STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. DOT Case Nos. 13-002
13-003

I-10 PECAN HOUSE, INC.,

Respondent.
_____/

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. DOT Case Nos. 13-058

OLAN Q. NOBLES,

Respondent.
_____/

FINAL ORDER

This case was referred to the Division of Administrative Hearings and pursuant to notice a hearing was conducted before the assigned Administrative Law Judge (ALJ), The Honorable Edward T. Bauer, on January 9 and February 13, 2015. The ALJ entered a Recommended Order on May 4, 2015, that recommended (1) the Department enter a final order finding that the billboard identified in Notice

of Violation 1487 is illegal and subject to removal under Section 479.105, Florida Statutes, and enter a final order denying the related application for an outdoor advertising permit; (2) take no further action on Notice of Violation 1352 until the Department reevaluates the related application for an outdoor advertising permit under the pre-July 1, 2014, codification of Section 479.105, Florida Statutes; and (3) enter a final order finding Nobles guilty of violating Section 479.106, Florida Statutes, and imposing an administrative fine of $1,000.00.

A copy of the Recommended Order is attached. The Department filed timely exceptions to the Recommended Order on May 19, 2015. The Respondents did not file exceptions, but they did file a response to the Department's exceptions on May 29, 2015.

Rulings on Exceptions

Where a party files exceptions to a recommended order within 15 days of its entry, "[t]he final order shall include an explicit ruling on each exception, but an 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." § 120.57(1)(k), Fla. Stat. (2014); see also Fla. Admin. Code R. 28-106.217(1) ("Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis

for the exception, and shall include any appropriate and specific citations to the record.").

The Department may not reject or modify a finding of fact unless the Department 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 or that the proceedings did not comply with essential requirements of law. § 120.57(1)(*l*), Fla. Stat. (2014). "Competent, substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Bill Salter Adver., Inc. v. Dep't of Transp., 974 So. 2d 548, 550-551 (Fla. 1st DCA 2008) (citations and internal quotations omitted). Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. § 120.57(1)(*l*), Fla. Stat. (2014).

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. § 120.57(1)(*l*), Fla. Stat. (2014). When rejecting or modifying such conclusion of law, the Department must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Id.

Exception to Paragraph 11: Paragraph 11 is a finding of fact that a Department agent or employee "erroneously opined that, in fact, there was 'no problem' with the [two billboards constructed in 1976, RO ¶ 10], which Mr. Nobles reasonably took to mean that the signs continued to satisfy the on-premises exemption and, thus, were exempt from licensure." In an endnote, the ALJ found that the Department employee also stated that the billboards "looked all right to her." RO n.4. The endnote states that these statements "have not been received for their truth (i.e., that the billboards actually satisfied the on-premises exemption), but instead to show that the statements, upon which Mr. Nobles relied, were actually made." Id. (parentheses in original). Paragraph 11 also finds that the reasonableness of Nobles's understanding was bolstered by the fact that, after the inspection, Nobles heard nothing further about the March 2008 notices of violation. In another endnote, the ALJ finds that while the Department asserts it has no record of the disposition of the March 2008 notices, the fact that the signs were never removed allows the reasonable inference that the Department abandoned its prosecution of the notices. RO n.5.

The Department argues that the ALJ's finding of reliance on the statements was "misplaced" because they were made by "non-management" Department employees, and because a verbal statement or policy implicit in agency action "does not ipso facto amount to an administrative rule upon which reliance may be

had . . . ." (Exceptions at 3.) The Department argues that there is no competent substantial evidence to support Paragraph 11. (Exceptions at 4.)

If the Department is arguing that there is no competent substantial evidence in the record that the statements of the Department employee detailed in Paragraph 11 and endnote 4 were made, the Department is mistaken. (Tr. 371, 391.) There was no hearsay objection and, as the ALJ explained, the statements were not accepted for their truth but for the fact that they were made. RO n.4. If the Department is arguing that there is no competent substantial evidence to support the ALJ's finding of reasonable reliance, whether there was reliance on a misrepresentation is a question of fact, Pinzl v. Lapointe, 426 So. 2d 65, 66 (Fla. 5th DCA 1983), as is whether reliance was reasonable, Bishop v. Progressive Express Ins. Co., 154 So. 3d 467, 468 (Fla. 1st DCA 2015). These findings were supported by competent substantial evidence.

If the Department is arguing that reliance on the Department employee's statements was misplaced or unreasonable because the statements were not "made by an employee with agency enforcement authority," (Exceptions at 4), the Department did not cite any authority for the proposition that reliance on a statement is reasonable only when the statement is made by an employee with "agency enforcement authority. Research did not reveal any case using the term "agency enforcement authority." The Department does not explain what "agency

enforcement authority" is,[1] how to tell an employee with "agency enforcement authority" apart from an employee without "agency enforcement authority," or why the Department would have sent an employee who lacked "agency enforcement authority" to investigate a possible outdoor advertising violation.

The Department argues that a verbal statement or policy implicit in agency action "does not *ipso facto* amount to an administrative rule upon which reliance may be had," (Exceptions at 3) (citing Dep't of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 88 (Fla. 1st DCA 1997) (Benton, J., dissenting)), but the ALJ did not find that the Department employee's statements that there was "no problem" with the billboards and that they "looked all right to her" are rules. Cf. Schluter, 705 So. 2d at 82-86 (evaluating whether six policies of the DHSMV were "rules" within the meaning of Chapter 120).

Also, the Department does not cite any authority for the proposition that duly adopted rules of general application are the only statements of government "upon which reliance may be had." The Department does cite Corona Properties of Florida, Inc. v. Monroe County, 485 So. 2d 1314 (Fla. 3d DCA 1986), which held that a written vested rights determination and building permit that were issued by a Monroe County official were ultra vires and void ab initio because the official

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[1] The Department appears to equate an employee with "agency enforcement authority" with a "management" employee. (Exceptions at 3.) No authority is cited for this proposition.

lacked authority to issue the determination or the permit. 485 So. 2d at 1317. The point seems to be that because the Monroe County official lacked authority to issue the permit, the Department employee lacked authority to tell Nobles that there was no problem with his sign. But see Young v. Dep't of Cmty. Affairs, 625 So. 2d 831, 835 (Fla. 1993) (county not an agency for purposes of chapter 120). The Department does not explain why the Department employee lacked this authority, but even if she did, the Department does not explain how Nobles was supposed to know that and Corona does not hold that reliance on an ultra vires statement is unjustified.

If the Department is arguing that Paragraph 11 should be rejected or modified because the ALJ made an erroneous conclusion of law – e.g., that the Department employee's statements were not void ab initio as a matter of law – the Department is unable to reject or modify findings of fact on that basis. § 120.57(1)(*l*), Fla. Stat. (2014). If the Department is arguing that Paragraph 11 should be rejected or modified because the ALJ did not weigh conflicting evidence appropriately – e.g., inferring that a lack of evidence of the disposition of the 2008 notices of violation meant that the Department abandoned prosecution where a Department witness testified that it was likely that evidence of the disposition was missing because of consolidation of sign enforcement duties from the Department's district offices to its central office – the Department is also unable to

reject or modify findings of fact on that basis. Bill Salter Adver., 974 So. 2d at 551 ("In reviewing the record, neither the agency nor this court is permitted to re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion."). If the Department is arguing that Paragraph 11 should be rejected or modified because the ALJ made inappropriate inferences of reliance or that the Department abandoned prosecution, the Department's argument is in error. Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1283 (Fla. 1st DCA 1985) ("Factual inferences are to be drawn by the hearing officer as trier of fact.").

The Department finds that Paragraph 11 is supported by competent, substantial evidence. The Department's exception to Paragraph 11 is rejected. § 120.57(1)(*l*), Fla. Stat. (2014).

Exception to Paragraph 19: The Department takes exception to Paragraph 19 of the Recommended Order. Paragraph 19 finds that obtaining a permit for the "Exit Now" billboard, see RO ¶ 12, is a "nonstarter" under the 2014 version of Section 479.105, Florida Statutes, "whose plain language prohibits the issuance of a permit where, as here, the sign was previously exempt from licensure." Paragraph 19 also finds that the Department's unjustified delay in pursuing removal, together with its agent's erroneous statement that the billboard was legal, upon which Nobles relied, "requires" that the "Exit Now" application must be

evaluated under the version of the grandfather provision that was in effect from 2008 until July 1, 2014.[2]

While Paragraph 19 is labeled a finding of fact, the Department argues it is actually a mixed finding of fact and conclusion of law. (Exceptions at 4.) The Department is not necessarily bound by the ALJ's label. Sch. Bd. of Leon County v. Hargis, 400 So. 2d 103, 107 (Fla. 1st DCA 1981); Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993).

To the extent Paragraph 19 contains findings of fact susceptible to ordinary methods of proof – for instance, the findings that the Department unjustifiably delayed pursuing removal, that its agent erroneously said that the billboards were legal, and that Nobles relied on the agent's statements – the Department finds that such findings of fact are supported by competent substantial evidence. The Department's exceptions to such findings of fact are therefore rejected.

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[2] Before July 1, 2014, a statutory "grandfather" provision allowed the Department to issue a permit for an unpermitted sign if, among other things, the applicant could prove that "the sign has been unpermitted, structurally unchanged, and continuously maintained at the same location for a period of 7 years or more[.]" § 479.105(1)(e), Fla. Stat. (2013). Effective July 1, 2014, the statute was changed to allow the Department to issue a permit for a non-conforming sign, with the additional requirement that the sign "has never been exempt from the requirement that a permit be obtained[.]" § 479.105(1)(c)2, Fla. Stat. (2014). Hence the ALJ's finding, which neither party challenges, that obtaining a permit for the "Exit Now" billboard is a "nonstarter" under the 2014 statute, "whose plain language prohibits the issuance of a permit where, as here, the sign was previously exempt from licensure." RO ¶ 19; see also RO ¶ 58.

§ 120.57(1)(*l*), Fla. Stat. (2014); Heifetz, 475 So. 2d at 1281 ("Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact.").

To the extent Paragraph 19 is a conclusion of law interpreting a statute over which the Department has substantive jurisdiction, or is a finding of ultimate fact infused by policy considerations for which the Department has special responsibility – for instance, the finding that the Department's delay in pursuing removal, along with its agent's erroneous statements upon which Nobles relied, "requires" that the "Exit Now" application be evaluated under the version of the grandfather provision that was in effect from 2008 until July 1, 2014 – the Department is not required to afford deference to such findings or conclusions. § 120.57(1)(*l*), Fla. Stat. (2014); McDonald v. Dep't of Banking & Finance, 346 So. 2d 569, 579 (Fla. 1st DCA 1977); see also Fla. Cargo Carriers Ass'n v. Dep't of Bus. & Prof'l Regulation, 738 So. 2d 391, 392 (Fla. 3d DCA 1999) (recognizing McDonald as distinguishing between decisions where ALJ's fact finding role predominates and those in which the expertise of the reviewing agency should prevail). That said, the Department does not directly take exception to the finding that the permit application for the "Exit Now" sign must be evaluated under the pre-2014 version of Section 479.105. Instead, the Department argues that Respondents bore the burden of establishing they met the criteria under either the

pre- or post-July 1, 2014, version of Section 479.105. (Exceptions at 5.) The Department also argues that the record establishes that the Department "properly evaluated the 'Exit Now' sign under the pre-July 2014 law as evidenced in its denial letter dated April 18, 2014." Id.

The Department's argument on this point is common sense: a permit denial from April 2014 would have been governed by the previous version of the statute because the current version of the statute did not take effect until July 1, 2014. 2014-233, §§ 33, 50, Laws of Fla. However, the ALJ made no findings on when the permit application was denied, just that it was denied. RO ¶ 13. The Department is unable to make new findings of fact. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006).

The Department does claim that Paragraph 19 is not supported by competent substantial evidence (Exceptions at 6), but the evidence adduced in support of that claim is that the Department did evaluate the "Exit Now" application under the pre-July 2014 version of Section 479.105, which is precisely what Paragraph 19 finds the Department must do.

Because the Department does not directly challenge, but rather appears to concede, Paragraph 19's finding that the pre-July 2014 version of Section 479.105, Florida Statutes, must govern the application for the "Exit Now" sign permit, the Department's exception to Paragraph 19 is rejected.

Exception to Paragraphs 23 and 24: Paragraph 23 finds that with the "spacing issue" resolved (RO ¶ 22, unchallenged by the Department) and the relevant period of inquiry limited to any time between 1976 and 1993 (RO ¶¶ 21-22, also unchallenged by the Department), the "only other criterion" for licensure in dispute is Section 479.111(2), Florida Statutes. Paragraph 24 finds that the Section 479.111(2) issue cannot be resolved on this record because there is a "dearth of persuasive evidence concerning the zoning designation of the third parcel (the location of the "Exit Now" sign) during the critical period of inquiry." RO ¶ 24 (parentheses in original). Paragraph 24 finds that the record contains only the Department's "speculative assumption" that the third parcel was always unzoned because it is now unzoned. Paragraph 24 also finds that even if the Department's assumption is correct, it is "impossible" to determine whether the business activities conducted on the parcel from 1976 until the mid-1990's would satisfy the use test at any time between 1976 and 1993.

While the Department identified Paragraph 23 in its Exceptions, the Department argues that only Paragraph 24 should be rejected. (Exceptions at 7.) The Department argues that the record contains ample evidence that "during the relevant periods" the "2.30 acre parcel[3] was unzoned with an Agricultural 5 future

[3] The 2.3 acre parcel is the third parcel where the "Exit Now" sign is located. RO ¶¶ 5, 24.

land use designation and does not satisfy the commercial and industrial activities required for a permit in § 479.111(2), Fla. Stat." Id. The Department argues that Respondents failed to carry their burden of proof to warrant the Department's consideration of their permit application. Id. The Department also argues that Respondents' application for a permit for the "Exit Now" sign was denied on April 21, 2014, that Respondents were notified of their right to a hearing, and failed to request a hearing on the denial. Id. The Department argues that Respondents were not prevented from applying for a permit or from providing evidence to document that the "Exit Now" sign complies with Section 479.111. Id.

Thus, the Department makes two points in response to the ALJ's finding that whether Section 479.111(2) is satisfied cannot be resolved because there is a dearth of evidence concerning the zoning designation of the third parcel. First, the record contains lots of evidence about the zoning designation for the third parcel. Second, the Respondents bore the burden of proof to establish their right to a permit, so if there is a lack of evidence, the Respondents failed to carry their burden and the permit should be denied.

On the first point, the ALJ's finding that he was not persuaded that the third parcel was always unzoned or whether the business activities conducted on the parcel would satisfy the use test goes to the weight of the evidence. Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995) ("By stating he

was not persuaded, the hearing officer engaged in the act of ascribing weight to the evidence."). The Department correctly notes that there is evidence to support the conclusion that the parcel was always unzoned, but the Department cannot reweigh the evidence presented or otherwise interpret the evidence to fit a desired conclusion. Id. (citing Heifetz, 475 So. 2d at 1281). Nor can the Department make new findings of fact when competent substantial evidence supports the ALJ's findings of fact. Walker, 946 So. 2d at 605. To the extent Paragraph 24 is a finding of fact that the evidence presented did not persuade the ALJ that the parcel was always unzoned, the Department's exception is rejected. Goin, 658 So. 2d at 1138.

On the second point, Paragraph 24 draws no conclusions of law on the effect of Respondents' failure to carry their burden of persuasion. Paragraphs 25 and 63, however, do. The Department's exceptions to Paragraphs 25 and 63 are considered below.

Exceptions to Paragraphs 25 and 63: Paragraphs 25 and 63 are considered together because they are essentially the same: they both draw on the findings in Paragraphs 21-24 to conclude that the only impediment to a permit under the pre-July 2014 version of Section 479.105 is Section 479.111(2); they both note the "absence of evidence" that the sign could have satisfied Section 479.111(2) at any time beginning when the sign was erected in 1976; they both concede that this "absence of evidence" would usually mean a recommendation to deny the permit

because the applicant bears the burden of proof; and they both conclude that, because of "unusual history and posture of this case," the Department should reevaluate the application.

The only difference between Paragraphs 25 and 63 is that the former is labeled a finding of fact and the latter is labeled a conclusion of law. The Department is not bound by the ALJ's labels, Hargis, 400 So. 2d at 107; Battaglia, 629 So. 2d at 168, particularly where, as here, the ALJ reaches a set of conclusions in one part of a Recommended Order and labels them "findings of fact" and reaches identical conclusions in another part of the Recommended Order and labels them "conclusions of law."

The Department finds that the conclusion in Paragraphs 25 and 63 that under the facts and posture of this case the Department should reevaluate the "Exit Now" sign application is a conclusion of law over which it has substantive jurisdiction. § 120.57(1)(*l*), Fla. Stat. (2014). This finding is supported by (1) the ALJ's labelling of this finding as a conclusion of law, RO ¶ 63 and (2) the conclusion that the Department should reevaluate Respondents' permit application turns on an interpretation of various provisions of Chapter 479, Florida Statutes. The Department is charged with the administration and enforcement of Chapter 479, § 479.02(1), Fla. Stat. (2014), and therefore the ultimate authority to interpret Chapter 479 resides with the Department and not an ALJ. Public Employees

Relations Com. v. Dade County Police Benevolent Assoc., 467 So. 2d 987, 989 (Fla. 1985).

Under Florida law, it is "fundamental that an applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency." Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). The ALJ acknowledges this "fundamental" rule, RO ¶ 63 (citing Antel v. Dep't of Prof. Reg., 522 So. 2d 1056, 1058 (Fla. 5th DCA 1988), and also acknowledges that this rule would ordinarily require an adverse recommendation against the applicant. RO ¶ 63.

The ALJ cites no authority for his legal conclusion that the facts and posture of this case require the Department to ignore this rule. This conclusion is within the Department's substantive jurisdiction and the Department is therefore free to accept or reject the conclusion as it sees fit. § 120.57(1)(*l*), Fla. Stat. (2014).

While the Department agrees that, ordinarily, Respondents' failure to carry its burden of ultimate persuasion in support of its permit application would mean the application would and should be denied, to avoid the appearance of impropriety or arbitrary decision-making the Department accepts the ALJ's conclusion of law that the Department should reevaluate Respondents' application for a permit for the "Exit Now" sign to determine if the third parcel satisfied the requirements of

Section 479.111(2), Florida Statutes, at any time between 1976 and 1993. RO ¶¶ 25, 63. The Department accepts the ALJ's conclusion of law that the Department will afford Respondents with a reasonable opportunity to supplement the permit application with additional evidence. RO ¶ 63.

Exception to Paragraphs 41, 42, and 73: To place these paragraphs in context, Paragraphs 29-40 detail the ALJ's findings of fact as to the Department's allegation that Nobles engaged in, or benefitted from, the unauthorized clearing of vegetation. Bill Armstrong, a certified arborist, RO ¶ 33, discovered that a 120' x 25' area had been cleared of vegetation, including 30 felled trees, in the general area of a truck-mounted sign owned and maintained by Nobles. RO ¶¶ 30-35. Armstrong's discovery was corroborated by a Department employee, who found that vegetation had been selectively cleared and enhanced the visibility of Nobles's sign. RO ¶ 36. Nobles denied involvement and claimed that a road crew had cleared the signs two years earlier. RO ¶ 38. During his second inspection, Armstrong found that the stumps of the felled trees had sprouted and were in their first growing season, eliminating the possibility that they had been cleared when Nobles said they were. RO ¶ 39. The ALJ found clear and convincing evidence that Nobles had benefitted from the unauthorized clearing. RO ¶ 40.

Paragraph 41 finds that while Armstrong presented credible testimony on the number and species of trees removed from the area, the record evidence of their

market value consists entirely of hearsay: Armstrong testified that he called three nurseries, got price quotes, averaged the quotes, and plugged the averages into the mitigation formula established in rule 14-10.057.

Paragraph 42 finds that the ALJ has "no quarrel" with the formula or Armstrong's initial reliance on the price quotes, but that the Department was obligated to produce at least some non-hearsay evidence of the market values. Because the record was devoid of such non-hearsay evidence, Paragraph 42 finds the Department's request for mitigation must be denied.

Paragraph 73 reiterates that the Department failed to adduce any non-hearsay evidence on the market value of the trees, and concludes that Armstrong's hearsay testimony is insufficient to support a finding concerning the value of the trees.

The Department contends that Paragraphs 41 and 42 are not supported by competent substantial evidence (Exceptions at 9), but a review of the record substantiates the ALJ's view that the only competent substantial evidence of the value of the trees was Armstrong's testimony. To the extent Paragraphs 41 and 42 contain findings of fact, they are supported by competent substantial evidence and the Department's exception to them is rejected.

While labeled findings of fact, Paragraph 42 contains conclusions of law that Armstrong's testimony was hearsay that was not otherwise admissible, that the

Department was obligated to adduce non-hearsay evidence of the value of the trees, and that without such evidence the Department's mitigation request must be denied. Paragraph 73 reiterates these conclusions but properly labels them conclusions of law.

The Department notes that Armstrong's testimony as to the value of the trees may have been admissible under Section 90.704, Florida Statutes. ("If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.")

The Department also notes that Respondents did not object to Armstrong's testimony. (Exceptions at 9, 11.) The ALJ concluded that Respondents' failure to object was irrelevant. RO n.17 (citing Scott v. Dep't of Bus. & Prof'l Reg., 603 So. 2d 519, 520 (Fla. 1st DCA 1992)). The ALJ does not discuss more recent decisions of the First District Court of Appeal suggesting that the Court no longer follows Scott. See, e.g., Waybright v. Johnson-Smith, 115 So. 3d 445, 447 (Fla. 1st DCA 2013) ("unobjected to hearsay is probative as non-hearsay evidence") (citing Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991)); Wiley v. U.S. Mineral Prods. Co., 660 So. 2d 1087, 1089 (Fla. 1st DCA 1995) ("hearsay evidence not objected to becomes part of the evidence in the case and is usable as proof just as any other evidence, limited only by its rational, persuasive power.") (citations omitted).

In the Department's view, Waybright, Harrison, and Wiley represent the current analysis of the First District on whether unobjected to hearsay evidence is probative, especially in light of Harrison's statement that "an appellate court may consider only the objections to admissibility of evidence on the grounds specifically stated at trial, and will not consider those objections to admissibility urged for the first time on appeal." 583 So. 2d at 754.

While it is the Department's view that Amrstrong's testimony may have been admissible under Section 90.704 and that the ALJ erred by not following Waybright, Harrison, and Wiley, because the Florida Evidence Code falls outside the Department's substantive jurisdiction, the Department is unable to reject or modify the conclusions of law in Paragraphs 42 and 73. § 120.57(1)(*l*), Fla. Stat. (2014). The First District would agree: Barfield v. Dep't of Health, Bd. of Dentistry holds that the Board of Dentistry lacked substantive jurisdiction to reject an ALJ's conclusion of law that dental licensure exam grading sheets were inadmissible hearsay. 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001).

Barfield also holds that while an ALJ's evidentiary conclusions of law may be beyond an agency's substantive jurisdiction, such conclusions are not immune from review. 805 So. 2d at 1013. The Court held that an agency may enter a final order under protest and thereafter appeal from its own order as a party adversely affected. Id. (citing § 120.68(1), Fla. Stat.). Accordingly, the Department does not

reject, under protest and subject to the right of the Department to appeal from this order as a party adversely affected, the conclusions of law in Paragraphs 42 and 73 that the unobjected to hearsay evidence of the value of the improperly cleared trees and vegetation was not probative and could not be considered in support of the Department's mitigation claim.

Findings of Fact

The Findings of Fact in the Recommended Order are supported by competent, substantial evidence. The Department adopts the Findings of Fact in the Recommended Order and incorporates them by reference.

Conclusions of Law

The Department adopts the Conclusions of Law in the Recommended Order and incorporates them by reference.

Order

Based on the foregoing Findings of Fact and Conclusions of Law, including the Department's substituted Conclusions of Law, the Department finds as follows:

1. The billboard identified in Notice of Violation 1487 ("Big O's") is illegal and subject to removal pursuant to Section 479.105, Florida Statutes. The related application for an outdoor advertising permit is hereby denied.
2. The Department will take no further action on Notice of Violation 1352 ("Exit Now") until it reevaluates the related application for an outdoor

advertising permit under the pre-July 1, 2014 codification of Section 479.105, Florida Statutes. In keeping with the ALJ's recommendation that the Department should afford a reasonable opportunity to supplement that permit application with additional evidence, RO ¶ 63, Respondents will have 30 days from the date of this Final Order to furnish whatever additional evidence they believe the Department should consider to:

Richard E. Shine
Assistant General Counsel
Florida Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, FL 32399-0458

The Department will consider all evidence submitted in support of the application, including any timely submitted additional evidence as authorized under this Final Order, in its reevaluation. After its reevaluation under the pre-July 1, 2014 codification of Section 479.105, Florida Statutes, the Department will either grant or deny the application per the governing statutes and rules. If granted, the Department will enter a final order dismissing Notice of Violation 1352. If denied, Respondents will be afforded a point of entry into the administrative process as to the denial.

3. Nobles is guilty of violating Section 479.106, Florida Statutes. The Department imposes an administrative fine for this violation of $1,000.00. This order is under protest and subject to the Department's right to appeal from this order as a party adversely affected. Barfield, 805 So. 2d at 1013; § 120.68(1), Fla. Stat.

DONE and ORDERED this 31st day of July, 2014.

Jim Boxold
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, MS 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN 30 DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

Hon. Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

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