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

KATHRYN HOGAN PEREDA and
MARGARET HOGAN MARKER,
d/b/a HFT ADVERTISING,

Petitioners,

vs.

DOT Case No. 13-110
DOAH Case No. 15-0733

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) and pursuant to notice a hearing was conducted before the assigned Administrative Law Judge (ALJ), The Honorable June C. McKinney, on May 29, 2015. The ALJ entered a Recommended Order on September 14, 2015, that recommended the Department enter a final order upholding HFT's Notice of Denied Outdoor Advertising Permit Application for the eastward face of the "Monument Sign."

A copy of the Recommended Order is attached. The Petitioners (unless the context indicates otherwise, the Petitioners are referred to collectively as "HFT") filed exceptions to the Recommended Order with DOAH on October 6, 2015. HFT

never filed exceptions with the Department. The Department did not file exceptions to the Recommended Order, but did respond to HFT's exceptions.

Rulings on Exceptions

HFT filed exceptions with DOAH, not the Department as required, and in any case the exceptions were not timely filed. § 120.57(1)(k), Fla. Stat. (2015) ("The agency shall allow each party 15 days in which to submit written exceptions to the recommended order."); Fla. Admin. Code r. 28-106.217(1) ("Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders **with the agency responsible for rendering final agency action** within 15 days of entry of the recommended order . . . ."). The matters excepted are therefore not preserved for review. Mehl v. Office of Fin. Regulation, 859 So. 2d 1260, 1263 (Fla. 1st DCA 2003) ("Because appellants' argument as to the issue of common enterprise was not preserved due to the appellants' failure to file timely exceptions to the recommended order, the ALJ's factual finding is binding; therefore, we affirm as to it.").

While the Department does not waive the point that it would be within its rights to not rule on HFT's exceptions as untimely and improperly filed, in order to facilitate a complete review in the event this final order is appealed, Hamilton County Bd. of County Comm'rs v. State Dep't of Envtl. Regulation, 587 So. 2d

1378, 1390 (Fla. 1st DCA 1991), the Department rules on the merits of the exceptions as follows.

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. (2015). "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). "Factual inferences are to be drawn by the hearing officer as trier of fact." Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1283 (Fla. 1st DCA 1985). 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. (2015).

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. § 120.57(1)(*l*), Fla. Stat. (2015). 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 One: Paragraph 12 is a finding of fact that the Monument Sign (see RO ¶ 9) is located in the controlled area (see RO ¶ 27) of Hallandale Beach Boulevard and I-95, that I-95 is part of the interstate highway system, and that the eastward face of the Monument Sign is visible from the main-traveled way of I-95.

Paragraph 30 is a conclusion of law that the greater weight of the evidence establishes that the eastward face of the Monument Sign is visible from I-95, and that therefore the eastward face of the Monument Sign falls within the permitting

requirements of the Department's jurisdiction because it is visible to and within 660 feet of I-95. An endnote to Paragraph 30 finds that "Petitioner's visibility argument regarding the Carter proceeding is unpersuasive."

HFT argues that the ALJ's finding that the eastward face of the Monument Sign is "visible" from the main-traveled way of I-95 "is based on an erroneous and unreasonable interpretation of 'visible sign' contained in § 479.01(27), Florida Statutes." (Exceptions at 3-4.) HFT argues that for a sign to be considered "visible" from I-95, the message or contents of the sign must be capable of being seen by "a person of normal visual acuity" (Exceptions at 4) (citing § 479.01(27), Fla. Stat.), that the Department's rules do not establish how to determine what a person of normal visual acuity can see, and that the Department's interpretation of what is "visible" is subjective (Exceptions at 4). HFT argues that, in an unrelated case (the "Carter Proceeding"), the Department successfully defended a permit denial on the grounds that being able to catch a "glimpse" of a sign does not mean the sign is visible (Exceptions at 4). HFT contends that the eastward face of the Monument Sign is visible from I-95 for 1.5 seconds. HFT asks that the Final Order reflect that a sign is a "visible sign" only if "a typical motorist on the main traveled [way] is able to identify the 'advertising message or informative contents of a sign,' whether or not legible, without diverting his/her eyes from the direction of travel, as opposed to merely being able to catch a glimpse of the sign" (Exceptions at 5).

Paragraph 12 finds that the eastward face of the Monument Sign is visible from I-95, and Paragraph 30 expressly concludes that the "greater weight" of the evidence establishes the sign face's visibility. The Department is unable to re-weigh the evidence presented on whether the sign face was visible. 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."). Similarly, the ALJ's finding that she was unpersuaded by HFT's analogy to the Carter Proceeding 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.").

HFT does not argue that these findings are not supported by competent, substantial evidence. The Department correctly notes that the findings are supported by competent, substantial evidence. The Department is therefore unable to reject them. § 120.57(1)(*l*), Fla. Stat. (2014).

Rather than argue that the ALJ's factual findings that the sign face was visible from I-95 is not supported by competent, substantial evidence, HFT argues that the ALJ interpreted the word "visible" wrong. This ignores that (1) 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. (2015) and (2) the ALJ recited the statutory definition of "visible sign" verbatim (RO ¶ 28) (quoting § 479.01(27), Fla. Stat.). The ALJ used this definition in determining whether the sign was "visible" and found that it was. The Department cannot overturn this finding without violating Section 120.57(1)(*l*), Florida Statutes.

Exception One is rejected.

Exception Two: Paragraph 34 concludes that HFT's argument that the Department is equitably estopped from denying the eastward sign face permit "is not persuasive" and rejects HFT's contention that it detrimentally relied on a May 2010 letter as a demand to move the sign without notice regarding permitting. Paragraph 34 explains that the letter informed HFT that it had to relocate the sign "onto property owned," but that this did not mean the relocation would not have to be permitted. When HFT relocated the sign, HFT had the responsibility of doing so legally, and HFT's assertion of unjust treatment (HFT spent $50,000 to relocate) is "not compelling" because the westward face of the Monument Sign was also built with the same money and is being used as a permitted sign.

Paragraph 35 concludes that the "greater weight of the evidence established" that the eastward face of the Monument Sign is visible to I-95 and requires a permit. Because the eastward face is less than 1,500 feet from an existing sign on the same side of the highway, Section 479.07, Florida Statutes, prohibits issuance

of a permit. Paragraph 35 concludes that HFT "failed to meet its burden of proof" and failed to establish that the eastward face is exempt from permitting, should be grandfathered, or that the Department is equitably estopped from denying HFT's permit application.

HFT contends that the ALJ used the wrong standard for equitable estoppel (Exceptions at 5-6). HFT argues that the ALJ did not consider, "or at least failed to make any factual findings," on the Department's "failure to act or assert any permitting authority" over the Monument Sign or other signs owned by HFT (Exceptions at 6). HFT argues that Mark Johnson, a Department outdoor advertising inspector, id., "has no specific recollection of ever noticing" the HFT signs (Exceptions at 7). HFT argues that it purchased, expanded, or "constricted" the HFT signs "[i]n reliance on the Department's failure to act for a period of more than 25 years . . . ." Id. (emphasis omitted). HFT concludes by asking the Department to "make the additional findings of fact and conclusions of law" supporting HFT's estoppel argument. Id.

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), and therefore declines HFT's invitation to do so here.

On the merits, while Paragraphs 34 and 35 are labeled conclusions of law, the Department is not bound by that 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). Estoppel is a question of fact. Garcia v. Abbey Found., Inc., 567 So. 2d 522, 523 (Fla. 3d DCA 1990) ("[W]hether an estoppel exists depends on the circumstances of the case. . . . The existence of disputed facts involving estoppel present a question for determination by the trier of facts.") (citation omitted). Similarly, 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).

HFT does not argue that the factual findings in Paragraphs 34 and 35 are not supported by competent, substantial evidence. Nor does HFT challenge the ALJ's conclusion that it bore the burden of proof to prove its allegations, including its equitable estoppel claim (RO ¶ 24). The ALJ's findings that HFT's argument is not persuasive, that HFT "failed to meet its burden of proof," and that HFT failed to establish its equitable estoppel claim are supported by competent substantial evidence. It would therefore be a "gross abuse of discretion" for the Department to disregard these findings. Strickland v. Fla. A&M Univ., 799 So. 2d 276, 278 (Fla. 1st DCA 2001); Goin, 658 So. 2d at 1138.

As for HFT's argument that the ALJ should have used a different legal standard to evaluate its estoppel claim, first, 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. (2015). Second, the Recommended Order does not explicitly state what factors the ALJ considered, but they appear to be a misrepresentation of material fact, reasonable reliance, and detrimental change in position. See Department's Responses to Exceptions at 4. Neither HFT's proposed estoppel standard nor the ALJ's standard account for the familiar rule that the State can only be estopped in "very exceptional circumstances." N. Am. Co. v. Green, 120 So. 2d 603, 610 (Fla. 1959) ("The instances are rare indeed when the doctrine of equitable estoppel can effectively be applied against state action. It will be invoked only under very exceptional circumstances."); see also Greenhut Constr. Co. v. Henry A. Knott, Inc., 247 So. 2d 517, 524 (Fla. 1st DCA 1971). But because the law of estoppel falls outside the Department's substantive jurisdiction, to the extent Paragraphs 34 and 35 make legal conclusions, the Department is unable to reject or modify the conclusions of law in Paragraphs 34 and 35. § 120.57(1)(*l*), Fla. Stat. (2014); Barfield v. Dep't of Health, Bd. of Dentistry, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). HFT's proposed standard for its estoppel claim is not as or more reasonable than the ALJ's standard. § 120.57(1)(*l*), Fla. Stat. (2015).

Exception Two is rejected.

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, the Department denies Petitioners' permit application for the eastward face of the Monument Sign and upholds HFT's Notice of Denied Outdoor Permit Application for the eastward face of the Monument Sign.

DONE and ORDERED this ___ day of October, 2015.

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

FILED D.O.T. CLERK
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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:

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