BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

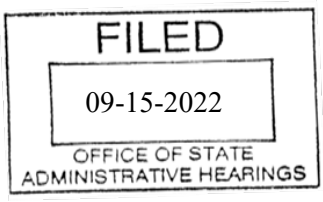
VICTORY MEDIA GROUP, LLC,
Petitioner,

v.

GEORGIA DEPARTMENT OF TRANSPORTATION,
Respondent.

Docket No.: 2217292
2217292-OSAH-DOT-OA-42-Fry

Agency Reference No.: 2217292



INITIAL DECISION

This dispute involves the Georgia Department of Transportation's ("GDOT" or "the Department") decision to revoke the multiple message supplement of Victory Media Group, LLC ("Victory" or "Victory Media") associated with GDOT Permit D4614. The hearing was conducted on June 9, 2022, before the undersigned administrative law judge. Victory was represented at the hearing by G. Franklin Lemond, Jr., Esq. E. Adam Webb, Esq. was also attorney of record for Victory. GDOT was represented by Pearson Cunningham, Esq. and Denise Weiner, Esq. The record was held open to allow the Parties to make post-hearing submissions. Due to the complexity of the factual and legal issues and the ALJ's hearing schedule, IT IS ORDERED that the deadline for issuance of this Final Decision be extended to September 14, 2022, as authorized by the Georgia Administrative Procedures Act, O.C.G.A. 50-13-41(a). For the reasons explained below, the Department's determination that GDOT Permit D4614 issued to Victory Media was issued erroneously and should be revoked is **AFFIRMED**.

II. Findings of Fact

Based upon the record before it and the evidence and testimony that was received at the hearing, the Court finds the following material facts that inform its conclusions of law.

1. Victory has two members, Steve Galberaith and Beth Perkins. [*See* Testimony of Steve Galberaith; Testimony of Beth Perkins.]
2. This case is about outdoor advertising in Georgia, which is governed by the Outdoor Advertising Control Act (the "Act"), codified at O.C.G.A. §§ 32-6-70 *et. seq.* On September 14, 2021, Victory Media applied to the Department for a multi- message supplement for a sign to be located within Dawson County, Georgia (Application No. 1001380).[1] [*See* OSAH Form 1-Attachments at 1; Petitioner's Exhibit 1; Testimony of Steve Galberaith].
3. On October 25, 2021, the Department granted Victory Media's permit application and issued the multiple message supplement for the Sign. [*See* OSAH Form 1- Attachments, Ex. B; Petitioner's Exhibit 2, p. 1.]
4. The Department later realized that the multi- message permit was issued in error. Thus, on November 19, 2021—25 days after its approval letter was issued—the Department sent Victory Media notice that the Department was revoking the permit in accordance with Ga. Comp. R. & Regs. r. 672-6-.08(2)(B). [*See* OSAH Form 1-Attachments, Ex. C; testimony of Walter Sanders].
5. The Department became aware of the error and Mr. Sanders and Ms. Perkins discussed the issue before the November 19, 2021 letter was sent. Beth Perkins, half-owner of Victory Media testified at the hearing that she was the outdoor advertisement manager at the Department from July 2013 to November 2015. [Testimony of Walter Sanders and Beth Perkins.]

1 A "standard" outdoor advertising sign is what one commonly thinks of as a billboard. A "multiple-message" outdoor advertising sign is a billboard that is able to "change the message or copy on the sign electronically by movement or rotation of panels or slats." O.C.G.A. § 32-6-71(11.1). Typically, a multi-message sign is a digital billboard, but as the definition demonstrates, that is not a necessary condition. *See* O.C.G.A. § 32-6-71(11.1).

6. The Department issued the permit in error because Victory Media's Sign could not be permitted as a multi-message sign under O.C.G.A. § 32- 6-75(c)(1)(C), which prohibits a multi-message sign from being located within 5,000 feet of another multi-message sign on the same side of the highway. [OSAH Form 1-Attachment Two at 3; Petitioner's Exhibit 3; Testimony of Steve Galberaith; testimony of Walter Sanders].
7. The November 19, 2021 letter was sent via UPS, which confirmed the letter was delivered to the addressee. [Testimony of Walter Sanders.]
8. Ga. Comp. R.& Regs. 672-6-.08(1) requires that notice of revocation be sent by certified mail.
9. On December 17, 2021, Victory submitted a Request for Administrative Hearing to GDOT regarding the stated intention to revoke the multiple message supplement. [*See* OSAH Form 1, Exhibit D.]
10. Although certified mail is the prescribed method of service, Victory Media received actual notice as evidenced by its filing the request for an administrative hearing and was well aware of the issue based on the conversation between Mr. Sanders and Ms. Perkins.
11. The existing multi-message sign is MMS Permit D3674. [*See* Petitioner's Exhibit 3; Testimony of Steve Galberaith.]
12. The Department did not send Victory any further correspondence concerning the revocation, which Mr. Galberaith testified he understood to be a notice of *intent* to revoke and not a revocation. [*See* Testimony of Steve Galberaith; Testimony of Walter "Buddy" Sanders.]
13. The Re line of the November 19, 2021 letter reads "Revocation of Multiple Message Sign Permit D4614." Although the fist sentence in the body of the letter reads that the "purpose of this notice is to inform you that it is the intent of the Georgia Department of Transportation

("the Department") to revoke Multiple Message Sign Permit No. 4614 ("the Permit") …" elsewhere, the letter clearly states, that "Victory Media may request an administrative hearing to review the Department's decision to revoke the Permit on this basis. The Ga. Comp. R. & Regs, sections cited, by the Department in the November 19 letter (672-6-.09 and 672-1-.05) make it abundantly clear that this is a notice of revocation and not an amorphous notice of intent to do so at some indeterminant time in the future. [*See* OSAH Form 1-Attachments, Ex. C]. The Court finds that the November 19, 2021 notice letter is a notice of revocation.

14. Mr. Galberaith testified that after receiving approval, Victory arranged to have the approved sign and the electronic multiple message display installed. He did not testify as to what steps were taken or when they were taken. Ms. Perkins, however, testified that installation occurred in March 2022. [*See* Testimony of Steve Galberaith and of Beth Perkins.]
15. As of the hearing date, the Department's online permitting system still listed Permit D4614 as having an "active" multiple message supplement and the sign as "standing." [*See* Petitioner's Exhibit 4.]
16. Victory Media argues that the other sign (GDOT Permit No. D3674) was not constructed within the initial 12-month period following the Department's grant of the permit, and thus, it became an illegal sign. As an illegal sign, Victory Media argues that it should not be considered for purposes of the spacing limitation contained in O.C.G.A. § 32-6-75(c)(1)(C).
17. In 2010, Roma applied to the Department for a standard outdoor advertising sign. [*See* Petitioner's Exhibit 5.]
18. On July 29, 2010, GDOT issued Permit D3674 to Roma. [*See* Petitioner's Exhibit 6; Testimony of Steve Galberaith.]

19. Subsequently, on August 9, 2010, GDOT approved Roma's application for a mechanical multiple message permit. [*See* Petitioner's Exhibit 7 (obtaining approval for two (2) 14'x48' mechanical multiple message faces).]
20. GDOT's August 9, 2010 Letter to Roma advised it that the mechanical multiple message permit associated with D3674 was valid for one (1) year from August 9, 2010, but that this approval did not alter the deadline of July 29, 2011 to complete the installation of the underlying sign. [*See* Testimony of Steve Galberaith; Petitioner's Exhibit 7.]
21. On May 20, 2011, Roma through its counsel E. Adam Webb of the firm Webb, Klase & Lemond, LLC, applied to GDOT to modify its multiple message permit by reducing the sign face to 10.5'x36' and utilizing electronic multiple message technology rather than mechanical. Mr. Webb is counsel of record in this case. [*See* Petitioner's Exhibit 8; OSAH-1.]
22. As late as August 9, 2011, Mr. Webb was corresponding with Mr. Brian Asherbranner with the Department concerning receiving approval for the modification to D3674. [*See* Petitioner's Exhibit 11.]
23. Victory's other member, Beth Perkins, used to work for the Department as its outdoor advertising manager, the position currently held by Mr. Sanders. [*See* Testimony of Beth Perkins.]
24. According to O.C.G.A. § 32-6-74(a), "[p]ermits and renewals thereof shall be issued for and shall be valid only if the sign is erected and maintained in accordance with this part during the 12-month period next following the date of issuance." [*See* O.C.G.A. § 32-6-74(a); Testimony of Beth Perkins]

25. Ga. Comp. R. & Regs. 672-6-.05(1)(a) establishes that "signs shall be erected, maintained, and operational within 12 months of issuance of the permit or prior to the expiration of any extension granted in accordance with O.C.G.A. § 32-6-74."

26. Ga. Comp. R. & Regs. 672-6-.06(3) establishes that signs "shall be operating in accordance with the permit within twelve (12) months of approval or shall expire without further notice."

27. Ga. Comp. R. & Regs. 672-6-.08(3)(b) establishes that "Permits shall expire for the following reasons . . . (b) An approved revision has not been completed or is not operating within twelve (12) months."

28. According to O.C.G.A. § 32-6-71(6), an illegal sign means

> (A) A sign for the maintenance of which a permit is required under this part, or any amendment thereof, which sign is being maintained without a permit;
>
> (B) A sign presently being maintained without a required permit even though it could have been permitted under any outdoor advertising control law in effect at the time of its erection;
>
> (C) A sign presently being maintained without a permit, which sign could not have been permitted under the law in effect at the time of its erection even though the sign may meet the requirements of this part for the issuance of a permit;
>
> (D) A sign on which the permit has been revoked pursuant to this part;
>
> (E) A sign on which a nonconforming application for permit was denied and the denial has become final; and
>
> (F) A nonconforming sign for which no permit was sought as required by Code Section 32-6-79.

29. The spacing limitation of O.C.G.A. § 32-6-75(c)(1)(C) applies to both signs because they are both multi-message signs on the same side of the road as one another. [Testimony of Walter Sanders.]

30. According to the Department's records, GDOT Permit No. D3674 has maintained valid permits with the Department since issuance; the permit holder has renewed its permits each

year; and the Department has never taken adverse action against the permit for being an unauthorized or illegal sign. [*See* Testimony (Beth Perkins), Testimony (Walter Sanders)].

31. Mr. Webb, counsel of record in this case, advocated for the issuance of a permit for D3674 after July 29, 2011, i.e., after it had purportedly become an illegal sign according to Petitioner. As a result, the Department, nevertheless, issued a permit for D3674, which permit has been actively maintained since.

32. Neither Mr. Galberaith, nor Ms. Perkins could testify from personal knowledge thar D3674 was not constructed in the time allowed.

33. Victory also asserts that the Act and the related regulations are unconstitutional content-based restrictions on speech. Victory has made other constitutional arguments as well. This administrative court has no authority to declare statutes or regulations unconstitutional. See Ga. Comp. R. & Regs. 616-1-2-.22(3). Therefore, this Court renders no decision regarding Victory's arguments that the Act and regulations are unconstitutional. The Court makes no findings or conclusions as to this claim, but it is preserved for appeal.

III. Conclusions of Law

1. Outdoor advertising in Georgia is governed by the Georgia Outdoor Advertising Control Act ("the Act"), which is codified at O.C.G.A. §§ 32-6-70 through 32-6-97. The Georgia General Assembly has declared it to be the policy of the state to regulate outdoor advertising in areas adjacent to the interstate and primary highway systems within the state. O.C.G.A. § 32-6-70. It has also authorized GDOT "to promulgate rules and regulations governing the issuance and revocation of permits for the erection and maintenance of outdoor advertising" authorized by O.C.G.A. §§ 32-6-72 and 32-6-73. O.C.G.A. § 32-6-90. The rules and

regulations are to be consistent with the safety and welfare of the traveling public and the purposes of the federal Highway Beautification Act. *Id.*

2. In this appeal of a revocation by the permit holder, the Department bears the burden of proof. *See* Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

3. The Department revoked Victory Media's multi-message application pursuant to O.C.G.A. § 32-6-75(c)(1)(C). [OSAH Form 1-Attachment Two at 3]. That provision prohibits a multi-message sign from being located within 5,000 feet of another multi-message sign on the same side of the highway. *See* O.C.G.A. § 32-6-75(c)(1)(C). The Department determined that a multi-message sign holding a valid permit was within 5,000 feet of Victory Media's Sign. The distances between the other sign and Victory Media's Sign are not in dispute in this matter. Rather, for the purposes of this proceeding, Victory Media questions, whether the November 19, 2021 letter is a revocation (i.e., whether it is merely notice of intent to revoke), such that this issue is not ripe for review and asserts that the sign used as the basis for the revocation, D3674, is an illegal sign, which should not be considered for the purposes of the 5,000 foot limitation.

4. Regarding the first argument, as should be evident from the findings of fact above, the Court concludes that the November 19, 2021 letter is a revocation letter and the issue of the Department's revocation of Victory's Multi-Message Sign Permit 4614 is ripe for review.

5. Regarding the second argument, the Court must first interpret O.C.G.A. § 32-6-71(6), O.C.G.A. § 32-6-74(a), O.C.G.A. § 32-6-77, cited above, in light of O.C.G.A. § 32-6-79(f), which reads

> On or after March 24, 1980, the department *shall have the right to refuse* to issue any additional permits to any person, firm, or corporation who the department determines

> is maintaining or is allowing to be maintained an illegal sign or signs as defined by paragraph (6) of Code Section 32-6-71 on the interstate or primary highways in this state until such illegal sign or signs are removed. (emphasis added).

6. This language also appears in the Department's Regulations:

> Pursuant to O.C.G.A. § 32-6-79(f), the Department has the right to refuse to issue a permit to any person, firm or corporation whom the Department determines is maintaining or is allowing to be maintained an illegal sign or signs as defined by O.C.G.A. § 32-6-71(6).

Ga. Comp. R. & Regs. 672-6-.05 (c) Maintenance of Illegal Signs.

7. The plain language of the statute demonstrates that the Department has the right to refuse to issue a permit to an illegal sign. It does not, however, mandate that a permit not be issued to an illegal sign. *Cf. Deal v. Coleman*, 294 Ga. 170, 172–73 (2013) (explaining that questions involving statutory interpretation begin with the "plain and ordinary" meaning of the words in the statute and end there when no ambiguity exists). While the Department had the right to deny the permit after July 29, 2011, it did not exercise that right. Instead, it issued the permit as Mr. Webb requested. That would have been the time to resolve any lingering questions concerning whether the owner could be forced to tear the sign down at some point in the future. That issue was resolved when the Department issued the permit after July 29, 2011 even though the sign had not been erected. Presumably, Mr. Webb would not have advocated that D3674 receive a permit had it become irretrievably and irrevocably an illegal sign as of July 29, 2011, and subject to being required to be torn down.

8. Consequently, The Court rejects Victory Media's argument that D3674 is invalid because the sign weas not constructed within 12 months of the issuance of the initial permit. The evidence presented at the hearing demonstrates that the permit is valid. As Mr. Sanders testified at the hearing, the Department's records indicate that the permit is valid. The Department has never considered the permit invalid, nor has the validity of the permit been

questioned. The permit holder operating this sign has relied and continues to rely on the Department's determination in this respect. Presumably, the permit holder also relied on Mr. Webb to obtain a valid permit. Due process would require that the holder be given notice and an opportunity to be heard before its permit be rendered invalid by the Department or this Court. The Department cannot simply revoke a permit without the permittee first being given notice and an opportunity to be heard on the issue. *See Goldrush II v. City of Marietta*, 267 Ga. 683, 693 (1997) ("Due process also requires that one . . . whose valid license is being revoked or suspended, be given notice and an opportunity to be heard.").

9. Accordingly, even if there was a period of time following July 29, 2011, during which D3674 had expired and it became an illegal sign (a somewhat metaphysical question since the sign Petitioner had not been erected), it would have been an "illegal sign" only until the time the permit was issued. After the permit was issued, D3674 ceased to be "A sign for the maintenance of which a permit is required under this part, or any amendment thereof, *which sign is being maintained without a permit*." O.C.G.A. § 32-6-71(6)(A) (emphasis added). Thus, after the permit issued after July 29, 2011, D3674 was not being "maintained without a permit." Irrespective of Mr. Sanders' or Ms. Perkins' testimony about their interpretation of the law, this is a pure statutory interpretation question for the Court to decide. To whatever extent D3674 was ever an illegal sign, it was cured by the issuance of the permit on August 9, 2011 and by the subsequent renewals after that date.

10. The argument that D3674 is an illegal sign and should not be used in the 5,000-foot calculation is in the nature of an affirmative defense on which the Petitioner has the burden of proof, Ga, Comp. R. & Regs. 616-1-2-.07(1). As noted, when Victory Media's witnesses were asked directly, neither could testify, based on personal knowledge, that the sign was not

actually erected by the purported deadline. Faced with such speculation, the Court cannot conclude that the sign must have become an illegal sign on this basis. "[T]here is a presumption of regularity that requires the courts to presume that public officers have properly discharged their official duties." *Sleph v. Williams*, 284 Ga. 349, 352 (2008). Given the Department has regarded the owner as having maintained (and renewed) a valid permit for the sign over the last decade (and more), the Court cannot conclude that the sign has actually been an illegal sign all this time. *See id.* at 353 (holding presumption of regularity not overcome). The Court concludes that Petitioner did not carry the burden of proof as to this defense.

11. Additionally, Victory Media did not apprise the Department of the purported issue with GDOT Permit No. D3674 during the application process. Instead, according to the Department, Victory Media formally raised its argument with respect to GDOT Permit No. D3674 in this proceeding a mere 11 days before the hearing, long after the Department informed Victory Media that it intended to revoke its permit as having been issued in error.[2] Despite knowledge that the Department was intending to revoke Victory Media's permit, Victory Media erected the Sign anyway. There is no dispute that neither sign may simultaneously exist in light of the spacing limitation of O.C.G.A. § 32-6-75(c)(1)(C). Thus, if anyone is to bear the loss, it must—under basic principles of equity—be Victory Media.

2 The delay is all the more puzzling given that "Roma's agent"—a baffling and mystifying choice of words under the circumstances—Mr. Webb, was the attorney representing Roma in the permitting process for D3674 and is also an attorney of record in this case. [*See* Petitioner's Proposed Finding of Fact ¶ 27; Petitioner's Exhibits P-8 and P-11; and OSAH-1.] To be clear, Mr. Webb's actions concerning D3674 are not outcome determinative for the Court's ruling in this case. They merely provide additional support for the Court's conclusion that D3674 is not now and never was an illegal sign. The evidence presented by the Department in its case in chief was more than adequate to sustain the Department's burden of proof that D3674 has a valid permit, is not an illegal sign and should be considered for purposes of O.C.G.A. § 32-6-75(c)(1)(C). Having carried the burden of proof independent of the facts surrounding Mr. Webb's representation of Roma, O.C.G.A. § 32-6-75(c)(1)(C) and O.C.G.A. § 32-6-75(c)(2) support the Department's revocation decision as a matter of law.

See Corey Outdoor Advertising, Inc., 254 Ga. at 225 ("Furthermore, the city acted immediately, upon discovery the mistake, to correct it, whereas the appellant ignored the city's stop-work orders, and instead hastened to complete construction of the billboard, including placement of the advertisement copy.").

12. Ms. Perkins testified that the D3674 could possibly have been issued a non-conforming permit. That sign, however, does not meet the definition of "non-conforming" in O.C.G.A. § 32-6-71(12) since there nothing to suggest that D3674 had been compliant with state law regulations when it was permitted, but became noncompliant "due to changes in state law or changes in rules and regulations since the date of erection of the sign." The Court concludes that based on a preponderance of the evidence, D3674 has and has had a valid permit since the one was issued on August 9, 2011, and is, therefore, not an illegal sign. As a result, it is a valid sign for considering the 5,000-foot separation limit under O.C.G.A. § 32-6-75(c)(1)(C).

13. Finally, unlike the language in O.C.G.A. § 32-6-79(f), which authorizes, but does not compel the Department to deny a permit for an illegal sign, the statutory provision relating to the 5,000-foot limitation provides no similar leeway:

> If a multiple message sign on a primary highway or other highway is in violation of any of the above conditions, its permit *shall be revoked and the sign shall be removed*. During the appeal of any violations of paragraph (1) of this subsection, the sign shall remain fixed until the matter is resolved. The commissioner may allow the continued operation of a multiple message sign during part or all of the appeals process.

O.C.G.A. § 32-6-75(c)(2) (emphasis added). Read in conjunction with O.C.G.A. § 32-6-75(c)(1)(C), which lists as one of the "above conditions," that multi-message signs not be placed within 5,000 feet of each other, the Department had no choice but to revoke Victory Media's permit.

14. Petitioner argued that since the permit for D4614 remained active on the Department's website, the Department had not revoked the permit. For reasons set forth more fully above the Court rejects that argument. Additionally, however, the Department's actions are consistent with the second and third sentences of O.C.G.A. § 32-6-75(c)(2) and further undermine Petitioner's argument.

15. Based on the above, the Court concludes that the Department showed by a preponderance of evidence that the revocation of Petitioner's multi-message sign permit was proper.

IV. CONCLUSION

For the reasons above, the Department's decision to revoke Victory Media's Multi-Message Sign Permit No. 4614 in this matter is **AFFIRMED**.

SO ORDERED, this 15th day of September 2022.

John Fry
Administrative Law Judge