

OFFICE OF GENERAL COUNSEL
(850) 245-1000
(850) 245-1001 FAX



THE MAYO BUILDING
407 SOUTH CALHOUN STREET
TALLAHASSEE, FLORIDA 32399-0800

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
COMMISSIONER ADAM H. PUTNAM

Please Respond To:
LaSharontè D. Williams-Potts
Office of General Counsel
407 S. Calhoun Street, Suite 520
Tallahassee, FL 32399
(850) 245-1011
Lasha.Williams@FreshFromFlorida.com

June 9, 2016

Judge W. David Watkins
c/o DOAH Clerk
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

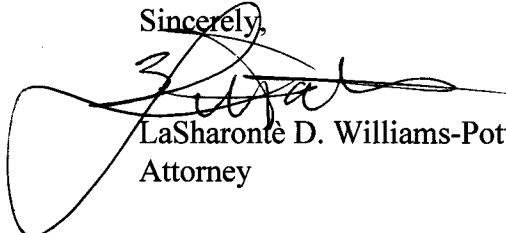
Re: Agency Final Order
Gateway Farms, LLC vs. Landscape Service Professionals, Inc.
and The Gray Insurance Company
Case No.: 15-3728

FILED
2016 JUN 10 PM 12: 27
DIVISION OF
ADMINISTRATIVE HEARINGS

Dear Judge Watkins,

Enclosed is a copy of the Department's Final Order. Please feel free to contact our office if you have any questions or concerns.

Sincerely,



LaSharontè D. Williams-Potts
Attorney

**STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**

GATEWAY FARMS, LLC,

Petitioner,

vs.

Case No.: 2015-3728

LANDSCAPE SERVICE PROFESSIONALS,
INC., AND THE GRAY INSURANCE
COMPANY, AS SURETY,

Respondents.

FILED
2016 JUN 10 PM 12:27
DIVISION OF
ADMINISTRATIVE HEARINGS

FINAL ORDER

THIS CAUSE arising under the Florida Agricultural License and Bond Law, Sections 604.15 through 604.34, Florida Statutes, came before the Commissioner of the Florida Department of Agriculture and Consumer Services (“the Department”) for consideration and final agency action. The Commissioner of Agriculture and Consumer Services, as head of the Department, has jurisdiction over the subject matter and the parties.

I. BACKGROUND

This case commenced when Gateway Farms, LLC (hereinafter “Gateway”) filed with the Department an agricultural products dealer’s complaint against Landscape Service Professional, Inc. (hereinafter “Landscape”) and the Gray Insurance Company (hereinafter “Surety”) alleging that Landscape failed to pay for slash pine trees, bald cypress, and sable palm trees purchased roughly on or around January 22 and 23, and February 9 and 16, 2015. The claim totaled \$13,462.30 and included the \$50.00 claim filing fee. On June 5, 2015, Landscape filed its answer with the Department and requested a formal hearing. The Department referred the case to the Division of Administrative Hearings (hereinafter “DOAH”).

At the hearing, Gateway presented the testimony of its owner, David Hajos, and offered two exhibits into evidence. Respondents presented the testimony of Sandra Benton, Guy Michaud, and John Harris, who was accepted as an expert. Respondents offered into evidence 14 exhibits. Further, the evidence established that payment had been made for the sabal palms and the cypress tress purchased from Gateway. Therefore, the remaining issue is nonpayment for 58 slash pines totaling \$7,933.46. The claim was reduced to reflect this amount.

II. POST HEARING PROCEDURAL HISTORY

A one-volume final hearing transcript was filed on January 20, 2016. Respondents timely filed their proposed recommended order by the proposed deadline, February 1, 2016. Gateway filed its proposed order on February 23, 2016. Gateway's proposed order was not timely filed, and accordingly, was not considered in the preparation of the Recommended Order.

The ALJ entered the Recommended Order on March 18, 2016. On April 4, 2016, Landscape filed Exceptions to the Recommended Order. The record consists of all notices, pleadings, stipulations, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings and exceptions the Recommended Order.

III. STANDARD OF REVIEW

Section 120.57(1)(l), Fla. Stat., dictates the applicable standard regarding "findings of fact." The Department is therefore bound to accept the ALJ's findings of fact unless, after a thorough review of the record, there exists no competent substantial evidence to support the finding. *Id.* See also Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009); Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Additionally, the Department cannot modify or substitute new Findings of Fact if competent substantial evidence supports the

ALJ's findings. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006); Gross v. Dep't of Health, 819 So. 2d 997, 1004 (Fla. 5th DCA 2002). "Competent substantial evidence' does not refer to the weight or probative value of the evidence but solely to the existence and admissibility of that evidence." Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); Dunn v. State, 454 So. 2d 641, 649 (Fla. 5th DCA 1984).

Findings of fact that are actually Conclusions of Law should be treated as Conclusions of Law despite any mislabeling. Battaglia Props. Ltd. v. Fla. Land and Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1993); Kinney v. Dep't of State, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). Unlike Findings of Fact, Conclusions of Law may be modified or rejected by the Department and differing interpretations applied. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001); IMC Phosphates, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009). In this case, the Department must state with particularity its reasons for rejecting or modifying such conclusions of law and must make a finding that its substituted conclusion of law is more reasonable than that which was rejected or modified. s. 120.57(1)(l), Fla. Stat. (2015). Further, the Department may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

Id.

IV. EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent Landscape filed sixteen (16) exceptions to the Recommended Order. The Department's ruling on each exception is as follows:

Exception 1. – Exception to Finding of Fact in paragraph 4 on page 4 of the Recommended Order:

Respondent, Insurance Company, filed a denial of the claim and was represented at hearing by Landscape's counsel.

Respondents argue that the ALJ should have included the fact that in its Answer, Respondent Landscape asserted as an affirmative defense to payment, non-viability of the agricultural products within the meaning of section 581.142(c)(1), Fla. Stat. This statute makes the sale of the products unlawful and within the purview of the Department. In support of their argument, Respondents allege that the ALJ disregarded this same issue in the Statement of Issues in the Recommended Order and in other parts of this proceeding.

Respondents do not address the ALJ's finding specifically. Instead, it seems that they are attempting to reargue points already made at the formal hearing. After a review of the record, it does not appear that the findings in paragraph 4 were not based on competent, substantial evidence. As such, the Department overrules Exception 1.

Exception 2. – Exception to Finding of Fact on paragraph 1 on page 3 of the Recommended Order:

Gateway is a producer and seller of agricultural products, including slash pine trees.

In their second exception, Respondents note that Gateway was not licensed and bonded with the Department and thus, the transactions in questions were illegal. However, Respondents have not alleged that the ALJ's finding in paragraph 1 was not based on competent, substantial evidence. The Department finds that it was and therefore overrules this exception.

Exception 3. – Exception to Finding of Fact in paragraph 5 on page 4 of the

Recommended Order:

Lynn Griffith, Landscape's plant and soil expert, considers Gateway to be a competent and professional grower.

Respondents take exception to this finding and note that Lynn Griffith admitted in a report that he had limited knowledge of Gateway's nursery operation. Respondents further note that Mr. Griffith's report suggested that the trees had limited root systems and were otherwise non-viable nursery stock and argue that the ALJ's failure to consider the viability of the trees in making findings of fact and conclusions of law was a departure from the essential requirements of law.

After a review of the record, particularly, R, Exhibit 4-F, p3, the Department believes that the ALJ's finding was based on competent, substantial evidence. Mr. Griffith admitted he had limited knowledge of Gateway's operations; however, he also acknowledged that he believes Gateway had been in business for a number of years, and that Gateway is a competent and professional grower. As such, the Department overrules this exception.

Exception 4. – Exception to Finding of Fact in paragraph 8 on page 5 of the

Recommended Order:

Between 20-30 of the trees ordered from Gateway were intended as replacement trees for approximately 150 slash pines provided by six other vendors that had been planted by Landscape, and then died.

Respondents argue that the findings in paragraph 8 are incorrect. Instead, the Gateway trees replaced 150 slash pine trees provided by one vendor in particular. The Department agrees with Respondents. The record reflects testimony and exhibits showing that the slash pine trees from all except one other vendor survived after being planted at the

site. See (R, p. 167, 12-25), (R, p. 174, 14-21), (R, Exhibit 5a). The finding in paragraph 8 was not based on competent, substantial evidence and is therefore rejected.

Exception 5. – Exception to Finding of Fact in paragraph 9 on page 5 of the Recommended Order:

Within several weeks of planting, 58 of the slash pines purchased from Gateway began to show signs of decline, resulting in their eventual death. Landscape consulted with the Palm Beach County Extension Service and industry professionals as to the cause of the death and decline of the slash pine trees, who undertook an investigation into the same.

Respondents argue that the record is devoid of evidence reflecting the investigation conducted by the professionals at the Palm Beach County Extension Service. Respondents also argue that this finding demonstrates the ALJ's misconception that the viability standards in Chapter 581, Fla. Stat., are inapplicable in this case.

In paragraph 9, the ALJ simply made factual findings regarding the sequence of events surrounding the decline of 58 slash pine trees. The ALJ did not entertain the content of any reports that may have been generated following the investigation by the experts. The Department thus finds that the findings in paragraph 9 were based on competent, substantial evidence. Exception 5 is overruled.

Exception 6. – Exception to Finding of Fact in paragraph 10 on page 5 of the Recommended Order:

Slash pine trees are very sensitive and can be easily stressed. Stress can be caused by a variety of factors including: transplanting, harsh handling; bark exposure to sunlight; including superficial wounds to the bark; too much or too little water; or planting too deeply. The stress will cause a tree to emit chemicals that attract beetles, which inhabit the trees and may kill a stressed tree within a week or two of the infestation.

Respondents argue that the ALJ should have included what they believe to be the initial stress factor, root pruning at the nursery. Respondents further argue that “harsh pruning” and “bark exposure to sunlight” were not factors addressed at the hearing. However, after a review of Gateway Farms, LLC v. Landscape Service Professionals, Inc.

the record, including transcripts and exhibits, the Department finds that paragraph 10 was based on competent, substantial evidence. Exception 6 is therefore overruled.

Exception 7. – Exception to Finding of Fact in paragraph 11 and 12 on page 6 of the Recommended Order:

11. In March 2015, Lynn Griffith, an agricultural consultant, conducted an SWA site visit. Mr. Griffith noted that a majority of the planted pines were healthy, but there were some that were not doing well; some had holes in them indicative of a pine beetle infestation.

12. In his report dated March 12, 2015, Mr. Griffith opined on the impact of the ambrosia (pine) beetle infestation on the slash pines:

The quantities of boreholes in some of the dead or declining pines would lead me to conclude that borers could be a primary cause of death, but in other cases the number of holes was low, indicating the pine decline was initiated by other factors.

Respondents' Exception 7 does not identify a clear legal basis. As such, the Department overrules this exception.

Exception 8. – Exception to Finding of Fact in paragraph 14 on page 6 of the Recommended Order:

At hearing, Ms. Benton's opinion regarding the cause of death of the pines was echoed by John Harris, accepted as an expert in landscape economics and arborism. Mr. Harris's opinion centered on only one possible explanation for the trees' demise: a failure to have an adequate root system or an inability of the roots to generate new growth. Typically, this is caused by improper "hardening off" of the root system by the grower. However, on cross-examination, Mr. Harris acknowledged that while pine beetles typically infest stressed trees, if the beetle population builds up enough in an area they will attack otherwise healthy trees.

Respondents' Exception 8 does not identify a clear legal basis. This exception is therefore overruled.

Exception 9. – Exception to Finding of Fact in paragraph 16 on page 7 of the Recommended Order:

Mr. Hajos further testified that any trees that are going to die due to the stress of being dug out of the ground will die during the hardening off process.

Respondents argue that Mr. Hajos did not provide any evidence to support his testimony, which was ultimately the basis for the finding in paragraph 16. Respondents believe that since Mr. Hajos did not present support for his testimony, the ALJ's finding is not based on competent, substantial evidence.

Respondents' argument is misguided. The ALJ merely summarized Mr. Hajos' testimony as to his belief of when and how a stressed tree would die. Such testimony is reflected in the record. The Department finds that this finding was based on competent, substantial evidence. Exception 9 is overruled.

Exception 10. – Exception to Findings of Fact in paragraph 17 and 18 on pages 7 and 8 of the Recommended Order:

17. Mr. Hajos attributed the death of the Gateway trees to several factors, including stress caused by improper lifting of the trees during loading and unloading, stress caused by a delay in planting the trees after they arrived at the SWA site, and the pre-existing pine beetle infestation.

18. Mr. Hajos examined a photograph received in evidence and explained that it showed a tree being improperly lifted by Landscape personnel during unloading. The photograph showed the strap around the tree trunk doing the primary lifting. The result is that rather than distributing the pressure between the trunk and the strap on the root ball, the root ball will be loosened, which will stress the tree.

Respondents' argument in Exception 10 is similar to the argument made in Exception 9. As such, the Department overrules Exception 10 for the same reasons.

Exception 11. – Exception to Finding of Fact in paragraph 19 on page 8 of the Recommended Order:

Mr. Hajos testified that he was aware that the Gateway trees that had been delivered to the SWA site were left on the ground for days before being planted. This testimony was corroborated by Landscape's Daily Job Report log which reflected the delivery of the first load

of the Gateway pines to the SWA site on January 23 and 24, 2015, but planting of those trees did not begin until January 29, 2015.

Respondents next argue that the findings in paragraph 19 are not reflected in the record. Respondents reference the same Daily Job Report to illustrate that the trees were not left on the ground for days before planting and were instead planted the day they were delivered.

Where the evidence presented supports two inconsistent findings, it is the ALJ's role to decide the issue one way or the other. The Department may not reject the ALJ's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. Further, the Department cannot weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. Walker v. Bd. of Prof'l Engineers, 946 So.2d 604, 605 (Fla. 1st DCA 2006) (citing Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985)).

In this case, the ALJ found that the Daily Job Report corroborated Mr. Hajos' testimony that the trees were delivered to the site well before they were planted by Landscape. The Department finds that this finding was based on competent, substantial evidence. Exception 11 is overruled.

Exception 12. – Exception to Finding of Fact in paragraph 20 on page 8 of the Recommended Order:

On one occasion, a Landscape truck that had picked up trees from Gateway, broke down in Ocala on its return trip to Palm Beach County and had to return to the Gateway site in High Springs. There, the trees were unloaded, and then reloaded onto a different truck where they were delivered two days later to the SWA job site. This inordinate delay and additional loading and unloading further stressed the trees.

As in Exception 11, Respondents argue that there was no delay in planting the trees at the site. However, the Department finds that there is competent, substantial evidence

from which the ALJ's findings could reasonably be inferred. Therefore, Exception 12 is overruled.

Exception 13. – Exception to Finding of Fact in paragraph 21 on page 8 of the Recommended Order:

However, once a pine beetle has entered the bark of a pine tree preventative spraying will be ineffective at eradicating the pest.

Respondents argue that the ALJ's finding is not based on competent, substantial evidence because Mr. Hajos did not provide any evidence to support his testimony. However, the ALJ made the findings in paragraph 21 after hearing unopposed testimony by Mr. Hajos. The ALJ then weighed this evidence along with the evidence provided by Landscape. The Department finds that there is competent, substantial evidence from which the ALJ's finding could reasonably be inferred. Exception 13 is overruled.

Exception 14. – Exception to Finding of Fact in paragraph 22 on page 9 of the Recommended Order:

Mr. Michaud could not testify with certainty that the Gateway trees died of inadequate roots, as opposed to a beetle infestation.

Respondents take exception to the finding in paragraph 22 and allege that Mr. Michaud is an expert in the handling and installation of trees and was an eyewitness to the unloading, installation, and the watering of the trees at the site. Respondents fail to contest that the findings were not based on competent, substantial evidence.

After a review of the record, the Department finds that there is competent, substantial evidence from which the ALJ's findings could reasonably be inferred. Mr. Michaud testified that he was not sure how the trees died. (R, p. 75, 5-6). This exception is overruled.

Exception 15. – Exception to Finding of Fact in paragraph 24 on page 9 of the

Recommended Order:

Based on the totality of the evidence, it is more likely than not that a combination of factors contributed to the SWA slash pine deterioration, including delays in planting the trees after delivery, rough handling, and the beetles. None of these causes are attributable to the actions of Gateway. Likewise, the greater weight of the evidence does not support a conclusion that the trees sold by Gateway to Landscape were nonviable nursery stock.

Respondents argue that it provided physical evidence to support its case while the Petitioner provided hearsay and opinions. Again, the Department may not weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. For these reasons, Exception 15 is overruled.

Exception 16. – Exception to the ALJ's Recommendation on page 12 of the Recommended Order:

Respondents take exception to the ALJ's recommendation that it pay Gateway for trucking and loading fees, which make up the total claim of \$7,933.46. Section 604.21(1)(a), Fla. Stat., states in part, "...Such complaint shall include all agricultural products defined in s. 604.15(1), as well as any additional charges necessary to effectuate the sale unless these additional charges are already included in the total delivered price."

Gateway's claim includes charges for "delivery" of the trees. The Department interprets "delivery" to be an additional charge necessary to effectuate the sale of the trees and thus falls within section 604.15(1), Fla. Stat. As a matter of law, Gateway's award should include the charges for delivery. The Department overrules Exception 16.

V. FINDINGS OF FACT

The Commissioner of Agriculture adopts the Findings of Fact set forth in the attached Recommended Order subject to the following changes:

1. Between 20-30 of the trees ordered from Gateway were intended as replacement trees for approximately 150 slash pines provided by another vendor that had been planted by Landscape, and then died.

VI. CONCLUSIONS OF LAW

The Commissioner of Agriculture adopts the conclusions of law set forth in the attached Recommended Order subject to the following changes:


2. Paragraph 30 on page 10 of the Recommended Order defines “dealer in agricultural products” and cites section 604.15(1), Fla. Stat. The Recommended Order also states that “Landscape is a dealer in agricultural products within the meaning of section 604.15(1).” However, the correct citation to both is section 604.15(2), Fla. Stat.

ORDERED AND ADJUDGED:

1. That Respondent, Landscape, is indebted to Claimant Gateway in the amount of \$7,983.46.
2. Respondent, Landscape shall pay to Claimant, Gateway, \$7,983.46 within thirty (30) days from the date of this Final Order. In the event Respondent Landscape does not comply with this Final Order within thirty (30) days, Surety, the Gray Insurance Company, as Co-respondent, is hereby ordered to provide payment under the conditions and provisions of the agricultural dealer’s bond, to **ADAM H. PUTNAM, COMMISSIONER OF AGRICULTURE. Should responsibility of payment evolve to the Co-respondent, the Gray Insurance Company, it will be notified by the Department. This Final Order is effective on the date filed with the Clerk of the Department.**

DONE and ORDERED at Tallahassee, Leon County, Florida, this 6th day of June, 2016.

ADAM H. PUTNAM
COMMISSIONER OF AGRICULTURE


Michael A. Joyner
Assistant Commissioner of Agriculture

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Filed with Agency Clerk this 6th day of June, 2016.


Agency Clerk

Copies furnished to:

Judge W. David Watkins, Administrative Law Judge, The Division of Administrative Hearings, The Desoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399

Christopher Stephen Rapp, Esq., Tobin & Reyes, P.A., Mizner Park Office Tower, Suite 510, 225 Northeast Mizner Boulevard, Boca Raton, Florida 33432

Gateway Farms, LLC v. Landscape Service Professionals, Inc.
DOAH Case No.: 2015-3728

Mark John Labate, Esq., 2748 East Commercial Blvd., Fort Lauderdale, Florida 33308

The Gray Insurance, Attn: Bond Claim Department, 3601 N I-10 Service Road, Metairie, LA
70009-6202

Amy Topol, Division of Consumer Services, the Rhodes Building, 2005 Apalachee Parkway,
Tallahassee, FL 32399