FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

MARJORY STONEMAN DOUGLAS BUILDING
3900 COMMONWEALTH BOULEVARD
TALLAHASSEE, FLORIDA 32399-3000

RICK SCOTT
GOVERNOR

HERSCHEL T. VINYARD JR.
SECRETARY

December 4, 2013

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

Re: Michael and Cathy LaRosa vs. Perry Funk and DEP
DOAH Case No.: 13-1853
OGC Case No.: 13-0978

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Respondent's Exceptions to Recommended Order of Dismissal
3. DEP's Exceptions to Recommended Order
4. Petitioner's Exceptions to Recommended Order
5 Respondent Perry Funk's Response to Petitioner's Exceptions
6. DEP's Response to Petitioners' Exceptions

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

MICHAEL AND CATHY LAROSA,	)	
	)	
Petitioners,	)	
	)	
vs.	)	**OGC CASE NO. 13-0978**
	)	**DOAH CASE NO. 13-1853**
PERRY FUNK AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order of Dismissal ("ROD") on September 12, 2013, to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. A copy of the ROD is attached hereto as Exhibit A. The Petitioners, Michael and Cathy LaRosa ("Petitioners"), filed their Exceptions to the Recommended Order on September 27, 2013. The Respondents, Perry Funk ("Funk"), and the Department, also filed Exceptions to the Recommended Order of Dismissal on September 27, 2013. The Respondents, Funk and the Department, filed their Responses to Petitioners' Exceptions, on October 7, 2013, and October 11, 2013,

respectively.[1] This matter is now on administrative review before the Secretary for final agency action.

BACKGROUND

The Department issued a letter to the Respondent Funk, on March 21, 2013, in DEP File No. 56-0137658-003, informing him that the proposed modification of his private dock was determined by the Department to be exempt from the requirement to obtain an environmental resource permit. The Petitioners and the Respondent Funk reside on adjacent residential lots in St. Lucie County, Florida. They have adjacent private docks on a manmade basin off of Mud Cove, which connects to the St. Lucie River.

On March 28, 2013, the Respondent Funk published notice of the determination in the St. Lucie News-Tribune. The Petitioners filed a petition for hearing on May 14, 2013, one day after Michael LaRosa saw construction activity at the Funk dock. The Department referred the petition to DOAH, and moved to dismiss the petition as untimely. Based on the unopposed motion of the Department, the ALJ bifurcated the administrative proceeding in order to first address the issue of whether the petition was timely filed. The ALJ conducted an evidentiary hearing on the issue of timeliness on July 30, 2013. Thereafter, the one-volume hearing transcript was filed with DOAH and

[1] The Respondent Department timely filed, on October 7, 2013, a Motion for Extension of Time to File Response to Exceptions until October 11, 2013. The Respondent Department filed its Response on October 11, 2013, before the Department's entry of an order on the motion. The motion is hereby granted and the Response filed on October 11, 2013, is deemed timely filed.

the parties submitted proposed recommended orders. The ALJ subsequently issued the ROD on September 12, 2013.

SUMMARY OF THE RECOMMENDED ORDER OF DISMISSAL

In the ROD, the ALJ recommended that the Department enter a final order dismissing the petition for administrative hearing. (ROD at page 9). The ALJ found that the Petitioners filed their petition more than 21 days after publication of notice in the newspaper. (ROD ¶¶ 15-18, 21). The ALJ concluded that since the Petitioners did not file their petition within 21 days of the newspaper notice, they waived their right to an administrative hearing unless they could prove circumstances that would entitle them to rely on the doctrine of equitable tolling. (RO ¶¶ 19, 21).

The ALJ found that the Petitioners' argument for application of the doctrine of equitable tolling focused on a telephone conversation with a Department employee on January 31, 2013. (RO ¶¶ 3, 25). The ALJ found that the Department employee did not mislead or lull the Petitioners into inaction, and that the untimely filing was due to Michael LaRosa's misunderstanding of what he was told on January 31, 2013. (RO ¶¶ 4-8, 22, 25). The ALJ concluded that the Petitioners did not prove facts necessary to establish their right to invoke the doctrine of equitable tolling. (RO ¶¶ 23, 26).

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. (2013); *Charlotte Cty. 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).

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 Cty. Sch. Bd.,* 652 So.2d 894 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

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 Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). 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). A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 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. (2013); *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. (2013). 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.*

PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to the last sentence in paragraph 4 of the ROD, where the ALJ found that the Department's employee ("Luedike") denies making certain representations to Mr. LaRosa during their January 31, 2013, telephone conversation. (RO ¶ 4). The Petitioners argue that the hearing testimony does not support a finding that Mr. Luedike did not tell Mr. LaRosa that the Department would notify him directly by regular mail or email, before authorizing changes to Funk's dock. Contrary to the Petitioners' argument, Mr. Luedike's hearing testimony supports the ALJ's finding. (Tr. p. 57). Therefore, since competent substantial evidence supports the ALJ's finding, the Petitioners' Exception No. 1 is denied.

Exception No. 2

The Petitioners take exception to paragraph 5 of the ROD, where the ALJ found that:

> 5. Luedike is not in the Department's Port St. Lucie office, which is the office that is responsible for reviewing and taking agency action on proposed activities in St. Lucie County like Funk's proposed dock modification. Luedike is in the Department's West Palm Beach office. This fact supports Luedike's testimony that he provided general permitting information to LaRosa, and not information about what Luedike himself would do if Funk submitted a permit application or other information to the Department's Port St. Lucie office.

The Petitioners argue that the ALJ's findings "regarding which Department office would process a permit filed in St. Lucie County is unsupported and contrary to undisputed record evidence." *See* Petitioners' Exceptions at page 5.

Contrary to the Petitioners' argument, the ALJ's findings are supported by competent substantial record evidence. (Tr. pp. 77 and 81; Pet. Ex. 2; Joint Pre-Hearing Stipulation at 3). Therefore, the Petitioners' Exception No. 2 is denied.

Exception No. 3

The Petitioners take exception to paragraphs 6 through 8 of the ROD, where the ALJ found that Mr. Luedike did not tell Mr. LaRosa that Funk's project needed his sign-off. (RO ¶¶ 6-8). The ALJ found that if Mr. LaRosa believed his sign-off was required, then he was mistaken. (RO ¶ 8). The Petitioners argue that the ALJ's findings in paragraphs 6 through 8 are "critically incomplete." *See* Petitioners' Exceptions at page 7.

The Petitioners argue that additional findings are necessary regarding the first "key disputed fact[]" identified by the ALJ in paragraph 4 of the ROD, in order to correctly apply the doctrine of equitable tolling. *Id.* The ALJ determined that the first "key disputed fact[]" was whether Mr. Luedike told Mr. LaRosa that the Department would notify him by mail or email before authorizing any changes to Funk's dock. (RO ¶ 4). The ALJ found that Mr. LaRosa "says [this] representation was made to him by Luedike," and that "Luedike says [it was] not." (RO ¶ 4). The ALJ then found that Mr. Luedike was not even located in the office that would be responsible for reviewing and authorizing changes to Funk's dock; and that this fact supported Luedike's testimony.

(RO ¶ 5). Thus, contrary to the Petitioners' argument, the ALJ did make complete findings as to the first "key disputed fact[]" that was identified in paragraph 4.

The Petitioners do not argue that the ALJ's findings in paragraphs 6 through 8 are not supported by competent substantial evidence. Instead, the Petitioners argue that the Department should reweigh the record evidence, make additional findings, and draw different inferences than those drawn by the ALJ. The Department is not authorized, however, to reweigh the evidence, make additional findings, or draw different inferences from the evidence than those drawn by the ALJ. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994). In addition, the ALJ's interpretation and application of the doctrine of equitable tolling is not a conclusion of law over which the Department "has substantive jurisdiction." *See* § 120.57(1)(l), Fla. Stat. (2013); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001).

The ALJ's findings in paragraphs 6 through 8 are supported by competent substantial record evidence. (Tr. 32-33, 57-58, 77). Therefore, based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Exception No. 4

The Petitioners take exception to the last sentence in paragraph 9 of the ROD, where the ALJ found that:

> 9. Petitioners state in their proposed recommended order that "The undisputed testimony establishes that Mr. Luedike instructed Mr. LaRosa that he could wait until 'visually seeing' construction on the Funk property to call back for a

> copy of the permit at that time." Although Petitioners apparently make this statement to suggest that Luedike deprived Petitioners of the opportunity to challenge the permit, it is inconsistent with LaRosa's allegation that Luedike told him the Department would notify LaRosa before action was taken on the Funk dock project and that LaRosa's sign-off would be necessary. (Emphasis added).

The Petitioners assert that the ALJ's "inference is simply unreasonable and is not supported by the record." *See* Petitioners' Exceptions at page 11. Contrary to the Petitioners' assertion, the record shows that Mr. LaRosa testified that after the conversation with Mr. Luedike, he believed that he would have to sign-off on any agency action taken by the Department. (Tr. pp. 32-33). In the proposed recommended order, the Petitioners argued to the ALJ that "Mr. Luedike instructed Mr. LaRosa that he could wait until 'visually seeing' construction on the Funk property to call back for a copy of the permit at that time." *See* Petitioners' Proposed Recommended Order at page 8, paragraph 20. Thus, the ALJ's finding of inconsistency is supported by competent substantial record evidence. *See* § 120.57(1)(l), Fla. Stat. (2013); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

Exception No. 5

The Petitioners take exception to paragraph 10 of the ROD, where the ALJ found that:

> 10. How this statement by Luedike fits within the context of his conversation with LaRosa is unknown. By itself, the statement is insufficient to show that Luedike made an affirmative statement to LaRosa that he could file a timely

> petition for hearing after construction began on the Funk dock.

The Petitioners contend that this finding is not supported by the record evidence. *See* Petitioners' Exceptions at page 12. Contrary to the Petitioners' contention, the ALJ's finding is a reasonable inference from the lack of evidence. The ALJ found the evidence was "insufficient" to support a finding that "Luedike made an affirmative statement." This evidentiary ruling is a matter within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Exception No. 6

The Petitioners take exception to the ALJ's conclusion of law in paragraph 25 regarding application of the doctrine of equitable tolling. (RO ¶ 25). The Petitioners assert that the ALJ's conclusion is not supported by the record or is incomplete based on the arguments in their prior five exceptions. For the reasons outlined in the rulings on the Petitioners' first five exceptions above, this exception is also denied.

RESPONDENTS' EXCEPTIONS

DEP and Funk's Exceptions

The Respondents take exception to the ALJ's conclusions in paragraphs 21, 22, 23, and 26, on the basis that the ALJ did not have jurisdiction to find that there existed disputed issues of material fact for adjudication regarding application of the doctrine of equitable tolling. *See* DEP's Exceptions at pages 2-6; Respondent Funk's Exceptions at

pages 1-4. The Respondents' arguments deal with procedural and evidentiary matters that are within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). In addition, the ALJ's interpretation and application of the doctrine of equitable tolling is not a conclusion of law over which the Department "has substantive jurisdiction." *See* § 120.57(1)(l), Fla. Stat. (2013); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001).

Therefore, based on the foregoing reasons, the Respondents' Exceptions are denied.

CONCLUSION

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

ORDERED that:

A. The Recommended Order of Dismissal (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The Petitioners' Petition for Administrative Hearing challenging the exemption determination in File No. 56-0137658-003 is DISMISSED.

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 Agency 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 4th day of December, 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.

Kay Buchanan 12/4/13
CLERK DATE

CERTIFICATE OF SERVICE

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

Andrew J. Baumann, Esquire
Lewis, Longman & Walker, P.A.
515 North Flagler Drive, Suite 1500
West Palm Beach, FL 33401-4327
abaumann@llw-law.com

John S. Yudin, Esquire
Guy, Yudin & Foster, LLP
55 East Ocean Boulevard
Stuart, FL 34994-2214
johnyudin@guyyudinlaw.com

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
brynna.ross@dep.state.fl.us

by electronic filing to:

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

this 4th day of December, 2013.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Administrative Law Counsel

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