FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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GOVERNOR

HERSCHEL T. VINYARD JR.
SECRETARY

April 22, 2013

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

Re: DEP vs. Franklin County
DOAH Case No.: 12-3276EF
DEP/OGC Case No.: 11-1815

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. DEP's Exception to the 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

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 11-1815**
	)	**DOAH CASE NO. 12-3276EF**
FRANKLIN COUNTY,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on January 29, 2013, submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Department and counsel for the Respondent, Franklin County (the "County"). The Department filed its Exception to the Recommended Order on February 13, 2013, to which the County did not respond. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

The County has owned and maintained that portion of County Road 370 known as Alligator Drive, located at Alligator Point in the southeastern tip of the County, since an undisclosed date in the late 1970s. Before then, the road was classified as a secondary road owned and maintained by the Department of Transportation ("DOT"). Sometime during the late 1970s, the Legislature transferred the ownership and control

of some secondary roads, including County Road 370, from the state to local governments. The Department has established a coastal construction control line ("CCCL") for the County and a permit is required before any person may conduct construction activities seaward of that line. Between 1986 and 1996 the County obtained CCCL permits from the Department to construct and re-construct a revetment at County Road 370. This man-made sloping structure constructed with rock boulders protects County Road 370 from coastal erosion. The revetment is a "rigid coastal armoring structure" under the Department's CCCL permitting rules.

In July 2005, Hurricane Dennis made landfall in the Florida Panhandle causing damage to the shoreline along County Road 370. As an emergency measure, the County replaced rock boulders that had been displaced in the rock revetment. The County also placed unauthorized concrete debris and other debris material within the footprint of the rock revetment seaward of the CCCL. The unauthorized debris material has never been removed and such debris poses a potential safety hazard to the public.

In 2006, the County applied for a joint coastal permit to authorize a 2.9-mile beach renourishment and dune restoration project along a segment of the Alligator Point shoreline. The joint coastal permit was issued in May 2011. A debris removal plan was incorporated as a permit condition requiring the County to remove the unauthorized debris material. The County, however, did not undertake the beach renourishment project or complete any of the work relating to the debris removal plan.

The Department issued a one-count Notice of Violation ("NOV") on January 20, 2012, alleging that after a storm event in July 2005, the County placed unauthorized construction debris and other debris material in a previously permitted rock revetment

seaward of the CCCL, and that the debris still remains within the footprint of the revetment. On August 31, 2012, the NOV was amended to add a second count, which alleged that between 2000 and 2005 the County placed granite rock boulders and unauthorized construction debris and material east of the revetment seaward of the CCCL. The Amended NOV further alleged that the County did not obtain a permit for the placement of the granite rock boulders or remove the unauthorized debris and material. The Amended NOV also includes a requirement that the County take remedial action to correct all violations; it does not seek reimbursement of investigative expenses or the imposition of an administrative penalty.

In response to the Amended NOV, on September 20, 2012, the County filed an Amended Petition requesting a formal hearing to contest the charges. A prehearing stipulation was filed by the parties on November 28, 2012. The ALJ conducted the final hearing on November 30, 2012. At the beginning of the final hearing, the parties announced they had reached a settlement regarding Count II of the Amended NOV. The parties requested that the ALJ's RO incorporate their stipulation regarding the corrective action for Count II of the Amended NOV. Following post-hearing submittals and filing of the hearing transcript, the ALJ entered his RO on January 29, 2013.

SUMMARY OF THE RECOMMENDED ORDER

The ALJ recommended that the Department enter a final order determining that the County is liable for the violations in Count I. The ALJ recommended as a corrective action that the County, within 60 days of the effective date of the final order, remove the existing construction debris and other material seaward of the CCCL from within the footprint of the previously permitted rock revetment and dispose of the material at an

appropriate disposal facility landward of the CCCL. The ALJ further recommended that if compliance with the time period requires the County to complete activities during the Atlantic hurricane season, the time frame for completing the debris removal activities will be 60 days after the end of the hurricane season. (RO at pp. 15-16).

As to Count II, the ALJ recommended that, based upon the parties' agreement at the final hearing, the Department's final order should also determine that the County is liable for the violations in Count II. Within 60 days of the effective date of the final order, as corrective action, the County shall submit to the Department a complete application for a rigid coastal armoring structure located between Department reference monuments R-213 and R-214 that complies with all Department permitting rules and statutes. The County shall complete the permitted construction prior to the expiration of the permit. In addition, if the County does not submit a complete application within 60 days of entry of the final order, or does not construct the structure authorized by the permit prior to the permit's expiration, the County shall remove all material placed seaward of the CCCL pursuant to a Department approved debris removal plan. (RO at p. 16).

The ALJ concluded that although the County contended in its Amended Petition that the enforcement action should be barred by the doctrine of equitable estoppel, no proof was submitted in support of this allegation, and the issue was not addressed in the County's Proposed Recommended Order. Thus the contention was rejected. (RO ¶ 26). The ALJ noted that the County also argued at the final hearing that the enforcement action should be barred because of "unreasonable delay" on the part of the Department in undertaking enforcement. The ALJ concluded that although

couching its argument in slightly different terms, the County was again contending that the statute of limitations in section 95.11(3)(f), Florida Statutes bars this administrative proceeding. The ALJ rejected the County's contention based on the reasons outlined in his ruling in the November 27, 2012, Order on Motions. (RO ¶ 27). In that Order, the ALJ concluded that the "[c]ases cited by the Department in support of its Motions uniformly hold that chapter 95 does not apply to administrative enforcement actions." *See* Order on Motions, November 27, 2012 at page 1.

The ALJ noted that the County argued that due to a substantial decline in property values caused by the recession, it lacked the necessary resources to comply with the corrective action, and its financial status should be taken into account in formulating a corrective action plan. The ALJ concluded that while the cost involved in remediating the violations is no doubt a genuine concern, under the applicable case law, the County's financial status was not a defense to its liability under the Amended NOV.

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. (2011); *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, the agency is bound by such factual finding in preparing the 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 label what is essentially an ultimate factual determination as a "conclusion of law," however, 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 the 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). The Department is charged with enforcing and interpreting chapter 403 of the Florida Statutes. Thus, chapter 403 of the Florida Statutes is within the Department's regulatory jurisdiction and expertise. *See Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985).

Agencies do not have jurisdiction, however, 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.

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). 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, however, even when exceptions are not filed. *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.*

PETITIONER'S EXCEPTION

Exception No. 1

The DEP takes exception to paragraph 21 of the RO where the ALJ states that "[t]he department has the burden of proving [with] the preponderance of the evidence that the respondent is responsible for the violation." The ALJ quotes the third sentence of paragraph (d) of subsection 403.121(2), Florida Statutes. The Department asserts that the ALJ's citation to paragraph (d) of subsection 403.121(2) is incorrect because that paragraph applies in proceedings arising under subsection 403.121(2), when the Department seeks to impose administrative penalties. *See* DEP's Exception at pages 1-2.

Contrary to the Department's assertion, paragraph (d) applies in this administrative enforcement proceeding brought under subsection 403.121(2) where the NOV seeks "[a]n order for corrective action, penalty assessment, or damages." (Emphasis added). *See* § 403.121(2)(a), Fla. Stat. (2012). The third sentence of paragraph (d), quoted by the ALJ, determines the Department's burden of proof with regard to liability. The fourth sentence of paragraph (d) then states that "[n]o administrative penalties should be imposed unless the department satisfies that burden." In this proceeding, the Department did not seek administrative penalties, but sought to determine liability for certain violations so that orders for corrective action can be imposed on the violator. The provisions of paragraph (d) of subsection 403.121(2), Florida Statutes, apply in this proceeding.

Therefore, based on the foregoing reasons, the DEP's exception is denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised,

It is therefore ORDERED:

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

B. The County is liable for the violations in Count I of the Amended NOV. Within 60 days of the effective date of this Final Order, the County shall remove the existing construction debris and other material seaward of the CCCL from within the footprint of the previously permitted rock revetment and dispose of the material at an appropriate disposal facility landward of the CCCL. If compliance with the time period requires the County to complete activities during the Atlantic hurricane season, the time frame for completing the debris removal activities is 60 days after the end of the hurricane season.

C. The County is liable for the violations in Count II of the Amended NOV. Within 60 days of the effective date of this Final Order, the County shall submit to the Department a complete application for a rigid coastal armoring structure located between Department reference monuments R-213 and R-214 that complies with all applicable Department permitting rules and statutes. The County shall complete the permitted construction prior to the expiration of the permit. If the County does not submit a complete application within 60 days of entry of this Final Order, or does not construct the structure authorized by the permit prior to the expiration of the permit, the County

shall remove all material placed seaward of the CCCL pursuant to a Department approved debris removal plan.

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 18th day of April, 2013, 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.

Lea Crandall 4/22/13
CLERK DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to:

Thomas M. Shuler, Esquire
Law Office of Thomas M. Shuler, P.A.
40 4th Street
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Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
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by electronic filing to:

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

this 22nd day of April, 2013.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
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