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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

AP

CAS CLOS

JACQUELINE M. LANE,

Petitioner,

vs.

INTERNATIONAL PAPER COMPANY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

OGC CASE NO. 01-0582
DOAH CSAE NO. 01-1490

FINAL ORDER

An Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH") submitted his Recommended Order to the Department of Environmental Protection ("Department") in this formal administrative proceeding. The Recommended Order indicates that copies thereof were served upon *pro se* Petitioner, Jacqueline M. Lane ("Petitioner"), and upon counsel for Co-Respondent International Paper Company ("IPC"). A copy of the Recommended Order is attached as Exhibit A. Exceptions to the Recommended Order were filed with the Department by the Petitioner and IPC. Responses in opposition to the Petitioner's Exceptions were filed on behalf of IPC and the Department. The Petitioner filed a Response to IPC's Exceptions.[1]

The matter is now before the Secretary of the Department for final agency action.

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[1] The Petitioner also filed a Motion to Strike IPC's Response in Objection to the Petitioner's Exceptions. Petitioner's "Motion to Strike," however, is actually a substantive Response in opposition to IPC's prior Response and is not authorized by the Uniform Rules of Procedure. See Rule 28-106.217, F.A.C., limiting the parties to a formal administrative proceeding to the filing of Exceptions and Responses to Exceptions. Consequently, the Petitioner's "Motion to Strike" is not considered in this Final Order.

BACKGROUND

Petitioner is a citizen of the State of Florida who lives on Perdido Bay in Escambia County, Florida. IPC operates a bleach kraft fine paper mill (the "Mill") in Cantonment, Florida, also located in Escambia County. The Mill was formerly operated by Champion International Corporation ("Champion"). In June of 2000, IPC notified the Department it was acquiring Champion as a wholly owned subsidiary. IPC took over operation of the Mill on January 1, 2001, at which time IPC and Champion had fully merged.

On January 19, 2001, IPC submitted an Application for Transfer of a Wastewater Facility or Activity Permit ("Application"), and advised the Department that the permittee name for the wastewater facility at the Mill had been changed from Champion to IPC. Several wastewater permit-related documents were submitted by IPC as part of this Application. The Department processed IPC's Application pursuant to Rule 62-620.340, Florida Administrative Code ("F.A.C."), as a requested transfer from Champion to IPC of Permit No. FL0002526-002-IWF/MT (the "Permit") and related documents.[2] The Permit, issued by the Department in November of 1995, combined the prior separate state and federal operating permits into a single operating permit for the industrial wastewater treatment facility (the "Facility") at the Mill.

On or about April 4, 2001, the Petitioner filed a petition for a formal administrative proceeding challenging the Department's proposed transfer of the Permit and related documents from Champion to IPC (the "Petition"). The matter was referred to DOAH for formal administrative proceedings and DOAH Administrative Law Judge, Charles A.

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[2] The Permit "related documents" are specifically identified by the ALJ in his Finding of Fact No. 9.

Stampelos ("ALJ"), was assigned to preside over the case. A DOAH final hearing was held before the ALJ in Pensacola on June 19-20, 2001.

Several prehearing motions were filed by IPC, including an alternative motion to dismiss the Petition or for more definite statement. The ALJ denied IPC's motion to dismiss the Petition, but required the Petitioner to file a more definite statement. IPC also filed a Motion in Limine, requesting the ALJ to enter an order limiting the issues at the final hearing. After oral argument, the ALJ entered an order granting IPC's Motion in Limine. Consequently, the ALJ limited the evidence at the final hearing to the issue of the ability of IPC to comply with the conditions within the four corners of the existing Permit and related documents. IPC filed an additional prehearing motion requesting the ALJ to enter a summary recommended order, recommending dismissal of the Petition for lack of Petitioner's standing to challenge the proposed Permit transfer. However, the ALJ deferred ruling on this motion until the issuance of this Recommended Order.

RECOMMENDED ORDER

On August 24, 2001, the ALJ entered his Recommended Order in this proceeding. The ALJ concluded that the Petitioner lacks standing under §§ 120.569 and 120.57, Florida Statutes, to challenge the transfer of the Permit from Champion to IPC. The ALJ further concluded that IPC provided reasonable assurance at the final hearing that it has complied with the Permit conditions and related documents since it assumed the operation of the Mill in January of 2001, and that IPC has the ability to comply with the Permit conditions in the future. Nevertheless, the ALJ concluded that the Petitioner did not participate in this administrative proceeding for an "improper purpose" within the purview of §§ 120.569(2)(e) and 120.595(1), Florida Statutes.

RULINGS ON THE PETITIONER'S EXCEPTIONS

Exceptions 1-3

These three Exceptions of the Petitioner object to Conclusions of Law Nos. 72-79, wherein the ALJ concluded that the Petitioner lacks standing under sections 120.569 and 120.57, Florida Statutes, to challenge the transfer of the Permit from Champion to IPC. Nevertheless, I concur with the ALJ's conclusion that the Petitioner lacks standing to maintain this administrative proceeding because she failed to demonstrate that her "substantial interests" would be adversely impacted by the transfer of the Permit. See, e.g., Agrico Chemical Company v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981) (concluding that petitioners lacked standing to be entitled to a formal administrative hearing because they failed to demonstrate that their environmental interests would be substantially affected by the agency action), rev. denied, 415 So.2d 1359 (Fla. 1982).

Petitioner's reliance on the decision in Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840 (Fla. 1993), is misplaced. In Krivanek, the court ruled that the issue of lack of standing could not be raised for the first time on appeal. In this proceeding, however, the standing issue was raised by IPC by the filing of a Motion for Summary Recommended Order with the ALJ before the DOAH final hearing commenced.

Unlike a circuit court action, there is no requirement in an administrative proceeding that an answer or affirmative defenses to a petition must be timely filed by a respondent in order to prevent the petitioner's allegations from being deemed to have been admitted. See Rules 28-106.203 and 28-106.204, F.A.C. Furthermore, the

question of whether IPC's Motion for Summary Recommended Order asserting Petitioner's lack of standing was timely filed is a procedural matter within the sound discretion of the ALJ.

In any event, "standing" may be a moot issue in this case because the Petitioner was afforded a formal administrative hearing and was allowed to present evidence and argument in support of her position. See Hamilton County Comm. v. Dept. of Environmental Regulation, 587 So.2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the standing issue was moot, since the issues were fully litigated in the administrative proceeding below).

Accordingly, the Petitioner's Exceptions 1-3 are denied.

Exceptions 4-24[3]

These miscellaneous Exceptions object to 27 separately numbered findings of fact of the ALJ in the Recommended Order. Most of these challenged factual findings deal with the primary substantive issue in this case, i.e., whether IPC has provided reasonable assurance that it has the ability to comply with the existing provisions of the Permit and related documents as required by Rule 62-620.340(3), F.A.C. The Petitioner essentially disagrees with the weight given by the ALJ to the evidence presented at the DOAH final hearing and the inferences drawn by the ALJ from this evidence. With one minor exclusion, these miscellaneous Exceptions of Petitioner are otherwise rejected for the following reasons:

1. The findings of fact of an administrative law judge may not be rejected or modified, "unless the agency first determines from a review of the entire record, and

[3] The Petitioner's Exceptions inadvertently end with a numbered Exception "21." However, on page five of the Exceptions, the paragraph immediately following numbered paragraph "18" is erroneously numbered as paragraph "16," rather than the correct number "19."

states with particularity in the order, that the findings of fact were not based on competent substantial evidence" (emphasis supplied). Section 120.57(1)(l), Florida Statutes (2000). Accord Belleau v. Dept. of Environmental Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). Thus, if the DOAH record in this case discloses any competent substantial evidence supporting the challenged findings of fact of the ALJ in his Recommended Order, I am bound by such factual findings in preparing this Final Order. Id. at 1123.

2. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Belleau, 695 So.2d at 1307. These evidentiary-related issues are matters that are generally within the province of the administrative law judges, as the triers of the facts. Martuccio v. Dept. of Professional Regulation, 622 So.2d 607, 609 (Fla. 1st DCA 1993); Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

3. Many of these Exceptions cite to portions of the final hearing transcript and exhibits and then set forth various inferences drawn by the Petitioner from the evidence that are different from the inferences drawn by the ALJ in his Recommended Order. A reviewing agency, however, is not free to modify factual findings in a recommended order in an effort to fit desired conclusions of a party by interpreting the evidence in a manner different from the interpretations reasonably made and inferences reasonably drawn by an administrative law judge from the evidence of record. Heifitz, 475 So.2d at 1281-1282.

4. A number of these miscellaneous Exceptions of the Petitioner also cite to selected evidence of record which purportedly supports additional findings of fact

suggested by Petitioner to be appropriate in this case. Petitioner's suggested additional factual findings not contained in the ALJ's Recommended Order must be rejected. In preparing a final order, an agency reviewing a DOAH recommended order has no authority to make independent and supplementary findings of fact suggested in a party's Exceptions. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485 (Fla. 2d DCA 1994); Inverness Convalescent Center v. Dept. of H.R.S., 512 So.2d 1011, 1015 (Fla. 1st DCA 1987). The scope of review of any agency considering a DOAH recommended order is limited to ascertaining whether the administrative law judge's existing findings of fact are supported by competent substantial evidence of record. North Port, Fla., 645 at 487.

5. Even if the record does contain evidence arguably supporting certain findings of fact proposed by the Petitioner which are contrary to some of the ALJ's challenged factual findings, this does not necessarily warrant rejection of those findings of the ALJ. The Florida courts have ruled that, if there is competent substantial evidence supporting an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622 (Fla. 1st DCA 1986).

6. The Petitioner also contends in these Exceptions that some of the ALJ's findings were erroneously based on improper testimony by the expert witnesses, William Evans and Kyle Moore. The Petitioner suggests that the expertise of Mr. Evans and Mr. Moore did not qualify them to render certain opinion testimony relied upon by the ALJ to support some of the challenged findings of fact. See the ALJ's Findings of

Fact 41-43 and 54. However, a review of the transcripts of the final hearing testimony reflects that the *pro se* Petitioner did not raise any objections to such expert testimony of Mr. Evans and Mr. Moore. Therefore, this testimony is now a part of the record in this proceeding and is entitled to be considered by the ALJ and by me, along with any other record evidence. See, e.g., Tri-State Systems, Inc. v. Dept. of Transportation, 500 So.2d 212, 213 (Fla. 1st DCA 1985) (evidence admitted without objection at a DOAH hearing becomes part of the evidence in the case and is usable as proof just as any other evidence), rev. denied, 506 So.2d 1041 (Fla. 1987).

I do agree with a portion of the Petitioner's Exception 8. Based on a review of the entire record in this case, I determine that the ALJ's finding that ECUA has a wastewater treatment plant presently discharging into Perdido Bay is not based on any competent substantial evidence. The ALJ's Finding of Fact 29 is thus modified by the elimination of the second sentence. Nevertheless, I am of the view that this rejected factual finding is a subordinate finding not critical to the disposition of this case, and it is deemed to constitute "harmless error."

I further conclude that the remainder of the ALJ's factual findings challenged in these miscellaneous Exceptions are based on competent substantial evidence of record and adopted in this Final Order. This competent substantial evidence includes, but is not limited to, the expert testimony of William Evans and Kyle Moore at the final hearing and the Department's Exhibits 3-8 admitted into evidence. Mr. Evans is a licensed professional engineer and is the Department's Northwest District Industrial Wastewater and Underground Injection Control Permitting Supervisor. Mr. Moore has a chemical engineering degree from Auburn University and is IPC's Environmental Supervisor.

Both Mr. Evans and Mr. Moore were accepted by the ALJ as experts in the field of environmental engineering.

In view of the above legal authorities and rulings, the Petitioner's Exception 8 is granted in part. The remainder of the Petitioner's Exceptions 4-24 are denied.

RULING ON EXCEPTION OF IPC

IPC's Exception objects to the ALJ's Finding of Fact No. 71 and his Conclusion of Law No. 90. In these two paragraphs of the Recommended Order, the ALJ finds and concludes that the Petitioner did not participate in this administrative proceeding for an "improper purpose" within the purview of §§ 120.569(2)(e) and 120.595(1), Florida Statutes. IPC asks the Department to overrule the ALJ and to assess against the Petitioner the reasonable litigation costs and attorneys' fees incurred by IPC in this proceeding.

Subsection 120.595(1)(b), Florida Statutes, states that the "final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorneys fee to the prevailing party only where the nonprevailing adverse party had been determined by the administrative law judge to have participated in the proceeding for an improper purpose" (emphasis supplied). No such determination was made by the ALJ in this administrative proceeding. Rather, as noted above, the ALJ expressly concluded in his Recommended Order that no such "improper purpose" on the part of the Petitioner was evident in this case.

The question of whether a party intended to "participate in an administrative proceeding for an improper purpose" has been judicially determined to be an issue of fact within the prerogative of the administrative law judge, rather than a conclusion of

law that may be freely rejected by the reviewing agency. Burke v. Harbor Estates Associates, Inc., 591 So.2d 1034, 1037 (Fla. 1st DCA 1991). Accord, Bevan v. Cowart, 17 FALR 319, 326 (Fla. DEP 1994). Moreover, since the 1996 revision of the Florida Administrative Procedure Act, the issue of whether a party has participated in an administrative proceeding for an improper purpose may no longer be a matter within this agency's "substantive jurisdiction" under subsection 120.57(1)(l), Florida Statutes.

Regarding the issue of whether the Petitioner participated in this proceeding for an improper purpose, IPC essentially disagrees with the inferences drawn by the ALJ from the pleadings filed and evidence presented by the Petitioner in this case. However, as discussed above, it is the function of the ALJ, as the finder of the facts in a formal administrative proceeding, "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." Goin v. Commission of Ethics, 658 So.2d 1131, 1138 (Fla. 1st DCA 1995). I decline to substitute my judgment for that of the ALJ on this factual matter by reweighing the evidence presented at the final hearing or by drawing inferences therefrom that are different from those of the ALJ. IPC's Exception is therefore denied.

CONCLUSION

As noted by the ALJ in the Recommended Order, the Petitioner has not demonstrated in this proceeding that she will be adversely affected merely because of the transfer of the Permit from Champion to IPC. I agree with the ALJ that the Petitioner's real complaint in this proceeding is not with the Permit transfer. Petitioner's actual grievance is with the Department's enforcement of the Permit conditions, even

prior to the time that IPC took over the operation of the Mill. The ALJ correctly observed, however, that this is not an "enforcement" proceeding based on allegation of violations of permit conditions by IPC. Instead, this proceeding is an administrative challenge to a proposed transfer of an existing wastewater facility permit.

Rule 62-620.340(3), F.A.C., plainly states that the Department's determination of whether it shall allow a permit transfer "shall be limited solely to the ability of the proposed permittee to comply with the conditions of the existing permit, and it shall not consider the adequacy of these permit conditions." In this case, the ALJ properly found that IPC had even more ability than Champion to comply with the conditions of the Permit because of IPC's considerably greater financial, technical, and staff resources.[4]

It is therefore ORDERED:

A. With the minor modification to Finding of Fact 29 discussed above, the Recommended Order is otherwise adopted and is incorporated by reference herein.

B. The petition for administrative hearing filed by the Petitioner in this proceeding is dismissed with prejudice.

C. IPC's request that its reasonable attorney's fees and costs incurred in this proceeding should be assessed against the Petitioner is denied.

D. The Northwest District Office is directed to approve the transfer of Permit No. FL0002526-002-IWF/MT and related documents from Champion to IPC pursuant to Rule 62-620.340, F.A.C.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal

[4] The ALJ's Finding of Fact 43 includes a finding that IPC is an international paper company having approximately $30 billion dollars in annual gross sales as compared to Champion's approximate $5 billion dollars annual gross sales.

pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 8 day of October, 2001, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

DAVID B. STRUHS
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

CLERK

10/8/01
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Terry Cole, Esquire
Patricia A. Renovitch, Esquire
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Ann Cole, Clerk and
Charles A. Stampelos, Administrative Law Judge
Division of Administrative Hearings
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Tallahassee, FL 32399-1550

and by hand delivery to:

Craig D. Varn, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 9th day of October, 2001.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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