STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MW HORTICULTURE RECYCLING FACILITY, INC.,	)	
Petitioner,	)	
v.	)	**OGC CASE NO. 19-1536**
	)	**DOAH CASE NO. 19-5636**
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	
MW HORTICULTURE RECYCLING OF NORTH FT. MYERS, INC.,	)	
Petitioner,	)	
v.	)	**OGC CASE NO. 19-1537**
	)	**DOAH CASE NO. 19-5642**
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on September 17, 2020, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A.

DEP timely filed exceptions with the Department on October 2, 2020. On September 30, 2020, the Petitioners, MW Horticulture Recycling Facility, Inc. (MW), and MW Horticulture Recycling of North Ft. Myers, Inc. (MW-NFM) (collectively the Petitioners), filed a Motion for Extension of Time to Submit Exceptions with DOAH, requesting an additional thirty (30) days

to file exceptions to the ALJ's RO. While the Petitioners' filed its motion for extension of time prior to expiration of the period for filing exceptions to the RO in compliance with rule 62-110.106(4), Florida Administrative Code; the Petitioners incorrectly filed its motion with DOAH and not the Department's agency clerk, as directed by DOAH's Recommended Order and rule 28-106.217(1), Florida Administrative Code. [1]

On October 9, 2020, the Petitioners' counsel sent an e-mail to the Department's agency clerk which read, in pertinent part, that "[o]n 09/30/2020, our office filed the attached Motion for Extension of Time (through 11/2/2020) to Submit Exceptions on behalf of the MW Horticulture entities for cases 19-5636 and 19-5642. When possible, can you please advise if an Order will be entered regarding our Motion?" On that date, the Department's agency clerk learned that Petitioners had filed a motion for extension of time but had no record of it having been filed with the Department's agency clerk as required by rule 28-106.217(1), Florida Administrative Code. On October 14, 2020, the Petitioners submitted its exceptions filed with DOAH to DEP's agency clerk. On October 15, 2020, the Department entered an order granting, in part, Petitioners' motion for extension of time to file its exceptions, and accepted the Petitioners' exceptions to the RO. Neither party filed responses to the other party's exceptions.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On April 25, 2019, Petitioners, MW and MW-NFM, submitted their annual renewal Yard Trash Transfer Station or Solid Waste Organics Recycling Facility registration applications to the Department. Petitioners' facilities are alternatively known as Source Separated Organics

[1] All motions, exceptions, and responses to exceptions filed after issuance of DOAH's RO must be filed with the Department's agency clerk. *See* Fla. Admin. Code R. 28-106.217(1)(2020).

Processing Facilities (SOPFs). Petitioner MW's application was designated as file number SOPFD 19-02 and known as the South Yard. Petitioner MW-NFM's application was designated as file number SOPFD 19-01 and known as the North Yard. On August 22, 2019, the Department issued notices of denial for both registration application renewals.

On September 11, 2019, Petitioners timely filed petitions for an administrative hearing challenging the registration denials. On October 18, 2019, the Department referred the petitions to DOAH to conduct an evidentiary hearing and submit a recommended order. DOAH consolidated the cases on October 31, 2019. The Department filed an Emergency Motion to Strike Witnesses on March 3, 2020. On March 4, 2020, the Petitioners filed their motion to strike witnesses. Petitioners' motion was withdrawn at hearing, and the Department's motion was denied.

At the final hearing, Petitioners presented the expert testimony of David Hill, who was tendered and accepted as an expert in compost and solid waste management; and Jeffrey Collins, who was tendered and accepted as an expert in fire prevention and suppression. Petitioners also presented the fact testimony of Denise Houghtaling, Mark Houghtaling, Mario Scartozzi, Deborah Schnellenger, Harshad Bhatt, and Rick Roudebush.

The Department presented the fact testimony of Lauren O'Connor; Vincent Berta; the expert testimony of Steve Lennon, who was tendered and accepted as an expert in fire prevention and suppression; Doug Underwood, who was tendered and accepted as an expert in fire prevention and suppression; and Renee Kwiat, who was tendered and accepted as an expert in solid waste and air quality.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order denying the Petitioners' annual registration renewal applications for the North Yard and South Yard. (RO at p. 19). In doing so, the ALJ found the evidence established that neither MW nor MW-NFM proved by a preponderance of the evidence that it would meet the "design and operating requirements for yard trash processing facilities." (RO ¶¶ 58-59). Specifically, the ALJ concluded that neither MW nor MW-NFM "provided reasonable assurance that it would meet the requirements that none of the processed or unprocessed material shall be mechanically compacted, and that none of the processed or unprocessed material shall be more than 50 feet from access by motorized firefighting equipment." (RO ¶¶ 58-59). Moreover, the ALJ found the evidence did not "provide reasonable assurance that the Petitioners can effectively control and prevent unauthorized open burning at the North Yard and South Yard" as required by Department rules. (RO ¶ 60). The ALJ then concluded that the "totality of the evidence does not justify labeling Petitioners as irresponsible applicants under relevant Department rule." (RO ¶ 62). *See* Fla. Admin. Code R. 62-701.320(3)(2020).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2020); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value

or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994*); Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive

jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-142 (Fla. 2d DCA 2001). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2020). The agency, however, 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." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1 regarding Paragraph 11

The Petitioners take exception to paragraph 11 of the RO, alleging that the "record reflects that MW maintains both processed and unprocessed material in organized piles so as to be managed in a way to aerate and keep the temperatures at a level limiting spontaneous combustion." Petitioners' Exceptions at p. 1. However, the Petitioners did not allege that the findings are not supported by competent, substantial evidence. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 1.

Moreover, the findings of fact are supported by competent substantial evidence. (Lennon, T. Vol. I, pp. 42-43; Petitioners' Ex. No. 3; DEP Ex. Nos. 9-17). Because the findings in paragraph 11 are supported by competent substantial evidence, and the Petitioners fail to meet the requirements of section 120.57(1)(k), Florida Statutes, this exception must be rejected.

Based on the foregoing reasons, Petitioners' Exception No. 1 is denied.

Petitioners' Exception No. 2 regarding Paragraph 28

The Petitioners take exception to paragraph 28 of the RO, alleging the findings are not supported by competent, substantial evidence. Contrary to the Petitioners' exception, the findings of fact are supported by competent, substantial evidence. (Lennon, T. Vol. I, pp. 42-43; Kwiat, T. Vol. II, pp. 137-41, 146-47; DEP Ex. Nos. 1, 10-17, 26). Because the findings in paragraph 28 are supported by competent substantial evidence, and the Petitioners fail to meet the requirements of section 120.57(1)(k), Florida Statutes, this exception must be rejected.

Based on the foregoing reasons, Petitioners' Exception No. 2 is denied.

Petitioners' Exception No. 3 regarding Paragraph 29

The Petitioners take exception to paragraph 29 of the RO, alleging the Department does not have a "clear definition of mechanical compaction." Petitioners' Exceptions at p. 2. First, the Petitioners' exception is vague, fails to cite to any record to support its claim, and does not allege that the findings are not supported by competent, substantial evidence. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 3.

The Petitioners imply that the phrase "mechanical compaction" is vague and fails to provide adequate standards for agency action. The test for vagueness is whether the rule requires the performance of an act in terms so vague that men of common intelligence must guess at its meaning. *Southwest Florida Water Mgmt. Dist. v. Charlotte Cty.*, 774 So. 2d 903 (Fla. 2d DCA 2001); *see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Regulation*, 688 So. 2d 404 (Fla. 1st DCA 1997); *St. Petersburg v. Pinellas County Police Benevolent Assoc.*, 414 So.2d 293 (Fla. 2d DCA 1982) (general test for vagueness of a rule is whether persons of common intelligence are

required to guess at the rule's meaning and could differ as to the rule's interpretation.) In fact, the record in this case establishes that DEP and the Petitioners' expert did not disagree over the definition of "mechanical compaction." (Hill, T. Vol. II, p. 215; Collins, T. Vol. II, p. 244; Denise Houghtaling, T. Vol. III, pp. 337-38).

Moreover, the findings of fact are supported by competent substantial evidence. (Lennon, T. Vol. I, pp. 25-27, 31-32, 42-43; Kwiat, T. Vol. II, pp. 137-38, 146-47, 160; DEP Ex. Nos. 9-17, 23). Because the findings in paragraph 29 are supported by competent substantial evidence, and the Petitioners fail to meet the requirements of section 120.57(1)(k), Florida Statutes, this exception must be rejected.

Based on the foregoing reasons, Petitioners' Exception No. 3 is denied.

Petitioners' Exception No. 4 regarding Paragraph 17

The Petitioners take exception to paragraph 17 of the RO alleging in its entirety that "Petitioner takes exception to finding of fact No. 17 in that it relies upon an undefined set of rules with the State of Florida, Department of Environmental Protection." Petitioners' Exceptions at p. 2. Paragraph 17 of the RO reads in its entirety:

> 17. Captain Underwood testified that the majority of the 75 calls were to the lake pile at the North Yard. *See* Tr. Vol. I, pg. 59. The lake pile was a temporary site on the southern end of the lake that borders the North Yard and for most of 2018 and 2019, contained debris from Hurricane Irma. The lake pile temporary site was completely cleared by the time of the hearing.

RO ¶ 17.

First, the Petitioners' exception is exceptionally vague, fails to cite to any record to support its claim, and does not allege that the findings are not supported by competent, substantial evidence. The Petitioners' allegation that the findings in paragraph 17 of the RO rely upon an undefined set of rules is so vague that it is impossible to determine what terms, phrases

or concepts are in dispute. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 4.

Moreover, the findings of fact are supported by competent substantial evidence. (Underwood, T. Vol. I, p. 49-50, 59). Because the findings in paragraph 17 are supported by competent substantial evidence, and the Petitioners fail to meet the requirements of section 120.57(1)(k), Florida Statutes, this exception must be rejected.

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

Petitioners' Exception No. 5 regarding Paragraph 22

The Petitioners take exception to paragraph 22 of the RO, which reads, in its entirety:

> 22. By Petitioners' own admission, the facilities have repeatedly violated applicable Department rules throughout the course of their operations over the last two and one-half years. The most pertinent of these violations center around the Department's standards for fire protection and control to deal with accidental burning of solid waste at SOPFs.

RO ¶ 22.

The Petitioners takes exception to paragraph 22 of the RO, alleging the Petitioners' "violations were the result of Hurricane [I]rma, a category 4 hurricane which made landfall in the State of Florida," . . . . Any violation was the direct result of the overwhelming volume of material needed to be processed and disposed of following Hurricane Irma." Petitioners' Exceptions at p. 2.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2020); *Peace River/Manasota Reg'l Water Supply*

Authority, 18 So. 3d at 1082, 1088; *Wills,* 955 So. 2d at 62-63. However, the Petitioners did not allege that the findings are not supported by competent, substantial evidence. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 5. Moreover, contrary to the Petitioners' arguments, the ALJ's findings in paragraph 22 are supported by competent substantial evidence. (Lennon, T. Vol. I, pp. 25-27, 45; Kwiat, T. Vol. II, pp. 138-41; Hill, T. Vol. II, p. 219; DEP Ex. Nos. 1, 2, 23; Denise Houghtaling, T. Vol. III, pp. 300, 331, 333-35, 350).

Furthermore, the Petitioners seek to have the Department reweigh the evidence. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

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

Petitioners' Exception No. 6 regarding Paragraph 45

The Petitioners take exception to paragraph 45 of the RO, alleging that the Department's witness Renee Kwiat testified that the only mechanical compaction she witnessed during her inspections were of MW loading debris for offsite shipment. Petitioners' Exceptions at p. 2.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial

evidence." § 120.57(1)(l), Fla. Stat. (2020); *Peace River/Manasota Reg'l Water Supply Authority,* 18 So. 3d at 1082, 1088; *Wills,* 955 So. 2d at 62-63. However, the Petitioners did not allege that the findings are not supported by competent, substantial evidence. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 6. Moreover, contrary to the Petitioners' arguments, the ALJ's findings in paragraph 45 are supported by competent substantial evidence. (Berta, T. Vol. I, pp. 15-17; O'Conner, T. Vol. I, pp. 92, 97-98, 107, 113; Kwiat, T. Vol. II, pp. 137-41, 143-47, 153-59; DEP Ex. Nos. 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 17, 23, 25).

Furthermore, the Petitioners seek to have the Department reweigh the evidence. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Based on the foregoing reasons, Petitioners' Exception No. 6 is denied.

Petitioners' Exception No. 7 regarding Paragraph 47

The Petitioners take exception to paragraph 47 of the RO, alleging that the hearing testimony supported the Petitioners' actions to suppress and mitigate the fires by driving their equipment on the tops of the piles of material. Petitioners' Exceptions at pp. 2-3.

An agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with

particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2020); *Peace River/Manasota Reg'l Water Supply Authority,* 18 So. 3d at 1082, 1088; *Wills,* 955 So. 2d at 62-63. However, the Petitioners did not allege that the findings are not supported by competent, substantial evidence. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 7. Moreover, contrary to the Petitioners' arguments, the ALJ's findings in paragraph 45 are supported by competent substantial evidence. (Lennon, T. Vol. I, pp. 25-27; O'Connor, T. Vol. I, pp. 94-95; Denise Houghtaling, T. Vol. III, pp. 300, 331, 333-35, 350; DEP Ex. Nos. 20, 23; Petitioners' Ex. No. 16).

Moreover, the Petitioners seek to have the Department reweigh the evidence. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Based on the foregoing reasons, Petitioners' Exception No. 7 is denied.

Petitioners' Exception No. 8 regarding Paragraph 54

The Petitioners take exception to paragraph 54 of the RO, which identifies the legal standard of proof in the case. Paragraph 54 reads, in its entirety, as follows: "Rule 62-701.320(9) directs the Department to deny a solid waste permit if reasonable assurance is not provided that the requirement of chapters 62-4 and 62-701 will be satisfied. *See also* Fla. Admin. Code R.

62-4.070(2). A solid waste permit may include registrations. *See* § 403.707(1), Fla. Stat."

If the reviewing agency modifies or rejects a conclusion of law set out in the ALJ's recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). The Petitioners failed to identify any legal basis for its exception to the conclusions of law in paragraph 54 of the RO and failed to offer a substitute legal conclusion that is "as or more reasonable" than that which it proposes be rejected. § 120.57(1)(l), Fla. Stat. (2020). Instead, the Petitioners summarily reject the ALJ's conclusion of law in paragraph 54 without providing any legal basis for the exception or citation to the record. *See* §§ 120.57(1)(j) and (k), Fla. Stat. (2020).

Moreover, the Petitioners allege that their testimony establishes that MW would meet the Department's rule requirements. The Petitioners seek to have the Department reweigh the evidence, even though paragraph 54 of the RO contains conclusions of law and not findings of fact. Even if paragraph 54 contained findings of fact, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Nevertheless, paragraph 54 of the RO does not contain any findings of fact, only conclusions of law

Based on the foregoing reasons, Petitioners' Exception No. 8 is denied.

Petitioners' Exception No. 9 regarding Paragraph 60

Petitioners take exception to the conclusions of law in paragraph 60 of the RO, alleging that "Petitioner's direct testimony demonstrated reasonable assurance that they can effectively control and prevent unauthorized open burning at both the north and south yards." Petitioners' Exceptions at p. 3.

If the reviewing agency modifies or rejects a conclusion of law set out in the ALJ's recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). The Petitioners failed to identify any legal basis for its exception to conclusions of law in paragraph 60 of the RO and failed to offer a substitute legal conclusion that is "as or more reasonable" than that which it proposes be rejected. § 120.57(1)(l), Fla. Stat. (2020). Instead, the Petitioners summarily reject the ALJ's conclusion of law in paragraph 60 without providing any legal basis for the exception or citation to the record. *See* § 120.57(1)(j) and (k), Fla. Stat. (2020).

Moreover, the Petitioners seek to have the Department reweigh the evidence, even though paragraph 60 of the RO contains conclusions of law and not findings of fact. Even if paragraph 60 contained findings of fact, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Based on the foregoing reasons, Petitioners' Exception No. 9 is denied.

Petitioners' Exception No. 10 regarding Paragraph 61

Petitioners take exception to the conclusion of law in paragraph 61 of the RO, which merely quotes the Department's definition of "irresponsible applicant, and reads in its entirety:

> 61. Rule 62-701.320(3) defines an 'irresponsible applicant' as one that 'owned or operated a solid waste management facility in this state, including transportation equipment or mobile processing equipment used by or on behalf of the applicant, which was subject to a state or federal notice of violation, judicial action, or criminal prosecution for activities that constitute violations of chapter 403, F.S., or the rules promulgated thereunder, *and could have prevented the violation through reasonable compliance with Department rules*.' (Emphasis added).

RO ¶ 61 (emphasis added by ALJ in RO).

If the reviewing agency modifies or rejects a conclusion of law set out in the ALJ's recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). The Petitioners failed to provide an explanation for how its interpretation of Florida Administrative Code Rule 62-701.320(3) is as or more reasonable than the ALJ's interpretation of this rule. Moreover, the ALJ did not interpret Florida Administrative Code Rule 62-701.320(3) in paragraph 61 of the RO; instead, the ALJ merely quoted the definition of "irresponsible applicant" in this paragraph of the RO. The Petitioners have no legal basis to take exception to an applicable quotation from the Department's rules.

Based on the foregoing reasons, Petitioners' Exception No. 10 is denied.

Petitioners' Exception No. 11 regarding Paragraph 62

Against their own best interest, Petitioners take exception to the conclusions of law in paragraph 62 of the RO, which reads:

> 62. The preponderance of the evidence established that Petitioners did not consistently comply with Department rules over the two and one-half years prior to the final hearing. However, Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations. The totality of the evidence does not justify labeling Petitioners as irresponsible applicants under the relevant Department rules.

RO ¶ 62.

An agency's interpretation of statutes and rules within its regulatory jurisdiction does not have to be the only reasonable interpretation. It is enough if such agency interpretation is a "permissible" one. *Suddath Van Lines, Inc.*, 668 So. 2d at 212. If the reviewing agency modifies or rejects a conclusion of law set out in the ALJ's recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). However, the Petitioners did not even offer a substitute conclusion of law in Petitioners' Exception No. 11; instead, the Petitioners referenced their own testimony in support of rejecting paragraph 62 of the RO.

Ultimately, the Petitioners seek to have the Department reweigh the evidence. Drawing reasonable inferences from the evidence, is an evidentiary-related matter wholly within the province of the ALJ, as the "fact-finder" in this administrative proceeding. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003). I am not authorized to reweigh the evidence and draw inferences that are different from those drawn by the ALJ. *See, e.g., Heifetz,* 475 So. 2d at 1281-82; *Greseth v. Dep't of Health and Rehabilitative Services*, 573 So. 2d 1004, 1006 (Fla. 4th DCA 1991).

In addition, the ALJ's findings are a reasonable inference from the hearing testimony. The ALJ can "draw permissible inferences from the evidence." *Heifetz*, 475 So. 2d at 1281-82.

See also Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604, 605 (Fla. 1st DCA 2006) ("It is the hearing officer's function to consider all the evidence presented, including drawing permissible inferences from the evidence, and reaching ultimate findings of fact based on competent, substantial evidence.").

Based on the foregoing reasons, Petitioners' Exception No. 11 is denied.

Petitioners' Exceptions No. 12 and 13 to the RO's Recommendation

Petitioners take exception to the RO's recommendation that the "Department of Environmental Protection enter a final order denying Petitioners' annual registration renewal applications for the North Yard and South Yard," alleging that the Petitioners have proven by a preponderance of the evidence that they are in "substantial compliance." However, as cited by the ALJ in paragraph 54 of the RO, the standard of proof for annual registration renewal applicants is "reasonable assurance" and not "substantial compliance" that the requirements of Florida Administrative Code Chapters 62-4 and 62-701 will be met. *Fla. Dep't of Transp. v. J.W.C. Co. Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

Based on the foregoing reasons, Petitioners' Exceptions No. 12 and 13 are denied.

Petitioners' Exception No. 14 regarding the Conclusions of Law in General

Petitioners take exception to the RO's Conclusions of Law in general, stating

> 14. Petitioner takes exception to the Conclusions of Law <u>to the extent that it contains a finding</u> that Petitioner could have prevented the violation through reasonable compliance with the Department rules under the existence of an emergency order entered by the State of Florida. Petitioner clearly acted within reasonable compliance with the Department rules and the State of Emergency that existed throughout the State of Florida.

Petitioners' Exceptions at p. 4 (emphasis added).

Numbered paragraph 14 of the Petitioners' exceptions takes exception to findings of fact in the RO and not the conclusions of law in the RO. An agency reviewing a recommended order

may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2020); *Peace River/Manasota Reg'l Water Supply Authority,* 18 So. 3d at 1082, 1088; *Wills,* 955 So. 2d at 62-63. However, the Petitioners did not allege that the findings are not supported by competent, substantial evidence. An agency need not rule on an exception that does not identify the legal basis for the exception. § 120.57(1)(k), Fla. Stat. (2020). This alone is a sufficient basis to reject Exception No. 14.

Moreover, contrary to the Petitioners' allegations, the RO's Conclusions of Law do not find or conclude that the Petitioners' "could have prevented the violation through reasonable compliance with the Department rules under the existence of an emergency order entered by the State of Florida." Petitioners' Exceptions at p. 4. Instead, paragraph 62 of the RO reads that "Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations" and that the "totality of the evidence does not justify labeling Petitioners as irresponsible applicants under the relevant Department rule." RO ¶ 62. Paragraph 62 of the RO does not conclude that the Petitioners provided reasonable assurances that they were entitled to approval of their annual registration renewal applications for the North Yard and South Yard. Instead, Paragraphs 61 and 62 of the RO conclude that the Petitioners merely were not "irresponsible applicants" as defined by Florida Administrative Code Rule 62-701.320(3). Just because the ALJ concluded that the Petitioners were not "irresponsible applicants" does not mean the ALJ concluded the Petitioners are entitled to annual registration renewal applications for their two facilities. In fact, the ALJ concluded in the RO that the Petitioners were not entitled

to the two registration renewals, because they did not provide a preponderance of the evidence that either facility would meet the design and operating requirements for yard trash processing facilities. RO ¶¶ 56-59.

Based on the foregoing reasons, Petitioners' Exception No. 14 is denied.

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception No. 1 regarding Paragraph 38

DEP takes exception to paragraph 38 of the RO, alleging the findings are not supported by competent, substantial evidence. Specifically, DEP alleges that this paragraph "should be rejected in its entirety, or, in the alternative, be clarified to reflect that Petitioner MW-NFM could have prevented the accumulation of material in violation of Department rules but did not." DEP's Exceptions at p. 5.

If the DOAH record contains any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the final order. *See, e.g., Walker*, 946 So. 2d at 605; *Fla. Dep't of Cord*, 510 So. 2d at 1123. DEP contends that paragraph 38 of the RO should be rejected or, in the alternative, clarified by adding supplemental information. However, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., Fla. Power & Light Co.*, 693 So. 2d at 1026-1027; *North Port, Fla.*, 645 So. 2d at 487.

Moreover, the findings of fact are supported by competent, substantial evidence. (Denise Houghtaling, T. Vol. III, pp. 290-94, 300-302; Petitioners' Ex. No. 22). Because the findings in paragraph 38 are supported by competent substantial evidence, and DEP fails to meet the requirements of section 120.57(1)(k), Florida Statutes, this exception must be rejected.

Based on the foregoing reasons, DEP's Exception No. 1 is denied.

DEP's Exception No. 2 regarding Paragraph 50

DEP takes exception to a portion of the findings of fact in paragraph 50 of the RO, which reads in its entirety:

> 50. The persuasive and credible evidence established that Petitioners did not consistently comply with Department rules over the two and one-half years prior to the final hearing. However, Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations. The totality of the evidence does not justify labeling the Petitioners as irresponsible applicants under the relevant statute and Department rule.

RO ¶ 50 (emphasis added). The totality of DEP's exception leads the Department to conclude that DEP accepts the first sentence of paragraph 50 of the RO but takes exception to the second and third sentence of paragraph 50 of the RO, quoted above. However, DEP does not directly identify which portion of paragraph 50 of the RO should be stricken.

Later in paragraph 61 of the RO, the ALJ quotes the definition of "irresponsible applicant," contained in Florida Administrative Code Rule 62-701.320(3), which reads, in pertinent part:

> (3) Irresponsible applicant. In addition to the provisions of subsection 62-4.070(5), F.A.C., when determining whether the applicant has provided reasonable assurances that Department standards will be met, the Department shall consider repeated violations of applicable statutes, rules, orders, or permit conditions caused by a permit applicant after October 1988, relating to the operation of any solid waste management facility in this state if the applicant is deemed to be irresponsible. For purposes of this subsection, the following words have the following meaning:
>
> . . .
>
> (b) "Irresponsible" means that an applicant owned or operated a solid waste management facility in this state, including transportation equipment or mobile processing equipment used by or on behalf of the applicant, which was subject to a state or federal notice of violation, judicial action, or criminal prosecution for activities that constitute violations of chapter 403, F.S., or the rules promulgated thereunder, *and could have prevented the violation through reasonable compliance with Department rules.*

Fla. Admin. Code R. 62-701.320(3)(2020) (emphasis added by the ALJ and the Department).

In paragraph 50 of the RO, the ALJ found that the Petitioners did not consistently comply with Department rules for two and one-half years before the DOAH final hearing. (Kwiat, T. Vol. II, p. 160). However, the ALJ also found that "Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations." RO ¶ 50. Moreover, the ALJ found that the "totality of the evidence" did not justify labeling the Petitioners as "irresponsible applicants" under relevant statutes and Department rules. Nevertheless, the ALJ concluded in paragraphs 58 and 59 of the RO that both MW and MW-NFM did not provide by a preponderance of the evidence that they would meet the design and operating requirements for yard trash processing facilities. RO ¶¶ 58-59. As a result, the ALJ recommended that the Department enter a final order denying the Petitioners' registration and renewal applications for the North and South Yards.

DEP takes exception to paragraph 50 of the RO, alleging the findings are not supported by competent, substantial evidence. However, the findings of fact are supported by competent, substantial evidence. (Denise Houghtaling, T. Vol. III, pp. 270-309, 312-55; Mark Houghtaling, T. Vol. III, pp. 356-61, Petitioners' Ex. No. 22). Because the findings in paragraph 50 are supported by competent substantial evidence, and DEP fails to meet the requirements of section 120.57(1)(k), Florida Statutes, this exception must be rejected.

The ALJ can "draw permissible inferences from the evidence." *Heifetz,* 475 So. 2d at 1281-82. *See also Walker*, 946 So. 2d at 605 ("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial

evidence."). Moreover, drawing reasonable inferences from the evidence, is an evidentiary-related matter wholly within the province of the ALJ, as the "fact-finder" in an administrative proceeding. *See e.g., Tedder*, 842 So. 2d at 1025. The Department is not authorized to reweigh the evidence and draw inferences that are different from those drawn by the ALJ. *See, e.g., Heifetz*, 475 So. 2d at 1281-82; *Greseth*, 573 So. 2d at 1006. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Based on the foregoing reasons, DEP's Exception No. 2 is denied.

DEP's Exception No. 3 regarding Paragraph 62

DEP takes exception to the mixed findings of fact and conclusions of law in paragraph 62 of the RO, which reads:

> 62. The preponderance of the evidence established that Petitioners did not consistently comply with Department rules over the two and one-half years prior to the final hearing. However, Petitioners established through persuasive and credible evidence that because of the impacts of Hurricane Irma, and the subsequent circumstances, they could not have reasonably prevented the violations. The totality of the evidence does not justify labeling Petitioners as irresponsible applicants under the relevant Department rules.

RO ¶ 62 (emphasis added).

If the reviewing agency modifies or rejects a conclusion of law set out in the ALJ's recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). However, DEP did not offer an adequate explanation for why DEP's legal interpretation is more reasonable than the ALJ's legal interpretation of Florida Administrative Code Rule 62-701.320(3). Instead, DEP alleges that

paragraph 62 of the RO should be rejected, because it is based on an erroneous finding of fact in paragraph 50 of the RO that "because of the impacts of Hurricane Irma, and the subsequent circumstances, [the Petitioners] could not have reasonably prevented the violations." *See* Fla. Admin. Code R. 62-701.320(3)(2020) (definition of "irresponsible applicant").

DEP seeks to have the Department reweigh the evidence upon which the conclusion of law in paragraph 62 of the RO is based, because DEP rejects the ALJ's findings of fact in paragraph 50 of the RO. Drawing reasonable inferences from the evidence, is an evidentiary-related matter wholly within the province of the ALJ, as the "fact-finder" in this administrative proceeding. *See e.g., Tedder,* 842 So. 2d at 1025. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Contrary to DEP's exception No. 2 to paragraph 50 of the RO, the ALJ's findings in paragraph 50 are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Denise Houghtaling, T. Vol. III, pp. 270-309, 312-55; Mark Houghtaling, T. Vol. III, pp. 356-61, Petitioners' Ex. No. 22).

Based on the foregoing reasons, DEP's Exception No. 3 is denied.

CONCLUSION

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

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on Exceptions, and is incorporated by reference herein; and

B. The proposed annual registration renewal applications from MW Horticulture Recycling Facility, Inc. (DEP file number SOPFD 19-02), and MW Horticulture Recycling of North Ft. Myers, Inc. (DEP file number SOPFD 19-01), for the North Yard and the South Yard are DENIED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 15 day of December, 2020, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Syndie Kinsey Digitally signed by Syndie Kinsey Date: 2020.12.15 11:57:54 -05'00'

CLERK DATE

CERTIFICATE OF SERVICE

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

Clayton W. Crevasse, Esquire Sara E. Spector, Esquire Roetzel & Andress 2320 First Street, Suite 1000 Fort Myers, Florida 33901 ccrevasse@ralaw.com sspector@ralaw.com	Carson Zimmer, Esquire Department of Environmental Protection Mail Station 35 3900 Commonwealth Boulevard Tallahassee, Florida 32399-3000 Carson.Zimmer@FloridaDEP.gov

this 15th day of December, 2020.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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