IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Civil Action No. 83,530

JORY BRICKER,

Appellant,

v.

J. TERRY DEASON, et al.,

Appellees.

REPLY BRIEF OF APPELLANT, JORY BRICKER

Ted E. Karatinos, Esquire
SEELEY & KARATINOS, P.A.
Florida Bar No. 0983209
23 Sixth Street North
St. Petersburg, FL 33701
(813) 823-1500
Counsel for Appellant,
Jory Bricker

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REBUTTAL ARGUMENT

I. AN INDIVIDUAL HAS A RIGHT TO JUDICIAL REVIEW OF AN ADMINISTRATIVE AGENCY'S FINAL ORDER, REGARDLESS OF WHETHER THE INDIVIDUAL FILED EXCEPTIONS TO A HEARING OFFICER'S RECOMMENDED ORDER.

The appellees' answer briefs raise Florida Administrative Code Rule [hereinafter "FAC Rule"] 25-22.056(4)(b) as a hoop to judicial review. At first blush, that FAC Rule looks like a complete triumph of form over substance. That FAC Rule seems to waive a right to seek judicial review of any law or fact used by a hearing officer to which a party does not later take exception. Yet, FAC Rule 25-22.056(4)(b) should not be read in such a draconian way.

What is the underlying purpose of that FAC Rule? The Rule gives notice. It avoids surprise. It focuses the issues. In an administrative arena where formal pleadings are not often filed and unknowing pro se litigants abound, FAC Rule 25-22.056(4)(b) gives an agency one more chance to understand a party's position before entering a final order. That FAC Rule does not bar judicial review. Jory Bricker cannot appeal the recommended order. She can only appeal the Commission's final order. The FAC Rule does not discuss waiving judicial review of a final order. That Rule only talks about waiving objections to a "recommended or proposed order." In their answer briefs, the appellees twist the FAC Rule, arguing that it bars judicial review of a **final** order.

There are two reasons why FAC Rule 25-22.056(4)(b) does not bar judicial review to Jory Bricker. First, waiving objections to a recommended order does not equate to waiving judicial review of a final order. FAC Rule 25-22.056(b)(4) does not address final

orders. Second, Jory Bricker submitted proposed findings of fact and conclusions of law. Her proposal may not negate a mandate to file exceptions, but it serves the purpose of the mandate -- notice. For these two reasons, FAC Rule 25-22.056(b) does not bar judicial review of the issues in Jory Bricker's initial brief.

A. FAC RULE 25-22.056(4)(b) DOES NOT HAVE THE EFFECT OF WAIVING AN INDIVIDUAL'S RIGHT TO JUDICIAL REVIEW.

Judge Smith states his position on the issue as follows:

> It is not an impediment to our review that Stuckey's did not except to the proposed order when the Department considered it pursuant to § 120.57(1)(b)8 and 9. Enforcement of statutory procedural guarantees remains a judicial function under the review procedures of § 120.68, and it would be inconsonant with the purposes of the Administrative Procedure Act to hold that an affected party must first debate procedural defects before a nonjudicial agency in order to complain to the appropriate reviewing court. Moreover, our duty is to review the Department's order, not the hearing officer's recommended order; and by adopting the recommended order, the Department adopted as its own any error in the hearing officer's failure to rule[.]"

Stuckey's of Eastman, Georgia v. Department of Transp., 340 So. 2d 119, 120 (Fla. 1st DCA 1976)(Smith, J.). This ruling seems to conflict with Judge Zehmer's opinion in Environmental Coalition of Florida, Inc. v. Broward County, 586 So. 2d 1212 (Fla. 1st DCA 1991)(Zehmer, J.).[1] A closer look reveals no inconsistency.

In Broward County, the First DCA could determine for itself

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[1] "Having filed no exceptions to the findings of fact contained in the recommended order, Environmental Coalition has thereby expressed its agreement therewith, or at least waived any objection to, those findings of fact. The facts relied on by this court are taken directly from the recommended order." Broward County, 586 So. 2d at 1213.

whether to accept the factual findings and legal conclusions of the final order. By accepting the facts in the recommended order, the Broward County court merely exercised one of its powers as a reviewing court. If the Broward County court had discovered a lack of substantial and competent evidence to support the agency's ruling, the court was within its right to reverse the final order. Thus, failure to file exceptions to a recommended order does not prevent an appellate court from reviewing a final order to determine its sufficiency. Such a reading of FAC Rule 25-22.056(4)(b) is severe. Rather, **"it is not an impediment to [appellate] review that [a party] did not except to the proposed order[.]"** Stuckey's of Eastman, Georgia, 340 So. 2d at 120 (emphasis added). Neither FAC Rule 25-22.056(4)(b), nor Broward County address judicial review of final orders.

To the extent that the Commission adopted the hearing officer's recommended order in its final order, the Commission had the power to adopt error by the hearing officer. Stuckey's of Eastman, Georgia, 340 So. 2d at 120. In this case, Jory Bricker contends that the Commission adopted a recommended order that was contrary to consumer safety law and unsupported by substantial competent evidence. This Court must review the error that arises from the Commission's final order, not the hearing officer's recommended order. Reading the language of FAC Rule 25-22.056(4)(b), one may reasonably infer a waiver of objections to the agency concerning adoption of findings in the recommended order, but not waiver of argument to the appellate court concerning

error in the final order. Failure to file exceptions to a recommended order does not bar judicial review of a final order.[2]

Contrary to the position taken in the Appellees' answer briefs, Jory Bricker submits that this Court should conduct full judicial review of the Commission's final order as set forth in her initial brief.

B. IF A PARTY SUBMITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT PARTY'S POSITION IS CLEAR FOR THE PURPOSE OF SEEKING JUDICIAL REVIEW.

Jory Bricker's position became apparent, when she filed a proposed order that contained findings of fact and conclusions of law. R-I-145. Since the recommended order rejects Jory Bricker's proposed order, filing of exceptions would have been redundant. It would be absurd to condition review on a requirement that a party restate the same position taken scant weeks before. A party inherently takes exception to a recommended order that almost entirely rejected that party's proposed order.

By filing a detailed proposed order, Jory Bricker satisfied the underlying purpose of FAC Rule 25-22.056(4)(b). The Rule seems designed to notify a ruling agency and opposing parties of legal and factual deviations from the recommended order. Where the recommended order sets forth a line-item analysis of the parties' proposed orders, that purpose is more than satisfied. Although perhaps mandatory, filing of exceptions in such a situation hardly

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[2] Any reading of FAC Rule 25-22.056(4)(b) to bar judicial review defies the plain language of that Rule, since the Rule only applies to a "recommended or proposed order." This appeal is taken from a final order on the merits.

seems necessary to effect the purpose of notice. Further, "administrative proceedings need not contain all the formalities of judicial proceedings." Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322, 323 (Fla. 1990). Compliance with the underlying purpose of an FAC Rule of procedure should be all that is necessary to continue on a smooth road towards judicial review. See, e.g., Amcor, Inc. v. Brock, 780 F.2d 897, 899 (11th Cir. 1986)(administrative procedure may be waived in the interest of justice where no prejudice results).

Contrary to the position taken in the Appellees' answer briefs, Jory Bricker submits that this Court should conduct full judicial review of the Commission's final order as set forth in her initial brief.

CONCLUSION

Appellant, Jory Bricker, requests that this Court reverse the Public Service Commission's Order, No. PSC-94-0306-FOF-EI, of March 17, 1994.

Respectfully submitted,

Ted E. Karatinos
TED E. KARATINOS, ESQUIRE
SEELEY & KARATINOS, P.A.
Florida Bar No. 0983209
23 Sixth Street North
St. Petersburg, FL 33701
(813) 823-1500
Counsel for Appellant,
Jory Bricker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail on this 28th day of September, 1994 to:

Christiana Moore, Esq.
Public Service Commission
Suite 216, 101 East Gaines Street
Tallahassee, Florida 32399-0850

Rob Vandiver, Esq.
Public Service Commission
Room 212, 101 East Gaines Street
Tallahassee, Florida 32399-0850

William D. Talbott
Executive Director
Public Service Commission
Room 116, 101 East Gaines Street
Tallahassee, Florida 32399-0850

Rodney E. Gaddy, Esq.
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733

Ted E. Karatinos

TED E. KARATINOS, ESQUIRE