Florida Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
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Rick Scott
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Herschel T. Vinyard, Jr.
Secretary

February 1, 2011

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

Re: BTIITF vs. James R. Therrien
DOAH Case No.: 10-6553
DEP/OGC Case No.: 10-1948

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Therrien's Exceptions to Recommended Order
3. BTIITF's Response to Therrien'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

Filed February 1, 2011 11:44 AM Division of Administrative Hearings

STATE OF FLORIDA
BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,	
Petitioner,	
vs.	**OGC CASE NO. 10-1948**
	DOAH CASE NO. 10-6553
JAMES R. THERRIEN,	
Respondent.	

FINAL ORDER

On November 3, 2010, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("Department" or "DEP") and the Board of Trustees of the Internal Improvement Trust Fund ("Board" or "BOT")[1] in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that a copy was sent to the counsel for the Petitioner BOT and to the Respondent James R. Therrien ("Therrien"). The Respondent Therrien filed Exceptions to the RO on November 17, 2010. The Petitioner BOT filed a response to the Respondent's Exceptions on November 19, 2010.

[1] Subsection 253.002(1), Florida Statutes provides that "[t]he Department of Environmental Protection shall perform all staff duties and functions related to the acquisition, administration, and disposition of state lands, title to which is or will be vested in the Board of Trustees of the Internal Improvement Trust Fund. . . . Unless expressly prohibited by law, the board of trustees may delegate to the department any statutory duty or obligation relating to the acquisition, administration, or disposition of lands, title to which is or will be vested in the board of trustees."

BACKGROUND

This matter began with the issuance of a Notice of Violation ("NOV") against the Respondent Therrien by the BOT that he received on June 9, 2010, charging him with violations of law associated with a single-family dock structure that he constructed on sovereign submerged lands in the Halifax River in Daytona Beach. The BOT sought to charge the Respondent with past due lease payments and fine him for unauthorized use of sovereignty submerged lands. The Respondent requested an administrative hearing and the matter was referred to DOAH and assigned to an ALJ. On September 8, 2010, the Petitioner BOT was granted leave to file its First Amended NOV, Orders for Corrective Action, and Administrative Fine Assessment ("First Amended NOV").

The ALJ conducted the final hearing on October 7, 2010. The Respondent indicated that he was going to arrange for the filing of a transcript of the final hearing but did not do so. (RO page 2). The Respondent also declined to file a proposed recommended order. The BOT filed its proposed recommended order on October 14, 2010, and the ALJ subsequently issued the RO on November 3, 2010.

RECOMMENDED ORDER

In the RO the ALJ recommended that the BOT enter a final order that requires an appropriate lease renewal including payment of past due lease fees and interest and the current lease payment; or the Respondent must remove the dock structure or enough of it so that no lease is required; and impose the administrative fine set forth in the First Amended NOV. (RO pages 13-14).

The ALJ found that in 2004, the Respondent entered into a Sovereignty Submerged Lands Lease with the BOT to allow him to construct a single-family dock

structure into the Halifax River from his property. In 2007, he entered into a Modification to Increase Square Footage ("Modified Lease"). The Modified Lease covered 2,714 square feet, required an annual lease fee of $423.89, and expired on November 16, 2008. (RO ¶ 2). The ALJ found that to date the Respondent refuses to renew the lease, or pay any fees, and has not removed the dock structure. (RO ¶ 8). The ALJ concluded that a lease is required for the Respondent's dock structure because it is too large for a consent of use (RO ¶ 20), that he must remove the dock structure or enough of it so that no lease is required (RO ¶ 23), or enter into a new lease (RO ¶23). The ALJ also concluded that it would not be appropriate to grant a reduction in the assessments required by BOT rule for an after-the-fact lease application. (RO ¶ 24). In addition the ALJ found that under the facts of the case, it would be appropriate to waive part of the administrative fine and concluded that a $2,000 fine would be appropriate. (RO ¶ 22).

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). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co., 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); Collier Med. Ctr. V. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus 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. *See, e.g., Brogan v. Carter*, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by

such factual finding in preparing this Final Order. *See, e.g., Walker v. Bd. Of Prof. Eng'rs*, 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. V. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. V. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. Of Broward County*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. Of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police*

Benevolent Ass'n, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142 (Fla. 2d DCA 2001).

RULINGS ON EXCEPTIONS

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, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. Of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. 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." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2010); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

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.*

RESPONDENT'S EXCEPTIONS

The Respondent filed written exceptions to the RO. The pleading contains six numbered paragraphs. *See* Respondent's Exceptions to Recommended Order. The Respondent essentially objects to the ALJ's recommendation that the BOT assess an administrative fine of $2,000. The Respondent requests that the fine be dropped or waived. He argues that the fine is an "extreme undue hardship" "in light of the fact that Respondent also would have to incur the great expense of dock removal, *plus* the expense of over $1,200.00 in back-due lease payments." (Emphasis added). *See* Respondent's Exceptions to Recommended Order at p. 2 ¶ 4. However, contrary to the Respondent's assertion, the ALJ's recommendation was made in the alternative.

Assessment of a $2,000 administrative fine was recommended by the ALJ who determined that "under the facts of this case, it would be appropriate to waive part of the fine under [Rule 18-14.002(3), F.A.C.]." (RO ¶ 22). The ALJ also determined that "[u]nder Rule 18-21.008(1)(b)5., Respondent must remove his dock structure, or enough of it so that no lease is required. Another *alternative* would be for Respondent to enter into a new lease." (Emphasis added) (RO ¶ 23).

If the Respondent were to choose the alternative to enter into a new lease then the ALJ recommended that "Respondent sign the appropriate lease renewal and send it, along with $1,283.22 in past due lease fees and interest owed BOT, plus the lease payment for 2010/2011, . . ." (RO at page 13). The ALJ concluded that under Rule 18-21.008(1)(b)5, the BOT is not authorized to "charge lease payments after expiration of a lease, but it does authorize the imposition of a fine on Respondent for not complying with the BOT's order to remove his dock structure." (RO ¶ 21). A "new lease" for the

Respondent's existing structure would be subject to "an assessment for the prior unauthorized use of sovereignty land for after-the-fact lease applications." (RO ¶ 24) *See* Fla. Admin Code R. 18-21.011(1)(b). The rule contains a provision for reducing the assessment based on certain factors that the BOT should consider. *See* Fla. Admin Code R. 18-21.011(1)(b)12. The ALJ found that although the "Respondent's position in this case can be construed as a request under paragraph (12) of the Rule to reduce the assessment . . . it would not be appropriate to grant such a request." (RO ¶ 24).

To the extent that the Respondent's exceptions challenge the ALJ's factual findings regarding waiver of the administrative fine and assessments for after-the-fact lease applications, it should be noted that the Respondent did not file a hearing transcript with DOAH or with his Exceptions. Florida case law holds that none of the ALJ's findings of fact are subject to being rejected or modified in this Final Order based on lack of competent substantial evidence because the agency is unable to "review the entire record" as required by Section 120.57(1)(l), Florida Statutes. *See Booker Creek Preservation, Inc., v. Dep't of Envtl. Regulation*, 415 So.2d 750 (Fla. 1st DCA 1982) (concluding that a party filing exceptions to findings of fact in a recommended order has the responsibility to pay for and furnish a copy of the transcript of the DOAH proceeding to the reviewing agency). Since no transcript of testimony was prepared and filed in this case, the agency is unable to review the entire record and conclude that these factual findings are not supported by any competent substantial evidence. *Id. See also Pope v. Ray*, 2004 WL 1211594, DOAH Case No. 03-3981 (Fla. Dept. Env. Prot. 2004).

Therefore, based on the foregoing, the Respondent's exceptions are denied.

CONCLUSION

Having reviewed the Recommended Order and other pertinent matters of record, and being otherwise duly advised, it is therefore ORDERED:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference herein.

B. Within 10 days of the date of this Final Order, the Respondent James R. Therrien shall sign the appropriate lease renewal and send it, along with $1,283.22 in past due lease fees and interest owed to the Board of Trustees, plus the lease payment for 2010/2011, by cashier's check or money order made payable to the "Internal Improvement Trust Fund," and shall include thereon OGC Case No. 10-1948 and the notation "Internal Improvement Trust Fund." The lease renewal and payment shall be sent to 3319 Maguire Boulevard, Suite 232, Attention David Herbster, Program Administrator, Submerged Lands and Environmental Resource Program, Orlando, Florida 32803; or

C Within 20 days of the date of this Final Order, the Respondent James R. Therrien shall remove his dock structure or at least enough of it to preempt no more than 1,150 square feet of sovereignty submerged lands; and

D. Within 30 days of the date of this Final Order, the Respondent James R. Therrien shall pay to the Board of Trustees an administrative fine in the amount of $2,000.00, by cashier's check or money order made payable to the "Internal Improvement Trust Fund," and shall include thereon OGC Case No. 10-1948 and the notation "Internal Improvement Trust Fund." The payment shall be sent to 3319

Maguire Boulevard, Suite 232, Attention David Herbster, Program Administrator, Submerged Lands and Environmental Resource Program, Orlando, Florida 32803.

JUDICIAL REVIEW

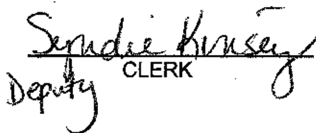
Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 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 28 day of January, 2011, in Tallahassee, Florida.

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST
FUND OF THE STATE OF FLORIDA

HERSCHEL T. VINYARD, JR.
Secretary
Florida Department of Environmental Protection, as agent for and on behalf of the Board of Trustees of The Internal Improvement Trust Fund of the State of Florida.

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



Deputy CLERK 1/31/11 DATE

CERTIFICATE OF SERVICE

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

James R. Therrien
237 North Halifax Avenue
Daytona Beach, FL 32114-4121

by electronic filing to:

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

and by hand delivery to:

Christopher T. Byrd, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 31st day of January, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Administrative Law Counsel

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