IN THE SUPERIOR COURT OF DAWSON COUNTY
STATE OF GEORGIA

VICTORY MEDIA GROUP, LLC *Petitioner,* *v.* GEORGIA DEPARTMENT OF TRANSPORTATION, *Respondent.*	Civil Action File No. 2022-CV-0457

ORDER ON PETITION FOR JUDICIAL REVIEW

INTRODUCTION

This case arises under the Outdoor Advertising Control Act, codified at O.C.G.A. §§ 32-6-70, *et seq.*, and it is before the court for judicial review under the Georgia Administrative Procedure Act (the "APA"), O.C.G.A. §§ 50-13-1 *et seq*. *See* O.C.G.A. § 50-13-19(a) (providing for judicial review in contested cases under the APA); *see also* O.C.G.A. § 32-6-95 (providing for judicial review under the Outdoor Advertising Control Act pursuant to the APA).

The case concerns the multiple message supplement issued by Respondent Georgia Department of Transportation (the "Department") to Petitioner Victory Media Group, LLC ("Victory Media") on October 25, 2021, and the Department's subsequent revocation of the multiple message supplement. Victory Media appeals from the November 4, 2022 Final Decision of the Department, which affirmed the September 15, 2022 Initial Decision of the Office of State Administrative Hearings ("OSAH"), affirming the Department's decision to revoke Victory Media's supplement.

For the reasons explained below, the Court AFFIRMS.

STANDARD OF REVIEW

Pursuant to the APA, this is not a de novo proceeding. Rather, judicial review under the APA is a two-step process. *Lamar Co. v. Whiteway Neon-Ad*, 303 Ga. App. 495, 497 (2010) (judicial review of a final decision under the Outdoor Advertising Control Act). First, the Court must determine if there is "any evidence" in the record to support any findings of fact. Second, the Court reviews any conclusions of law, de novo, to determine whether the law was correctly applied to the facts. *Id.*

BACKGROUND[1]

On September 14, 2021, Victory Media applied to the Department for a multiple message supplement permit for its Sign, located at or near milepost 43 on State Route 400 (GA-400) in Dawson County, Georgia, specifically at latitude 34.348727 west and 84.048210 north. [*See* Admin. Rec. Vol.1/R.4, 11 (OSAH Form 1-Attachment One at ¶ 1; *id.* at Ex. A)]. On October 25, 2021, the Department approved the permit application. [*See id.* at R.13].

Subsequent to the Department's approval, the Department discovered that it made a mistake in granting the application because another sign (GDOT Permit No. D3674) was located less than 5,000 feet away (approximately 2,000 feet) on GA-400, and thus, the Department could not lawfully permit Victory Media's Sign as a multi-message sign under O.C.G.A. § 32-6-75(c)(1)(C) (prohibiting a multiple message signs

[1] Citations are to the Administrative Record filed with the Court, [*See* Vols. 1–2], as paginated with he red font in the lower, left-hand corner.

from being located "within 5,000 feet" of another "on the same side of the highway"). [*See id.* at R.14].[2] On November 19, 2021, the Department sent notice to Victory Media informing it of the mistake, explaining the Department's authority to revoke a permit issued in error, and notifying Victory Media that it could request "an administrative hearing to review the Department's decision to revoke the Permit[.]" [*Id.*].

The Notice identifies Victory Media's Permit Number (D4614) for which the multiple message supplement was being revoked; it cites O.C.G.A. § 32-6-75(c)(1)(C) and explains why Victory Media's multiple message supplement does not comply with this Code section; it identifies the competing multiple message permit (D3674) as being within 5,000 feet of Victory Media's; it explains there was an error in the application process; and it cites Ga. Comp. R. & Regs. r. 672-6-.08(2)(b) as authorizing the Department to revoke a permit having been issued in error. [*Id*]. The Notice goes on to explain that Victory Media had the right to "request an administrative hearing to review the Department's decision to revoke the Permit," [*Id.*], and that if Victory Media failed to "make a proper request for an administrative hearing," the Notice would "become final with regard to the Department's determination regarding the revocation of the Permit." [*Id.* at R.15]. Victory Media contends the Notice was insufficient or otherwise not an actual notice of revocation. [Petition at 10–11].

---

[2] The location of the Victory Media's Sign and GDOT Permit No. D3674 are not in dispute, nor the distance between the signs.

Following the Notice, Victory Media requested an administrative hearing on December 17, 2021. [*See* R.16, R.22]. The administrative hearing at OSAH occurred on June 9, 2022. [*See* Vol.1/R.148]. The ALJ's Initial Decision, affirming the Department's revocation, was issued on September 15, 2022. [*Id.*]. In October 2022, Victory Media requested agency review of the Initial Decision with the Department. [Vol.2/R.211]. Agency review was granted, and the matter was heard at a hearing before the Department on October 24, 2022. [*See* Vol.2/R.247]. The Department issued its Final Decision, affirming the Initial Decision on November 4, 2022. [*Id.* at 248].

The competing multiple message sign, Permit No. D3674, was issued its permit and multiple message sign supplement around late July and early August 2010. [*See* Vol.1/R.106]. Around July 2012, the Department transferred GDOT Permit No. D3674 from the initial permittee to the current permit holder. [*See* Vol.1/R.90; Notice of Elec. Filing, Hr'g. Audio, at 59:30 (Walter Sanders Testimony)].[3] According to the Department's records, GDOT Permit No. D3674 has maintained a valid permit and supplement with the Department since issuance; the succeeding permit holder has renewed the permit and each year as well; and the Department has never taken adverse action against the permit for being an unauthorized or illegal sign. [*See* Hr'g Audio, at 51:00–59:30 (Walter Sanders); *id.* at 3:16:00–3:17:00 (Testimony of Beth Perkins)]. The Department was not even notified by Petitioner about the supposed

[3] OSAH made an audio recording of the testimony taken at the hearing, an electronic copy of which was filed with the Administrative Record. Citations are to the internal timestamps on the audio file.

invalidity of GDOT Permit No. D3674 until April 2022, which is well after it had issued a Notice revoking Victory Media's multiple message supplement, and in the midst of a related proceeding involving Victory Media. [Hr'g Audio at 48:30 (Sanders Testimony)].

Victory Media contends that GDOT Permit No. D3674 should not have been counted for purposes of the spacing prohibition in O.C.G.A. § 32-6-75(c)(1)(C) under O.C.G.A. § 32-6-77. That Code section provides that "signs which are not lawfully erected or maintained shall not be counted nor shall measurements be made therefore for the purpose of determining the spacing limitation prescribed in Code Sections 32-6-75 and 32-6-77." O.C.G.A. § 32-6-77. Victory Media contends this Code section is applicable because the multiple message revision to Permit No. D3674 was not completed within a year; therefore, the revision was "unlawfully erected," and should not be counted under O.C.G.A. § 32-6-77. [*See* Petition at 4–5].

DISCUSSION

I. Notice of Revocation

Victory Media argues that the Department's Notice was not an actual notice of revocation or that the Notice is somehow improper because it stated, "it is the *intent* of the . . . Department . . . to revoke Multiple Message Sign Permit No. 4614," [*See* Vol.1/R.14 (Notice of Revocation) (emphasis added)], rather than stating that the Department was *actually revoking* the permit. [*See* Pet. at 10–11]. The ALJ and the Department did not err in concluding that the Notice of Revocation the Department sent to Victory Media was proper.

The Notice complies with the content requirements specified in Ga. Comp. R. & Regs. r. 672-6-.08(1), as detailed above.[4] To the extent Victory Media argues that the Department has not actually revoked its permit yet, the Court finds that is ultimately the case because this proceeding is occurring, which in turn serves as an adjudication of process on the issue. Department Rule 672-6-.09 provides Victory Media with the right to contest "an adverse action by the Department," through which Victory Media is availing itself of here. If the party *fails* to request a hearing following such notice, *then* "the permit shall be revoked without further notice or hearing." Ga. Comp. R. & Regs. r. 672-6-09. Thus, the Department cannot automatically revoke a permit, without providing a permit holder with due process—notice and an opportunity to be heard regarding the revocation. *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.").[5]

---

[4] As the ALJ pointed out, even if 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." [Vol1-R.150]. Victory Media did not enumerate this as error in its Petition, much less explain why a purported issue of service would warrant reversal.

[5] Victory Media's citation to *Hames v. Kusmiersky*, 166 Ga. App. 730 (1983) is unpersuasive. That case concerned a *premature* appeal by the aggrieved party because "no final judgment" "had been entered by the Board," *i.e.*, the lower tribunal from which the appeal to superior court was taken. 166 Ga. App. at 732. Here, the Department has clearly entered its Final Decision affirming the Department's determination that Victory Media's multiple message permit is due to be revoked.

II. Validity of Permit No. D3674

Victory Media argues that the Department should not have relied on Permit No. D3674 in light of O.C.G.A. § 32-6-77, for the reasons noted above. This issue presents mixed questions of law and fact. Ultimately, the Court concludes that the ALJ and the Department did not err in rejecting this argument.[6]

As for the facts, the record supports the factual findings below, and the Court cannot conclude that the ALJ's factual findings were clearly erroneous. As noted above, according to the Department's records, 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* Hr'g Audio, at 51:00–59:30 (Walter Sanders); *id.* at 3:16:00–3:17:00 (Testimony of Beth Perkins)]. This includes during the time in which Victory Media's co-owner, Beth Perkins, held the position of Outdoor Advertising Manager for the Department before the Department's current Outdoor Advertising Manager, Mr. Sanders. [*See* Hr'g. Audio at 3:16:00–3:17:00]. Furthermore, the Department, at the behest of the original permittee, transferred the Sign's permit to the current permittee in 2012. [Vol.1/R.90; Hr'g. Audio, at 59:30].

---

[6] This issue was recently decided in a related case involving another one of Victory Media's signs that was "spaced out" by Permit D3674. *See* Victory Media Group, LLC v. Ga. Dept. of Transp., Civil Action No. 2022-CV-0425, Order on Petition for Judicial Review (Dawson Sup. Ct. Apr. 21, 2023), which is presently on appeal. Judge Collier rejected Victory Media's argument that O.C.G.A. § 32-6-77 required ignoring Permit D3674 for the same reasons Victory Media advances here. While not yet binding on the issue because of the pending appeal, the fact that a separate Superior Court Judge has reviewed and decided the issue is persuasive.

As for the law, the Court concludes that it was properly applied to the facts. Code section 32-6-77 states that existing signs are ignored for purposes of the spacing prohibition only when they "are not lawfully erected or maintained." O.C.G.A. § 32-6-77 (Department Permit No. D3674, the ALJ recognized, is being lawfully maintained; the permit has been renewed each year, [Vol.1/R.156–57]. *See also* O.C.G.A. § 32-6-71(6)(A)–(C) (defining an "illegal sign" as a sign "*presently* being maintained without a required permit" (emphasis added)). Furthermore, although the Act and regulations do require that a sign be constructed within 12 months of the initial issuance of the permit, *See, e.g.*, Ga. Comp. R. & Regs. r. 672-6-.06(3), the ALJ correctly observed that the Department has discretion before revocation, [*Id.* at R.159]. *See* Ga. Comp. R. & Regs. r. 672-6-.08(2)(d) ("A permit or renewal thereof *may be revoked* when . . . [t]he [multi-message] revision of a permit has not been completed in accordance with Section 672-6-.06 or an approved revision has been abandoned[.]" (emphasis added)); Ga. Comp. R. & Regs. r. 672-6-.06(2) (providing for revisions "under O.C.G.A. § 32-6-75(c)").

While the Court ultimately doesn't place the same emphasis on the "maintained" aspect of the Code, as the Georgia DOT does, as the Court notes that the statutory language could in fact be viewed favorably to the Petitioner on this issue as to whether or not the sign was "not lawfully erected", the Court ultimately concludes that the evidence from the record does not support a finding that the sign is illegally erected/held. While the prospect of deeming the D3674 permitted sign as simply "non-conforming" is of potential practical interest to the Court as a prospective

method of resolution of this issue, the Court ultimately concedes the potential flaws in this logic, both in that the Court essentially cannot find that the D3674 Permit is, in fact, invalid, but also in that if such an outcome did occur, it would likely create an unintended side effect across the State of Georgia of potential new permit applicants racing across the State to potentially invalidate any/every existing permit that might be conflicting if any evidence could be found to call into question the timing of construction and the strict compliance with the permitting rules. That is a box that this Court will presently leave closed.

Victory Media also argues that the ALJ impermissibly shifted the burden to it to demonstrate that the competing sign should not be considered for purposes of O.C.G.A. § 32-6-75(c)(1)(C) pursuant to O.C.G.A. § 32-6-77, instead of placing that burden with Department. The ALJ expressly stated that the "Department [bore] the burden of proof," and that the Department carried that burden. [Vol.1/R.155 (Initial Decision); *id.* at R.160]. The ALJ made clear that, "[t]he 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 counted for purposes of O.C.G.A. § 32-6-75(c)(1)(C)." [*Id.* at R.158 n.2].

The ALJ similarly did not err in explaining that Victory Media's argument was like an affirmative defense for which it would have the burden of proof. *See Burchett v. State*, 283 Ga. App. 271, 273 (2007) ("Where certain conduct is generally prohibited, but where a statutory exception permits the conduct under specified circumstances, the exception amounts to an affirmative defense."). The Outdoor Advertising Control

Act generally prohibits off-premises, multiple message signs withing 5,000 feet of one another on the same side of the highway. O.C.G.A. § 32-6-75(c)(1)(C). Code section 32-6-77 supplies a specific exception to this prohibition for signs that are "not lawfully erected or maintained." O.C.G.A. § 32-6-77.

The ALJ's application of the "presumption of regularity" principle was likewise proper. [*Cf.* Pet. at 11–12, *with* Vol.1/R.157–58]. Courts are not to presume "public officers have [im]properly discharged their official duties." *Selph v. Williams*, 284 Ga. 349, 252 (2008) ("[T]here is a presumption of regularity that requires the courts to presume that public officers have properly discharged their official duties."). No one could conclusively establish that GDOT Permit No. D3674 was invalid because it had not erected within the original 12-month period in 2011, such that the permit had supposedly (and irrevocably) become an illegal sign. [Vol.1/R.157–58 ("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." (emphasis original)].

The ALJ noted that Victory Media's own evidence suggested that the Department may have excused any delay in erecting the sign at GDOT Permit No. D3674 in 2011. Victory Media's own counsel was representing *that* permittee at the time, was in communication with the Department concerning the issue, and was requesting that the then-permittee be allowed to erect the multiple-message sign, notwithstanding the initial delay. [Vol.1/R.156–57; *see* Vol.1/R.113 (email corrs.)].

This, coupled with the fact that, later, in July 2012, the Department approved a transfer of GDOT Permit No. D3674 from the original permittee to the current permittee also suggested that the Department regarded Permit No. D3674 as being validly maintained. [V.1/R.90 (Transfer Letter)]. In short, the Court cannot conclude that the ALJ erred as a matter of law, based upon its factual findings, that the Department erroneously relied on Permit NO. D3674 as the basis for revoking Victory Media's multiple message supplement as having been issued in error.

III. Constitutional Challenge

Victory Media raises a number of constitutional arguments against the Outdoor Advertising Control Act. The Court ultimately declines to grant the requested relief by the Petitioner.

Before a duly enacted statute can be declared unconstitutional, a court must be "clearly satisfied" that the statute is unconstitutional. *JIG Real Est., LLC v. Countrywide Home Loans, Inc.*, 289 Ga. 488, 490 (2011) (quotation omitted). The conflict must be "clear and palpable." *Id.* (quotation omitted). Statutes are presumed to be constitutional, and the challenger bears a heavy burden to overcome this presumption. *Id.* Victory Media has not carried its burden of demonstrating that the Outdoor Advertising Control Act is clearly unconstitutional to the Court.

CONCLUSION

The November 4, 2022 Final Decision of the Georgia Department of Transportation, which is the subject of this Petition for Judicial Review is hereby AFFIRMED.

It is SO ORDERED this 23rd day of June, 2023.

Clint. G. Bearden
Superior Court Judge,
Dawson County, Georgia

*Draft Proposed Order Prepared By:
Pearson K. Cunningham
Ga Bar No. 391024
Hall Booth Smith, P.C.
Counsel for Respondent

**Final Order form is as Reviewed & Edited by the Court*