STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

PETER J. PEDICINI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 07-1567**
	)	**DOAH CASE NO. 07-4116**
STUART YACHT CORPORATION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER

On February 20, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order of Dismissal ("ROD") to the Department of Environmental Protection ("Department") in the above captioned proceeding. A copy of the ROD is attached hereto as Exhibit A. The ROD indicates that copies were served to counsel for Petitioner, Peter J. Pedicini, ("Petitioner"); and to counsel for Co-Respondents Stuart Yacht Corporation ("SYC") and the Department. On March 11, 2008, the Petitioner filed Exceptions to the ROD. On March 17, 2008, the Department issued an Order to Show Cause why the Exceptions should not be stricken as untimely filed. Respondent SYC also filed a letter with the Department on March 17, 2008, responding to the Petitioner's Exceptions and requesting entry of an order striking the Exceptions as improper and untimely. The Petitioner responded to the Order to Show Cause on March 27, 2008. On March 28,

2008, the Respondent SYC filed a response to the Petitioner's response. This matter is now before me for final agency action.

BACKGROUND

On August 14, 2007, the Department acknowledged that Respondent SYC qualified to use a Noticed General Permit to remove an existing dock and to construct a new dock in a manmade canal connected to the South Fork of the St. Lucie River in Stuart, Martin County, Florida. A timely petition challenging the proposed agency action was filed by the Petitioner. In his petition for hearing, the Petitioner alleged that the proposed new dock would cause the following injuries to his interests: (a) interference with ingress and egress to the Petitioner's shoreline; (b) interference with the Petitioner's desire to obtain a permit in the future to construct a dock or to "harden" the southern shoreline; and (c) interference with the Petitioner's riparian rights.

The Department referred the matter to DOAH to conduct an evidentiary hearing. In referring the matter to DOAH, the Department expressly reserved its right to object to the Petitioner's standing to initiate this proceeding. The Department subsequently filed a motion to dismiss the petition on the ground that the Petitioner lacked standing. The Department argued that the recent ruling of the circuit court for Martin County in Stuart Yacht Corporation v. Peter Pedicini, Case No. 430025CA630 (October 10, 2007), that Mr. Pedicini had no riparian rights associated with the manmade canal, was dispositive on the issue of the Petitioner's standing in this administrative proceeding. The Martin County circuit court also established that Respondent SYC owns the southern half of the canal bottom. St. Lucie Settlement, Inc., the homeowners association, owns the northern half of the canal bottom. Respondent SYC joined in the Department's motion

to dismiss. The ALJ denied the motion to dismiss, but noted that the denial of the motion did not affect the requirement that the Petitioner affirmatively prove his standing at the final hearing.

On December 11, 2007, Petitioner moved for a continuance of the final hearing based on alleged problems associated with the deposition of certain expert witnesses of Respondent SYC and Petitioner's inability to review certain Department exhibits. Because Petitioner's grounds for a continuance were not related to the standing issue, the ALJ denied the motion for continuance, but informed the parties in the Order Denying Continuance that the subject matter of the hearing on December 19, 2007, would be exclusively whether Petitioner had standing. The ALJ conducted the December 19, 2007, hearing, and subsequently issued his ROD on February 20, 2008.

THE RECOMMENDED ORDER OF DISMISSAL

In the ROD, the ALJ ultimately concluded that the evidence was insufficient to prove that the Petitioner had a substantial interest that could be unreasonably interfered with if the proposed permit were issued. (ROD, Conclusion of Law 23). The ALJ found that the Petitioner's testimony about his past use of the canal was inconsistent. (ROD, Finding of Fact 13). The Petitioner testified that he moored his boat in the canal once in 1995; that he boated into the canal to fish on several occasions; and that at least twice when he attempted to enter the canal by boat he was denied access by representatives of SYC. However, in a deposition taken before the hearing, the Petitioner said he had never attempted to use the canal. (ROD, Finding of Fact 13). The ALJ further found that the only testimony presented by the Petitioner to support his claim that the

proposed permit would interfere with his navigation, fishing, and desire to obtain a dock permit in the canal was the following:

> I couldn't get a boat in there with that proposed dock in the center line of the canal right on their side of the canal. It would be 150 feet long. It would be a huge Wall of China. My neighbor and I couldn't get to our shoreline.

(ROD, Finding of Fact 14).

Therefore, the ALJ determined that the evidence presented was insufficient to prove that the Petitioner would be unable to navigate into the canal in a small boat or to fish in the canal if SYC's proposed dock is constructed. The evidence was also insufficient to prove that the Petitioner would be unable to construct any kind of dock for any kind of watercraft if SYC's proposed dock is constructed. The ALJ further concluded that the Petitioner's interest in constructing a dock in the future was speculative. In addition, the Petitioner did not present any evidence to support the claim that he would be prevented from hardening his shoreline. (ROD, Finding of Fact 15, Conclusions of Law 21, 22, 23).

The ALJ found that because the canal is artificial, having been created by dredging, the Petitioner has no riparian rights associated with the canal. That was the holding of the Martin County circuit court judgment. (ROD, Finding of Fact 4). In addition the ALJ concluded, based on other case law, that persons whose property abutted an artificial water body had no riparian rights; and such persons could not prevent the owner of the bottom from exercising control of its property. (ROD, Conclusion of Law 18). Therefore, the ALJ concluded that the Petitioner's interest in preserving the opportunity to navigate over the bottom of the canal owned by Respondent SYC was not a legally cognizable interest. (ROD, Conclusion of Law 19).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

The following rulings on the Exceptions to the ROD are made in light of the standards governing the administrative review of DOAH recommended orders by agencies having the authority and duty to enter final orders. Subsection 120.57(1)(l), Florida Statutes, provides that an agency final order "may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction." Subsection 120.57(1)(l) also prescribes that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. (2007); Wills v. Florida Elections Commission, 955 So.2d 61 (Fla. 1st DCA 2007); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) (holding that agency may not reject an ALJ's findings of fact, which are supported by competent, substantial evidence, nor is it authorized to reweigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret the evidence).

A reviewing agency has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record in this case discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by

such finding in this Final Order. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994). Under Subsection 120.57(1)(k), Florida Statutes, a reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." § 120.57(1)(k), Fla. Stat. (2007).

RULINGS ON EXCEPTIONS

Preface

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991). The ALJ's ROD found that the Petitioner did not satisfy his burden of proving standing to maintain the administrative hearing. The Petitioner's Exceptions did not contest those key factual findings relating to his lack of standing.

Petitioner's Response to the Order to Show Cause

As noted in the Order to Show Cause, the Petitioner's Exceptions to the ROD were not timely filed. The deadline for filing the written exceptions with the Department's agency clerk expired at the end of the Department's normal business hours on March 6, 2008. Nevertheless, the Florida case law holds that the time period for filing exceptions to a recommended order is not jurisdictional and may be waived by the agency upon a showing of "excusable neglect" or other sufficient legal cause by the party belatedly filing the exceptions. See, e.g., Hamilton County Board of County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1390 (Fla. 1st DCA 1991). On March 27, 2008, the Petitioner responded to the Order to Show Cause. The Petitioner's response was accompanied by affidavits that contain sufficient legal cause to waive the time period and accept the Exceptions as timely filed.

Ruling on the Petitioner's Exceptions

The Petitioner's "written exceptions" contain seven paragraphs. The paragraphs correspond to seven attachments to the "written exceptions." The Petitioner then explains that "[t]hese enclosed facts were denied to be considered by Judge Cantor (sic) for he limited the hearing to my standing." The Petitioner's "written exceptions" and seven attachments appear to be an attempt to supplement the record of the DOAH hearing with information that was either excluded by the ALJ or not presented at the time of the hearing. As noted in the standards of review of DOAH recommended orders, I have no authority to make independent or supplemental findings of fact. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994). In addition, the "written exceptions" do not fully comply with Subsection 120.57(1)(k),

Florida Statutes, which provides that a reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." § 120.57(1)(k), Fla. Stat. (2007). Therefore, to the extent that any of the seven paragraphs may be deemed to comply with Subsection 120.57(1)(k), Florida Statutes, the "written exceptions" are denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the ROD, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order of Dismissal (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. Petitioner, Peter J. Pedicini's, petition is dismissed.

C. Respondent, Stuart Yacht Corporation is granted use of a Noticed General Permit as determined in File No.: 43-0161277-002.

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 pursuant to Rules 9.110 and 9.190, 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 15th day of May, 2008, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
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.

Kay Buchanan
CLERK

5/15/08
DATE

CERTIFICATE OF SERVICE

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

Paul B. Erickson, Esquire
Alley, Maass, Rogers & Lindsay, P.A.
340 Royal Poinciana Way, Suite 321
Palm Beach, FL 33480

Guy Bennett Rubin, Esquire
Rubin & Rubin
Post Office Box 395
Stuart, FL 34995

Claudia Llado, Clerk and
Bram D. E. Canter, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Amanda Gayle Bush, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 16th day of May, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

For FRANCINE M. FFOLKES
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242