FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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LT. GOVERNOR

HERSCHEL T. VINYARD JR.
SECRETARY

February 7, 2013

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

Re: Last Stand, Inc. and George Halloran vs. Fury Management, Inc. and DEP
DOAH Case No.: 12-2574
DEP/OGC Case No.: 12-1275

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Respondents' Joint Exceptions to Two Findings of Fact in Recommended Order

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

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

LAST STAND, INC. AND GEORGE HALLORAN,	)	
	)	
Petitioners,	)	
	)	
vs.	)	**OGC CASE NO. 12-1275**
	)	**DOAH CASE NO. 12-2574**
FURY MANAGEMENT, INC. AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	

CONSOLIDATED FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") on December 31, 2012, to the Department of Environmental Protection ("DEP" or "Department") in the above referenced administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioners, Last Stand, Inc. and George Halloran ("Petitioners"), counsel for Respondent, Fury Management, Inc. ("Fury"), and counsel for the Department. Respondents filed joint exceptions on January 15, 2013. This matter is now before the Secretary for final agency action.[1]

[1] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

BACKGROUND

The Department noticed its intent to issue a consolidated environmental resource permit and sovereignty submerged land lease to Respondent Fury on June 13, 2012. Fury is a Florida corporation that is in the water attraction business and has been operating in Key West for seventeen years. It currently operates a recreational site similar to the proposed project. Fury proposed a project consisting of permanently-moored platforms and large floating water toys where customers will swim, ride jet skis, use kayaks, and play on the water toys. The Petitioners challenged the permit and lease and were referred to DOAH for an evidentiary hearing that was held on October 31 and November 1, 2012. The two-volume final hearing transcript was filed with DOAH. The parties submitted proposed recommended orders and the ALJ subsequently entered the RO on December 31, 2012.

RECOMMENDED ORDER

In the RO the ALJ recommended that the Department enter a final order granting the consolidated environmental resource permit and sovereignty submerged lands lease. (RO pp. 28-29). He also recommended that the permit should direct that Fury's monetary donation for mitigation shall be paid to the Florida Keys National Marine Sanctuary Foundation for use in the Florida Keys Mooring Buoy Account 30.4.4.6.; and that the lease should be modified to show the lease area is 17,206 square feet. (RO p. 29).

Environmental Resource Permit

The ALJ found that Fury provided reasonable assurance that the proposed project complied with all applicable regulatory permitting criteria. (RO ¶¶ 46, 51-62, 97,

100-101). He concluded that the Petitioners did not meet their burden of ultimate persuasion that Fury was not entitled to issuance of the environmental resource permit. (RO ¶ 102). The ALJ also determined that Fury's proposed monetary donation to the mooring buoy program, for purposes of mitigation, complied with the applicable statute. *See* § 373.414(1)(b)1., Fla. Stat. (2012). (RO ¶¶ 97-99).

Sovereignty Submerged Lands Lease

The ALJ found that Fury met its burden to prove that the proposed project was not contrary to the public interest and that it met all applicable criteria for authorization to lease sovereignty submerged lands. (RO ¶¶ 69-78, 103-110). The ALJ concluded that the Department's interpretation and application of the proprietary rule defining "water dependent activity" was reasonable and consistent with prior Department final orders. (RO ¶¶ 75-78, 106-109).

Standing

The ALJ found that the Petitioner Halloran had standing to initiate this administrative proceeding. The ALJ concluded Halloran's interests in using the waters in the vicinity of the project for recreational purposes and for nature observation were substantial interests that this proceeding was designed to protect, and those interests could be affected by the proposed project. (RO ¶¶ 3, 84). The ALJ found that the associational standing of the Petitioner Last Stand was not established because the evidence did not show that a substantial number of its members would be affected by the proposed project. (RO ¶¶ 85-87).

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. (2012); *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); *Nunez v. Nunez,* 29 So.3d 1191, 1192 (Fla. 5th DCA 2010).

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). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, this agency is 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). Neither should the agency, however, 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).

Agencies do not, however, 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). Even when exceptions are not filed, however, 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. (2012); *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. (2012). The agency need not rule on an exception, however, 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.*

RESPONDENTS' EXCEPTIONS

Exception No. 1

The Respondents, Fury and DEP, take exception to page 3 of the RO where the ALJ describes witness Eric Denhart as "Fury's operations manager." The Respondents contend that this description is not supported by the competent substantial record evidence and should be rejected. The record evidence shows that Mr. Denhart owns and operates Denhart Marine Consultants (Tr. pp. 75-76) and that Marius Venter is Fury's "operations manager." (Tr. p. 80, lines 2-6).

Based on the foregoing reasons, the Respondents' exception is granted.

Exception No. 2

The Respondents, Fury and DEP, take exception to paragraph 20 of the RO where the ALJ finds that the water toys and kayaks will "be brought back to an upland location each night." The Respondents argue that there is no competent substantial record evidence to support this finding and it should be rejected. The record evidence shows that the water toys will remain at the location each night. (Tr. pp. 53 and 74; Fury's Composite Ex. 8, Notice of Intent at p. 3). In addition, the ALJ found in paragraph 19 that the "water toys would be secured to the water bottom with permanent

anchors;" in paragraph16 that one of the floating platforms "would support up to ten kayaks;" and in paragraph 43 that the "floating platforms and water toys will have Coast Guard-approved lighting." (RO ¶¶ 16, 19, 20, and 43).

Based on the foregoing reasons, the Respondents' exception is granted.

CONCLUSION

Having considered the applicable law in light of the rulings on the exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A), as modified by the rulings above, is adopted in its entirety and incorporated herein by reference;

B. The Respondent Fury Management, Inc.'s Consolidated Environmental Resource Permit and Sovereignty Submerged Lands Lease for Department Permit File No. 44-0309238-001 and Lease File No. 440348135 is GRANTED;

C. The Permit shall direct that the Respondent Fury Management, Inc.'s monetary donation for mitigation shall be paid to the Florida Keys National Marine Sanctuary Foundation for use in the Florida Keys Mooring Buoy Account 30.4.4.6.; and

D. The Lease shall be modified to show the lease area is 17,206 square feet.

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 filing 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 7th day of February, 2012, 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.

Deputy CLERK

2/7/13
DATE

CERTIFICATE OF SERVICE

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

Marcy I. LaHart, Esquire
Marcy I. LaHart, P.A.
4804 Southwest 45th Street
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by electronic filing to:

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The DeSoto Building
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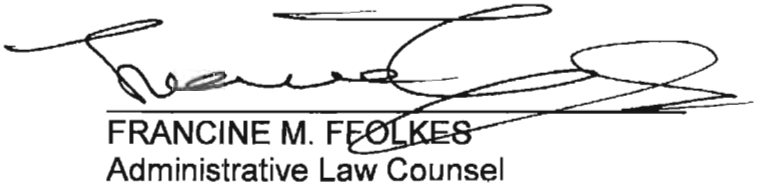
Tallahassee, FL 32399-1550

and by hand delivery to:

Ronald Woodrow Hoenstine, III, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 7th day of February, 2012.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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