B/a 4-11-85

FILED
SID J. WHITE
MAR 18 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

BEFORE THE SUPREME COURT
FOR THE STATE OF FLORIDA

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, Appellant, vs. E. PETER GOLDRING, Appellee.	CASE NO. 65,769 APPEAL FROM DISTRICT COURT OF APPEAL, THIRD DISTRICT - NO. 83-2880

REPLY BRIEF OF APPELLANT DEPARTMENT OF ENVIRONMENTAL REGULATION

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I. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL INCORRECTLY APPLIES THE DEPARTMENT'S JURISDICTIONAL STANDARDS.

Appellee, E. Peter Goldring, has devoted much of his brief to an attempt to demonstrate how the Department does not use wetland species of vegetation to define the limits of its jurisdiction. In his attempt to show deviation from that method, Goldring cites testimony in the record which shows that the Department requires a connection, by vegetation or water, from a named water body to an area dominated by jurisdictional vegetation.

The Department has never, in its brief or otherwise, asserted that it has jurisdiction in the absence of a connection to a named water body. What the Department has consistently asserted for almost 10 years is that in order to establish jurisdiction on a parcel of property one must start from the water body and proceed landward. Wherever wetland vegetation listed in Fla. Admin. Code Rule 17-4.02(17) exists contiguous to the named water body, the Department exerts jurisdiction. Jurisdiction is not limited to areas, as suggested by the lower court, in intertidal areas. When formulating rules and policy, the Department focuses on the ultimate purposes of Chapter 403, Florida Statutes. One purpose is the protection of water quality. The Department recognizes that areas which are totally isolated from open waters (i.e. surrounded by upland areas as determined by the presence of upland vegetation) contribute little or nothing to the quality of those

waters, even if the isolated areas are wet enough to support a community of wetland vegetation. For that reason the Department requires that the vegetation be connected to the open water body. The connection indicates that water moves on and across the property for a biologically significant period of time, that the area is hydrologically connected to the open water and that the quality of the open water may be affected. In isolated wetland areas it is assumed that water does not move off-site and therefore has no effect on the water quality of state water bodies. Such is the case with the Florida Rock and Sand site mentioned in Goldring's brief. A berm and haul road has effectively severed the hydrologic surface connection at that site and it is therefore considered to be outside of the Department's jurisdiction.

The requirement of a connection of the vegetation to a water body is based on common sense. The Department's dredge and fill regulations are aimed at protecting the state water bodies. The vegetative index is the method of determining the hydrological boundary of the water body. If the boundary line, i.e. the line of jurisdictional vegetation, ends, the hydrological boundary of the water body ends and the Department's jurisdiction is fixed at that point.

The fact that the Department requires that the jurisdictional vegetation exist from a water body to a regulated site is not some new and inconsistent requirement which "throws its entire brief

out the window." See Goldring Brief at 11. The requirement of the connection has existed and has been consistently utilized since the inception of the rule. See Exhibit 3 of Appendix to Initial Brief. However, the Department's basic premise remains the same. The Department traces its jurisdiction from the edge of a water body landward to the extent the vegetation listed in Fla. Admin. Code Rule 17-4.02(17) exists. The Department does not, and has not used some method other than the presence or absence of jurisdictional vegetation in determining the landward extent of a water body under Chapter 403, F.S. In addition to the three Final Orders appended to the Department's Initial Brief, the Final Order in this case, and the case of State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1983); pet. rev. den. 436 So.2d 98 (Fla. 1983), an additional Final Order has recently emerged from litigation which reinforces the fact that the Department has consistently over time used vegetation to define the limits of its jurisdiction. The Final Order in State of Florida Department of Environmental Regulation v. Fleming, DOAH Case No. 83-3239 (Final Order signed June 12, 1984); aff'd per curiam __ So.2d __ (Fla. 1st DCA February 6, 1985), reh. den __ So.2d __ (Fla. 1st DCA March 8, 1985) has been upheld by the First District Court of Appeal and may now be cited without questions as to its finality. A copy of the Final Order is attached as Exhibit 1 to the Appendix of this brief. That Final Order, ironically entered on the same day as the lower court opinion in this case,

is in keeping with the long standing Department construction of its rules and enabling legislation that the extent of jurisdictional vegetation is the key factor by which the Department's jurisdiction is to be defined under Chapter 403, F.S.

It should be remembered that a purpose of the vegetative index is to facilitate the delineation of the hydrological boundary of a water body. It is quite simple to establish whether a jurisdictionally vegetated area is connected by vegetation and water to an open water body. It is not simple at all, however, to conduct the tests and measurements required to determine the precise boundary at which water moves back and forth. The Department must here again take exception to a statement contained at page 31 of Goldring's Brief. Goldring notes that a Department witness "testified as to the simplicity and ease of determining a connection with another body of water (and thus also, an exchange) (R-401)". It is clear from a review of the record that the "connection" testified to entails merely locating the extent of open water and jurisdictional vegetation, and is not to be equated with an "exchange." To determine whether water moves back and forth from a site would require a resort to mean or ordinary high water surveys, tide tables, topographic maps, photogrammetric maps and other methods of determining two way flow and would necessitate use of the services of registered land surveyors, hydrologists and other professionals. See e.g. Chapter 472, F.S. That was not the intent of the legislature when requiring that the

Department's jurisdiction "shall be defined by species of plants," §403.817(2), Florida Statutes.

Goldring devotes a portion of his brief to an attempt to show that the Department had no administrative or judicial cases explaining the method by which the Department exercized its jurisdiction, which would have been available for legislative scrutiny during debate on the Warren S. Henderson Wetland Protection Act of 1984. The Department contends that the argument is fallacious and entirely without merit. The Department has provided this Court with three Final Orders which carefully explain that jurisdiction is to be determined by the extent of jurisdictional vegetation. The fact that two of those orders were affirmed per curiam by the First District Court of Appeal does not affect the administrative precedent of the Final Orders themselves. Those orders were entered prior to passage of the Wetlands Act, and the legislature is presumed to have knowledge of them. Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983). Also available to the legislature was the Final Order in this case, which is found at R-1350. In addition to those administrative orders the legislature knew of the case of State v. Falls Chase Special Taxing District, supra. The language in that case regarding the method by which the Department is to exert jurisdiction is quite clear. The First District Court of Appeal's recognition that §403.817, Florida Statutes "...requires the Department to

establish a method of determining the natural landward extent of waters of the state by identification of vegetation...,". Falls Chase, supra at 791, was certainly available to the legislature during debate on passage of the Wetlands Act. This Court may choose to give weight to those Final Orders and cases as it sees fit. To state, however, that those Orders and cases somehow do not exist and that the legislature had no knowledge of them during passage of the recent Wetlands Act of 1984 is, at best, incorrect.

It should be noted that the Warren S. Henderson Wetlands Act of 1984 was, by its very nature of expanding the Department's regulatory jurisdiction, extremely controversial. Lobbyists from environmental groups and regulated interests were active in the process. A review of contemporaneous news reports indicates that the Act did not pass quietly from committee to floor to law. To suggest that the Florida Legislature passed a bill of such magnitude, which adopted, incorporated and reaffirmed the Department's method of determining jurisdiction, without having an understanding of how the Department exerts jurisdiction, is unrealistic.

Appellee, Goldring, spends a considerable portion of his brief in an attempt to show that waters must "exchange" with a parcel of property before jurisdiction attaches. By exchange, he means the physical back and forth movement of water from the open water body to the site and back. The Department again asserts

that such a construction of a single word in the rule's intent paragraph is contrary to the express language of the operative sections of the rule and statute, and would be contrary to the intent of Chapter 403, Florida Statutes. If Goldring's argument is accepted by this Court, it would mean that the 1977 legislature intended that the sea would have to rise up and cover South Florida in order for the state agency charged with protecting the waters and wetlands of the state to exercize regulatory jurisdiction over the state's largest and most fragile wetland system. Such a construction is absurd and was certainly not intended by the 1977 legislature in passing Section 403.817, F.S. The Department would direct the Court's attention to the Final Order in Occidential Chemical Company v. State of Florida Department of Environmental Regulation, DOAH Case No. 80-895R (Final Order signed November 26, 1980), aff'd per curiam 411 So.2d 388 (Fla. 1st DCA 1981), at 9-11, in which the DOAH hearing officer dealt specifically with the issues raised in this case and found the Department's method of determining jurisdiction to be reasonable and well within the permissible range of the language of the statute and rule. The Final Order is attached as Exhibit 3 of the Appendix to the Initial Brief.

Goldring's final contention is that the Department's method of determining jurisdiction creates an irrebuttable presumption. It should first be noted that the statute does not create a legal presumption, but rather confers the authority for the Department

to exert regulatory jurisdiction over certain well defined geographical areas, i.e. those areas where jurisdictional vegetation is present. The fact that the legislature delegated the authority to the Department to regulate dredge and fill activities in geographical areas defined by the presence or absence of vegetation does not make the statute invalid. See e.g. State Department of Citrus v. Griffin, 239 So.2d 577, 580-581 (Fla. 1970). The legislature has the authority to delegate powers to a regulatory agency, so long as those powers are carefully circumscribed. Lewis v. Bank of Pasco County, 346 So.2d 53, (Fla. 1976). This Court has, in fact, recently held that "[s]ubordinate functions may be transferred by the legislature to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions." Microtel, Inc. v. Florida Public Service Commission, __ So.2d __, 10 FLW 141 (Fla. 1985). In this case the legislature has transferred to the Department the function of determining the areal extent of the Department's jurisdiction based on biological and botonical features.

Even if the establishment of the Department's jurisdiction were to be classified as a presumption, it is not irrebuttable. As previously noted, if an area is dominated by jurisdictional vegetation, it might not be within the Department's jurisdiction if it can be shown that the area is not connected to an open water body. The presumption would not be irrebuttable and therefore

would not be invalid.

For the above-stated reasons, and the reasons expressed in the Department's Initial Brief, the Department respectfully requests that this Court reverse the opinion of the lower court in this matter and affirm the Final Order of the Department.

II. THERE IS COMPETENT SUBSTANTIAL EVIDENCE ON THE RECORD TO SUPPORT THE HEARING OFFICER'S FINDING OF FACT THAT GOLDRING'S DREDGING WILL VIOLATE STATE WATER QUALITY STANDARDS.

The hearing officer in this case found that Goldring's proposed 62 foot deep dredge area would result in violations of the state water quality standard for specific conductance. That standard is found in Florida Administrative Code Rule 17-3.061(2)(o). A copy of the rule is included as Exhibit 2 of the Appendix to this brief. Goldring alleges in his brief that there is no competent, substantial evidence in the record that the chlorine content of the water in the pit will be raised to more than 250 parts per million (PPM). Regardless of whether that is true or not, it is irrelevant since the water quality standard for specific conductance is not expressed in PPM of chlorine. The pertinent language of the rule, with the correct standard which must be met, is as follows:

> Specific Conductance -
> shall not be increased more than 100% above background levels or to a maximum level of 500 micromhos per centimeter in surface waters in which the specific conductance of the water at the surface is less than 500 micromhos per centimeter...

A review of the record quickly shows that there is competent, substantial evidence in the record that the above standard will be violated. There is evidence in the record that background levels of chlorine in the area are as low as 35 PPM (R-0055) and in fact the hearing officer, through extrapolation of that figure and

review of other evidence, specifically found that background levels of specific conductance are less than 100 micromhos per cubic centimeter (R-1340). There is evidence in the record that chlorine levels in Goldring's proposed pit after completion of the dredging would approach 250 PPM (R-0058). Finally, there is evidence in the record that 250 PPM chlorine is equivalent to 1000 micromhos of specific conductance. Therefore, utilizing evidence in the record, it may be seen that Goldring's activities will result in levels of specific conductance approaching 1000 micromhos per cubic centimeter, exceeding the maximum levels allowed by the rule of 500 micromhos per cubic centimeter by a factor of two. While the above facts are not the only facts in the record indicating that Goldring's dredging would cause violations of the state water quality standard for specific conductance, they constitute sufficient competent substantial evidence in the record to uphold the hearing officer's finding of fact that the standard for specific conductance would be violated.

It is well established that neither the Appellate forum nor the agency may substitute its judgment for that of a hearing officer in a Section 120.57, Florida Statutes, proceeding as to the weight of the evidence on any finding of fact which is based on substantial competent evidence. Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383 (Fla. 5th DCA 1983); McCray v. Department of Health and Rehabilitative Services,

384 So.2d 980 (Fla. 3d DCA 1980); Oliff v. Florida State Board of Nursing, 374 So.2d 1054 (Fla. 1st DCA 1979); Pasco County School Board v. Florida PERC, 353 So.2d 108 (Fla. 1st DCA 1978); McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). A hearing officer's findings may not be overturned unless a review of the entire record reveals a total lack of substantial evidence to support them. Gruman v. State Department of Revenue, 379 So.2d 1313 (Fla. 2d DCA 1980).

For court to reweigh the evidence presented to the finder of fact would be contrary to the function of the court as appellate tribunal. Caloosa Property Owners Association, Inc. v. Department of Environmental Regulation et al., __ So.2d __, 10 FLW 144 (Fla. 1st DCA 1985). Substantial weight should be accorded agency findings and a reviewing forum cannot substitute its judgment for that of the agency on a finding of fact or the weight thereof. Graham v. Estuary Properties Inc., 399 So.2d 1374 (Fla. 1981).

To prevail on appeal, Appellant must demonstrate that the agency action below was unequivocally wrong and not based on competent, substantial evidence. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981). As shown above, Goldring has not carried this burden.

Appellant's argument is based only on a misinterpretation of relevant law. Appellant fails to establish that the Department's findings are not supported by competent, substantial evidence or

that any finding is clearly erroneous, but argues only that levels of chlorine in Goldring's pit will not exceed 250 PPM, an incorrect standard. A review of the record reveals that the only evidence submitted at hearing supports the findings of fact that violations of the specific conductance standard will occur.

In conclusion, the Department's Final Order which finds that Goldring's activities will cause a violation of the specific conductance standard is supported by substantial competent evidence and should not be overturned on appeal.

CONCLUSION

For the afore stated reasons, and for the reasons set forth in the Department's Initial Brief in this matter, the Petitioner/Appellant, State of Florida, Department of Environmental Regulation respectfully requests that this Court reverse the decision of the Second District Court of Appeal in Goldring v. State of Florida Department of Environmental Regulation, 452 So.2d 968 (Fla. 2d DCA 1984), and uphold the validity of the Department's Final Order in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing REPLY BRIEF OF APPELLANT DEPARTMENT OF ENVIRONMENTAL REGULATION, were filed with Clerk's Office of the Supreme Court of the State of Florida, and a true copy of the same was served by U.S. Mail on John G. Fletcher, Esquire, 7600 Red Road, South Miami, Florida 33143-5484, on this 18 day of March, 1985.

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