

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GUY McCANN,)
)
 Petitioner,)
)
 vs.) CASE NO. 93-6414
)
 UNIVERSITY OF CENTRAL FLORIDA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

THIS CAUSE came on to be heard on the Motion to Dismiss filed by Respondent before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride, on January 6, 1994 from Tallahassee, Florida via telephone conference call, the Petitioner being advised of the motion and having filed an response within the required time, pursuant to Rule 60Y-2.016(1), Florida Administrative Code. The arguments presented in the motion have been fully considered. The following appearances were entered:

APPEARANCES

For Petitioner: Guy K. McCann (pro se)
1510 Mizell Avenue
Winter Park, Florida 32789

For Respondent: Scott A. Silzer, Esquire
General Counsel
University of Central Florida
Post Office Box 16005
Orlando, Florida 32816-0015

STATEMENT OF THE ISSUES

Whether the Division of Administrative Hearings retains jurisdiction to conduct a formal hearing under the provisions of Section 120.57(1), Florida Statutes, if the Charge of Discrimination has not been filed with the Florida Commission on Human Relations within 180 days of the occurrence of the alleged unlawful employment practice, pursuant to the provisions of Rule 60Y-5.001(a), Florida Administrative Code.

PRELIMINARY STATEMENT

On March 26, 1992, Petitioner completed a Charge of Discrimination form which was filed with the Commission on Human Relations on March 30, 1992. The Charge alleged that Respondent engaged in an unlawful employment practice, in violation of Chapter 760, Florida Statutes and federal law. An Amended Charge was filed on June 9, 1992. On February 10, 1993, the complaint of discrimination was dismissed as untimely. Following a motion for reconsideration, the Notice of Dismissal was rescinded. Following

redetermination, the complaint was again dismissed as untimely on October 8, 1993. Subsequently, Petitioner timely filed a Petition for Relief and requested a formal hearing under the provisions of Section 120.57(1), Florida Statutes. This matter was referred to the Division of Administrative Hearings for a formal hearing on November 3, 1993. Respondent was directed to file an answer with the Commission within 20 days of the date of service of the Petition. Respondent replied by filing a Motion to Dismiss and Answer with the Division on November 22, 1993. Petitioner filed his response to the Motion to Dismiss on December 3, 1993 and a hearing on the motion was set for January 6, 1994. By agreement of the parties, the hearing was conducted by telephone conference call. Subsequent to the hearing, Petitioner filed a Motion to Accept for Filing and Consideration Exhibit on Clarification of the Issue, dated February 3, 1994. Respondent objected to the motion. On consideration, the Motion of Petitioner is GRANTED and the attached Exhibit has been duly considered by the Hearing Officer. The hearing was transcribed and filed on January 18, 1994. The documents properly filed of record have been duly considered and the allegations contained in the Charge of Discrimination and Petition for Relief have been taken as true.

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

FINDINGS OF FACT

1. Petitioner is a white male, who was 58 years of age at the relevant time, and is a former associate professor in the School of Communications at the University of Central Florida.

2. In 1988-89, Petitioner was an untenured professor, with tenure decisions pending the following year. Petitioner alleges that the director of his department began practicing a pattern of discriminatory conduct by placing false information in his evaluation file which ultimately affected his rating and with the intent to deny him tenure.

3. On October 8, 1990, Petitioner discovered that the ratings for 1989-90 had been changed by the director of the department. As a result of this action, Petitioner filed a grievance with the United Faculty of Florida (UFF). Petitioner did not file a charge of discrimination with the Florida Commission on Human Relations (FCHR) as a result of this event.

4. On May 16, 1991, Petitioner acknowledged receipt of an evaluation by the Chair of the department which Petitioner alleges was inaccurate and incorrect. As a result of this action, Petitioner filed a grievance with the union and with the President's office on June 7, 1991. A Settlement of the grievance was signed on September 6, 1991. On January 8, 1992, Petitioner discovered that the settlement had not been implemented by the university.

5. On July 19, 1991, Petitioner was denied tenure and offered a terminal contract, which indicated that it would not be renewed beyond the indicated date. On August 26, 1991, Petitioner accepted the contract.

6. On March 30, 1992, Petitioner filed with the FCHR a Charge of Discrimination. Petitioner alleged that UCF committed age discrimination against him by filing improper evaluations of his teaching performance in 1990 and again in 1991, and that as a result of that unlawful employment practice he was improperly denied tenure and placed on a terminal contract.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsection 120.57(1), Florida Statutes.

8. In order to be entitled to a formal administrative hearing, Florida law requires that a party's "substantial interest" be determined by an agency. Section 120.57, Florida Statutes (1987). Under this law, the Division of Administrative Hearings is charged with the responsibility to conduct the formal hearing. However, the jurisdiction of this tribunal is limited in this case. As cogently stated by the First District Court of Appeal in Department of Environmental Regulation vs. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982), review denied 436 So.2d 98 (Fla. 1983):

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.

9. The Legislature has established a Statute of Limitations on the filing of charges of discrimination which limits the jurisdiction of the FCHR and this tribunal. The first issue that this tribunal must decide in this matter is whether or not the original Charge of Discrimination was filed by the Petitioner with the FCHR within 180 days of the alleged violation, as required by Section 760.10(10), Florida Statutes (1991) and Rule 60Y-5.001, Florida Administrative Code.

10. Whether the filing of the charge was timely is jurisdictional. The courts have directed that in order to determine whether the complaint was timely "[w]e must focus upon the time of the discriminatory act, not upon the time at which the consequences of the act became most painful...." *St Petersburg Motor Club v. Cook*, 567 So.2d 488 (Fla. 2d DCA 1990). Therefore, in accordance with this opinion, the limitations period commenced to run no later than August 26, 1991, the day that he accepted the Terminal Contract which was more than 180 days prior to the filing of the Charge on March 30, 1992. It can also be argued that the Terminal Contract was not the defining discriminatory act but rather the consequence of the last discriminatory act which was the completion of the evaluation form by the Chair and received by Petitioner on May 16, 1991. Under either scenario, the time had run by March 30, 1992.

11. Petitioner further argues that the time for filing was tolled by the occurrence of other events, such as his filing of a grievance with the UFF. This is not the law. Because Petitioner chose to first pursue a remedy through another administrative process does not suspend the requirement that the charge of discrimination must be filed with the FCHR within 180 days of the alleged violation. *Kourtis v. Eastern Airlines*, 409 So.2d 139 (1982). Accord: *Farancy v. St. Mary's Hospital, Inc.*, 585 So.2d 1151 (Fla. 4th DCA 1991).

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered dismissing with prejudice the Petition for Relief filed by Petitioner in FCHR Case No. 92-3504 and DOAH Case No. 93-6414 for failure to timely file his original Charge of Discrimination.

DONE AND ENTERED this 29th day of April, 1994, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 1994.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this 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 contact the agency that will issue the final order in this case concerning agency 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.