FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1445

FLORIDA SPRINGS COUNCIL,

Appellant,

v.

SUWANNEE RIVER WATER MANAGEMENT DISTRICT and SEVEN SPRINGS WATER COMPANY,

Appellees.

On appeal from Suwannee River Water Management District. Virginia H. Johns, Chair.

November 30, 2022

PER CURIAM.

This appeal presents the narrow procedural question of whether Suwannee River Water Management District Rule 40B-1.1010(2)(a) entitles Appellant to an administrative hearing. We answer that question affirmatively.

I.

Seven Springs Water Company ("Water Company") applied for a permit from the Suwannee River Water Management District ("Management District") to collect water from Gilchrist County for

bulk sale. The Management District announced that it planned to deny the application. The Water Company petitioned for a formal administrative hearing to challenge the proposed denial. Appellant did not seek to intervene. After the formal hearing, an administrative law judge ("ALJ") ordered the Management District to approve the Water Company's permit application. The Management District adopted the ALJ's order under protest and issued the permit.

Appellant, citing Management District Rule 40B-1.1010(2)(a), petitioned for an administrative hearing to challenge the issuance of the Water Company's permit. However, the ALJ found that Rule 40B-1.1010(2)(a) did not entitle Appellant to a hearing. The ALJ expressed concern that Appellant's interpretation of the Rule to create a second point of entry in the administrative process "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." Accordingly, the ALJ directed the Management District to dismiss Appellant's petition. Concluding that it was obligated to follow the ALJ's order, the Management District dismissed Appellant's hearing petition "for the reasons set out" in the ALJ's order.

This appeal followed, in which Appellant maintains that it is entitled to a hearing under Rule 40B-1.1010(2)(a).

II.

This Court uses a de novo standard when reviewing an administrative agency's conclusions of law. *1701 Collins Miami Owner, LLC v. Dep't of Revenue*, 321 So. 3d 875, 878 (Fla. 1st DCA 2021). In relevant part, Rule 40B-1.1010 ("Point of Entry into Proceedings") of the Florida Administrative Code provides:

> *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. Such

> requests for an administrative hearing shall only address those aspects of the agency action which differ from the proposed agency action.

Fla. Admin. Code R. 40B-1.1010(2)(a) (emphasis added).

Here, the Management District published notice of its intent to deny the Water Company's permit application. Because Appellant agreed with the Management District's proposed action, it had no basis to petition for a hearing at that time. *See Washington Cty. v. Nw. Fla. Water Mgmt. Dist.*, 85 So. 3d 1127, 1130–31 (Fla. 1st DCA 2012) (noting that injury in fact is among the requirements to receive an administrative hearing). Appellant argues that this changed once the Management District took its "final" agency action by—in compliance with the ALJ's order—issuing the Water Company's permit. *See Sowell v. State*, 136 So. 3d 1285, 1288 (Fla. 1st DCA 2014) ("Final agency action is that which brings the administrative adjudicatory process to a close."). Appellant then petitioned for an administrative hearing under Rule 40B-1.1010(2)(a).

"[A]dministrative rules must be interpreted according to their plain language whenever possible." *Smith v. Sylvester*, 82 So. 3d 1159, 1161 (Fla. 1st DCA 2012). Here, the plain language of Rule 40B-1.1010(2)(a) authorized Appellant's hearing petition because the Management District's final action—issuing the Water Company's permit—was materially different from its proposed action—denying the permit.

The Water Company questions the validity of the Rule, arguing that when it challenged the Management District's proposed action, sections 120.569 and 120.57(1), Florida Statutes, provided Appellants with a clear point of entry. The Water Company argues that the rule impermissibly creates a second point of entry. Even so, the Water Company has never challenged the rule under section 120.57, Florida Statutes. For these reasons, we express no opinion as to the wisdom of the Rule or whether the Rule is an invalid exercise of delegated legislative authority. *See Goodman v. Fla. Dep't of Law Enf't*, 238 So. 3d 102, 108 (Fla. 2018) (noting that "duly promulgated agency rules" are "presumptively

valid until invalidated") (quoting *City of Palm Bay v. State Dep't of Transp.*, 588 So. 2d 624, 628 (Fla. 1st DCA 1991)).

III.

Because the plain, unchallenged language of Rule 40B-1.1010(2)(a) authorized Appellant's hearing petition, it was error to dismiss the petition with prejudice.* Therefore, we reverse Management District Final Order 21-008—which was based on the ALJ's "Order Dismissing Petition and Closing File"—and remand this case to the Management District for consideration consistent with this opinion.

REVERSED and REMANDED.

ROWE, C.J., and MAKAR and JAY, JJ., concur.

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* The ALJ's order also found that it lacked jurisdiction to consider Appellant's petition because the Management District had a pending appeal in this Court that challenged its issuance (under protest) of the Water Company's permit. Ultimately, that appeal ended in a dismissal under Rule of Appellate Procedure 9.350(a). The ALJ's concern about interfering with a pending appeal is understandable. *See Thursby v. Stewart*, 138 So. 742, 751 (Fla. 1931.) However, in such a circumstance, the better practice is to dismiss the petition *without* prejudice or to hold the petition in abeyance during the pendency of the appeal. *See, e.g.*, *Lindsay v. State*, 842 So. 2d 1057, 1058 (Fla. 4th DCA 2003) ("However, even if the trial court lacked jurisdiction to rule on the instant motion because of the pending direct appeal, instead of dismissing the motion . . . the better practice would have been to stay the motion until jurisdiction returned."). This is particularly advisable when—as happened in this case—the appellate court has issued a show cause order in response to a motion to stay so that jurisdiction could potentially be relinquished to the lower tribunal.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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