

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

FILED
2000 FEB 18 A 10:54
DIVISION OF
ADMINISTRATIVE
HEARINGS

SG OUTDOOR,

Petitioner,

vs.

DOT CASE NO.: 05-395
DOAH CASE NO.: 09-1551

DEPARTMENT OF TRANSPORTATION,

Respondent.

FINAL ORDER

On July 9, 2004, Respondent, Department of Transportation ("Department"), issued a Notice of Violation to Petitioner, SG Outdoor ("SG"), alleging that SG did not have the permission of the owner of the sign site to maintain a sign that was permitted under Department sign permit tag number AU557. On August 10, 2004, the Department issued a letter to SG revoking Sign Permit tag number AU557. Subsequently, Notices of Violation Illegally Erected Sign were issued by the Department on October 6, 2005, for the original wooden sign previously permitted by the Department under tag number AU557 and a two sided metal monopole sign that had been erected without a permit. On October 26, 2005, SG requested a formal administrative hearing.

A formal administrative hearing was held on September 29, 2009, before R. Bruce McKibben, a duly appointed Administrative Law Judge (ALJ). Appearances on behalf of the parties were as follows:

For Petitioner: Vincent Stona, pro se
SG Outdoor
36181 East Lake Road, Suite 185
Palm Harbor, Florida 34685

For Respondent: Susan Schwartz, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

At the hearing, SG called two witnesses, Vincent A. Stona and Gary Barbosa, and SG Exhibits 1 through 28 were admitted into evidence. The Department put on the testimony of Outdoor Advertising Administrator Lynn Holshcuh and Department Exhibits 5 through 14 were admitted into evidence.

The parties timely filed proposed recommended orders which were duly considered by the Administrative Law Judge in preparation of his Recommended Order which was issued on November 19, 2009. The Department timely filed exceptions to the Recommended Order on December 4, 2009.

STATEMENT OF THE ISSUES

The issues as stated by the Administrative Law Judge in his Recommended Order were:

- (1) Whether Petitioner [SG] breached its contract with Respondent [Department] by not making payments for a sign lease, thereby resulting in the sign permit becoming invalid; and
- (2) Whether Petitioner constructed a roadside sign illegally, i.e., without a permit.

EXCEPTIONS

The Department takes exception to findings of fact in paragraphs 5 and 12 of the Recommended Order. Pursuant to Section 120.57(1)(l), Florida Statutes (2009), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, the agency cannot do so unless it 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 on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Department 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 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 Professional Engineers, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

The Department's first exception is directed to that portion of Paragraph 5 of the Recommended Order which states that "[t]he Original Sign was purchased by Petitioner in 1991 and was located on the Grimes property." The Department contends that there is no record evidence to support this finding and that the record shows that SG's owner testified that he had only been in the outdoor advertising business since 1997; that when he purchased the sign he decided to update the lease; and that the lease between SG and Ona Grimes was signed on June 23, 1999. While acknowledging that the date of acquisition of the sign is not a material fact, the Department looks to this record evidence and asserts that Paragraph 5 should be amended to reflect that the sign was purchased between 1997 and 1999. After review of the

record in its entirety it is determined that there is no record evidence to support the finding that SG purchased the sign in 1991. The Department's exception is well-taken and Paragraph 5 of the Recommended Order is modified to reflect that the sign was purchased by SG at some time between 1997 and 1999.

The Department's second exception is directed to that portion of Paragraph 12 of the Recommended Order which finds that there was no evidence as to whether SG attempted to make a lease payment at any time. The Department argues that the finding should be amended to reflect that SG did not make rental payments on the sign to the Department on the basis of the record evidence. The record reflects that in January, 2004, SG's rental check was returned by Anna Grimes with a note explaining that payment needed to be sent to the Department and that SG's owner, Vincent Stona, when asked why he did not send a check to the Department, testified that he believed the Department would not accept rental payments. Again, based upon review of the entire record, the Department's exception is granted and Paragraph 12 of the Recommended Order is modified to provide that Mr. Stona did not make rental payments on the sign to the Department.

The Department next takes exception to conclusions of law set out in paragraphs 27, 29, 31, and 32 of the Recommended Order. Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2009), 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.

Turning first to Paragraph 27 of the Recommended Order the Department's third exception takes issue with the legal conclusion that the agency action giving rise to this proceeding was the intended revocation of a permit. As the Department contends, the record clearly reflects that the charging documents in this case were the October 6, 2005, notices of violation for the maintaining of outdoor advertising signs without a permit in violation of Section 479.07(1), Florida Statutes. The Department's exception is granted and Paragraph 27 of the Recommended Order is modified to provide that as the party issuing the violation notices, the Department bears the burden of proof by a preponderance of the evidence that the allegations in the charging documents are correct.

The Department's fourth exception goes to the last sentence of paragraph 29 of the Recommended Order where the ALJ concluded that the Department "seems to have abandoned its initial Notice of Violation" relating to the original wooden structure and issued on July 9, 2004. Essentially, the Department argues that there was no abandonment of the Notice of Violation. When SG failed to timely file a petition for an administrative hearing, SG was notified by letter dated August 10, 2004, that its permit had been revoked. In other words, SG's failure to timely file a petition to challenge the July 9, 2004, Notice of Violation resulted in the permit revocation becoming final agency action. See Whiting v. Florida Dept. of Law Enforcement, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003)(late filing of petition presumed to constitute waiver of rights). The Department's exception is granted and Paragraph 29 of the Recommended Order is modified to delete the last sentence in the paragraph.

In its fifth exception the Department looks to paragraph 31 of the Recommended Order and challenges the ALJ's conclusion that the Department failed to afford SG a cure period as required by Section 479.05, Florida Statutes, and that this failure prevented the Department from carrying its burden of proving SG's non-compliance with the lease for the original wooden sign. The Department contends that the cure provision of Section 479.05, Florida Statutes, is inapplicable to this matter because it is not a revocation proceeding. The Department's exception is well-taken. Section 479.05, Florida Statutes, addresses the denial or revocation of licenses and provides:

The department has authority to deny or revoke any license requested or granted under this chapter in any case in which it determines that the application for the license contains knowingly false or misleading information or that the licensee has violated any of the provisions of this chapter, unless such licensee, within 30 days after the receipt of notice by the department, corrects such false or misleading information or complies with the provisions of this chapter.

The Notices of Violation at issue in this case do not seek the revocation or denial of a license for SG's wooden sign but is instead grounded upon SG's maintenance of the sign **without** a permit in violation of Section 479.07(1), Florida Statutes. As discussed next above, the record confirms that SG's permit for the wooden sign was revoked on August 10, 2004. The sign therefore, has no valid permit.

Although, the Department carried its burden to prove that the sign was maintained without a valid permit and is therefore subject to removal as an illegal sign, the Department will, in light of the confusion surrounding the Department's earlier expressed intention to acquire the sign, reinstate the permit for the sign upon payment of back permit fees and any lease payments determined to be due and owing. Upon reinstatement of the permit, the

Department has the option to leave the sign in place and assume the leasehold interest or acquire the sign pursuant to Section 479.24, Florida Statutes. Paragraph 31 of the Recommended Order is modified accordingly.

The Department's final exception is directed to Paragraph 32 of the Recommended Order in which the ALJ concludes that the Department should pay just compensation to SG for its original wooden sign less any lease payments due and owing. After noting that the ALJ recommended that the Department reverse the revocation of the permit for SG's original wooden sign and pay SG just compensation for the sign, the Department argues:

Assuming the revoked permit was reinstated, removal and compensation would not be required. The Department would retain the option of either paying for removal of the sign or leaving the sign in place by assuming the leasehold interest. Paragraph 32 should therefore be amended to reflect that if the permit is reinstated, SG Outdoor would be required to make back lease payment and back permit fees. Further, if the Department chose to remove the sign, just compensation should be paid.

As a result of the disposition of the Department's exception to Paragraph 31 of the Recommended Order, the ALJ's conclusion that the Department must pay just compensation for the sign to SG must be rejected. Paragraph 32 of the Recommended Order is modified accordingly.

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 through 11, 12 as modified, and 13 through 24 of the Recommended Order 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 25, 26, 27 as modified, 28, 29 as modified, 30, 31-32 as modified, and 33 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

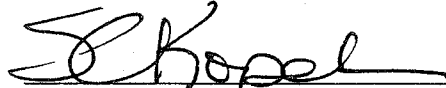
ORDERED that upon SG Outdoor's payment to the Department of Transportation of back permit fees and lease payments, the Department of Transportation will reinstate the permit for the original wooden sign previously permitted by the Department of Transportation and identified in Notice of Violation Illegally Erected Sign Number AU557a. If SG Outdoor fails to make such payment within 60 (sixty) days of the date of this Final Order, the sign permit will not be reinstated and SG Outdoor shall remove the sign. It is further

ORDERED that should SG Outdoor fail to make payment as above ordered and fail to remove the sign, the Department of Transportation, or its contractor, will remove the sign without further notice and the cost of removal is hereby assessed against SG Outdoor pursuant to Section 479.105(3), Florida Statutes. It is further

ORDERED that SG Outdoor shall remove the outdoor advertising sign identified in Notice of Violation Illegally Erected Sign Number AU557a#2 within 30 (thirty) days of this final order. It is further

ORDERED that should SG Outdoor fail to remove the sign, the Department of Transportation, or its contractor, will remove the sign without further notice and the cost of removal is hereby assessed against SG Outdoor pursuant to Section 479.105(3), Florida Statutes.

DONE AND ORDERED this 16 day of February, 2010.



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

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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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