

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

JAY SWEATT, DAWN SWEATT,
Owners of Two-Year-Old Labrador Dog
Named BACCHUS,

Appellants,

CASE NO.: 2017-CA-000117
Division 49: Judge Scott C. DuPont

v.

FLAGLER COUNTY BOARD OF
COUNTY COMMISSIONERS,

Appellee.

ORDER AND OPINION

This is an appeal of an Adjudicatory Order entered by the Flagler County Board of County Commissioners (“the Board”) classifying Appellants’ (“the Sweatts”) dog Bacchus as a dangerous dog pursuant to Florida Statute Section 767.11(1)(a), and the Flagler County Code of Ordinances Section 5-67,

Appellants contend that they were deprived of due process when the Board took arguments and unsworn testimony from the public (non-parties) without providing Appellants the opportunity to cross-examine the witnesses. Appellants additionally contend that the Board failed to observe the essential requirements of law when it reweighed and reinterpreted the evidence and rejected the Hearing Officer’s factual finding that RW was unlawfully in the Sweatts’ home when he was bitten by Bacchus. Lastly, Appellants contend that the Board

applied the wrong law when it found that RW had “implied consent” to enter the Appellants’ home when he was bitten.¹

Relevant Factual and Procedural Background²

The Sweatts’ two-year old Labrador, Bacchus, bit their son’s eight-year-old friend (“RW”) while he was in the Sweatts’ home. The Sweatts notified Flagler County Animal Control (“Animal Control”) of the incident and Bacchus was quarantined for ten days until he received a clean bill of health. Animal Control conducted an investigation of the incident and determined that there was sufficient cause to declare Bacchus a “dangerous dog” as defined by Florida Statute Section 767.11(1)(a).³ The Sweatts were notified of Animal Control’s classification of Bacchus and they requested a hearing in order to appeal the classification.

Hearing Officer Charles Cino was assigned to the matter. At the hearing conducted on August 11, 2015, the County and the Sweatts were provided the opportunity to present their evidence, provide testimony, and cross-examine the witnesses. The County presented testimony by RW’s parents, Rickie Westfall Sr. and Geri Westfall, and by Animal Control Officer Katie DiPippo. The Sweatts presented their own testimony, that of their daughter, that of Canine Behavior Consultant, Deborah Birmingham, and that of Keith Neal. The Hearing Officer continued the hearing in order to hear testimony by RW. At the second hearing, RW testified and the Sweatts offered testimony by their son RS in rebuttal. The Sweatts additionally recalled Ms. Birmingham, Mrs. Sweatt, and Ms. DiPippo. Ms. DiPippo admitted that she had not obtained any affidavits from any persons desiring to have Bacchus declared a dangerous dog.

¹ The Court finds no merit in and does not address this last argument.

² In the interest of judicial economy, the Court does not recite factual and procedural findings, which are not relevant to this opinion.

³ The statute defines a “dangerous dog” as a dog that has “aggressively bitten, attacked, or endangered or has inflicted severe injury on a human being on public or private property.” §767.11(1)(a), Fla. Stat.

Ms. DiPippo also testified that she had declared Bacchus a dangerous dog based solely on her review of the photographs of RW's injuries.⁴ Additionally, Ms. DiPippo explained that she had not considered the statutory exemptions of the Florida Statutes in finding that Bacchus was a dangerous dog.⁵ Ms. DiPippo stated that she thought that the very purpose of the hearing was to determine whether the exemption applied to exclude Bacchus from the dangerous dog classification.

A few days after the second hearing, Hearing Officer Cino issued a written "Recommendation of the Hearing Officer," which included his findings of fact, conclusions of law, and recommendations to the Board. Hearing Officer Cino found that Bacchus had caused severe injury to RW, resulting in a disfiguring scar on his cheek. Therefore, he fit into the statutory definition of a dangerous dog. However, the Hearing Officer determined that RW was unlawfully on the Sweatts' property at the time of the injury because: (1) he had entered the home without knowledge of the Sweatts; (2) had been told not to come back until he was called (and had not been called or told to return); and (3) did not have authority to enter the home. Based on those findings, the Hearing Officer declared that although under the Florida Statute Bacchus qualified as a dangerous dog because he had caused severe injury to RW, Bacchus was exempted from the classification because RW was unlawfully in the Sweatts' home at the time of

⁴ RW received 44 stitches as a result of the bite.

⁵ Florida Statute Section 767.12(2)(a) provides that:

- (2) A dog may not be declared dangerous if:
 - (a) The threat, injury, or damage was sustained by a person who, at the time, was unlawfully on the property or who, while lawfully on the property, was tormenting, abusing, or assaulting the dog or its owner or a family member.

his injury. Accordingly, the Hearing Officer recommended that the Board not classify Bacchus as a dangerous dog.

The Recommended Order was presented to the Board for its approval or rejection at the Board's September 9, 2015 public meeting. The Board was provided with the Recommended Order and the record and transcript of the hearing before Hearing Officer Cino. Additionally, the Board received instructions from the County Attorney that in making its decision to accept or reject the Recommended Order, the Board was only to consider: (1) whether the factual findings of the Hearing Officer were supported by competent substantial evidence; and (2) whether the Hearing Officer applied the correct law. The Board was warned that it may neither reweight the evidence nor consider any additional or new evidence not on the record of the administrative hearing before Hearing Officer Cino. After receiving its instructions, the Board heard arguments by the Sweatts in favor of and by RW's attorney in opposition to the Recommended Order. The Board additionally invited members of the public to comment.

Thereafter, the Board issued an Adjudicatory Order classifying Bacchus as a dangerous dog. In coming to this conclusion, the Board found that there was competent substantial evidence to support the Hearing Officer's finding that Bacchus had caused severe injury to RW. However, the Board rejected the Hearing Officer's finding that Bacchus was exempted from the classification because RW was unlawfully in the Sweatts' home at the time that he was bitten. The Sweatts appeal the Adjudicatory Order designating Bacchus as a dangerous dog.

Legal Analysis

This Court has jurisdiction to consider an appeal of the Board's administrative order pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C). The Court's review, however, is strictly limited to its consideration of: (1) whether due process was accorded the parties; (2)

whether the essential requirements of law were observed; and (3) whether the administrative findings and order were supported by competent evidence. *Haines City Cmty. Dev. V. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

The Flagler County Administrative Hearing Ordinance specifies the procedure to be used by the county in its review of a dangerous dog classification. Sec. 2-308, Flagler County Code of Ordinances. Pursuant to Section 2-303, upon being informed of a matter subject to an administrative hearing “the county attorney shall promptly assign the matter to a hearing officer for the purpose of conducting an administrative hearing, making findings of fact and conclusions of law, and rendering a recommended order with regard to said matter.” Upon assignment, the hearing officer must schedule and conduct an administrative hearing, and prepare a written recommended order containing findings of fact, conclusions of law, and a recommended decision. Sec. 2-304, Flagler County Code of Ordinances. The recommended order is then filed with the county attorney. *Id.* Once the county attorney receives the recommended order, he or she places the order on “the agenda of the board for its consideration at its next regular meeting.” Sec. 2-305, Flagler County Code of Ordinances. At the review before the Board:

- (1) The **party** supporting the recommended order shall have five (5) minutes to address the board in favor of the recommended order.
- (2) The **party** opposing the recommended order shall have five (5) minutes to address the board in opposition to the recommended order.
- (3) The **party** supporting the recommended order shall have three (3) minutes for rebuttal.

Such presentations before the board shall consist solely of argument, which may include references to evidence presented to the hearing officer, but shall not include any presentation of evidence before the board.

Sec. 2-306, Flagler County Code of Ordinances (emphasis added).

At the conclusion of the presentation provided for herein, the board shall vote to **either uphold or reject the recommended order**, which action shall constitute the action of the board on the question. That action and the record created both before the hearing officer and before the board shall be subject to judicial review as provided by law.

Sec. 2-307, Flagler County Code of Ordinances (emphasis added).

First, the Court finds that the Board exceeded its authority and violated its own rules by allowing non-party RW, through his counsel, to present arguments in opposition to the Recommended Order. Sec. 2-306 specifies that only **parties** to the proceeding are permitted to present argument. The only parties to the proceedings whereby Bacchus was to be classified as a dangerous dog were his owners, the Sweatts, and the County, which was seeking to enforce its code. Therefore, the only parties entitled to argue before the Board were the Sweatts and the County. However, other than instructing the Board on its role, the applicable standard of its review, and the proper procedures to follow, the County Attorney made absolutely no argument either opposing or supporting the Recommended Order. Instead, the attorney representing RW, a non-party to the proceedings, was allowed to present argument before the Board. In addition to being a clear violation of Sec. 2-306, this error by the Board deprived the Sweatts of their due process rights.

Second, the Court finds that the Board exceeded its authority and violated its own rules by its piecemeal treatment of the Recommended Order—rejecting part and accepting part of the order. The Ordinance at issue clearly states that the Board “shall vote to **either uphold or reject** the recommended order.” Sec. 2-307. In the instant case, the Board had no authority to partly accept and partly reject the Recommended Order. In overstepping its authority under Section 2-307, the Board failed to observe the essential requirements of law and deprived the Sweatts of their right to due process.

Moreover, in a fact-driven case such as this, great weight must be given to the findings of Hearing Officer Cino, who alone had the opportunity to hear and observe the witnesses and evaluate their credibility. *Resnick v. Flagler County Sch. Bd.*, 46 So. 3d 1110, 1112 (Fla. 5th DCA 2010) citing *Dunham v. Highlands County Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Notably, the fact that the Board may have found conflicting evidence in the administrative record has no bearing on the Board's determination of whether the hearing officer's factual findings were supported by competent substantial evidence. *Resnick v. Flagler County Sch. Bd.*, 46 So. 3d at 1112-13 (underscoring that if the hearing officer's factual findings are supported by any competent substantial evidence, an administrative agency cannot reject those findings even if some other competent substantial evidence may support different findings) citing *Gross v. Dep't of Health*, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002); *Umatilla v. Pub. Employees Relations Comm'n*, 422 So. 2d 905, 907-08 (Fla. 5th DCA 1982). An administrative hearing officer's duties and function are well-defined by Florida law:

. . . 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. *State Beverage Department v. Ernal, Inc.*, 115 So. 2d 566 (Fla. 3d DCA 1959). If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. **The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.** We recognize the temptation for agencies, viewing the evidence as a whole, to change findings made by a hearing officer that the agency does not agree with. As an appellate court, we are sometimes faced with affirming lower tribunal rulings because they are supported by competent, substantial evidence even though, had we been the trier of fact, we might have reached an opposite conclusion. As we must, and do, resist this temptation because

we are not the trier of fact, so too must an agency resist this temptation since it is not the trier of ordinary factual issues not requiring agency expertise.

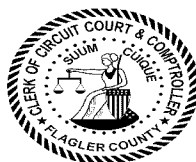
Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985) (emphasis added).

In the instant case the Board impermissibly changed Hearing Officer Cino's findings of fact and conclusions of law by reweighing and reinterpreting the evidence. Although the Board couched its decision in terms of a claim of "lack of competent substantial evidence," the plain language of the Adjudicatory Order reveals that instead of simply reviewing the Recommended Order to determine whether it was supported by competent substantial evidence, the Board actually reviewed it to see if it was opposed by any evidence. In doing so, and in clear violation of well-established law, the Board substituted its own judgment as to the relative weight to be given the conflicting evidence based on the Board's own opinion of the credibility of certain evidence.

Based on the foregoing, the Court finds that the Flagler County Board of County Commissioners failed to observe the essential requirements of law, and in doing so, violated the Sweatts' due process rights. Therefore, it is:

ORDERED AND ADJUDGED that the Adjudicatory Order on appeal is hereby **QUASHED** and the matter is **REMANDED** to the Flagler County Board of Commissioners for further proceedings consistent with this Order.

DONE and ORDERED in Chambers at Kim C. Hammond Justice Center, Bunnell, Flagler County, Florida this 16th day of August, 2017.




SCOTT C. DUPONT
CIRCUIT JUDGE

Copies:
Appellant
Appellee