

STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION

PRECISION TRAFFIC COUNTING, INC.,  
d/b/a BUCKHOLZ TRAFFIC,

Petitioner,

vs.

DOAH CASE NO.: 99-4544  
DOT CASE NO.: 99-247

STATE OF FLORIDA,  
DEPARTMENT OF TRANSPORTATION,

Respondent.

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FINAL ORDER

This proceeding was initiated by the filing of a Request for Formal Hearing on October 22, 1999, by Petitioner, PRECISION TRAFFIC COUNTING, INC., d/b/a BUCKHOLZ TRAFFIC (hereinafter BUCKHOLZ TRAFFIC), in response to the Notice of intent to Revoke Qualification (Notice) issued by Respondent, DEPARTMENT OF TRANSPORTATION (hereinafter DEPARTMENT). On October 26, 1999, the matter was referred to the Division of Administrative Hearings (DOAH).

On February 28 and 29, 2000, a formal administrative hearing was held in Jacksonville, Florida, before Larry J. Sartin, a duly appointed Administrative Law Judge of the DOAH. Appearances on behalf of the parties were as follows:

For Petitioner: M. Lee Fagan, Esquire, Attorney at Law  
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Jacksonville, Florida

Robert Aguilar, Esquire  
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Post Office Box 855  
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For Respondent: Brian F. McGrail, Esquire  
Brian A. Crumbaker, Esquire  
Department of Transportation  
605 Suwannee Street, M.S. 58  
Haydon Burns Building  
Tallahassee, Florida 32399-0458

At the hearing, the DEPARTMENT presented the testimony of ten witnesses and offered fifteen exhibits. The DEPARTMENT'S Exhibits 1 (as modified), and 3 Trough 14, were admitted into evidence. BUCKHOLZ TRAFFIC presented the testimony of two witnesses and offered eleven exhibits. BUCKHOLZ TRAFFIC'S Exhibits 1 through 5, 9, and 14 through 18, were offered and accepted into evidence. The transcript of the proceeding was filed on March 29, 2000. On April 7, 2000, the DEPARTMENT and BUCKHOLZ TRAFFIC filed their respective Proposed Recommended Orders. On May 3, 2000, Judge Sartin issued his Recommended Order. On May 18, 2000, BUCKHOLZ TRAFFIC filed its exceptions to the Recommended Order and the DEPARTMENT filed its response to BUCKHOLZ TRAFFIC'S exceptions on May 28, 2000.

#### STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in his Recommended Order, "The issue in this case is whether Respondent may revoke the Petitioner's qualification to bid on Florida Department of Transportation contracts for which pre-qualification is required for one year because of events and correspondence described in a Notice of Intent from Respondent dated October 6, 1999."

#### BACKGROUND

On October 6, 1999, the DEPARTMENT issued a Notice to Burita Allen, president of BUCKHOLZ TRAFFIC, advising that the DEPARTMENT intended to revoke the firm's qualification to bid on DEPARTMENT contracts for which pre-qualification is required by Section 337.14, Florida Statutes, for one year. Additionally, the DEPARTMENT advised BUCKHOLZ TRAFFIC, should the intended revocation action be upheld, it would also constitute a determination of non-responsibility to bid on any other DEPARTMENT construction or maintenance contracts and from acting as a material supplier, subcontractor, or consultant on any DEPARTMENT contract during the period of revocation. The Notice identified three specific incidents on DEPARTMENT job sites where Jeffery Buckholz, as representative of BUCKHOLZ TRAFFIC, physically assaulted a DEPARTMENT inspector, displayed abusive, intemperate, disorderly, and insubordinate conduct, and that this pattern of behavior was exhibited over a period of nine months.

On October 22, 1999, BUCKHOLZ TRAFFIC filed a timely Request for Formal Hearing. The DEPARTMENT referred the matter to DOAH on October 26, 1999, for assignment of an Administrative Law Judge and to schedule a final hearing. The final hearing was held on February 28 and 29, 2000, in Jacksonville, Florida.

It was noted at the outset of the formal administrative hearing that the DEPARTMENT had the burden of proof to establish good cause for revoking BUCKHOLZ TRAFFIC'S Certificate of Qualification and should have been identified as the Petitioner. However, due to the style of the case at the initiation of the administrative proceeding, at the Administrative Law Judge's suggestion and with the parties' agreement, the hearing proceeded identifying BUCKHOLZ TRAFFIC as Petitioner and the DEPARTMENT as the Respondent. This Final Order reflects that agreement in the style of the matter.

#### BUCKHOLZ TRAFFIC'S EXCEPTIONS TO THE RECOMMENDED ORDER

As its first exception, BUCKHOLZ TRAFFIC takes exception to the statement in the Preliminary Statement of the Recommended Order, that the DEPARTMENT'S Exhibit 1, Office of Inspector General - Report of Investigation (May 28-August 3, 1999), was admitted into evidence. According to BUCKHOLZ TRAFFIC, the Administrative Law Judge specifically ruled this proposed exhibit to be inadmissible and admitted only the affidavits of Stefanie Maxwell and David Schweppe into evidence and not the entire report.

A review of the record reflects that the Administrative Law Judge did, in fact, admit only the affidavits of Ms. Maxwell and Mr. Schweppe into evidence and ruled that the remainder of the report was inadmissible. However, the affidavits were offered as part of the DEPARTMENT'S Exhibit 1 and when the Administrative Law Judge ruled the remainder of the exhibit inadmissible, the affidavits were not removed from the remainder of the exhibit and were not separately numbered when admitted into evidence. As such, the Recommended Order is correct that Exhibit 1, as modified, was admitted into evidence.

BUCKHOLZ TRAFFIC'S first exception is rejected.

BUCKHOLZ TRAFFIC'S second exception is to the statement made in the Preliminary Statement of the Recommended Order that BUCKHOLZ TRAFFIC presented testimony of one witness. According to BUCKHOLZ TRAFFIC, it presented the testimony of two witnesses: Donald Fullerton and the deposition testimony of Juanita Moore.

The record reflects that BUCKHOLZ TRAFFIC presented the testimony of two witnesses: Mr. Fullerton, who testified in person, and Ms. Moore, whose deposition testimony was introduced.

BUCKHOLZ TRAFFIC'S second exception is accepted, and the Preliminary Statement is corrected herein.

BUCKHOLZ TRAFFIC'S third exception is to the second sentence of Finding of Fact No. 4 and the statement that BUCKHOLZ TRAFFIC has been working with the DEPARTMENT since 1966. According to BUCKHOLZ TRAFFIC, the testimony of Ms. Allen, president of BUCKHOLZ TRAFFIC, established that BUCKHOLZ TRAFFIC has been doing business with the DEPARTMENT since 1996.

The record supports BUCKHOLZ TRAFFIC'S exception that BUCKHOLZ TRAFFIC has been doing business with the Department since 1996. Reference to 1966 in the Recommended Order is an apparent scrivener's error, and has no material relevance to the proceeding or the outcome.

BUCKHOLZ TRAFFIC'S third exception is accepted, and Finding of Fact No. 4 is corrected accordingly.

BUCKHOLZ TRAFFIC'S fourth exception is to the first sentence of Finding of Fact No. 13, which characterizes Mr. Buckholz' "inability to act in a non-aggressive, non-threatening manner" as not being supported by the totality of the evidence presented.

The first sentence of Finding of Fact No. 13 states: 'Based upon Mr. Buckholz' actions, as described, infra, and Mr. Buckholz' testimony at hearing, Mr. Buckholz has evidenced an inability to control his anger and to act in a non-aggressive, non-threatening manner.' BUCKHOLZ TRAFFIC offers no citations to the record for evidence contradicting the finding or to support its exception that the finding is not supported by the "totality of the evidence presented." It is the Administrative Law Judge's function "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz v. Dep't of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3d DCA 1959). The Administrative Law Judge's findings in both sentences of Finding of Fact No. 13 are supported by competent, substantial evidence in the record.

BUCKHOLZ TRAFFIC'S fourth exception is rejected.

BUCKHOLZ TRAFFIC'S fifth exception is to the Administrative Law Judge's Finding of Fact No. 16 that Section 8-5 of the DEPARTMENT'S Standard Specifications allows the DEPARTMENT "absolute authority to require contractors to discharge employees." According to BUCKHOLZ TRAFFIC, Section 8-5 specifically allows the DEPARTMENT to require a contractor to discharge an employee from "the work," which is limited to that particular contract with the DEPARTMENT as provided in the

definitional section of the Standard Specifications, Section 1-51, 1996 edition, which provides as follows:

1-51 Work. All labor, materials and incidentals required for the construction of the improvement for which the contract is made, including superintendence, use of equipment and tools, and all services and responsibilities prescribed or implied, which are necessary for the complete performance by the Contractor of his obligations under the contract. Unless otherwise specified herein or in the Contract, all costs of liability and of performing the Work shall be at the Contractor's expense.

As concluded by the Administrative Law Judge, Section 8-5 of the Standard Specifications is controlling and grants the engineer the authority to discharge employees of the contractor who are intemperate, disorderly, or insubordinate from the job site. The definition of "the work" is not limited as suggested by BUCKHOLZ TRAFFIC, is not relevant, and has no material impact on the engineer's authority and responsibility over the job site as it relates to this case.

BUCKHOLZ TRAFFIC'S fifth exception is rejected.

BUCKHOLZ TRAFFIC'S sixth exception is to that portion of Findings Fact No. 21 that the "MOT plan provided that there would be no disruption of traffic between 3:15 and 6:30 p.m." According to BUCKHOLZ TRAFFIC, the MOT plan itself is not in evidence, and as explained by Mr. Buckholz, who did the revisions of the MOT plan, the MOT plan only provided restrictions as to "lane closure," not the all encompassing no disruption of traffic stated in the "Findings of Fact (sic)."

In addition to Mr. Buckholz' testimony, evidence was introduced establishing that the MOT plan was known to the DEPARTMENT engineers and that it was the DEPARTMENT'S ultimate responsibility for the proper enforcement of the MOT. The Administrative Law Judge found the testimony of the DEPARTMENT'S engineers more persuasive than the testimony of Mr. Buckholz. It is the Administrative Law Judge's function "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz, 475 So. 2d at 1281; Ernal, 115 So. 2d 566.

BUCKHOLZ TRAFFIC'S sixth exception is rejected.

BUCKHOLZ TRAFFIC'S seventh exception is to those portions of Finding of Fact No. 24 which "imply that there were no MOT devices for the second offloading or that the Petitioner would have conducted the second offloading without proper MOT devices." According to BUCKHOLZ TRAFFIC this was not the case because BUCKHOLZ TRAFFIC "did have sufficient MOT devices for lane narrowing and Mr. Buckholz, who has designed, signed and sealed MOT plans for years for the Department, testified that he would not have conducted the second offloading without proper MOT devices."

The Administrative Law Judge heard all of the testimony regarding lane narrowing versus lane closures, the methods utilized for the first offloading, and the role of the subcontractor, Acme Barricades. The Administrative Law Judge determined that the testimony of the DEPARTMENT witnesses was more persuasive than the testimony of Mr. Buckholz. This finding is also supported by Mr. Buckholz' testimony that he concluded Acme was not needed for the second offloading. The record supports the finding that there were insufficient MOT devices for the safe second offloading of equipment.

BUCKHOLZ TRAFFIC'S seventh exception is rejected.

BUCKHOLZ TRAFFIC'S eighth exception is to Finding of Fact No. 25 and the characterization of Mr. Lavant's testimony. BUCKHOLZ TRAFFIC argues that if Edward Lavant's testimony is read in its entirety, it is clear that he did not have a clear recollection of the two different sign offloadings that occurred on the day in question. Mr. Lavant, according to BUCKHOLZ TRAFFIC, testified that the problem that he had with Mr. Buckholz for the second sign offloading was that Mr. Lavant viewed any lane narrowing as being the same thing as a lane closure and that Mr. Lavant thought that Mr. Buckholz was going to utilize the same lane type closure as during the first offloading which occurred the same day prior to rush hour traffic. The issue, BUCKHOLZ TRAFFIC claims, was not over the presence of MOT devices, i.e., cones to direct traffic.

The record reveals that the testimony of Mr. Lavant was consistent with the testimony of Carrie Stanbridge and David Sadler, that regardless of whether BUCKHOLZ TRAFFIC intended to narrow or close the on-ramp lane, it was not safe to do so during peak traffic hours as Mr. Buckholz intended.

BUCKHOLZ TRAFFIC'S eighth exception is rejected.

BUCKHOLZ TRAFFIC'S ninth exception is to Finding of Fact No. 26 as not being supported by the record. According to BUCKHOLZ TRAFFIC, the boom truck utilized for offloading is not an

eighteen wheel truck like a semi, and nowhere in the record is there testimony that it is such. Rather, BUCKHOLZ TRAFFIC claims there is testimony that it is the same width as the eighteen wheel delivery truck, but not as long, as shown on BUCKHOLZ TRAFFIC'S Exhibit 17.

The record reflects that the boom truck utilized to offload the eighteen wheel flatbed truck was not itself an eighteen wheel truck. However, the record also reflects that the boom truck is the same width as the eighteen wheel truck and when placed side-by-side, the two trucks would create an obstruction 16 feet across. The evidence established the DEPARTMENT'S on-site personnel determined that the offloading plan proposed by Mr. Buckholz was not safe during peak traffic hours, regardless of whether BUCKHOLZ TRAFFIC intended to narrow or close the on-ramp lane.

BUCKHOLZ TRAFFIC'S ninth exception is rejected.

BUCKHOLZ TRAFFIC'S tenth exception is to Findings of Fact No. 27 through 37 as not being supported by the record. BUCKHOLZ TRAFFIC cites to certain testimony in the record in which Mr. Lavant clarified his testimony regarding the second offloading, that the issue was really lane closure and not lack of MOT devices, diverting traffic through the gore area was anticipated by the second offloading, that diverting traffic through the gore area is, in fact, common practice when doing ramp work; that only Mr. Buckholz is certified to design MOT plans and he did in fact do the revisions for this particular project; and that Mr. Buckholz was familiar with the traffic flow on the project and had the expertise to determine what was and what was not safe as far as a lane narrowing versus a lane closure is concerned. According to BUCKHOLZ TRAFFIC, the DEPARTMENT'S representatives did not have the knowledge of what the MOT plan contained and could not show Mr. Buckholz where in the specifications his proposal violated the MOT plan for this project.

BUCKHOLZ TRAFFIC recharacterizes Mr. Buckholz' behavior claiming he "understandably became frustrated." BUCKHOLZ TRAFFIC claims that the "accurate facts" are that Mr. Buckholz became frustrated because DEPARTMENT representatives were not capable of following the contract and specifications for this project, and that while he disagreed with their recommendations because of their lack of knowledge about the MOT for this project, he followed their directives and did not conduct the second offloading in violation of any DEPARTMENT directive.

Notwithstanding Mr. Buckholz' testimony and BUCKHOLZ TRAFFIC'S tenth exception, there is competent, substantial evidence in the record from the testimony of Mr. Lavant, Ms.

Stanbridge, and Mr. Sadler, that regardless of whether BUCKHOLZ TRAFFIC intended to narrow or close the on-ramp lane, it was not safe to do so during peak traffic hours as Mr. Buckholz intended, and to support the Administrative Law Judge's findings.

The issues of proper MOT and lane closure were prevalent throughout the proceeding and the record supports the Administrative Law Judge's findings. As correctly found and concluded by the Administrative Law Judge, it is within the DEPARTMENT'S authority to make the ultimate determination regarding disruption of traffic during a construction project. There is competent, substantial evidence to support the DEPARTMENT'S safety concerns with BUCKHOLZ TRAFFIC'S offloading plans and the propriety of the DEPARTMENT'S denial of BUCKHOLZ TRAFFIC'S permission to offload the truck in the manner proposed by BUCKHOLZ TRAFFIC.

In its tenth exception BUCKHOLZ TRAFFIC also states: "The Department representatives showed that their ego and anger were involved when they refused to allow Mr. Buckholz to offload the second truck even after rush hour traffic had ended." If by this statement BUCKHOLZ TRAFFIC is suggesting that additional findings of fact be made by the DEPARTMENT regarding the demeanor of DEPARTMENT employees, the DEPARTMENT must reject the suggestion. The DEPARTMENT is without authority to make additional findings of fact. Moreover, the suggested finding is not supported by competent, substantial evidence in the record and is contrary to the competent, substantial evidence in the record and contrary to other findings of the Administrative Law Judge.

BUCKHOLZ TRAFFIC'S tenth exception is rejected.

BUCKHOLZ TRAFFIC'S eleventh exception is to the lack of a finding in Finding of Fact No. 37 that BUCKHOLZ TRAFFIC did in fact follow the directive of the police officer. It is undisputed, according to BUCKHOLZ TRAFFIC, that the second offloading did not occur in violation of any DEPARTMENT or police directives.

The record reflects that BUCKHOLZ TRAFFIC followed the directive of the law enforcement officer when faced with the prospect of arrest. However, the record also reflects that despite the presence of law enforcement officers, Mr. Buckholz continued to conduct himself in an intemperate, disorderly, and unprofessional manner culminating in the threat of physical violence directed toward Kevin Oswaldel. The DEPARTMENT is without authority to make additional findings of fact and such findings are not necessary to the resolution of the issues or to further support the Administrative Law Judge's conclusions.



BUCKHOLZ TRAFFIC'S eleventh exception is rejected.

BUCKHOLZ TRAFFIC'S twelfth exception is to Findings of Fact No. 38 and 39 and the lack of a finding therein that Mr. Buckholz did not get into a loud confrontation with Mr. Oswaldel until after Mr. Oswaldel referred to Mr. Buckholz with profanity.

BUCKHOLZ TRAFFIC'S exception seeking an additional finding regarding the confrontation between Mr. Buckholz and Mr. Oswaldel does not include citation to record evidence which would support it. While there is evidence in the record that at some point Mr. Oswaldel asked Mr. Buckholz why Mr. Buckholz was "acting liking like an [expletive]," the totality of the evidence does not require such a finding.

BUCKHOLZ TRAFFIC'S twelfth exception is rejected.

BUCKHOLZ TRAFFIC'S thirteenth exception is to Finding of Fact No. 42 and the lack therein of a finding that the DEPARTMENT "did allow the second offloading to occur on the side street in question, but still would not allow offloading on the ramp even though rush hour had ended."

The findings in Finding of Fact No. 42 that Mr. Buckholz was denied permission to offload the truck from the on-ramp when it arrived at approximately 7:00 p.m., but was granted permission to offload the truck from a side street, are supported by competent, substantial evidence. Additional findings to support those findings are unnecessary and the DEPARTMENT is without authority to make additional findings.

BUCKHOLZ TRAFFIC'S thirteenth exception is rejected.

BUCKHOLZ TRAFFIC'S fourteenth exception is to Finding of Fact No. 43. By this exception, BUCKHOLZ TRAFFIC states that it takes exception to the statement that the DEPARTMENT properly rejected Mr. Buckholz' plan of offloading when the DEPARTMENT could not provide any contractual provision or provisions of the MOT plan itself that prevented his proposed method of offloading, when Mr. Buckholz himself was the expert in the field of MOT.

BUCKHOLZ TRAFFIC'S fourteenth exception again argues that the DEPARTMENT failed to present any contract provisions or MOT provision that prevented Mr. Buckholz' proposed method of offloading. However, as the record reflects and as the Administrative Law Judge has found and concluded, the DEPARTMENT has the ultimate authority to determine when traffic may be disrupted during a construction project. The DEPARTMENT exercised its authority and properly denied BUCKHOLZ TRAFFIC permission to offload the second truck in the manner proposed by

Mr. Buckholz. BUCKHOLZ TRAFFIC also suggests in exception 14 that Mr. Buckholz' testimony should have been believed because he is an expert in the field of MOT. However, the record contains no evidence of Mr. Buckholz being offered or qualified as an expert in MOT. By his finding, the Administrative Law Judge rejected Mr. Buckholz' testimony and his self-serving testimony regarding his qualifications in the area of MOT.

BUCKHOLZ TRAFFIC'S fourteenth exception is rejected.

BUCKHOLZ TRAFFIC'S fifteenth exception is to Finding of Fact No. 48. According to BUCKHOLZ TRAFFIC, there was no request or directive from the DEPARTMENT that BUCKHOLZ TRAFFIC or Mr. Buckholz do anything other than have Mr. Buckholz stay off that particular job site pursuant to Standard Specification 8-5, with which Mr. Buckholz fully complied.

The remedy provided in the Standard Specifications was invoked against BUCKHOLZ TRAFFIC and BUCKHOLZ TRAFFIC believes it fully complied with its requirements. BUCKHOLZ TRAFFIC argues that there was no request by the DEPARTMENT for any other action to be taken by BUCKHOLZ TRAFFIC, and, thus, a finding that no action was taken by BUCKHOLZ TRAFFIC is improper.

There is competent, substantial evidence to support Finding of Fact No. 48 and to support rejection of BUCKHOLZ TRAFFIC'S fifteenth exception. Burita Allen, president of BUCKHOLZ TRAFFIC, and Mr. Buckholz testified that other than having Mr. Buckholz stay off of the Haines Street job site, no remedial or other action was taken to prevent similar incidents by Mr. Buckholz. Due to BUCKHOLZ TRAFFIC'S failures, Mr. Buckholz subsequently physically assaulted a DEPARTMENT employee on the Baymeadows project site.

BUCKHOLZ TRAFFIC'S fifteenth exception is rejected.

BUCKHOLZ TRAFFIC takes exception to that portion of Finding of Fact No. 53 identifying Mr. Schweppe as an inspector on the Baymeadows project. According to BUCKHOLZ TRAFFIC, Mr. Schweppe was in training at the time and Mr. Schweppe testified that he was not the inspector on the job, which is why he was not offended by comments made about the quality of the inspectors on this job.

The record reflects that Mr. Schweppe was not an inspector on the Baymeadows project. However, whether or not he was offended by the comments made about the quality of the inspectors on the job is not relevant. Although relevant, but not among the Administrative Law Judge's findings, is Mr. Schweppe's testimony regarding the offensive nature of Mr. Buckholz' screaming,

cursing, and physical threats. However, the DEPARTMENT is without authority to make additional findings in this regard, even when supported by the record.

BUCKHOLZ TRAFFIC'S sixteenth exception is accepted in part, and Finding of Fact No. 53 is corrected that Mr. Schweppe was not an inspector on the Baymeadows project; the sixteenth exception is otherwise rejected.

BUCKHOLZ TRAFFIC'S seventeenth exception is to Finding of Fact No. 55, that according to the letter from Ms. Allen dated May 1, 1999, BUCKHOLZ TRAFFIC would not redo work without being compensated for it. BUCKHOLZ TRAFFIC argues in this exception that there was no refusal to redo the work and the work was in fact redone to the satisfaction of the DEPARTMENT.

Finding of Fact No. 55 does not address whether there was a refusal by BUCKHOLZ TRAFFIC to redo the work. Finding of Fact No. 55 addresses the fact that the appropriate course of action for a contractor is to make demands for such items after the contract is complete. The finding is supported by competent, substantial evidence. BUCKHOLZ TRAFFIC'S seventeenth exception is rejected. BUCKHOLZ TRAFFIC'S eighteenth exception is to Finding of Fact No. 59 that Mr. Buckholz cannot take criticism from someone whom he considers to be inferior to himself, because there is no substantiation in the record as to who is and is not inferior to Mr. Buckholz. BUCKHOLZ TRAFFIC also notes in this exception to the finding that "Mr. Schweppe [did not] respond[] in kind to Mr. Buckholz," because Mr. Schweppe personally insulted Mr. Buckholz and BUCKHOLZ TRAFFIC with comments that this was the worst construction job he had seen and that he invited Mr. Buckholz into a physical altercation with his comment that "there is plenty of room right here."

Witness testimony conflicts with regard to whether "there is plenty of room right here" was spoken, its intent, and its meaning. It is the function of the Administrative Law Judge to resolve conflicts and judge the credibility of witnesses. Heifitz, 475 So. 2d at 1281; Ernal, 115 So. 2d 566. It is also the function of the Administrative Law Judge to evaluate the testimony and demeanor of the witnesses. Kibler v. DBPR, 418 So. 2d 1081, 1083 (Fla. 4th DCA 1982). The Administrative Law Judge resolved those conflicts and made credibility and other determinations based upon the testimony and demeanor of the witnesses. BUCKHOLZ TRAFFIC'S eighteenth exception is rejected. BUCKHOLZ TRAFFIC'S nineteenth exception is to Finding of Fact No. 60, claiming BUCKHOLZ TRAFFIC was the prime contractor, not the subcontractor, on the project. BUCKHOLZ TRAFFIC again claims that Mr. Schweppe was not offended by the comments made about the inspection job on this project because he was not the inspector

for the project, but Mr. Buckholz testified that he was very offended by Mr. Schweppe's comments. BUCKHOLZ TRAFFIC claims that when inflammatory comments are made by DEPARTMENT representatives rather than BUCKHOLZ TRAFFIC'S representatives, "they are only stated to be unnecessary.

In The Administrative Law Judge's resolution of the conflicting testimony, his characterization of the testimony and demeanor of the witnesses, and Mr. Buckholz' responses are well supported by the record.

BUCKHOLZ TRAFFIC'S nineteenth exception is rejected.

BUCKHOLZ TRAFFIC'S twentieth exception is to Finding of Fact No. 62, regarding the confrontation of Mr. Schweppe by Mr. Buckholz. According to BUCKHOLZ TRAFFIC, Mr. Buckholz came back from the ditch and the parties moved on to the next curb cut ramps before Mr. Schweppe made his statement that "there is plenty of room right here," thus leading Mr. Buckholz to believe that he was inviting a physical altercation with Mr. Buckholz because Mr. Schweppe was right next to Mr. Buckholz when he made the comment.

There is conflicting testimony as to whether the statement was made, and if made, its meaning, tone, and intent. There is also testimony from Mr. Buckholz himself that when he believed he heard those words, it was an invitation to fight and he hit Mr. Schweppe twice. There is competent, substantial evidence to support the finding made by the Administrative Law Judge in this regard. The record provides ample additional evidence to support Finding of Fact No. 62, and additional findings are neither necessary nor authorized to be made by the DEPARTMENT.

BUCKHOLZ TRAFFIC'S twentieth exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-first exception is to Finding of Fact No. 63 regarding the lack of provocation by Mr. Schweppe to Mr. Buckholz prior to Mr. Buckholz hitting Mr. Schweppe, as the finding notes that Mr. Schweppe made the comment that "there is plenty of room right here."

Again, this is an issue where the testimony of the witnesses was conflicting and subject to interpretation. It is the Administrative Law Judge's function "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz, 475 So. 2d at 1281; Ernal, 115 So. 2d 566. The Administrative Law Judge weighed the evidence and evaluated the testimony and the demeanor of the witnesses. The Administrative

Law Judge resolved those conflicts and credibility issues as reflected in his findings. The record supports the finding that Mr. Buckholz struck Mr. Schweppe twice in the face with his fist without warning, provocation, or justification.

BUCKHOLZ TRAFFIC'S twenty-first exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-second exception is to Finding of Fact No. 64, that Mr. Buckholz thinks that the conduct he exhibited is an acceptable way to resolve differences. BUCKHOLZ TRAFFIC argues that Mr. Buckholz said he was sorry the incident occurred. but demonstrated no remorse for his behavior.

Based upon his testimony and demeanor at the hearing, the Administrative Law Judge concluded that Mr. Buckholz "continued to express his belief that such conduct is an acceptable way to resolve differences." Remarkably, BUCKHOLZ TRAFFIC'S exception also supports the propriety of the Administrative Law Judge's finding in this regard. Conclusions and determinations reflecting on demeanor of witnesses and credibility are within the province of the Administrative Law Judge, not the DEPARTMENT.

BUCKHOLZ TRAFFIC'S twenty-second exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-third exception is to Findings of Fact No. 65 through 68, as not being supported by the record. Additionally, BUCKHOLZ TRAFFIC takes exception to the statement that Mr. Buckholz "sucker punched" Mr. Schweppe, as the two men were face to face and Mr. Buckholz did not hit him until Mr. Schweppe stated that "there is plenty of room right here."

It is the Administrative Law Judge's function "to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." Heifetz, 475 So. 2d at 1281; Ernal, 115 So. 2d 566. The Administrative Law Judge heard the testimony of all of the witnesses. Based upon his interpretation of the evidence, it cannot be said that the blows thrown could not reasonably be described as "sucker punched." The record amply supports the findings of Mr. Buckholz' aggression against Mr. Schweppe and Ms. Maxwell.

BUCKHOLZ TRAFFIC'S twenty-third exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-fourth exception is to Finding of Fact No. 70, that Greg Xanders' letter of June 1, 1999, was consistent with Standard Specification 8-5. As BUCKHOLZ TRAFFIC previously noted, in its opinion Specification 8-5 only allows the DEPARTMENT to require the contractor to withdraw an employee

from that particular project that is governed by the specific contract. According to BUCKHOLZ TRAFFIC, the DEPARTMENT'S June 1, 1999, letter violated this specification and went beyond what is allowed by law and governing regulations in requiring Mr. Buckholz to stay off any and all DEPARTMENT job sites. The DEPARTMENT, according to BUCKHOLZ TRAFFIC, had absolutely no legal authority to take this position as Mr. Buckholz is also a principal of J. W. Traffic Engineering, Inc., which contracts require his attendance on DEPARTMENT job sites and was entirely uncalled for. BUCKHOLZ TRAFFIC claims the DEPARTMENT restricted its over broad direction and its June 17, 1999, letter narrowed Mr. Buckholz' restriction to only construction job sites in which BUCKHOLZ TRAFFIC construction company was involved. BUCKHOLZ TRAFFIC complains, as it did at the hearing, that the DEPARTMENT did not give any direction to BUCKHOLZ TRAFFIC in its June 1 letter as to what it was seeking in reference to assurances from Mr. Buckholz, nor did the DEPARTMENT ever contact BUCKHOLZ TRAFFIC to meet to explain what it was seeking from BUCKHOLZ TRAFFIC.

Competent substantial evidence in the record establishes that the DEPARTMENT afforded BUCKHOLZ TRAFFIC the opportunity to resolve the dispute and that Ms. Allen should have taken meaningful steps to repair the damage done by Mr. Buckholz' conduct and taken remedial and disciplinary measures against Mr. Buckholz to ensure the conduct was not displayed on future job sites. The Administrative Law Judge's finding regarding the June 1, 1999, letter and the DEPARTMENT'S authority under Section 8-5 of the Standard Specifications is well supported by the record.

BUCKHOLZ TRAFFIC'S twenty-fourth exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-fifth exception is to Findings of Fact No. 72 and 75. BUCKHOLZ TRAFFIC reiterates its position that the DEPARTMENT'S June 1 letter went way beyond what the law or applicable regulations allow it to do which left BUCKHOLZ TRAFFIC at a loss, except to respond that it would seek to have due process before having its rights to do business taken away. According to BUCKHOLZ TRAFFIC, Mr. Xanders' June 17 clarification narrowed the restriction but did not afford BUCKHOLZ TRAFFIC any additional information as to what it was seeking regarding assurance as to Mr. Buckholz' behavior as was requested by Ms. Allen's response.

The record reflects that BUCKHOLZ TRAFFIC was afforded the opportunity to resolve the dispute which arose from BUCKHOLZ TRAFFIC'S total disregard of DEPARTMENT directives, particularly in the face of Mr. Buckholz' attack on a DEPARTMENT employee. As evidenced by the record and reflected in the Administrative Law Judge's findings, and the portions of Ms. Allen's testimony

quoted by the Administrative Law Judge, Ms. Allen intended to take no remedial actions and her demeanor and tone and the demeanor and tone of her letter amply support the Administrative Law Judge's conclusion that it was "as arrogant and unreasonable as the conduct of Mr. Buckholz that precipitated the June 1, 1999, letter." These findings, as many others throughout the Recommended Order, are based upon the Administrative Law Judge having heard the witnesses and observed their attitude and demeanor and his findings are based on his determination of their credibility and thus should not be disturbed. Wash & Dry Vending Co. v. State, DBPR, 429 So. 2d 790, 792 (Fla. 3d DCA 1983).

BUCKHOLZ TRAFFIC'S twenty-fifth exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-sixth exception is to Findings of Fact No. 77 through 79. According to BUCKHOLZ TRAFFIC, Mr. Buckholz and Donald Fullerton testified that Mr. Buckholz went to the job site to meet with a City of Jacksonville representative at the request of the City, and not to meet with the DEPARTMENT. BUCKHOLZ TRAFFIC claims that all of the construction work had been completed and Mr. Buckholz was going to install traffic signal timings, not traffic light timing software, and that Mr. Buckholz stayed off the job for the remaining two and a half months during which construction was completed. BUCKHOLZ TRAFFIC claims there is no indication from the record that Mr. Buckholz even knew that the DEPARTMENT would be on site so there is no basis for the statement that he went there to flaunt anything, and that Mr. Buckholz did not interact with any DEPARTMENT representatives and there was no incident other than the DEPARTMENT calling the police who arrived after Mr. Buckholz had completed his assignment. The traffic signal timing design is an engineering function and Mr. Buckholz felt in his professional opinion that he needed to be there with the City when the system was implemented from both a safety and liability standpoint. This was not part of the construction contract between BUCKHOLZ TRAFFIC and the DEPARTMENT.

The record reflects that on August 11, 1999, Ms. Maxwell met with representatives of the City of Jacksonville to turn on the signal at the Baymeadows project site. There is also testimony that the signal could have been turned on without the assistance of Mr. Buckholz and that the City was uncertain whether the City requested Mr. Buckholz to be there or whether Mr. Buckholz volunteered to be there. The fact remains that in direct contravention of the directive given to BUCKHOLZ TRAFFIC on June 1, 1999, Mr. Buckholz returned to the Baymeadows site. There is competent, substantial evidence in the record to support the Administrative Law Judge's findings regarding failure to request permission for Mr. Buckholz to return to the project, and that Mr. Buckholz knew and understood that he was not to be at the

Baymeadows site in any capacity for the duration of the project. It is within the province of the Administrative Law Judge to make credibility determinations and in that regard he specifically found the testimony supporting Mr. Buckholz' claims "not convincing "

BUCKHOLZ TRAFFIC'S twenty-sixth exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-seventh exception is to Findings of Fact No. 80 through 82. BUCKHOLZ TRAFFIC takes exception to these findings because they fail to include the fact that the DEPARTMENT has not taken this kind of action in any other instance and that the action to revoke qualification is outside DEPARTMENT policy and has been done without prior notice to BUCKHOLZ TRAFFIC that this was a possibility.

BUCKHOLZ TRAFFIC asks the DEPARTMENT to make additional findings that the DEPARTMENT has not previously taken action such as this, that the action to revoke a contractor's certificate of qualification is outside of DEPARTMENT policy, and that its action was taken without prior notice to BUCKHOLZ TRAFFIC.

Pursuant to Section 337.16(2), Florida Statutes, the DEPARTMENT is authorized to revoke a contractor's Certificate of Qualification for good cause. Section 337.16(2), Florida Statutes, provides in pertinent part:

(2) For reasons other than delinquency in progress, the department, for good cause, . . . may deny, suspend or revoke any certificate of qualification. Good cause includes, but is not limited to, circumstances in which a contractor or the contractor's official representative . . . (emphasis added).

The statute clearly contemplates that good cause can be established against the contractor or the contractor's official representative. Section 337.16(2), Florida Statutes, and the DEPARTMENT'S policies support revocation of a contractor's certificate of qualification where good cause exists. There is competent, substantial evidence in the record to support the Administrative Law Judge's findings that in light of Mr. Buckholz' conduct, and the responses of BUCKHOLZ TRAFFIC to the DEPARTMENT'S directives, the DEPARTMENT informed BUCKHOLZ TRAFFIC its qualification to bid was being revoked.

BUCKHOLZ TRAFFIC'S twenty-seventh exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-eighth exception is to the conclusions of law that the DEPARTMENT met its burden of proof in



light of its noted exceptions, citing to Ferris v. Turlington, as the Commissioner of Education, 510 So. 2d 292 (Fla. 1987).

The Administrative Law Judge provided a detailed and well-reasoned Lion of the parties' burdens with citation to authority for his conclusions. The analysis and conclusions of the Administrative Law Judge in this regard are correct and supported in the law.

BUCKHOLZ TRAFFIC'S twenty-eighth exception is rejected.

BUCKHOLZ TRAFFIC'S twenty-ninth exception is to the "conclusions contained in the Certificates of Qualification, Good Cause and recommendation, as there is nowhere in Florida Statutes or regulations that defines 'good cause' to include the basis used by the DEPARTMENT in this case." According to BUCKHOLZ TRAFFIC, the DEPARTMENT failed to identify any of the enumerated justifications for revocation of qualification which are stated in Section 337.16, Florida Statutes, and the applicable Sections 14-22.012 and 14-22.0141, Florida Administrative Code, and there is a significant difference between this case and others where the DEPARTMENT has sought revocation. The DEPARTMENT, according to BUCKHOLZ TRAFFIC, failed to show that Mr. Buckholz or BUCKHOLZ TRAFFIC violated any DEPARTMENT directive, that BUCKHOLZ TRAFFIC has not been afforded due process, and that the DEPARTMENT is without legal justification for the redress it is seeking herein. BUCKHOLZ TRAFFIC argues that while there are both criminal and civil avenues which have been and can be pursued, the remedy sought in this case is not allowed by law. BUCKHOLZ TRAFFIC also argues that it is unreasonable to cripple an entire company for a few isolated instances of conduct, assuming the DEPARTMENT'S version of the facts is accepted.

As previously noted, Section 337.16(2), Florida Statutes, authorizes the DEPARTMENT to revoke a contractor's Certificate of Qualification for good cause:

(2) For reasons other than delinquency in progress, the department? for good cause, . . . may deny, suspend or revoke any certificate of qualification. Good cause includes, but is not limited to, circumstances in which a contractor or the contractor's official representative . (emphasis added).

The statute clearly contemplates that good cause can be established based upon the actions of the contractor's official representative. The record is replete with evidence supporting the DEPARTMENT'S action in issuing its notice of intent to revoke BUCKHOLZ TRAFFIC'S Certificate of Qualification. Mr. Buckholz'

conduct and attitude alone, or in combination with the attitude, actions, and failures to act demonstrated by Ms. Allen, president of BUCKHOLZ TRAFFIC, directly challenging the DEPARTMENT'S authority to remove Mr. Buckholz from projects, and displaying a pattern of ignoring DEPARTMENT directives are well supported by the record and the law.

BUCKHOLZ TRAFFIC'S twenty-ninth exception is rejected.

#### FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1, 2, 3, 5 through 52 and 54 through 82 are supported by the record and are accepted and incorporated as if fully set forth herein.

2. The Findings of Fact in paragraphs 4 and 53 are accepted as corrected and incorporated as if fully set forth herein.

#### CONCLUSIONS OF LAW

1. The DEPARTMENT has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.57, Florida Statutes.

2. The Conclusions of Law in paragraphs 83 through 98 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Administrative Law Judge's Recommended Order, as herein corrected, is adopted. It is further

ORDERED that the qualification to bid of PRECISION TRAFFIC COUNTING, INC., d/b/a BUCKHOLZ TRAFFIC, is hereby revoked for a period of one year from the date of this Final Order. It is further

ORDERED that PRECISION TRAFFIC COUNTING, INC., d/b/a BUCKHOLZ TRAFFIC, is hereby considered non-responsible to bid on any construction or maintenance contract or to act as a material supplier, contractor, or consultant on any DEPARTMENT OF TRANSPORTATION contract or project during the period of revocation above identified.

DONE AND ORDERED this 7th day of July, 2000.

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THOMAS F. BARRY, JR., P.E.  
Secretary  
Department of Transportation  
Haydon Burns Building  
605 Suwannee Street  
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

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