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

CRESTVIEW PAINT AND BODY, INC.,

Petitioner,

vs. DOT Case No. 17-019

DEPARTMENT OF TRANSPORTATION,

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, The Honorable Yolonda Y. Green, on November 29, 2017. The ALJ entered a Recommended Order on February 1, 2018, that recommended the Department enter a final order finding that (1) Crestview's sign was erected and maintained on Department right-of-way and (2) Crestview is not entitled to an exemption for an on-premises sign.

A copy of the Recommended Order is attached. Crestview filed exceptions to the Recommended Order on February 16, 2018, albeit with DOAH rather than the Department. The Department responded on February 22, 2018.

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

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include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.; 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. "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 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." Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). "If the ALJ's findings of fact are supported by competent, substantial evidence, the agency cannot reject them even to make alternate findings that are also supported by competent, substantial evidence." Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013). 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.

There is a fundamental difference between the deference an agency must accord to findings of evidentiary fact and findings of ultimate fact infused by policy considerations. "Matters that are susceptible of ordinary methods of proof, such as determining the credibility of

witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion." Baptist Hosp., Inc. v. Dep't of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA 1986); see also McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 579 (Fla. 1st DCA 1977) ("[W]here the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.").

The Department may reject or modify conclusions of law over which it has substantive jurisdiction. § 120.57(1)(*l*), Fla. Stat. 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 1: Crestview takes exception to paragraph 2 of the recommended order. Crestview expressly "does not take exception to the statements contained in finding of fact number 2, but seeks to expand the finding." 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). Exception 1 is rejected. Id.

Exception 2: Crestview takes exception to paragraph 4's finding that it is "not clear" whether the City of Crestview required a survey of the location. Crestview notes a city employee testified that surveys are typically done. The Department's response correctly points out that these are not the same thing: typical practice is not dispositive of whether something was done in a particular instance. Exception 2 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 3: Crestview takes exception to paragraph 6's misidentification of a witness. The Department agrees paragraph 6 should have identified Lynda Anderson, not Senida Oglesby. Paragraph 6's identification of Senida Oglesby as the witness in question is not supported by competent, substantial evidence, and the Department thus modifies paragraph 6 to identify Lynda Anderson. § 120.57(1)(*l*), Fla. Stat.

Exception 4: Crestview takes exception to paragraph 7, which finds Crestview's owner, Glenn Lowe, inspected a vehicle at the "concierge location" on Ferdon Boulevard (RO ¶ 3) on an undetermined date. Crestview does not argue this finding is not supported by competent, substantial evidence, and asks the Department to make new findings. The Department cannot do so. Walker, 946 So. 2d at 605. Exception 4 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 5: Crestview takes exception to paragraph 8, which finds the Department's investigator visited the concierge location on Ferdon Boulevard on three different dates in 2017 and observed no business activity there. Crestview does not argue the finding is not supported by competent, substantial evidence. The finding is supported by competent, substantial evidence. Exception 5 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 6: Crestview takes exception to paragraph 9, which finds the "credible evidence demonstrates that there was no legitimate business activity being conducted on behalf of Crestview Paint and Body at the Ferdon Boulevard location." Crestview argues this finding is "contrary to the undisputed and overwhelming evidence[,]" but does not argue the finding is unsupported by competent, substantial evidence. The Department cannot reweigh evidence to reach a desired conclusion. Bill Salter Adver., 974 So. 2d at 551. Exception 6 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 7: Crestview takes exception to paragraph 10, which finds Ferdon Boulevard is subject to Department permitting under Chapter 479, Florida Statutes, and that Crestview never requested or received a permit for outdoor advertising at the Ferdon Boulevard location. Crestview argues it received a permit from the City of Crestview, and that the sign is exempt from permitting as an on-premises sign.

Read in context with the first sentence of paragraph 10, which refers to the Department's permitting authority over Ferdon Boulevard, the Department understands the second sentence to mean "never requested or received a permit from the Department" as opposed to "never requested or received a permit from any entity that issues permits." Thus read in context, paragraph 10 is supported by competent, substantial evidence. As for Crestview's legal argument that its sign is exempt from permitting as an on-premises sign, 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. Exception 7 is rejected. Id.

Exception 8: Crestview takes identical exception to paragraphs 17, 19, and 20. Paragraph 17 finds the Department issued an Amended Notice of Violation for an illegal sign. Paragraph 19 finds that while the Department did not properly file a motion to amend, there was no prejudice or alternatively that any prejudice was cured. Paragraph 20 finds Crestview agreed to a continuance of the hearing (RO ¶ 18) based on the amended notice, and that Crestview had sufficient time to prepare for the hearing. Crestview's exceptions to these findings argue that its proposed recommended order states the "'statutory notice requirements of the Amended Notice of Violation was [sic] not properly followed' pursuant to § 479.107, Florida Statutes."

Crestview's point is unclear. The ALJ found that the Department did not properly file a motion to amend its notice, but that there was no prejudice or alternatively that any prejudice

was cured. Prejudice is a question for the trier of fact. Bishop v. Progressive Exp. Ins. Co., 154 So. 3d 467, 468 (Fla. 1st DCA 2015). Crestview does not contend that the findings in paragraphs 17, 19, and 20 are not supported by competent, substantial evidence. Exception 8 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 9: Crestview takes exception to paragraph 27, which concludes that Crestview's ownership of the Ferdon Boulevard location, maintenance of a business license for the location, and scheduling of appointments to meet customers at the location "does not constitute business activity of paint and body service conducted on the property sufficient to warrant an on-premises exemption for Crestview Paint and Body."

Whether a sign is an "on-premises" sign, and thus whether an exemption is warranted, is a question of law. McDonald's Corp. v. Dep't of Transp., 535 So. 2d 323, 325 (Fla. 2d DCA 1988). Despite this, Crestview argues the "more persuasive and creditable evidence" is that the Ferdon Boulevard site was not being used solely for advertising. Crestview thus apparently views paragraph 27 as a finding of fact, and asks the Department to reweigh evidence to reach a different finding. Crestview is mistaken on the former, McDonald's Corp., 535 So. 2d at 325, and the Department cannot do the latter. Bill Salter Adver., 974 So. 2d at 551.

Crestview does not advance a legal conclusion that is as or more reasonable than the conclusion in paragraph 27. The Department declines to reverse or modify the well-reasoned conclusion of law in paragraph 27. Exception 9 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 10: Crestview takes exception to paragraph 28, which concludes that if there was "minimal business activity" on the Ferdon Boulevard location, the activity was not meaningful. Paragraph 28 finds the "more credible evidence" was that if any business was done

on the site, the sign and messages displayed were not an "integral part" of any business done there.

Whether a sign is an "on-premises" sign, and thus whether an exemption is warranted, is a question of law. McDonald's Corp., 535 So. 2d at 325. Despite this, Crestview argues the "more persuasive and creditable evidence" is that the Ferdon Boulevard site was not being used solely for advertising. Crestview thus apparently views paragraph 28 as a finding of fact, and asks the Department to reweigh evidence to reach a different finding. Crestview is mistaken on the former, McDonald's Corp., 535 So. 2d at 325, and the Department cannot do the latter. Bill Salter Adver., 974 So. 2d at 551.

Crestview does not advance a legal conclusion that is as or more reasonable than the conclusion in paragraph 28. The Department declines to reverse or modify the well-reasoned conclusion of law in paragraph 28. Exception 10 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 11: Crestview takes exception to paragraph 29, which concludes that "acknowledgment signs" are not among the statutory exemptions to permitting. Crestview does not directly take exception to this conclusion. It argues that it was not operating an outdoor advertising sign for hire and it occasionally acknowledged appreciation for people or businesses.

Crestview does not advance a legal conclusion that is as or more reasonable than the conclusion in paragraph 29. The Department declines to reverse or modify the well-reasoned conclusion of law in paragraph 29. Exception 11 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 12: Crestview takes exception to paragraph 31, which concludes that even if Crestview's sign was on-premises, "which was not the case here, the evidence demonstrates that it is partially located on the [Department's] right-of-way and must be removed."

Crestview argues the "overwhelming and undisputed evidence proves" the sign is an on-premises sign. Here again, Crestview apparently sees paragraph 31 as a finding of fact, and asks the Department to reweigh evidence to reach a different finding. Crestview is mistaken on the former, McDonald's Corp., 535 So. 2d at 325, and the Department cannot do the latter. Bill Salter Adver., 974 So. 2d at 551.

Crestview also argues the right-of-way violation is "subject to [its] defenses," but does not elaborate beyond that. Crestview does not dispute that its sign is partially in Department right-of-way. The Department understands these unnamed "defenses" to which Crestview contends the right-of-way violation is "subject" to include estoppel, waiver, laches, and selective enforcement. Each are considered individually below. The Department's rulings on these "defenses" are incorporated by reference. Exception 12 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 13: Crestview takes exception to paragraph 33, which finds Crestview did not prove the elements of equitable estoppel because there was no allegation that the Department made any affirmative statement authorizing the sign or that Crestview relied on Department statements to its detriment. Crestview argues it met the elements of estoppel.

Whether equitable estoppel exists is for the finder of fact. Cleveland v. Crown Fin., LLC, 183 So. 3d 1206, 1210 (Fla. 1st DCA 2016). Although paragraph 33 is labeled a conclusion 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). The findings of fact in paragraph 33 are supported by competent, substantial evidence. Exception 13 is rejected. § 120.57(1)(*l*), Fla. Stat.

The Department notes that paragraph 33 does reach a legal conclusion on the elements of equitable estoppel against a state agency. Paragraph 33 cites Salz v. Department of

Administration, 432 So. 2d 1376, 1378 (Fla. 3d DCA 1983)[1] for these elements, but omits that "[a]gainst a state agency, however, equitable estoppel will be applied only under exceptional circumstances." Salz, 432 So. 2d at 1378 (citing North American Co. v. Green, 120 So. 2d 603 (Fla.1959)). Because the elements of estoppel are not within the Department's substantive jurisdiction, the Department cannot modify paragraph 33 to include this "exceptional circumstances" element. Barfield v. Dep't of Health, Bd. of Dentistry, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001).

Exception 14: Crestview takes exception to paragraph 34, which finds the defenses of waiver and laches do not apply on these facts because Crestview "has not established" them. Crestview argues the "overwhelming and undisputed evidence" supports these defenses.

Although paragraph 34 is labeled a conclusion of law, the Department is not bound by that label. Hargis, 400 So. 2d at 107. Waiver and laches are for the ALJ as the finder of fact. Hale v. Dep't of Revenue, 973 So. 2d 518, 523 (Fla. 1st DCA 2007); Goodwin v. Blu Murray Ins. Agency, Inc., 939 So. 2d 1098, 1104 (Fla. 5th DCA 2006) ("Like waiver, laches is also an affirmative defense. As such, the burden of proof is on the individual who asserts it, and it must be proved by very clear and positive evidence.")

Crestview asks the Department to reweigh the evidence to reach its desired conclusions of estoppel and waiver. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551. Paragraph 34 is supported by competent, substantial evidence. Exception 14 is rejected. § 120.57(1)(*l*), Fla. Stat.

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[1] Paragraph 33's citation of Salz has a typo: the opinion begins on page 1376 and the jump cite is to page 1378 of Volume 432 of the Southern 2d reporter.

Exception 15: Crestview takes exception to paragraph 35, which finds Crestview argues the Department engaged in selective enforcement by issuing a violation on its sign without investigating other signs. Crestview argues this was not the only basis of its selective enforcement claim and that there were "numerous other factors[,]" but it does not identify them.

The Department's response correctly notes that paragraph 35 is intended as a synopsis of Crestview's selective enforcement claim, and that this synopsis is correct. If this synopsis unintentionally omits the unnamed "numerous other factors" Crestview believes are important, the Department need not rule on an exception that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.; Fla. Admin. Code R. 28-106.217(1). Exception 15 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 16: Crestview takes exception to paragraph 36, which finds Crestview "has not established" the Department was aware of other violators and chose to pursue removal of Crestview's sign. Crestview argues "[i]t is abundantly and overwhelming [sic] clear from the more persuasive and creditable evidence presented" that the Department was aware of other violators and "turned a 'blind eye' to all the other violations."

Although paragraph 36 is labeled a conclusion of law, the Department is not bound by that label. Hargis, 400 So. 2d at 107. Whether Crestview established a selective enforcement defense is for the ALJ as finder of fact. Fla. Dep't of Transp. v. E.T. Legg & Co., 472 So. 2d 1336, 1337 (Fla. 4th DCA 1985) ("[W]hether there was selective enforcement was a question of fact to be determined by the trier of fact . . . .")

Crestview again asks the Department to reweigh the evidence to reach its desired conclusions. The Department cannot do so. Bill Salter Adver., 974 So. 2d at 551. The factual

findings in paragraph 36 are supported by competent, substantial evidence. Exception 16 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 17: Crestview takes exception to paragraph 37, which concludes that Crestview "has not established" its enforcement was based on impermissible factors such as race or religion.

Crestview repeats its 16th exception verbatim, arguing "[i]t is abundantly and overwhelming [sic] clear from the more persuasive and creditable evidence presented" that the Department was aware of other violators and "turned a 'blind eye' to all the other violations." The Department incorporates its ruling on Exception 16 by reference.

Crestview also argues "the evidence clearly shows" the Department "singled out" Crestview for "invidious reasons," citing E.T. Legg. E.T. Legg holds that selective enforcement is a question for the trier of fact, reviewed for competent, substantial evidence, 472 So. 2d at 1337, and affirmed the trial court's finding of selective enforcement as supported by competent, substantial evidence, id. at 1338. Under both E.T. Legg and Section 120.57, Florida Statutes, the Department cannot reverse or modify the trier of fact's findings on whether there was selective enforcement if those findings are based on competent, substantial evidence. The factual findings in paragraph 37 are supported by competent, substantial evidence. Exception 17 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 18: Crestview takes exception to paragraph 38, which finds the Department is not precluded from taking enforcement action against Crestview's sign merely because other signs may be in violation. Crestview argues "the evidence shows that the FDOT was guilty of selective enforcement" because it refused to enforce or ignored other violations and only sought enforcement against Crestview.

It is difficult to reconcile Crestview's exception with the conclusion in paragraph 38. It is not clear whether Crestview contends that the Department is precluded from taking enforcement action against one sign merely because other signs may be in violation. If it does, the Department finds that proposed substituted conclusion of law is not as or more reasonable than the conclusion of law in paragraph 38.

The most straightforward reading of Crestview's exception is to urge the Department to overrule the ALJ's findings of fact that the Department did not engage in selective enforcement. As developed in the rulings to Exceptions 16 and 17, incorporated here by reference, the Department cannot do so. Exception 18 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 19: Crestview takes exception to paragraph 39, which finds Crestview's sign is located on the Department's right-of-way and does not qualify for an exemption as an on-premises sign. Crestview argues the "preponderance of the more credible and persuasive evidence" does not support these findings.

In essence, paragraph 39 is a summary of the findings of fact and conclusions of law preceding it (the paragraph begins with "Based on the foregoing … .") The Department thus incorporates by reference its previous rulings on all other exceptions. Crestview's request that the Department reweigh the evidence to reach a desired conclusion is rejected. Bill Salter Adver., 974 So. 2d at 551. Exception 19 is rejected. § 120.57(1)(*l*), Fla. Stat.

Exception 20: Crestview takes exception to the ALJ's recommendation that the Department enter a final order finding that (1) Crestview's sign was erected and maintained on Department right-of-way and (2) Crestview is not entitled to an exemption for an on-premises sign. Crestview also argues the First Circuit Court in and for Okaloosa County, Florida, has

"taken jurisdiction" over this case by entering a temporary injunction, a copy of which is attached to Crestview's exceptions.

The Department's ruling on the recommendation immediately follows and is incorporated here by reference. On the jurisdictional question, Crestview's lawyer signed a joint pre-hearing stipulation in which the parties agreed that "DOAH has jurisdiction over the parties and the matters presented herein." Crestview does not argue that the Department lacks jurisdiction to enter a final order. The Department notes that the temporary injunction order was issued ex parte without notice to the Department. It enjoins the Department from removing Crestview's sign "until the resolution of the instant proceeding and/or administrative remedies are exhausted." The second contingency comes to pass today.

Crestview's exception to the ALJ's recommendation is rejected.

Findings of Fact

Except as modified here, 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 as modified here 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 accepts the ALJ's recommendation and finds that (1) Petitioner's sign was erected and maintained on the Department's right-of-way and (2) Petitioner is not entitled to an exemption for an on-premises sign.

DONE and ORDERED this 1st day of May, 2018.

Hon. Michael Dew
Secretary
Florida Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

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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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