

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

FILED
08 JUN 19 PM 2:07
DIVISION OF
ADMINISTRATIVE
HEARINGS

LAMAR OUTDOOR ADVERTISING-
LAKELAND,

Petitioner,

vs.

DOAH CASE NO.: 07-5457
DOT CASE NO.: 06-018

DEPARTMENT OF TRANSPORTATION,

Respondent.

FINAL ORDER

On January 30, 2006, the Department of Transportation (Department) issued a Notice of Intent to Revoke Sign Permit to Lamar Outdoor Advertising-Lakeland (Lamar) for sign permit number 7478, tag number BH378. Lamar responded with a Petition for Formal Administrative Hearing to challenge the decision. On May 1, 2006, the Department issued an Amended Notice of Intent to Revoke Sign Permit, and Lamar filed a petition in response. On July 31, 2007, the Department issued a final Notice of Intent to Revoke Sign Permit for Noncompliance (Notice) replacing the prior notices. In response, Lamar filed a 2nd Amended Petition for Formal Administrative Hearing (Petition), which was referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge and a formal hearing.

A formal administrative hearing was held in these cases in Tallahassee, Florida, on February 8, 2008, before R. Bruce McKibben, a duly appointed Administrative Law Judge.

Appearances on behalf of the parties were as follows:

For Petitioner: Gerald S. Livingston, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
215 South Monroe Street, Suite 200
Tallahassee, Florida 32301

For Respondent: Susan Schwartz, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

At the hearing, the Department presented the testimony of Lynn Holschuh and Andre Pavlov, and Lamar presented the telephonic testimony of David Henry. Joint exhibits 1 through 6 were admitted into evidence. The transcript from the February 8, 2008, hearing was filed February 22, 2008. The Department and Lamar filed their respective Proposed Recommended Orders on March 17, 2008. On March 26, 2008, Judge McKibben issued his Recommended Order. On April 9, 2008, the Department filed its exceptions to the Recommended Order. Lamar filed its exceptions to the Recommended Order on April 10, 2008, and the Department filed its response to Lamar's exceptions on April 18, 2008.

STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in his Recommended Order, the issue presented was "whether there was a structural change in Petitioner's sign, and whether the Department of Transportation's Notice of Intent to Revoke Sign Permit for violating Florida Administrative Code Rule 14-10.007(2) should be affirmed."

EXCEPTIONS TO RECOMMENDED ORDER

The Department takes exception to Findings of Fact 5, 7, and 10 in the Recommended Order.

Pursuant to Section 120.57(1)(l), Florida Statutes, an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, it cannot do so unless the agency first determines from a review of the entire record, and states with particularity in its final 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 the essential requirements of law. Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent, substantial evidence in the record to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Stokes v. State, Bd. of Prof'l Eng'rs, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

The Department's first exception addresses Finding of Fact 5 and contends that the last sentence of the finding and the attendant footnote should be stricken because there was no testimony or suggestion at the hearing that the sign was rebuilt by its prior owner, Prime Outdoor, pursuant to any settlement agreement. Review of the record in its entirety, and particularly the Settlement Agreement admitted as Joint Exhibit 4, confirms that Prime Outdoor was not a party to the agreement. The Department's exception is well-taken. Finding of Fact 5 is modified to delete its last sentence and the attendant footnote.

The Department next takes exception to Finding of Fact 7 with respect to the Administrative Law Judge's finding that: "Notice of a violation was not issued until 2006."

Review of the record in its entirety, and particularly Joint Exhibit 4, demonstrates that this finding is not supported by competent, substantial evidence. The undisputed evidence clearly established that a notice of violation was issued to Lamar for the subject sign on December 30, 2004. (Joint Exhibit 4, page 6) Pursuant to the Settlement Agreement (Joint Exhibit 4), this notice was withdrawn. Subsequently, Notices of Intent to Revoke Lamar's permit for the rebuilt sign were issued on January 30 2006, May 1, 2006, with a final notice being issued on July 31, 2007. Finding of Fact 7 is modified accordingly.

The Department's last exception goes to Finding of Fact 10 which sets out two reasons why A-frame construction was not used to rebuild the subject sign. The Department takes issue with this finding for a number of reasons including the assertion that no evidence or testimony was presented establishing why the prior owner of the sign, Prime Outdoor, did not use the A-Frame construction method to rebuild the sign. While the instant record does contain witnesses' speculation as to why the sign was not rebuilt with A-frame construction, there is no competent evidence regarding why Prime Outdoor did not use the method. Finding of Fact 10 is rejected.

Lamar takes exception to Conclusions of Law 23 through 27 in the Recommended Order.

Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes, provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of

administrative rule is as or more reasonable than that which was rejected or modified.

After consideration of Lamar's exceptions to Conclusions of Law 23 through 27, the Department finds that these Conclusions of Law comport with the Department's interpretation and application of controlling statutes and rules over which it has substantive jurisdiction and are otherwise fully supported in law. Accordingly, Lamar's exceptions to Conclusions of Law 23 through 27 are rejected.

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 4, 5 as modified, 6, 7 as modified, 8, 9, and 11 through 16 are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.
2. The Conclusions of Law in paragraphs 17 through 27 of the Recommended Order are fully supported in law, and are adopted and incorporated as if fully set forth herein.

ORDER

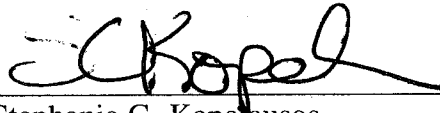
Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Lamar Outdoor Advertising-Lakeland's sign permit number 7478 for tag number BH378 is revoked.

ORDERED that Lamar Outdoor Advertising-Lakeland shall remove the outdoor advertising sign it maintains under sign permit number 7478, tag number BH378, within 30 days of this Order. It is further

ORDERED that should Lamar Outdoor Advertising-Lakeland fail to remove the sign within the next 30 days, the Department of Transportation, or its contractor, will remove the sign without further notice and the cost of removal is hereby assessed against Lamar Outdoor Advertising-Lakeland, pursuant to Section 479.10, Florida Statutes.

DONE AND ORDERED this 18th day of June, 2008.



Stephanie C. Koperousos
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2008 JUN 18 AM 8:16

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY 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 9.100(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.

Copies furnished to:

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