

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY ROSS,)
)
 Petitioner,)
)
 vs.) Case No. 10-10824RX
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
 _____)

SUMMARY FINAL ORDER

Petitioner filed a Challenge to Rule, in which he states that, pursuant to section 120.56, Florida Statutes (2010), he seeks a determination of the invalidity of Florida Administrative Code Rule 62-4.244. The "single issue" raised by Petitioner is that the rule "violates the United States Constitution and applicable provisions of the Florida Constitution." The Department of Environmental Protection (Department) filed a Motion for Summary Final Order Regarding the Invalidity of Rule 62-4.244, F.A.C., contending that there are no genuine issues as to any material fact and the Division of Administrative Hearings (DOAH) has no authority to determine the constitutionality of a rule. Petitioner filed a response in opposition to the motion.

FINDINGS OF FACT

1. Petitioner did not identify a particular part of Rule 62-4.244 that he claims is unconstitutional. Rule 62-4.244 is a lengthy rule and is not set forth here in its entirety. The gist of the rule is explained in subsection (1) (a):

The Department may allow the water quality adjacent to a point of discharge to be degraded to the extent that only the minimum conditions described in subsection 62-302.500(1), F.A.C., apply within a limited, defined region known as the mixing zone. Under the circumstances defined elsewhere in this section, a mixing zone may be allowed to provide an opportunity for mixing and thus to reduce the costs of treatment. However, no mixing zone or combination of mixing zones shall be allowed to significantly impair any of the designated uses of the receiving body of water.

CONCLUSIONS OF LAW

2. Petitioner named the City of Tarpon Springs as a Respondent in his rule challenge petition, along with the Department. However, the City is not a party unless it petitions to intervene, which it has not done.

3. Petitioner failed to allege a genuine issue as to any material fact. Section 120.57(1) (h), Florida Statutes (2010), provides:

Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall

be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

4. None of the grounds for invalidating a rule that are set forth in section 120.52(8), was invoked by Petitioner. Instead, Petitioner claims that the rule is unconstitutional under the United States Constitution and the Florida Constitution. DOAH has no authority to hear or adjudicate issues of federal law, including whether there has been a violation of the United States Constitution. DOAH is also without authority to determine the constitutionality of an existing rule under the Florida Constitution. See Dep't of HRS v. Fla. Med. Ctr, NME Hospitals, Inc., 578 So. 2d 351, 355 (Fla. 1st DCA 1991).

5. A party may challenge the constitutionality of a rule for the first time on appeal from a final order in a proceeding challenging agency action. See Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1982); Rice v. Dep't of HRS, 386 So. 2d 844 (Fla. 1st DCA 1980).

[W]e consider it entirely proper for a district court to pass on the constitutionality of a statute or rule when that is necessary in reviewing agency action, though there has been no agency decision on the constitutional question nor could there have been.

Rice at 848.

6. Petitioner is a party in a proceeding challenging agency action -- the industrial wastewater facility permit that is the subject of DOAH Case 10-3351 -- and it was in that case that Rule 62-4.244 was applied by the Department to justify the proposed agency action which Petitioner challenged. The Recommended Order was issued in DOAH Case 10-3351, but a final order has not yet been issued by the Department. Petitioner's claim that Rule 62-4.244 is unconstitutional is an issue that Petitioner may raise if he takes an appeal of the final order in DOAH Case 10-3351. It is improper to raise the issue as Petitioner did in this case.

DISPOSITION

Based on the record and the Conclusions of Law stated above, it is

ORDERED that the rule challenge is DISMISSED.

DONE AND ORDERED this 10th day of January, 2011, in
Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 2011.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.