Florida Department of Environmental Protection

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

Rick Scott
Governor

Jennifer Carroll
Lt. Governor

Herschel T. Vinyard, Jr.
Secretary

February 1, 2011

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: M.A.B.E. Properties, Inc.
DOAH Case No.: 10-2334
DEP/OGC Case No.: 08-1823

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Petitioners' Exceptions to Recommended Order
3. DEP and BTIITF's Response to the Petitioner's Exceptions

Please note that there are three separate documents attached as one document. I would be happy to provide the documents as individual files via e-mail if that would be more convenient for you.

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

Attachments

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

M.A.B.E PROPERTIES, INC.,

Petitioner,

v.

OGC Case No. 08-1823
DOAH Case No. 10-2334

DEPARTMENT OF ENVIRONMENTAL PROTECTION; BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND; SHANNON SUE, LLC; JUPITER HILLS LIGHTHOUSE MARINA, INC.; and JOHN and BARBARA CANONICO as TRUSTEES of the BARBARA CANONICO REVOCABLE TRUST,

Respondents.
_____/

FINAL ORDER

On November 4, 2009 an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP" or "Department") in this proceeding. Copies of the Recommended Order were served upon counsel for DEP, Respondents Shannon Sue, LLC, Jupiter Hills Lighthouse Marina, Inc., and John and Barbara Canonico as Trustees of the Barbara Canonico Revocable Trust ("Respondents"), and the Petitioner, M.A.B.E. Properties, Inc. ("Petitioner"). A copy of the Recommended Order is attached as "Exhibit A."

The Petitioner filed Petitioner's Exceptions to Recommended Order with the DEP agency clerk on November 19, 2010. On November 29, 2009, counsel for DEP filed its Department of Environmental Protection and Board of Trustees of the Internal Improvement Trust Fund's

Response to the Petitioners' Exceptions in opposition to the Petitioner's exceptions. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

This case involves an administrative challenge by the Petitioner to a Consent Order ("Consent Order") entered by the Department and the Respondents to address certain violations at Respondents' commercial marina ("Marina") in Tequesta, Florida. The Marina was constructed under a Consolidated Environmental Resource Permit ("Permit") issued by the Department to Respondent Jupiter Hills Lighthouse Marina, Inc. and a Sovereignty Submerged Lands Lease ("Lease") issued to the upland owner at the time, Respondents Barbara Canonico and John M. Canonico, as Trustees of the Barbara Canonico Revocable Trust. The Consent Order was entered April 1, 2010, and included several violations, assessed penalties for those violations, and ordered the Respondents to undertake corrective actions to come into compliance with the Permit, the Lease, and Department rules concerning the proper storage and disposal of petroleum products and hazardous substances and the assessment and cleanup of contaminated sites.

On March 31, 2010, Petitioner, an adjacent property owner, filed its Petition for Formal Administrative Hearing ("Petition") pursuant to Chapter 120, Florida Statutes, challenging the Consent Order. The Department referred the matter to DOAH on April 26, 2010, with a request for assignment of an Administrative Law Judge ("ALJ") to conduct a hearing on the Petition. By Amended Notice of Hearing dated May 20, 2010, a final hearing was scheduled and conducted on August 18 and 19, 2010, in West Palm Beach, Florida. The ALJ concluded in his Recommended Order ("RO") that the Consent Order was a reasonable exercise of the Department's enforcement discretion and should be approved.

THE STANDARD OF REVIEW OF CONSENT ORDERS

A consent order is a consensual administrative order authorized under §120.57(4), Florida Statutes, that is agreed to by the Department and one or more respondents. *Abbanat v. Reynolds and the Dep't of Envtl. Regulation*, 9 FALR 1989 (1987). DEP consent orders are of two classes. The first is a license or permit substitute that serves "as authorization for a permittable type of activity that has not yet been conducted or is ongoing." *Sarasota County v. Dep't of Envtl. Regulation and Falconer*, 9 FALR 1822, 1823 (1986). The second is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. *Williams v. Moeller and Dep't of Envtl. Regulation*, 8 FALR 5537, 5541 (1986); *North Fort Myers Homeowners, Assoc., Inc. v. Dep't of Envtl. Regulation and Florida Cities Water Co., Inc.*, 14 FALR 1502 (1992). Consent orders that are permit substitutes are treated as if they were permits, and the Department must review those consent order as such. *Abbanat*; *Williams* at 5542. When a substantially affected third party challenges an enforcement consent order, the appropriate standard of review is whether the Department abused its enforcement discretion in agreeing to the settlement, and the Department has the burden of proving the consent order is a reasonable exercise of that discretion. *Falconer* at 1825. The abuse of discretion standard does not turn on whether the consent order embodies the best possible settlement or even whether a better settlement could have been reached, but, rather, whether the settlement that was reached was reasonable under the circumstances. It merely needs to be appropriate given all of the factors that must be considered by the agency in reaching an agreement. If the Department is found not to have abused its discretion, the consent order is adopted; if that burden of proof is not met, then the consent order is voided. As a consensual document, the Department cannot compel the respondent to accept unilateral changes to a consent order. *West Coast Regional*

Water Supply Authority v. Central Phosphates, Inc., 11 FALR 1917, 1938 (1988). If the consent order is voided, the parties must re-enter negotiations before a replacement consent order could be entered.

In this case, Petitioner M.A.B.E. has challenged the Consent Order on two general grounds: the Consent Order did not resolve all of the Respondents' potential violations, and the penalty in the Consent Order was calculated improperly and is not sufficiently large to ensure future compliance. As to the first ground, "the decision to initiate enforcement is a matter that rests within the enforcement discretion of the Department." *North Fort Myers* at 1504. However, Petitioner is not without a remedy if it believes there are violations not resolved in the Consent Order that should be pursued. The citizen suit provision in §403.412(2), Florida Statutes, authorizes any citizen of the state to maintain an action for injunctive relief for violation of the state's environmental laws. *West Coast.*

As to Petitioner's second ground, when, as here, the corrective actions require a respondent to comply with the law -- including permits, leases, Department rules, or statutes -- the adequacy of the penalty is a matter solely in the enforcement discretion of the Department, because the corrective actions are per se reasonable and the amount of the penalty in that circumstance does not affect the substantial interests of the petitioner. In *Falconer*, I held that

> When a consent order allows a project built without a permit to remain, the threshold question in determining the reasonableness of the consent order is whether the project would have been entitled to a permit had the respondent applied for one. *If the respondent or the Department can carry the burden of proving that a permit could have been obtained based upon the reasonable assurance standard, then entry of a consent authorizing the project to remain is per se reasonable.* Although the Department, in the exercise of its enforcement discretion, may find it appropriate to impose additional requirements, such as imposition of penalties, recovery of costs or even removal of the installation, those other requirements are not the proper subject of review by third parties in a Section 120.57(1), proceeding, since they do not affect the substantial interests of

> third parties. *Those interests are limited to the environmental impacts of the projects themselves*. (Emphasis supplied.) *Id.* at 1823.

Although Falconer concerned an unpermitted structure, the same reasoning applies to all enforcement consent orders: while a petitioner's substantial interests are affected by the adequacy of the corrective actions, if the corrective actions require the respondent to comply with the Department's permits, leases, orders, rules, or statutes and does not authorize the respondent to remain out of compliance with those requirements, then the consent order is *per se* reasonable. In a consent order that is per se reasonable, the penalties will not affect the petitioner's substantial interests. Only when the consent order authorizes actions that are not in compliance with the law, such as allowing an unpermittable structure to remain in place, can the amount of the penalty be challenged. If the Department settles a violation under that circumstance, then factors such as the "nature of the violation, the sufficiency of any penalty, the availability of Department resources, Department enforcement priorities and the harm that might result from restoration" can be considered in determining whether the Consent Order is an appropriate exercise of the Department's enforcement discretion. *Falconer* at 1825.

In addition, I held in *North Fort Myers* that

> The adjudication of civil penalties in a Department enforcement action is a matter within the exclusive province of the courts under Section 403.141, Florida Statutes. The Department has chosen here, as in many other cases, to exercise its enforcement discretion as well as its authority to settle cases under Section 120.57(3), Florida Statutes, by agreeing to a settlement amount in lieu of initiating a circuit court complaint for civil penalties. Since a DOAH [ALJ] lacks the authority to recommend imposition of a specific penalty, it would not be appropriate for the [ALJ] to do in effect the same thing by reviewing the adequacy of a settlement amount. *Id.* at 1504.

Thus, a petitioner can only challenge a penalty assessment in a Consent Order when it is used by the Department as part of the justification for allowing a respondent to remain out of compliance with the Department's permits, leases, orders, rules, or statutes.

In this case, Petitioner M.A.B.E. did not take exception to the ALJ's findings that the corrective actions in the Consent Order were sufficient to bring the Respondents back into compliance with the rules, Permit, and Lease governing the violations identified in the Consent Order, other than alleging that the Consent Order did not cover all the potential violations or that the Department would not be sufficiently diligent in enforcing the Consent Order. Thus, Petitioner has by implication acquiesced in the ALJ's conclusion that the corrective actions in the Consent Order are reasonable and has foreclosed its ability to challenge the adequacy of the penalties. Even if Petitioner had challenged the adequacy of the corrective actions, once the ALJ found they were reasonable, the penalties were no longer an issue in the proceeding.

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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 on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2010); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of

evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

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. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Considerable deference should be given to agency interpretation of statutes and rules within their regulatory jurisdiction, and such interpretations should not be overturned unless "clearly erroneous." *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of their own statutes and rules do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *Suddath Van Lines, Inc v. Dep't of Envtl. Protection*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2010). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

RULINGS ON PETITIONER'S EXCEPTIONS

Exception 1. I accept the Petitioner's exception to the ALJ's findings in the Preliminary Statement on page 2 of the RO, and in paragraph 3 of the Findings of Fact that the Petitioner is a limited liability company. The record shows that Petitioner is a corporation. (Joint Pretrial Stipulation, page 5, paragraph f.8.) The Department agrees with this exception and adds that the ALJ also incorrectly uses the designation "LLC" in the style of the RO. There is no competent substantial evidence to support the ALJ's finding that Petitioner is an LLC.

Exception 2. I reject Petitioner's exception to the ALJ's finding in the Preliminary Statement on page 3 of the RO that the Petition sought, in part, "to incorporate other alleged or known violations in the calculation of the penalty." The Department correctly points out that on page 9 of the Petition, the Petitioner sought to modify the Consent Order because it did not "address all known violations" and the "penalties are not sufficient to deter future violations." Thus, the ALJ's finding is supported by competent substantial evidence.

Exception 3. I reject Petitioner's exception to the ALJ's failure to find in the Preliminary Statement on page 4 of the RO that the ALJ also granted Petitioner's request for Official Recognition of Sections 403.121, 403.161, 403.141, 376.311, 376.308, 376.305, 253.305, and 373.414, Florida Statutes. The ALJ's failure to include this information does not affect the decision in the RO, and I do not have the authority to supplement the record with additional findings.

Exception 4. I accept Petitioner's exception to the ALJ's finding in paragraph 3 of the RO that Mr. Brennen lives adjacent to the marina. The ALJ's finding is not supported by competent substantial evidence.

Exception 5. Petitioner takes exception to the ALJ's finding in paragraph 7 of the Findings of Fact of the RO that the stormwater exfiltration system was to be certified as complete "before the permit became effective." The Department agrees with Petitioner in this exception that the permit required certification prior to operation or use of the permitted docks, which is clearly stated in Specific Condition 14 of the Permit. Since the finding is not supported by competent substantial evidence, I accept this exception.

Exception 6. I accept Petitioner's exception to the ALJ's paraphrase of the April 24, 2009, letter from the Department to the Canonicos. The paraphrase of the letter is not supported by competent substantial evidence. The Petitioner is correct, and the Department agrees, that the letter actually states "commercial fishing and commercial dive boats moored at the marina is prohibited."

Exception 7. This exception has two parts. In the first, Petitioner takes exception to that portion of paragraph 21 in which the ALJ found that Mr. Keirn relied in part on the Settlement Guidelines for Civil and Administrative Penalties when calculating the penalty total of $30,500.00. Petitioner goes on to state that the Settlement Guidelines were used to calculate the penalty for the violation of "Specific Condition 24 of the permit which prohibits engine repair, discharges of oil and grease, and hull scraping." Since that penalty was part of the total penalty, the ALJ's statement that the Settlement Guidelines were used "in part" is correct and supported by competent substantial evidence. Such evidentiary-related matters are wholly within the province of the ALJ, as the "fact-finder" in an administrative proceeding. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). This part of the exception is rejected.

In the second part, Petitioner asserts that the ALJ misstates the total penalty as $30,500.00 rather than $30,000.00 plus $500.00 in expenses. The Department agrees with Petitioner that $30,000.00 is the correct total. Since the ALJ's misstatement is unsupported by competent substantial evidence, I accept this part of the exception.

Exception 8. I accept Petitioner's exception to the ALJ's finding in paragraph 25 of the Findings of Fact of the RO that the Consent Order resolved "all outstanding violations." The Department agrees that this characterization is not supported by competent substantial evidence. In fact, the Consent Order states in its first paragraph that it is entered "to reach settlement of certain matters at issue between the Parties."

Exception 9. The Petitioner takes exception to paragraph 28 of the RO where the ALJ found that "[b]ecause the Department's primary goals when resolving enforcement actions are remediation and avoiding protracted litigation rather than collecting fines, it is not unusual for a final consent order to have a lower civil penalty that that originally proposed." The Petitioner asserts that no evidence was presented that those are the goals of the Department in every enforcement case, but the competent substantial record evidence does support the ALJ's findings and reasonable inferences from that evidence. (Keirn T. pp. 27-29; 63-64, 132, 160; Andreotta T. p. 247; Long T. pp. 224-226). Thus, the exception is denied.

Exception 10. This exception has two parts. In the first, Petitioner takes exception to paragraph 30 of the RO in which the ALJ found that a Department employee testified that the Canonicos' obligation to submit a SAR Addendum was temporarily stayed "until this proceeding has been concluded." Petitioner correctly points out, and the Department agrees, that the testimony was actually that in the absence of an enforceable Consent Order, which would act as a Cleanup Agreement Document under the applicable rule, the timelines in Chapter 62-780, F.A.C. apply.

The ALJ's finding is not supported by competent substantial evidence, and this part of the Petitioner's exception is granted.

The Petitioner also takes exception to the last sentence in paragraph 30 in which the ALJ finds that "[a]pparently, the Canonicos have assumed the same thing [i.e., that the requirement is temporarily stayed] and have not performed any remedial action or paid any further penalties while this action is pending." However, I find there was sufficient testimony in the record to support this inference. (T. Keirn pp. 33 line 22 – 35 line 7, p. 102; T. Smith pp. 178 line 24 – 179 line 11). *See Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). Because the ALJ's finding is a reasonable inference from the competent substantial record evidence, this portion of the Petitioner's exception is denied.

Exception 11. The Petitioner takes exception to the ALJ's finding in paragraph 31 of the RO that "[i]n this case, the ELRA process was not required . . . but the Department elected to impose that penalty." As described above, Petitioner cannot challenge the penalty in this Consent Order. Nevertheless, the exception should be denied on additional grounds. The Petitioner argues that the ALJ's use of the term "elect" implies the Department chose among options, but the evidence shows the Department believed it was compelled to chose the penalty amount it did. However, the Department's witness clearly testified that the Department had options other than to use ELRA in the penalty calculation. (Kiern T. p. 99 lines 1-5). Thus, the ALJ's interpretation is based on competent substantial evidence, and the exception is denied.

Exception 12. The Petitioner takes exception to that portion of paragraph 35 in the RO in which the ALJ found that "[e]xercising its discretion, the Department did not consider economic gain by Respondents in assessing the penalty" for failure to maintain the stormwater system, inspect it, and submit reports to the Department. Again, Petitioner cannot challenge the penalty, but the

exception should be denied anyway. It is clear that Mr. Keirn did consider the economic benefits to the Respondents of non-compliance but decided not to pursue their recovery through the penalty. (T. Keirn p. 137.) Because the ALJ's findings are supported by competent substantial record evidence, this exception is denied.

Exception 13. The Petitioner takes exception to those portions of paragraphs 35, 37, 39, 40, 41, and 43 in the RO in which the ALJ found that "the Department's primary goal in negotiating the Consent Order was to avoid a long and uncertain litigation process that would delay an enforceable order requiring Respondents to immediately implement a Chapter 62-780 waste assessment and cleanup." Petitioner admits the ALJ's findings are supported by competent substantial record evidence (Keirn T. pp. 19, 25-26, 27-29; 63-64, 154, 160; Long T. pp. 224-226, 235-236) but argues that "as a matter of law, Chapter 62-780 is independently enforceable and self-executing" so there was no need for the Department to include it in the Consent Order. It is unclear what Petitioner means by "self-executing," however. Although the chapter can be enforced independently of the Consent Order, the obligation in the Consent Order to comply with the rule gives the Department an additional, and arguably easier, path to enforce its requirements. (T. Keirn p. 29 lines 8-10). Regardless, the ALJ's finding is supported by competent substantial evidence, and the exception is denied

Exception 14. I reject Petitioner's exception to the ALJ's references to "ELRA guidelines" in paragraphs 39 and 40 of the RO, despite the Department's request that the exception be granted. While I agree that there are no "ELRA guidelines" *per se*, I interpret the ALJ's referrals to "ELRA guidelines" to mean that ERLA was used as a guideline in for deciding on an appropriate penalty, and that finding is supported by competent substantial evidence in the record. (T. Kiern p. 99.)

Exceptions 15, 16, 17. In these three exceptions, Petitioner takes exception to the ALJ's findings and legal interpretations in paragraph 45 of the RO. They all concern the adequacy of the fines for violations of the Lease provisions. As discussed above, Petitioner cannot challenge the fine for the Lease violations, because the corrective actions do not allow the Respondents to remain out of compliance with the terms of the Lease. On that basis, the exceptions are denied. Regardless, the exceptions should also be denied because they are substantively deficient.

In Exception 15, Petitioner argues the ALJ misinterprets Rule 18-14, F.A.C., concerning the fines imposed by the Department on behalf of the Board of Trustees. Petitioner argues that the rule does not require that the fines are limited to $2500.00, as stated by the Department's witness, since no notice of violation was issued by the Department to the Respondents. Petitioner's interpretation of Rule 18-14 is incorrect. Under Rule 18-14.002(4), F.A.C., fines for first violations of the Board of Trustees' rules are limited to $2,500.00, unless the Board of Trustees approves a higher amount. Further, Rule 18-14.005 authorizes these fines to be collected pursuant Chapter 120, Florida Statutes. Section 120.57(4), Florida Statutes, authorizes any proceeding to be resolved through Consent Order. Nothing in the rules or statutes requires that a notice of violation must be issued initially before the case is settled. Thus, fines due in an enforcement proceeding for violations of the Board of Trustees' rules, such as this one, can be collected from a respondent through a consent order without the prior issuance of a notice of violation.

In Exception 16, Petitioner argues the ALJ shifted the burden of proving the appropriateness of the penalty from the Department to the Petitioner. Reading the RO in its entirety, especially paragraphs 52 and 54, I find that the ALJ clearly understood that the

Department, and not the Petitioner, has the burden (in appropriate cases) to prove the adequacy of any fine or penalty.

In Exception 17, Petitioner argues the ALJ takes inconsistent positions by finding "Neither fine was show to be unreasonable under the circumstances" with his conclusion in paragraph 55 that he has no authority to determine the adequacy of the penalty. These positions are not inconsistent; the ALJ's finding that Petitioner did not show the fines were unreasonable is a finding a fact that is based on competent substantial evidence. His legal conclusion in paragraph 55 that he has no authority to determine whether the penalty is adequate is a correct legal interpretation. There is no conflict.

For these additional reasons, exceptions 15, 16, and 17 are denied.

Exceptions 18, 19, 21, and 22. These exceptions concern the legal effect of an arithmetical error in the Consent Order. The Exceptions are all denied because the Petitioner has no standing to challenge the penalties. However, I will examine each exception in turn to determine whether there are additional grounds for denial.

In Exception 18, Petitioner takes exception to the ALJ's findings in paragraph 46 that:

> The penalty amounts, plus $500.00 for Department costs, were mistakenly summed as $17, 750.00 in paragraph 25 of the Consent Order. The correct amount is $17, 250.00.

The Petitioner argues that "no testimony was offered that $17,250 was the 'correct amount' of the penalty." However, Petitioner's counsel had the Department's District Director add the various penalty amounts and admit that the $17,250.00 was the correct amount. (T. Long pp. 220-223). Thus, the ALJ's findings in paragraph 46 are supported by substantial, competent record evidence.

The crux of Petitioner's argument in Exceptions 19, 20, and 21 is that the proper addition of the penalty is a discretionary act and that improper addition is an abuse of that discretion. Thus, argues Petitioner, since the total penalty amount is actually smaller than stated in the Consent Order, the ALJ cannot conclude that the Department exercised its enforcement discretion reasonably. Specifically, Petitioner takes issues with the ALJ's findings of fact in paragraphs 47 and 49 and conclusions of law in paragraphs 54 and 56. It argues that "[m]iscalculating penalties due to a misunderstanding or misapplication of the law is not, as a matter of law, a reasonable exercise of discretion." (Emphasis supplied). However, properly adding a column of numbers has nothing to do with the Department's enforcement discretion, and a mistake in adding numbers cannot be considered an abuse of discretion -- adding a column of numbers correctly or incorrectly is not a discretionary act. Mistakes in adding can be made, but a mistake is not a willful exercise of discretion -- it's a mistake. In these exceptions, the Petitioner asks me to reweigh the evidence adduced at the final hearing and "as a matter of law" reinterpret that evidence in order to reject the ultimate findings of the ALJ, which I can't do. *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997). Finally, Petitioner cites no legal support for its arguments, thus for that reason alone I could decline to rule on this exception. *See* § 120.57(1)(k), Fla. Stat. (2010). For these additional reasons, Exceptions 18, 19, 21, and 22 are denied.

Exception 20. The Petitioner takes exception to the last sentence in paragraph 48 of the RO in which the ALJ presumes "that the Department will respond quickly to reported violations" and enforce the Consent Order. The Department's witness testified that the Department responds to 99% of the calls that it gets (Keirn T. p. 91 lines 10-14), conducts inspections (Keirn T. p. 91 lines 10-14), and will enforce the provisions of this Consent Order through follow-up inspections

(Keirn T. pp. 31 line 25 – 32 line 5). There is competent substantial evidence to support this finding, and the exception is denied.

Exception 23. The Petitioner takes exception to the ALJ's conclusion of law in paragraph 55 of the RO in which he concludes that he lacks the authority to review the adequacy of the penalties. As discussed above, the ALJ is correct in his conclusion that he has no basis to review the adequacy of the penalties. The exception is denied.

Exception 24. The Petitioner takes exception to paragraph 55 of the RO in which the ALJ concludes that the Settlement Guidelines used by the Department are not binding on the Department. Petitioner argues the Guidelines are policy and that only the District Director can authorize a deviation from Department policy. This is a mischaracterization of the intent and effect of the Guidelines. As the ALJ found in paragraph 21, that although by their own terms the Guidelines are internal guidance intended to promote consistency in Department settlements, the District Offices are authorized to deviate from the them "when doing so will result in better compliance and better capability for carrying out the mission of the agency." In addition, the District Director testified that he approved and signed the Consent Order, thereby approving the penalty amount. (Long T. p. 219 line 2 - 220 line 10, pp. 234-235). The ALJ's legal conclusion is based on competent substantial evidence in the record, and the exception is denied.

It is therefore ORDERED:

1. As modified by the above rulings, the Recommended Order is otherwise adopted and incorporated by reference herein.

2. Consent Order 08-1823 between the Department and the Respondents is hereby approved and is effective as of the effective date of this Final Order.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the DEP clerk 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 DEP clerk.

DONE AND ORDERED this 28 day of January 2010, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Herschel T. Vinyard, Jr.
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.

Cyndie Kinsey
Deputy CLERK

1/31/11
DATE

CERTIFICATE OF SERVICE

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

James M. Porter, Esq.
James M. Porter, P.A.
2950 Sun Trust International Center
One Southeast Third Ave.
Miami FL 33131-1712

Ann Cole, Clerk and
D. R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand-delivery to:

Kirk S. White, Esq.
Francine M. Ffolkes, Esq.
3900 Commonwealth Blvd.
MS-35
Tallahassee FL 32399-3000

this 31st day of January, 2010.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

DAVID K. THULMAN
Assistant General Counsel

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