

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD A. CASTILLO, JR.,            )  
  )  
          Petitioner,                    )  
  )  
vs.                                        ) CASE NO. 92-2644  
  )  
DEPARTMENT OF ADMINISTRATION,    )  
DIVISION OF RETIREMENT,            )  
  )  
          Respondent.                    )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to notice, the above-styled matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride, on June 15, 1992, by telephonic conference call in Tallahassee, Florida. The following appearances were entered:

APPEARANCES

For Petitioner:   Keith F. Roberts, Esquire  
                          240 Plant Avenue  
                          Suite B-308  
                          Tampa, Florida

For Respondent:   Burton M. Michaels, Esquire  
                          Assistant Division Attorney  
                          Division of Retirement  
                          Cedars Executive Center  
                          Building C  
                          2639 North Monroe Street  
                          Tallahassee, Florida

STATEMENT OF THE ISSUES

Whether Petitioner is entitled to a 120.57(1) hearing although he failed to timely file a petition for an administrative hearing within twenty-one (21) days of his receipt of the final agency action letter.

PRELIMINARY STATEMENT

The authority to hold the June 15, 1992, hearing in this cause arose from the Mandate from the District Court of Appeal of Florida, Second District, dated March 24, 1992, in the case of Castillo v. Department of Administration, Division of Retirement, 593 So.2d 1116 (Fla. 2d DCA 1992). In the Opinion of the District Court of Appeal, reference is made to two affidavits that were attached to the brief of the appellant that were not before the Agency when it dismissed the appellant's petition as untimely. The Court remanded the case "for a fact finding proceeding to allow the agency to review the affidavits and consider appellant's arguments." (593 So.2d 1117d).

A prehearing stipulation was filed on June 14, 1992, and this hearing followed. The hearing was recorded, but not transcribed. The Petitioner filed proposed findings of fact on July 10, 1992. Respondent filed its proposals on July 8, 1992. They have been given careful consideration, and have been incorporated where appropriate. My specific rulings are contained in the Appendix attached hereto.

Based upon all of the evidence, the following findings of fact are determined:

#### FINDINGS OF FACT

1. The Respondent's final agency action letter was received by the Petitioner on December 11, 1990. The Respondent's final agency action letter concluded as follows:

"This letter constitutes final agency action. If you do not agree with this decision, you may request an Administrative Hearing in accordance with Section 120.57, Florida Statutes, by filing a written Petition within 21 days of receipt of this letter. Enclosed is a copy of Rule Sections 28-5.111 and 28-5.201, Florida Administrative Code, which outline the proper procedure. If you do not request such hearing within that 21-day period, then you shall have waived any right to a hearing in this matter."

2. This was the only written notice that Petitioner received from the Respondent agency concerning his right to request a hearing to challenge the agency's action, or concerning the procedure to be followed in doing so. Copies of the referenced Florida Administrative Code sections were enclosed.

3. The 21-day filing period for Petitioner was scheduled to end on January 2, 1991.

4. Petitioner retained counsel for the purpose of seeking an administrative hearing to challenge the Respondent's proposed final agency action, and a petition was drafted. On December 31, 1990, the petition was ready to be transmitted to the Respondent. Counsel was uncertain whether the petition should be posted by regular mail, or by Express Mail in order to insure guaranteed delivery by January 2, 1991. The concern of Petitioner's counsel was whether the rules required posting or actual receipt of the petition during the 21-day filing period in order to insure his client's right to a hearing.

5. Some time in the afternoon of December 31, 1990, counsel for Petitioner initiated a telephone call to an office in Tallahassee that he believed to be that of the general counsel for the Department of Administration, and asked to speak to an attorney. The woman answering the telephone advised that no attorney was presently available. Following inquiry concerning the purpose of the call, counsel for the Petitioner understood from the secretary that the 21-day filing requirement for a petition requesting an administrative hearing would be deemed satisfied by mailing, evidenced by postmark, within the applicable 21-day period. Counsel for Petitioner relied on this statement, and deposited the petition in the regular U.S. Mail prior to 5:30 P.M. on December 31, 1990.

6. Counsel for Respondent did not call the Legal Office of the Division of Retirement where an administrative secretary and an attorney were on duty during the afternoon hours of December 31, 1990.

7. The petition for administrative hearing filed by Petitioner was not received by the Respondent until January 14, 1991. The delay between the mailing of the Petition and its receipt is unexplained.

#### CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding.

9. Pursuant to the Mandate of the Second District Court of Appeal in Richard A. Castillo v. Department of Administration, Case No. 91-00504, wherein the Court, upon considerations of "equity," ordered a fact finding proceeding "to allow the agency to review the affidavits [presented by Petitioner] and consider appellant's arguments." See opinion at 593 So.2d 1116, 1117.

10. Section 28-5.111 provides, in pertinent part:

28-5.111 Point of Entry into Proceedings.

Unless otherwise provided by law or agency rule:

(1) Persons requesting a hearing on an Agency decision which does or may determine their substantial interest shall file a petition with the Agency within twenty-one (21) days of receipt of written notice of the decision, or within twenty-one (21) days of receipt of written Notice of Intent to render such decision; whenever possible, an Agency shall issue a written notice of intent to render a decision and allow persons who may be substantially affected thereby twenty-one (21) days from receipt in which to request a hearing. The notice shall state the time limit for requesting a hearing and shall reference the Agency's procedural rules.

(2) Any person who receives written notice of an Agency decision or who receives written notice of intent to render a decision and who fails to request a hearing within (21) days, shall have waived his right subsequently to request a hearing on such matters.

11. Section 28-2.201(3)(a) provides in pertinent part:

"A petition may be denied. . .if the petition is untimely."

12. Respondent, Division of Retirement, argues that Rule 28-5.111(1), Florida Administrative Code, mandates that a person requesting a hearing on an agency decision which does or may determine his substantial interest "shall file a petition with the Agency within twenty-one (21) days of receipt of written notice of the decision. . ." Rule 28-5.201(3)(a), Florida Administrative Code, provides that a petition may be denied "if the petition is untimely." Returning to Rule 28-5.111, Florida Administrative Code, it is provided in subsection (2) that a person, "who fails to request a hearing within twenty-one (21) days, shall have waived this right subsequently to request a hearing on such matters." Reading those rule-provisions together, Respondent argues that it is clear that the twenty-one day period for requesting a hearing means that such written request for hearing must be filed with the agency within that twenty-one day period of time. When a provision of law requires that a document must be filed within a specified period of time, then the mailing of such documents within that time period does not constitute compliance with that provision of law.

Citing Coca Cola Foods v. Cordero, 5890 So.2d 961, 962 (Fla. 1st DCA 1991). Respondent requests this tribunal to hold that the Petitioner was obligated to have his petition filed with the Respondent, Division of Retirement, no later than January 2, 1991, in order to meet the twenty-one day time period for the filing of that petition. He did not, and therefore, he waived his right to a hearing in the cause. Citing City of LaBelle v. Bio-Med Services, Inc., So.2d (Fla. 2d DCA 1992; Case No. 91-00626; Opinion filed May 6, 1992), 17 FLW D1177; Lamar Advertising Co. v. Department of Transportation, 523 So.2d 712 (Fla. 1st DCA 1988); Xerox Corporation v. Florida Department of Professional Regulation, 489 So.2d 1230 (Fla. 1st DCA 1986); Dickerson, Inc., v. Rose, 398 So.2d 922 (Fla. 1st DCA 1981).

13. However, Respondent overlooks the fact that the Second District Court of Appeal in its opinion in this case held that the timely filing of a request for an administrative hearing is not jurisdictional. See also Machules v. Department of Administration, 523 So.2d 1132 n.2 (Fla. 1988).

14. In addition, it is not self-evident that the language of the Florida Administrative Code sections, which refers variously to requests being "filed", or hearings being "requested" within 21 days, means that the petition seeking a hearing be received by the agency within that time. The Respondent's final agency action letter, by repeating these terms and referencing the pertinent rules, provided no additional guidance. An agency has the means to express unequivocally in its notice that "filing" and "requesting" mean receipt of the request by the agency. See Four Rivers Audubon Society v. Occidental Chemical Crop., 12 FALR 28199 (Fla. Dept. of Environmental Regulation 1990). Cf., Machules v. Department of Administration, supra, at N.1. It would have been a simple matter for Respondent to express its filing requirement clearly here. Under the circumstances, the confusion of Petitioner's counsel concerning this matter was not unreasonable.

15. Respondent was nor required to deny the petition here. Section 28-5.201(3)(a), by providing that "a petition "may" be denied if it is untimely filed plainly establishes such denial is a matter of agency discretion.

16. Respondent agency is invested with discretion to accept a hearing request that is not received by it within the stated 21-day period, as a matter of law as well. The opinion of the Second District Court of Appeal herein notes - indeed, the fact of the instant hearing establishes - that Respondent's decision to deny or accept Petitioner's petition is properly subject to equitable considerations.

17. The potential for extraordinary delay between posting and receipt of a petition, as evidenced by the 14-day delay here, underscores the unreasonableness of requiring in all events that a hearing request be received by the agency within 21 days.

18. Denial of a Petitioner's opportunity for hearing is a harsh result that should be avoided in a proper case upon equitable considerations. Inland Capital Corporation v. Lewis, 362 So.2d 676 (Fla. 4th DCA 1977) (petition mailed on final day of 21-day filing period); Rothblatt v. Department of Health and Rehabilitative Services. 520 So.2d 644 (Fla. 4th DCA 1988) (confusion about petition deadlines "excusable neglect"); Machules v. Department of Administration, supra (approving doctrine of "equitable tolling" to avoid loss or right to hearing). See also Girodano v. Department of Business Regulation, 17 FLWD 786 (Fla 1st DCA 1992).

19. The following considerations are also relevant to the decision whether Petitioner's petition should be accepted by Respondent agency:

(a) That Section 28-5.111, F.A.C., requires receipt by the agency of requests for hearing within the 21-day period therein described, is not unambiguously evident from the language of that provision.

(b) The notice of Petitioner's right to request a hearing contained in Respondent's final agency action letter provided no additional indication that receipt of such a request was required within the identified 21-day period.

(c) Petitioner endeavored in good faith to file his petition in a timely manner, as evidenced by

(i) the mailing thereof within the 21-day time period;

(ii) Petitioner's counsel's specific consideration of dispatching the petition by means that would have guaranteed its receipt by Respondent within that 21-day period, at a time when such dispatch was possible;

(iii) Petitioner's counsel's attempt to determine, by telephone call to the office of Respondent's general counsel, whether receipt of the petition within that time frame would be required.

(d) Substantial prejudice to Petitioner will result from the denial of his opportunity to be heard on the merits of his claim.

(e) There is no indication of prejudice to the Respondent agency in requiring it to accept the petition and conduct a hearing on Petitioner's claim.

20. Far from abandoning or neglecting his claim, Petitioner has sought diligently and consistently to present it to the Respondent agency. The dismissal of his petition by Respondent on the grounds of untimely filing has been appealed by Petitioner to the District Court of Appeal, leading to the instant proceeding. In the interest of equity and fundamental justice, Petitioner's attempt to present his claim by mailing to Respondent agency within the 21-day filing period his petition requesting a hearing in the good faith belief that such circumstances and upon all the considerations described herein, must be accepted by Respondent as a valid basis on which to proceed with a hearing on the merits.

21. Upon consideration of these matters, it is determined that the petition of Petitioner should be accepted by Respondent as timely filed, and an administrative hearing as requested thereby should be conducted according to Section 120.57(1), Florida Statutes.

#### RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be entered granting an administrative hearing on the Petition filed by Petitioner, and dated December 31, 1990.

DONE AND ENTERED this \_\_23rd\_\_ day of July, 1992, in Tallahassee, Leon County, Florida.

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DANIEL M. KILBRIDE  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904)488-9675

Filed with the Clerk of the Division  
of Administrative Hearings this \_\_23rd\_\_  
day of July, 1992.

APPENDIX TO RECOMMENDED ORDER

The following constitutes my specific rulings, in accordance with section 120.59, Florida Statutes, on findings of fact submitted by the parties.

Petitioner's proposed findings of fact.

Accepted in substance: 2,3,4,5(in part),6,7,8,10,11.

Rejected: 1(issue),5(in part-conclusion of law),6,9(irrelevant).

Respondent's proposed findings of fact.

Accepted in substance: paragraphs 1,2,3,7.

Rejected: paragraph 4(cumulative), 5(cumulative), 6(irrelevant).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.