

STATE OF FLORIDA
SUWANNEE RIVER WATER MANAGEMENT DISTRICT

MERRILLEE MALWITZ-JIPSON,

Petitioner,

vs.

Final Order No. 21-009
DOAH Case No. 21-1179

SEVEN SPRINGS WATER COMPANY
AND SUWANNEE RIVER WATER
MANAGEMENT DISTRICT,

Respondents.

FINAL ORDER

This case comes to the Suwannee River Water Management District (the "DISTRICT") upon the ORDER DISMISSING PETITION AND CLOSING FILE (the "ORDER OF DISMISSAL") from Administrative Law Judge FRANCINE M. FFOLKES ("ALJ FFOLKES ") with the State of Florida, Division of Administrative Hearings ("DOAH"). A copy of the ORDER OF DISMISSAL is attached as Exhibit A. The ORDER OF DISMISSAL was entered on April 14, 2021.

STATEMENT OF THE CASE

1. On February 24, 2021, the DISTRICT's issued its Final Order No. No. 21-003 in which the DISTRICT adopted, under protest, the recommended order issued by Administrative Law Judge G.W. CHISENHALL ("ALJ CHISENHALL"), in which ALJ CHISENHALL recommended that the DISTRICT issue renewal water use Permit Number 2-041- 218202-3 (the "PERMIT") to Respondent, Seven Springs Water Company ("SEVEN SPRINGS").

2. On March 17, 2021, the Petitioner, MERRILLEE MALWITZ-JIPSON, ("MALWITZ-JIPSON") filed a PETITION FOR ADMINISTRATIVE HEARING (the "PETITION"), in which it requested an administrative hearing on the DISTRICT's issuance of the PERMIT.

3. On March 25, 2021, the DISTRICT appealed Final Order No. 21-003 to the First District Court of Appeals where it was assigned Case No. 1D21-0888.

4. On March 30, 2021, the DISTRICT referred the PETITION to DOAH where it was assigned to ALJ FFOLKES.

5. On March 31, 2021, ALJ FFOLKES issued an Order to Show Cause directing the parties to show cause why the PETITION should not be dismissed for lack of jurisdiction under Fla. R. App. P. 9.600, which provides that lower tribunals are divested of jurisdiction over matters which are on appeal unless the appeals court allows the lower tribunal to proceed.

6. On April 11, 2021, the DISTRICT filed in the First District Court of Appeal its MOTION TO STAY APPEAL AND RELINQUISH JURISDICTION TO CONSIDER AND RULE ON PENDING PETITIONS FOR ADMINISTRATIVE HEARING in which the DISTRICT requested the appeals court to stay the appeal and relinquish jurisdiction to allow ALJ FFLOKES to proceed with the proceedings before DOAH.

7. On April 12, 2021, the DISTRICT filed with DOAH a response to the Order to Show Cause which requested ALJ FFOLKES to take no action on the Order to Show Cause until after the First District Court of Appeal ruled on the MOTION TO STAY APPEAL AND RELINQUISH JURISDICTION TO CONSIDER AND RULE ON PENDING PETITIONS FOR ADMINISTRATIVE HEARING, a copy of which was attached.

8. On April 14, 2021, ALJ FFOLKES entered the ORDER OF DISMISSAL. In the ORDER OF DISMISSAL, ALJ FFOLKES dismissed the PETITION for “lack of subject matter jurisdiction”, closed DOAH’s file and relinquished jurisdiction to the DISTRICT “for entry of an appropriate final order of dismissal.” (ORDER OF DISMISSAL at page 3)

9. On April 29, 2021, MALWITZ-JIPSON filed her PETITIONERS’ EXCEPTIONS TO DIVISION OF ADMINISTRATIVE HEARINGS’ ORDER DISMISSING PETITION AND CLOSING FILE setting out her exceptions to the ORDER OF DISMISSAL.

STATUS OF THE ORDER OF DISMISSAL

10. The ORDER OF DISMISSAL is not a recommended order. The term “recommended order” is defined in Ch. 120 as follows: “‘Recommended order’ means the official recommendation of an administrative law judge assigned by the division or of any other duly authorized presiding officer, other than an agency head or member of an agency head, for the final disposition of a proceeding under ss. 120.569 and 120.57.” Section 120.52(15), Fla. Stat. The ORDER OF DISMISSAL does not use the term “recommended” in its title or in its body (except where it references ALJ CHISENHALL’s previous recommended orders) and does not recommend that the DISTRICT do anything.

11. But more importantly, the ORDER OF DISMISSAL finds that both the DISTRICT and DOAH lack jurisdiction. ALJ FFOLKES finds that “a tribunal has jurisdiction to determine its own jurisdiction” (ORDER OF DISMISSAL at page 1) and then rules that “Neither the District nor DOAH may proceed because the appellate court’s jurisdiction also includes the legal issue raised by Petitioners.” (ORDER OF DISMISSAL page 3) and then, “The petition is DISMISSED for lack of subject matter jurisdiction.” (ORDER OF DISMISSAL at page 3) This is not a recommendation of dismissal, but an order determining that DOAH lacks jurisdiction and then outright dismissing the PETITION. Therefore the ORDER OF

DISMISSAL is not a “recommended” order.

12. Finally, it is apparent that ALJ FFOLKES did not consider the ORDER OF DISMISSAL to be a recommended order. This is because ALJ FFOLKES did not give the standard “Notice of Rights to Submit Exceptions” which is given on recommended orders. The governing statutes and rules governing exceptions only apply to recommended orders. *See*, Section 120.57(1)(k), Fla. Stat. (“The agency shall allow each party 15 days in which to submit written exceptions to the recommended order.”); Rule 28-106.217(1), F.A.C. (“Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order. . . .”) That is why recommended orders issued by DOAH have a “Notice of Rights to Submit Exceptions” at the end, to give notice that the parties may submit exceptions. As ALJ FFOLKES did not give the standard “Notice of Rights to Submit Exceptions” on the ORDER OF DISMISSAL, it is apparent that ALJ FFOLKES did not consider the ORDER OF DISMISSAL to be a recommended order.

FINDINGS OF THE ORDER OF DISMISSAL

13. In the ORDER OF DISMISSAL, ALJ FFOLKES found that DOAH and the DISTRICT lacked subject matter jurisdiction. The apparent reason seems to be that DOAH and the DISTRICT were divested of jurisdiction due to the appeal:

The lower tribunal cannot conduct further proceedings and enter orders that would affect or interfere with the subject matter of the appeal, and thus impinge on the appellate court's power and authority to decide the issues raised. *See Bailey v. Bailey*, 392 So. 2d 49 (Fla. 3d DCA 1981).

A separate lower tribunal is also without jurisdiction to proceed with subject matter that is pending on appeal. *See Dep't of Rev. ex rel. Simmons v. Wardlaw*, 25 So. 3d 80, 82 (Fla. 4th DCA 2009). The lower tribunal cannot act if it would interfere with the subject matter of a pending appeal. *See Casavan v. Land O'Lakes Realty, Inc. of Leesburg*, 526 So. 2d 215, 216 (Fla. 5th DCA 1988). Neither the District nor DOAH may proceed because the appellate court's jurisdiction also includes the legal issue raised by Petitioners.

(ORDER OF DISMISSAL at page 3) (Emphasis supplied); However, at the time ALJ FFOLKES issued the ORDER OF DISMISSAL, ALJ FFOLKES had been informed that the First District Court of Appeal was considering a stay of the appeal and relinquishing jurisdiction to DOAH to proceed. *See*, Fla. R. App. P. 9.600(b) (Stating that, “[T]he court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.”) Therefore it would seem as though the proper course would have been to hold the proceedings before DOAH in abeyance and allow the First District Court of Appeal to rule on the motion to stay appeal and relinquish jurisdiction to DOAH to proceed with a hearing on the PETITION.

14. However, ALJ FFOLKES also gave another reason for issuing the ORDER OF

DISMISSAL as follows:

Petitioners argue that they should be able to file a new petition challenging the Permit based on Florida Administrative Code Rule 40B-1.1010(2)(a). The new petition essentially challenges a legal ruling made by the judge in the *Seven Springs Water* case regarding the licensing provision in section 120.60(1), Florida Statutes. The District responded to the Order to Show Cause on April 12, 2021. The District's response reflects its understanding that it has invoked the jurisdiction of the First DCA to review final agency action. *See* § 120.68(1), Fla. Stat. (2020); *Sowell v. State, Dep't of Rev.*, 136 So. 3d 1285 (Fla. 1st DCA 2014); *Hill v. Div. of Retirement*, 687 So. 2d 1376 (Fla. 1st DCA 1997).

Petitioners contend that the District's rule 40B-1.1010(2)(a) allows their new petition. However, such an interpretation of the rule cannot be condoned by the undersigned. Such an interpretation would mean that the administrative adjudicatory process would never come to an end as new and former petitioners attempt to get the same tribunals, DOAH and the District, to rehear an unfavorable legal ruling. The appropriate remedy is to appeal the final agency action.

(ORDER OF DISMISSAL at page 2) (Emphasis supplied)

15. The operative provisions of Rule 40B-1.1010(2)(a), F.A.C. provide, "If final agency action materially differs from a written notice of the DISTRICT's intended action, persons who may be substantially affected shall have an additional 21 days, or for a notice of consolidated intent an additional 14 days, from the date of receipt or publication of notice of such action to request an administrative hearing." MALWITZ-JIPSON argues that as the DISTRICT's intended action was to deny the PERMIT and the DISTRICT' final agency action was to grant the Permit, the DISTRICT's final action "materially differs" from its intended action triggering Rule 40B-1.1010(2)(a)'s reopening of a 14 day window to file a petition.

16. But ALJ FFOLKES ruled that MALWITZ-JIPSON's interpretation of Rule 40B-1.1010(2)(a), F.A.C. "cannot be condoned" because it "would mean that the administrative adjudicatory process would never come to an end as new and former petitioners attempt to get the same tribunals, DOAH and the District, to rehear an unfavorable legal ruling." (ORDER OF DISMISSAL at page 2) As the DISTRICT has now taken final agency action on the PERMIT, and the rule only reopens a single 14 day window to file a petition after the DISTRICT takes final action, it is unclear why ALJ FFOLKES believes that MALWITZ-JIPSON's interpretation "would mean that the administrative adjudicatory process would never come to an end." ALJ FFOLKES did not offer what other possible interpretation of Rule 40B-1.1010(2)(a), F.A.C. could be "condoned" or find that Rule 40B-1.1010(2)(a), F.A.C. was invalid.¹

¹It is also worth noting that the operative language from the DISTRICT's Rule 40B-1.1010(2)(a), F.A.C. is substantially the same as the operative language contained in (1) the St. Johns Water

17. Therefore it seems likely that ALJ FFOLKES's belief that MALWITZ-JIPSON's interpretation of Rule 40B-1.1010(2)(a), F.A.C. "cannot be condoned" is the reason ALJ FFOLKES chose not to hold the DOAH proceedings in abeyance to wait for the First District Court of Appeal's ruling on the motion to stay and for relinquishment of jurisdiction and entered the ORDER OF DISMISSAL.

EXCEPTIONS

18. While MALWITZ-JIPSON filed exceptions, the statutory provisions concerning exceptions, including the requirement for the DISTRICT to rule on the exceptions, apply only to recommended orders. See, Section 120.57(1)(k), Fla. Stat. ("The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception. . .")

19. As the ORDER OF DISMISSAL is not a recommended order, the requirements concerning exceptions do not apply and this final order need not include an explicit ruling on MALWITZ-JIPSON's exceptions.

DISTRICT MAY NOT MODIFY OR DEVIATE FROM ALJ FFOLKES RULING

20. Section 120.57(1)(l), Fla. Stat., which provides statutory authority for an agency to modify or reject an ALJ's findings of facts and/or conclusions of law, concerns only "recommended orders" and is therefore inapplicable to the ORDER OF DISMISSAL.

21. Further, the ORDER OF DISMISSAL was cast as an order determining DOAH's "subject matter jurisdiction" The DISTRICT does not believe it has the authority to overrule ALJ FFOLKES on the issue of DOAH's subject matter jurisdiction and compel DOAH to exercise jurisdiction which ALJ FFOLKES has ruled that DOAH lacks.

22. Therefore, the DISTRICT is compelled to dismiss the PETITION for the reasons

Management District's rule 40C-1.1007(2)(a) ("If the District's Governing Board takes action which substantially differs from a written notice of the District's decision describing intended action, persons who may be substantially affected shall have an additional 21 days, . . . from the date of receipt of notice of said action to request an administrative hearing. . ."); (2) the Southwest Florida Water Management District's rule 40D-1.1010(2)(a) ("If final agency action materially differs from a written notice of the District's intended action, persons who may be substantially affected shall have an additional 21 days, or for a notice of consolidated intent an additional 14 days, from the date of receipt or publication of notice of such action to request an administrative hearing."); and (3) the South Florida Water Management District's rule 40E-0.109(2) ("If the District takes action which substantially differs from the notice of intended agency decision, the applicant or persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, F.A.C., unless otherwise provided by law.")

set out in the ORDER OF DISMISSAL.

ORDER

The PETITION is dismissed, with prejudice, for the reasons set out in the ORDER OF DISMISSAL.

JUDICIAL REVIEW


Any party to this proceeding has the right to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Suwannee River Water Management District, 9225 CR 49, Live Oak, Florida 32060; 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 Suwannee River Water Management District.

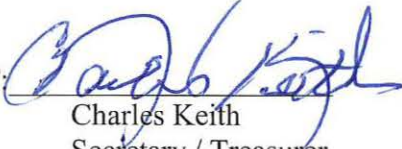
DONE and ORDERED on May 11, 2021.

GOVERNING BOARD OF THE SUWANNEE
RIVER WATER MANAGEMENT DISTRICT

By:


Virginia H. Johns
Chair

ATTEST:


Charles Keith
Secretary / Treasurer

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CERTIFICATE OF FILING

I HEREBY CERTIFY that the above order was filed with the Suwannee River Water Management District on MAY 11, 2021.


Warren Zwanka
Deputy Agency Clerk
Suwannee River Water Management District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above order was provided to:

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by email on MAY 11, 2021



Warren Zwanka
Deputy Agency Clerk
Suwannee River Water Management District

EXHIBIT “A”