

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

CURTIS W. LEE,

Petitioner(s),

CASE NO.: **16-2010-CA-0667**

vs.

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 TAXABLE COSTS
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 careful 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

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ORDER ENTERED

DEC 19 2011

/s/ James H. Daniel