documents were encompassed within the parameters of the

request. These tasks appear to be beyond the skill set required of those that strictly perform clerical functions. Finally, the court finds it difficult to comprehend why the second-in-charge of a fund with over one billion dollars in assets would devote 8 hours of time to respond to a public records request, and not delegate it to another employee, unless it was really necessary for him to personally do it.

Mr. Cohee also testified that it took longer than normal to compile the records for 2009 because the Pension Fund had just undergone its annual audit and, as a result, the documents were scattered throughout the office and were not yet organized. Plaintiff contends that he should not be charged for Mr. Cohee's time because he was going to organize the records at some point anyway. While that may be true, the bottom line is that Mr. Cohee was required to organize the records at that point in time in response to Plaintiff's request, or possibly face a potential violation of Chapter 119, and the request took him away from his other duties at the Pension Fund.

Plaintiff also claims that the $326.40 charge violated Chapter 119 because he requested an estimate of the service charge before the Pension Fund searched its records and produced them for inspection. Plaintiff contends that a public records custodian must supply such an estimate if it is requested, and that it must be provided before the records custodian conducts his or her search. Plaintiff cites *Woodward v. State,* 885 So.2d 444 (Fla. 4th DCA 2004), to support his position. Although it is arguable that *Woodward* stands for the broad proposition advanced by the Plaintiff, the evidence of Plaintiff's communications with the Pension Fund does not support Plaintiff's version of the evidence. On December 2, 2009, Plaintiff wrote to Mr. Keane and proposed that he visit the Pension Fund's offices on December 7, 2009 to review the documents he requested. In that same letter, Plaintiff did raise questions about the basis of the Pension Fund's stated intention to apply a service charge for the November 23 request and how the amount would be calculated, but he never specifically requested an estimate. More importantly, he also stated that "perhaps we can discuss [the service charge] on Dec. 7", the day Plaintiff had indicated that he wanted to view the

documents. By his own letter, Plaintiff clearly expected that the Pension Fund would have the documents ready by the date he arrived and the research, and time spent conducting the research, would necessarily have to occur before the date Plaintiff stated that he wanted to talk about the details of the service charge.

As to the requirement that Plaintiff sign a form agreeing to pay $27.66 per hour for Ms. Gorman's time to make copies, the imposed condition was inconsistent with the law under Chapter 119. §119.07(4)(d), Fla. Stat., allows a public agency to assess a special service charge for making copies, over and above the actual cost for duplication, but only "if the nature or volume of public records requested to be inspected or copied ... is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency." An agency cannot assess a special service charge every time there is a request to copy public records. As with inspections, the copy request must require "extensive clerical or supervisory assistance." This was not explained to the Plaintiff and he was, instead, given information that he would have to pay $27.66 per hour no matter what and told this before he ever determined what, if anything, he wanted to copy.

However, the court does not find that this violation of the Public Records Act was knowing or willful on the part of the Pension Fund. Instead, it appears that it was a simple mistake or oversight in communicating the precise legal standard for assessing a special service charge related to copying public records, rather than a violation that originated from a policy or standard practice on the part of the Pension Fund. The court notes that the Pension Fund, in response to a later public records request from Plaintiff, provided those copies to Plaintiff without assessing a special service charge. That said, it is important that public agencies communicate accurate information about the costs associated with a public records request because inaccurate information could result in a

chilling effect upon citizens exercising their rights under Chapter 119.

B. December 15, 2009 - August 6, 2010

Following the events of December 14, 2009, Plaintiff began a series of exchanges with Mr. Keane and the Pension Funds attorneys where he took great exception to the handling of his November 23, 2009 public records request. The exchange culminated in a January 12, 2010 letter from the Pension Fund's attorney, Robert Klausner, to the Plaintiff requiring that Plaintiff tender $606.00 in advance to review the documents compiled by Mr. Cohee. The $606.00 represented the $326.40 special service charge for Mr. Cohee's time spent compiling the documents in response to the November 23, 2009 request, in addition to $280.00 to hire an individual to sit with the Plaintiff while he reviewed the requested documents. The Pension Fund arrived at the $280.00 figure based upon $35.00 per hour for the employee's time over 8 hours, which is the time period Plaintiff had earlier indicated that he needed in order to review the documents. Mr. Klausner also explained that the Pension Fund would provide a refund if Plaintiff finished his review in less than 8 hours.

Needless to say, Plaintiff did not agree with either of these two charges. Thereafter, he submitted 8 more written public records requests through July 24, 2010, where he also detailed a litany of what Plaintiff believed to be misconduct in the Pension Fund's part and threats to initiate litigation. In each of these subsequent requests, he directed that he only wanted to pay for the documents to be copied and then pick them up, rather than inspect them first. The Pension Fund, however, did not provide the requested documents over this period of time. Instead, the Pension Fund steadfastly maintained that Plaintiff would still have to pay the outstanding $326.40 charge for the November 23, 2009 request before it would provide copies of any additional documents in response to Plaintiff's series of requests.

Finally, on August 6, 2010, Plaintiff tendered a check to the Pension Fund in the amount of $326.40 "under protest" and provided a list of documents that he still wanted to have copied. In his

letter, Plaintiff indicated that he would pay only $0.15 per copy. The Pension Fund provided copies of those documents shortly thereafter without any additional service charge.

Based upon *Lozman v. City of Riviera Beach*, 995 So.2d 1027 (Fla. 4th DCA 2008), and the court's earlier determination that the Pension Fund's special service charge of $326.40 was reasonable and in compliance with §119.07, Fla. Stat., the court finds that the Pension Fund was justified in its delayed response to Plaintiff's series of requests from December 15, 2009 through August 6, 2010. In *Lozman*, the plaintiff in that case requested several public documents and was then charged $233.50 for the time spent compiling the records. *Id.* at 1028. Lozman refused to pay the charges and was not given the documents. Lozman then made additional public records requests, but was told by the city that he had to first pay the bill for his original request before the city would provide further documents. *Id.* Lozman thereafter filed a petition for a writ of mandamus in circuit court which was denied. On appeal, the *Lozman* court affirmed the denial of mandamus relief "[b]ecause section 119.07(4) does not require the city to do any more than what it did in this case...." *Id.*

As Plaintiff concedes in his closing argument, *Lozman* supports the Pension Fund's decision to not provide any further documents until Plaintiff paid the original special service charge, provided that the special service charge was reasonable. This court determined based upon the reasoning outlined above that the charge was reasonable. Consequently, *Lozman* controls and the Pension fund did not violate Chapter 119 by delaying production of the requested documents until Plaintiff paid the outstanding bill.

However, the court agrees with the Plaintiff that the Pension Fund violated the Public Records Act by insisting that Plaintiff pay $35.00 per hour in advance for a Pension Fund employee to remain with the Plaintiff at all times while he inspected the documents compiled in response to his November 23, 2009 request. Under the facts and circumstances of this case, the requirement that

Plaintiff pay for someone to observe his inspection was not a reasonable condition under §119.07(1), Fla. Stat.

Legally, the Pension Fund relies on the Attorney General's opinion found at *Op. Att'y Gen. Fla.* 2000-11 for the authority to assess this $35.00 per hour special service charge. In that opinion, the Attorney General considered whether a county policy of safeguarding the county's building permit records by requiring a county employee to remain in the room at all times during any inspection, and then charging the individual requesting the public inspection for the time spent by the county employee observing the inspection, was proper under Chapter 119. *Id.* at 2. All of the records at issue were original, with no duplicates maintained by the county or any other entity. *Id.* The Attorney General concluded after a review of the applicable law that the county could adopt a policy of including the cost of having an employee observe the entire inspection reasoning that "the requested records contain original documents that have no recorded or maintained counterparts, such that, by their nature, they would need a heightened degree of protection from alteration or destruction." *Id.* at 3.

The Pension Fund argues similarly that the presence of an employee during Plaintiff's inspection was needed to protect the Pension Fund's documents, particularly given evidence of Plaintiff's past conduct. However, none of the documents produced in response to the November 23, 2009 request have been identified as originals in need of a "heightened degree of protection from alteration or destruction." Even if the Pension Fund is correct about the Plaintiff's past behavior justifying its heightened concern, and the court makes no finding one way or the other on that issue, the court believes that there were less drastic and costly steps that the Pension Fund could have taken to safeguard documents that were comprised mostly of copies of reports from vendors and other replaceable documents. Having to pay for what amounts to an escort at all times during an inspection of the specific documents requested on November 23, 2009 was not a reasonable

condition for the inspection.

Although the proposed $35.00 charge was a violation of Chapter 119, the court again finds that the Pension Fund's actions did not amount to a knowing or willful violation. The Pension Fund did not have any case law that was on point to provide guidance and its reliance on the opinion of the Attorney General found at *Op. Att'y Gen. Fla.* 2000-11 was reasonable. The court's determination that the Pension Fund violated the Public Records Act is based upon the court's determination that the reasoning employed by the Attorney General in *Op. Att'y Gen. Fla.* 2000-11 should be confined to situations where the records are originals or incapable of being replaced. This legal issue was a matter of first impression in an area of the law that must be judged on a case-by-case basis. Simply because the court has come to a different interpretation and application of the law under such circumstances does not, in any way, rise to the level of a willful violation.

C. September 5, 2010

After the August 2010 records production, Plaintiff presented another broad public records request directed towards learning about a particular investment opportunity the fund was considering and any documents that would support the right of the Pension Fund to collectively bargain on behalf of its members or act as an authorized business agent, certified bargaining agent, or labor organization under Chapter 447, Fla. Stat. Like the November 23, 2009 request, Plaintiff's request at this time was also broadly worded in a manner similar to a discovery request.

Plaintiff's September 2010 request led to an exchange of communications between the Plaintiff and the Pension Fund's attorneys that narrowed the scope of the request. After the back-and-forth, the focus of the outstanding request became item 4(c). In that request, Plaintiff asked for "any documents held by PFPF (the Pension Fund) concerning 'bargaining units', as such phrase is

defined in FS 447.203(8)."[1] On October 13, 2010, Mr. Keane e-mailed Plaintiff and advised that in order to begin conducting the necessary research to locate the documents, the Pension Fund would require a deposit of $2,352.00. Mr. Keane explained that this figure was based upon 1) the Pension Fund's estimate that it would take three full 8 hour days to do the research and 2) the actual labor cost of $98.00 per hour which was the average cost of Mr. Keane's time ($100.00 per hour), Mr. Cohee's time ($80.00 per hour) and Ms. Gorman's time ($30.00 per hour), plus 40% for the cost of employee benefits. The letter indicated that the Pension Fund would return money if less time were needed, but that Plaintiff would be obligated to pay additional money if the research exceeded 24 hours.

Plaintiff objected to the deposit and a series of letters and e-mails were exchanged between the two sides. At the trial, Plaintiff testified in so many words that he did not believe there would be any documents responsive to his request when he sent it in because the Pension Fund does not have the right under state law to collectively bargain on behalf of the participants in the pension fund. In short, he made the request with the hope of getting the Pension Fund to confirm that no such documents existed in order to verify and support his legal position in one of the ongoing disputes between the two sides. Plaintiff never paid the required deposit and Plaintiff ultimately received the response he was looking for through a discovery request in this action.

The court finds that the Pension Fund has not violated the Public Records Act in connection with its response to the September 5, 2010 request. It should be stated at the outset that Plaintiff's

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[1]"'Bargaining Unit' means either that unit determined by the commission, that unit determined through local regulations promulgated pursuant to s. 447.603, or that unit determined by the public employer and the public employee organization and approved by the commission to be appropriate for the purposes of collective bargaining. However, no bargaining unit shall be defined as appropriate which includes employees of two employers that are not departments or divisions of the state, a county, a municipality, or other political entity." §447.203(8), Fla. Stat.

motives for seeking the documents in item 4 of the request are irrelevant. *Microdecisions, Inc. v. Skinner*, 889 So.2d 871, 875 (Fla. 2nd DCA 2004). That said, the breadth and clarity of the words he chose when making the request are relevant and Plaintiff asked for every document in the Pension Fund's files "concerning" or relating to any organization that is approved to collectively bargain on behalf of public employees. Since the Pension Fund manages the pensions for the Jacksonville Sheriff's Office employees and the Jacksonville Fire Department's employees, all of its members are part of an organization that constitutes a "bargaining unit" under the statute and, conceivably, every document in every employee's file could be a document "concerning" a bargaining unit.

In response to such an extensive and vaguely stated public records request, the Pension Fund honored Plaintiff's request to advise him if the charges would exceed more than $50.00. The Pension Fund was well within its rights to collect a deposit before beginning its research, as long as it was reasonable and based upon the labor cost actually incurred. *Board of County Commissioners of Highlands County v. Colby*, 976 So.2d at 37. Given the nature of the request and the potential size of the request, it is not unreasonable for the Pension Fund to have concluded that Mr. Keane and/or Mr. Cohee would have had to participate in the records production and that it would take three full 8 hour days to go through all of the records to identify and redact exempt records and information. It also appears that the proposed deposit was based upon actual labor costs. Plaintiff eventually got the answer he was looking for, but that does not change the fact that at the time the request was made, it could have been interpreted in such a way as to call for almost every document in the Pension Fund's possession.

D. Conclusion

The public's right to access state government records is important and necessary to preserve our democratic form of government. However, that right does not entitle Plaintiff to unfettered

access to the Pension Fund's records. Chapter 119 requires that those requesting an extensive amount of records, as has been the case with more than one of Plaintiff's public records requests since November 23, 2009, must defray the reasonable cost to the taxpayer for the time spent responding to such requests, as well as the actual cost of duplication. Whether or not a public agency imposes a reasonable cost or other condition upon the inspection or copying of public records is a determination that the legislature has directed courts to make on a case-by-case basis.

In the instant case, the court finds that the Pension Fund has imposed two separate conditions that were unreasonable or not in compliance with the provisions of §119.07, Fla. Stat., under the specific facts of this case. The Pension Fund incorrectly advised Plaintiff that he would have to agree to pay $27.66 per hour for copy services even though at the time Plaintiff was told this by the Pension Fund representatives, Plaintiff had not requested that any documents be copied and Plaintiff would legally have to pay an hourly service charge for copy services only if his request for copies required extensive clerical or supervisory assistance. Additionally, the Pension Fund could not charge Plaintiff a $35.00 per hour fee to have a Pension Fund employee stay with him during his inspection of the requested public records because none of the records were original or incapable of being replaced. These violations were not rendered moot when the Pension Fund produced some of the documents Plaintiff originally requested on November 23, 2009 and when Plaintiff chose not to go forward with an inspection. *Grapski v. City of Alachua*, 31 So.3d at 198. The court finds that neither of these violations, however, was knowing, willful or done with a malicious intent.

With respect to Plaintiff's remaining allegations, the court finds that the Pension Fund has imposed reasonable conditions or otherwise complied with Chapter 119. The $326.40 special service charge was reasonable given the nature of Plaintiff's November 23, 2009 request and the Pension Fund was entitled to withhold production of any further documents until such time as

Plaintiff paid this amount. *Lozman v. City of Riviera Beach*, supra. The cost estimate given by the Pension Fund in response to Plaintiff's September 5, 2010 request was justified given the broad language employed by the Plaintiff to make his request.

Based upon the reasons outlined above, the court enters a declaratory judgment in favor of the Plaintiff and declares:

1. Defendant, the Pension Fund, violated §119.07.(4)(d), Fla. Stat., by requiring Plaintiff to sign a form agreeing to pay a $27.66 copy service charge to make copies of any of the documents produced in response to the November 23, 2009 public records request;

2. Defendant, the Pension Fund, violated §119.07(4)(d), Fla. Stat., by requiring Plaintiff to provide a deposit of $280.00 ($35.00 per hour for 8 hours) to pay for an employee of the Pension Fund to remain with Plaintiff at all times while he inspected the documents produced in response to his November 23, 2009 request;

3. Neither of these violations of Chapter 119 were done knowingly, willfully or with malicious intent;

4. The remaining actions on the part of the Pension Fund over the applicable time period did not violate Chapter 119;

5. The court reserves jurisdiction only to determine entitlement to costs and attorney's fees, as well as the amount of costs and attorney's fees.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 24TH day of June, 2011.

ORDER ENTERED
JUN 24 2011

/s/ James H. Daniel
JAMES H. DANIEL, ***Circuit Judge***

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CURTIS W. LEE,
Petitioner(s),

vs.

CASE NO.: **16-2010-CA-0667**
DIVISION: **CV-A**

BOARD OF TRUSTEES, JACKSONVILLE POLICE & fire pension fund,
Defendant(s).

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES UNDER §119.12, FLA. STAT., & GRANTING TAXABLECOSTS UNDER §57.041, FLA. STAT.

Plaintiff, CURTIS LEE, has moved to tax costs and attorney's fees following the entry of final judgment on his claims against Defendant, BOARD OF TRUSTEES, JACKSONVILLE POLICE & FIRE PENSION FUND (hereafter "PENSION FUND"), for violations of the open records provisions of Chapter 119, Fla. Stat., and Art. I, §24(a), Fla. Const. Plaintiff bases his claim for attorney's fees on §119.12, Fla. Stat., which states that "if a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorney's fees." Because this court has already determined, based upon the evidence presented at trial, that neither of the two Chapter 119 violations on the part of the PENSION FUND were knowing, willful or done with a malicious intent, the court finds that the PENSION FUND did not unlawfully refuse to permit inspection and copying of the records at issue and that Plaintiff is not entitled to an award of fees under §119.12, Fla. Stat.

The parties have succinctly framed the legal issue in determining Plaintiff's entitlement to

attorney's fees under §119.12, Fla. Stat., as whether or not the statute requires this court to award attorney's fees if there is a finding of good faith on the part of the PENSION FUND, even though this court ultimately found that certain actions did violate the open records provisions of Chapter 119. Unfortunately, the courts have been less than clear on this issue. In *News and Sun-Sentinel Co. v. Palm Beach County*, 517 So.2d 743, 744 (Fla. 4th DCA 1987), that court refused to "engraft onto the term 'unlawfully refused'" in §119.12 a "good faith or honest mistake exception" to awarding attorney's fees to a successful private citizen or organization where a public agency wrongfully withholds public records. The court reasoned that allowing such an exception would "seriously dilute" the purposes of the 1984 amendment to §119.12, which the court believed was to broaden and simplify access to public records by motivating the records holder to be more responsive and carful when a request for disclosure was made. *Id.*

However, the Florida Supreme Court in *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27 (Fla. 1993), citing conflict between the intermediate appellate court decision in that case and the decisions in the *Sun-Sentinel* case and *Brunson v. Dade County School Board*, 525 So.2d 933 (Fla. 3rd DCA 1988), held that a private entity that was judicially determined to be acting on behalf of a public agency was not required to pay attorney's fees under §119.12 in light of the uncertainty of its status as an agency within the meaning of Chapter 119. *Id.* at 30. The court in *New York Times Co.* found that PHH's uncertainty about its status was both reasonable and understandable and, therefore, it did not "unlawfully refuse" to produce its records. *Id.* Moreover, the court specifically disapproved of *Sun-Sentinel* and *Brunson* to the extent that either "would permit the award of attorney's fees under section 119.12 without a determination that the refusal was unlawful..." *Id.*

Although the court in *New York Times Co.* directed that trial courts must determine that an

agency's refusal to allow access to its records was "unlawful" before awarding any attorney's fees for violations of Chapter 119, Plaintiff argues that the holding in *New York Times Co.* should be limited only to those cases where there is some question concerning the public status of the agency withholding its records. To support his position, Plaintiff points to the court's observation in *New York Times Co.* that "section 119.12(1) was not intended to force private entities to comply with the inspection requirements of chapter 119 by threatening to award attorney's fees against them. If it is unclear whether an entity is an agency within the meaning of chapter 119, it is not unlawful for that entity to refuse access to its records." *Id.* at 29. However, there is no support for Plaintiff's position in the plain language of §119.12, as the statute does not specify that a trial court can award attorney's fees in certain circumstances regardless of whether or not the agency's conduct might be considered "lawful" or "unlawful".

After hearing the evidence, the court was convinced that the PENSION FUND committed two violations of Chapter 119, but that those violations were "not knowing, willful or done with a malicious intent." There is scant legal authority to guide public agencies on the question of whether they can require those requesting access to public records to pay for the cost of having someone observe the inspection in order to safeguard those public records and, if so, what might amount to a reasonable cost to the requesting party for such services. In the instant case, the court disagreed with the PENSION FUND's position on the facts of this case. Like the agency in *New York Times Co.*, the PENSION FUND "was confronted with the problem of simply not knowing whether the law was applicable to it." *Id.* at 30.

Similarly, the court found that the PENSION FUND's representation to the Plaintiff that he would be required to pay $27.66 per hour to have an employee of the PENSION FUND copy certain records was not totally accurate because Plaintiff would legally have had to pay an hourly service

charge for copy services only if his request for copies required extensive clerical or supervisory assistance. At the time the PENSION FUND made this representation, Plaintiff had yet to specify what, if anything, he wanted copied. Plaintiff may have had to pay such a fee, but he may not have either. Although it was a misstatement of the law, there was no evidence that it was anything but a simple mistake and there was no evidence that it was, in fact, the main reason for the delay in Plaintiff's inspection of the records he requested.

Accordingly, the court cannot find that the violations in this case amounted to an "unlawful refusal." Instead, the evidence reflected that both instances were honest, technical mistakes. Under such circumstances, the Plaintiff is not entitled to attorney's fees under §119.12.

Plaintiff was, however, the prevailing party for purposes of §57.041, Fla. Stat., and he is entitled to all of his taxable costs under that provision. The PENSION FUND did not contest the reasonableness of any of the fees and costs claimed by the Plaintiff. Thus, Plaintiff is entitled to an award of taxable costs in the amount of $1,245.70. The Plaintiff is directed to provide a proposed Final Judgment awarding this amount.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 19TH day of December, 2011.

JAMES H. DANIEL, ***Circuit Judge***

Copies to:

Robert M. Dees, Esquire
14 East Bay Street
Jacksonville, FL 32202

Robert D. Klausner, Esquire
10059 N.W. 1st Court
Plantation, FL 33324

ORDER ENTERED

DEC 19 2011

/s/ James H. Daniel

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CURTIS W. LEE, an individual,

Appellant,

vs.

BOARD OF TRUSTEES,
JACKSONVILLE POLICE & FIRE
PENSION FUND,

Appellee.
_____/

DCA CASE NO.: 1D12-587

L.T. Case No.: 16-2010-CA-000667

APPELLANT'S MOTION FOR
APPELLATE ATTORNEY'S FEES AND COSTS

Appellant Curtis W. Lee ("Lee"), by and through his undersigned attorneys, pursuant to Fla. R. App. P. 9.400 and Section 119.12, Fla. Stat. (2011), moves this Court to award attorney's fees and costs incurred in this appeal, and in the trial court, in favor of Lee, based upon the following:

I. STATUTORY BASIS FOR AWARD OF FEES AND COSTS

This Court should award attorney's fees and costs in favor of Lee based upon § 119.12, Fla. Stat. (2011), which states:

> If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the

> court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

Section 59.46, Fla. Stat., provides that statutory provisions allowing attorney's fees are to be construed to include payment of attorney's fees on appeal.

This Court, in *Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990), held that § 119.12, Fla. Stat., allows a plaintiff to recover attorney's fees for successfully appealing a denial of access. This Court also held that § 119.12, Fla. Stat., provides for an award of trial-level attorney's fees, following an appellate ruling that the trial court has incorrectly held an agency's denial of access to records to be lawful. In *Downs*, this Court stated that:

> [I]t is appropriate that a member of the public commencing litigation to enforce disclosure and whose right to disclosure is ultimately vindicated by court order at least have his attorney's fees reimbursed for that endeavor.
>
> 559. So. 2d at 247, citing *News & Sun –Sentinel Co. v. Palm Beach Co.*, 517 So. 2d 743 (Fla. 4th DCA 1987).

See also, *Disney v. Vaughen*, 804 So. 2d 581 (Fla. 5th DCA 2002) (it is not necessary for a party to obtain a ruling on attorney's fees in the trial court before a party may obtain appellate attorney's fees).

"The purpose underlying [Section 119.12] is to encourage public agencies to voluntarily comply with the requirements of [the Public Records Law] thereby ensuring that the state's general policy is effectuated." *Barfield v. Town of Eatonville*, 675 So.2d 233, 224 (Fla. 5th DCA 1996)(citing *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27 (Fla. 1993)). The statute is to be liberally construed as a tool for enforcement of the Public Records Law. *Downs,* 559 So.2d at 247.

As the Supreme Court of Florida stated in *PHH Mental Health Services, Inc.*,

> Section 119.12(1) is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state's general policy is followed. If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents. Additionally, persons seeking access to such records are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency.
>
> 616 So.2d at 29.

In *News and Sun-Sentinel Co. v. Palm Beach County*, 517 So.2d 743 (Fla. 4th DCA 1987), the court rejected the argument that an agency could avoid an award of attorneys' fees if it had a "good faith" belief that the requesting party was not entitled to records. The court stated that:

> The attorney's fees provision may be viewed by the records keeper as a penalty for noncompliance. In one sense this is accurate and thus it may have a tendency to motivate the records holder to be more responsive and careful when a request for disclosure is made. It is at the same time a means of compensating members of the public where a request for disclosure is frustrated when no specific exemption is involved. Clarification of particular applications of the public records law accrues to the benefit of the agency and the public. It is appropriate that a member of the public commencing litigation to enforce disclosure and whose right to disclosure is ultimately vindicated by court order at least have his attorney's fees reimbursed for that endeavor. The public should not be required to underwrite clarification of a law passed for its special benefit. Should we engraft onto the term "unlawfully refused" either a good faith or an honest mistake exception, the salutary effect of the 1984 amendment would be seriously diluted.
>
> The court having found that the newspaper was entitled under the law to disclosure of the documents which it requested, it follows that disclosure was unlawfully refused and the newspaper is entitled to reasonable attorney's fees.
>
> 517 So. 2d at 744.

Although this Court in *Downs* denied a motion for appellate attorney's fees for an appeal of an order denying attorneys' fees, the facts and circumstances of this case are different. First, to the extent that this Court agrees with Lee's cross-appeal in Case No. 1D11-4458 that the Pension Fund violated the Public Records Act in more ways than those found by the trial court, such determination would further support an award of attorneys' fees, including Lee's expenses incurred in

enforcing his rights under the Public Records Act. Second, § 119.12, Fla. Stat., provides that the "court shall assess an award, against the agency responsible, the reasonable costs of enforcement, including reasonable attorney's fees." Since attorneys' fees are part of the enforcement mechanism under § 119.12, Fla. Stat., fees incurred to enforce the provisions of § 119.12, Fla. Stat., should be reimbursed.

WHEREFORE, Appellant Curtis W. Lee respectfully requests this Court to award attorney's fees and costs in his favor. In addition, Appellant requests that this Court make it clear that the trial court should award trial-level fees as well.

MILAM HOWARD NICANDRI
DEES & GILLAM, P.A.

By: _____
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14 East Bay Street
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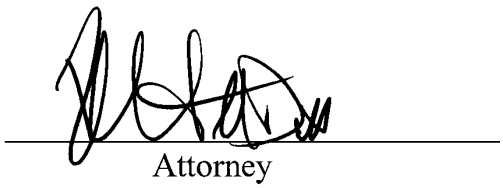
Tel: (904) 357-3660
Fax: (904) 357-3661

Attorneys for Appellant
Curtis W. Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Email & U.S. Mail to Robert D. Klausner, Esq. and Shaun H. Malvin, Esq., Klausner & Kaufman, P.A., 10059 N.W. 1st Court, Plantation, Florida 33324, on this *14th* day of June, 2012.



Attorney

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

April 22, 2013

CASE NO.: **1D12-0587**
L.T. No.: 16-2010-CA-000667

Curtis W. Lee	v.	Board Of Trustees, Jacksonville etc.
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed June 14, 2012, for attorney's fees is denied.

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

Served:

Robert D.Klausner	Robert M.Dees	Jonathan D.Kaney, I I I
Stuart A.Kaufman	Shaun H.Malvin	Hon.Ronnie Fussell, Clerk

co

JON S. WHEELER, CLERK

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CURTIS W. LEE, an individual,

Appellant,

vs.

BOARD OF TRUSTEES, JACKSONVILLE POLICE & FIRE PENSION FUND,

Appellee.
_____/

DCA CASE NO.: 1D12-587

L.T. Case No.: 16-2010-CA-000667

APPELLANT'S MOTION FOR REHEARING AS TO DENIAL OF ATTORNEYS' FEES

Appellant Curtis W. Lee ("Lee"), by and through his undersigned attorneys, pursuant to Fla. R. App. P. 9.330(a), respectfully moves this Court for rehearing with respect to this Court's denial of Lee's Motion for Attorneys' Fees, based upon the following:

1. Lee appealed an order denying his motion for attorneys' fees. This Court reversed, and held that the trial court erred in denying Lee's motion for fees. Lee had filed a Motion for Attorneys' Fees in this Court under § 119.12, Fla. Stat., which this Court denied on April 22, 2013.

2. Lee assumes that this Court denied his Motion for Attorneys' Fees based on the language in *Downs v. Austin*, 559 So. 2d 246, 248 (Fla. 1st DCA

1990) in which the court said that § 119.12, Fla. Stat., does not authorize attorneys' fees for efforts expended to obtain the statutory fee.

3. Lee submits that such ruling on attorneys' fees in *Downs* is inconsistent with the Supreme Court of Florida's subsequent decision in *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993). The Court in *Palma* held that, under the fee provision in § 627.428, Fla. Stat., attorneys' fees should be awarded for litigating the issue of *entitlement* to attorney's fees, but not for litigating only the amount of fees.

4. The fee provisions in § 119.12, Fla. Stat., and § 627.428, Fla. Stat. are substantially similar. Section 119.12, Fla. Stat., provides for an award of attorneys' fees in favor of a party who files suit under Chapter 119 and proves that an agency unlawfully refused access to public records. Similarly, § 627.428, Fla. Stat., provides for fees where an insured files suit against an insurer and is the prevailing party. There is no meaningful distinction in the language of § 119.12, Fla. Stat., and § 627.428, Fla. Stat., to support denial of attorneys' fees with respect to establishing entitlement to fees under § 119.12, Fla. Stat.

5. It does not appear that a case has directly addressed this issue since the Supreme Court's decision in *Palma*. However, the court in *Hewlings v. Orange Co*., Fla., 87 So. 3d 839 (Fla. 5th DCA 2012), awarded attorneys' fees to a plaintiff who successfully appealed an order denying attorneys' fees under

§ 119.12, Fla. Stat. Although the opinion only addresses the reasons for reversal of the denial of the plaintiff's motion for fees, the court's electronic docket shows that the Fifth DCA granted the plaintiff's motion for attorneys' fees on appeal. A copy of the docket is attached.

Based upon the foregoing, Lee respectfully requests this Court to grant his Motion for Attorneys' Fees in this appeal since the issue on appeal involved his entitlement to fees, not just the amount.

MILAM HOWARD NICANDRI
DEES & GILLAM, P.A.

By: *s/ Robert M. Dees*
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Florida Bar No. 714399
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Jacksonville, Florida 32202
Tel: (904) 357-3660
Fax: (904) 357-3661

Attorneys for Appellee
Curtis W. Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Rule 2.516, Fla. R. Jud. Admin., a copy of the foregoing has been furnished by electronic mail to Robert D. Klausner, Esq. and Shaun H. Malvin, Esq., at bob@robertdklausner.com and kkjllaw@gmail.com, on this *7th* day of May, 2013.

s/ Robert M. Dees
Attorney

Fifth District Court of Appeal Case Docket

Case Number: 5D11-2715

Final Civil Other Notice from Orange County

SUSAN HEWLINGS vs. ORANGE COUNTY, FLORIDA, ET AL.

Lower Tribunal Case(s): 2010-CA-16146

04/26/2013 03:31

Date Docketed	Description	Date Due	Filed By	Notes
08/19/2011	Case Filing Fee			
08/19/2011	Notice of Appeal Filed		Appellant	
08/19/2011	Order to pay filing fee - Civil appeal (300)			
08/30/2011	Docketing Statement Appellant			
09/01/2011	Case Filing Fee			
09/14/2011	ORD-Order Declining Mediation as Inappropriate			
11/28/2011	Initial Brief on Merits		Appellant	
12/13/2011	Appellee's Answer Brief		Appellee	
12/13/2011	Appendix for Answer Brief		Appellee	
12/16/2011	Notice of Change of Address		Appellee	
01/04/2012	Received Records			
01/05/2012	Appellant's Reply Brief		Appellant	
01/05/2012	Motion For Attorney's Fees		Appellant	
01/05/2012	Request for Oral Argument			
01/18/2012	RESPONSE		Appellee	
03/22/2012	Oral Argument Date Set			
05/18/2012	Affirmed in Part/Reversed in Part - Authored Opinion			
05/22/2012	Order Granting Attorney's Fees			
06/06/2012	Mandate			
07/31/2012	Returned Records			
09/24/2012	Miscellaneous Docket Entry			

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

June 03, 2013

CASE NO.: **1D12-0587**
L.T. No.: 16-2010-CA-000667

Curtis W. Lee	v.	Board Of Trustees, Jacksonville etc.
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellee's motion filed May 6, 2013, for rehearing and certification is denied.

Appellant's motion filed May 7, 2013, for rehearing is denied.

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

Served:

Robert D.Klausner
Stuart A.Kaufman
Robert M.Dees
Shaun H.Malvin
Jonathan D.Kaney, I I I

jm

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL FIRST DISTRICT STATE OF FLORIDA