STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS F. HERNANDEZ, Petitioner, vs. TRANSPO ELECTRONICS, INC., Respondent.	)	Case No. 99-3576

ORDER ACCEPTING SECOND REMAND DATED SEPTEMBER 5, 2002, AND REFUSING FIRST REMAND DATED DECEMBER 4, 2001

Administrative Law Judge (ALJ) Daniel Manry conducted an administrative hearing in this proceeding on November 13, 2002, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH). The parties and court reporter attended the hearing in Orlando. The ALJ participated by videoconference from Tallahassee, Florida.

APPEARANCES

For Petitioner: Luis F. Hernandez, pro se
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For Respondent: Charles Williams, Jr., Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Section 760.11(6), Florida Statutes (1995), bars Petitioner's claim of

discrimination against Respondent. (Citations to statutes refer to Florida Statutes (1995) unless otherwise stated).

PRELIMINARY STATEMENT

This case has an extensive procedural history. Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission) on or about October 3, 1995. The Commission issued a "Notice of Determination: No Cause" on July 14, 1999 (Notice of Determination). Petitioner requested an administrative hearing on August 13, 1999, within 35 days of the Notice of Determination. On August 23, 1999, the Commission referred the matter to DOAH to conduct an administrative hearing.

Respondent filed a Motion to Dismiss on October 19, 1999. No ruling was made. On December 16, 1999, Respondent filed a Motion for Clarification effectively seeking a ruling on the Motion to Dismiss. (The Motion to Dismiss and Motion for Clarification are referred to as the Motion to Dismiss.)

On April 10, 2000, the ALJ conducted a hearing on the Motion to Dismiss. Petitioner testified and submitted one exhibit for admission into evidence. Respondent submitted three exhibits. The identity of the exhibits and any rulings are set forth in the Transcript of the hearing filed on May 1, 2000.

In a Recommended Order dated June 6, 2000, the ALJ concluded that Section 760.11(7) barred Petitioner's claim of discrimination and recommended that the Commission dismiss Petitioner's claim. In relevant part, the Recommended Order

relied on appellate court decisions in Joshua v. City of Gainesville, 734 So. 2d 1068 (Fla. 1st DCA 1999) and Milano v. Moldmaster, Inc., 703 So. 2d 1093 (Fla. 4th DCA 1997).

On August 31, 2000, the Florida Supreme Court overruled the decisions of the appellate courts in Joshua and Milano. Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000). In Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So. 2d 891 (Fla. 2002), the court clarified its ruling in Joshua.

On December 4, 2001, the Commission issued an Order Remanding Petition for Relief from an Unlawful Employment Practice (first remand). The first remand concluded that the Recommended Order issued on June 6, 2000, "was improper because the Florida Supreme Court has overruled Milano v. Moldmaster, Inc., 703 So. 2d 1093 (Fla. 4th DCA 1998), by its decision in Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000)."

Respondent renewed the Motion to Dismiss and filed a Motion for Compulsory Mental Examination. On January 8, 2002, an Order Granting Continuance and Re-Scheduling Hearing required Petitioner to provide a written statement showing cause why Respondent's request for a mental examination should not be granted. Petitioner did not respond to the order to show cause, and the ALJ entered an Order Closing File on January 22, 2002.

On September 5, 2002, the Commission issued a second remand (second remand). The second remand correctly found that the Order Closing File:

> does not contain findings of fact and conclusions of law, or indicate on what basis Respondent's [Motion to Dismiss] was granted, or . . . if in fact it was granted.

On September 11, 2002, the ALJ issued a Notice of Hearing scheduling a hearing for November 13, 2002. At the hearing, the parties argued the issue of whether Petitioner's claim is barred in light of the decision in Woodham. The legal arguments are set forth in the Transcript of the hearing filed on December 2, 2002.

On December 16, 2002, Respondent filed Respondent's Brief and a proposed Recommended Order of Dismissal. Petitioner filed his Proposed Recommended Order on December 20, 2002. The ALJ accepts the second remand for the limited purposes of vacating the Order Closing File issued on January 22, 2002, denying Respondent's Motion for Compulsory Mental Examination, and explaining why the ALJ rejects the first remand.

FINDINGS OF FACT

1. Respondent employed Petitioner from May 25, 1995, until September 1, 1995. Petitioner filed a Charge of Discrimination with the Commission on October 3, 1995, within the time limit prescribed in Section 760.11(1). The filing date of October 3, 1995, fell within 365 days of May 25, 1995, the first day on which the alleged discrimination could have occurred.

2. Section 760.11(3) gave the Commission 180 days to investigate Petitioner's claim, determine if there was reasonable cause to believe a discriminatory practice had occurred, and notify the parties of the determination (agency determination).

Counting October 4, 1995, as the first day of the 180-day time limit, Section 760.11(3) authorized the Commission to make an agency determination no later than March 31, 1996.

3. The Commission did not make an agency determination on or before March 31, 1996. The Commission made an agency determination on July 14, 1999, approximately 1,202 days after the statutory deadline of March 31, 1996.

4. When the Commission did not make an agency determination by March 31, 1996, Section 760.11(8) authorized Petitioner to proceed on April 1, 1996, as if the Commission had determined there was reasonable cause to believe Respondent engaged in a discriminatory practice (legislative determination of reasonable cause). Section 760.11(8) authorized Petitioner to proceed under Section 760.11(4) by either filing a civil action in circuit court or requesting an administrative hearing.

5. Section 760.11(6) required a request for administrative hearing to be made within 35 days of the legislative determination of reasonable cause on April 1, 1996. Counting April 1, 1996, as the first day of the 35-day time limit, Section 760.11(6) barred a request for hearing after May 5, 1996.

6. Petitioner requested an administrative hearing on August 13, 1999, when Petitioner filed a Petition for Relief with the Commission. Petitioner requested a hearing approximately 1,220 days after the legislative determination of reasonable cause in Section 760.11(8) on April 1, 1996.

7. Petitioner delayed the request for hearing because he was waiting to hear from the Commission. Contrary to the requirements of Florida Administrative Code Rule 60Y-5.008, Petitioner did not file a motion for extension of time to request an administrative hearing. (Citations to rules refer to rules promulgated in the Florida Administrative Code in 1996.)

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569(1) and 120.57(1). The 35-day filing requirement in Section 760.11(6) is not a prerequisite to jurisdiction. Failure to comply with the 35-day time limit admits a defense similar to a statute of limitations. Milano, 703 So. 2d at 1094-1095, n.1. See also Machules v. Department of Administration, 523 So. 2d 1132, 1134, n.2 (Fla. 1988)(time limits in analogous statutes are not jurisdictional); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457-458 (1990), and Espinoza v. Missouri Pacific Railroad Co., 754 F.2d 1247, 1250 (5th Cir. 1985)(time limits in analogous federal statutes are not jurisdictional).

9. The Commission proposes in the first remand to grant a request for an administrative hearing that is barred by Section 760.11(6). The Commission relies on the decision of the Florida Supreme Court in Joshua, 768 So. 2d at 433.

10. The decision in Joshua does not reach the facts in this case. In Joshua, the court held that Section 95.11(3)(f) gave an

aggrieved person four years to file an "action" based on Section 760.11. Joshua, 768 So. 2d at 433. Section 95.011 defines the term "action" as a civil action, and Joshua arose from a civil action in circuit court in Alachua County, Florida.

11. Unlike the facts in Joshua, Petitioner filed a request for an administrative hearing. An administrative hearing is not a civil action and is beyond the purview of Section 95.11(3)(f).

12. When the Commission failed to make an agency determination within the 180-day time limit in Section 760.11(3), a legislative determination of reasonable cause occurred by operation of Section 760.11(8). The legislative determination of reasonable cause enabled Petitioner to either file a civil action or request an administrative hearing pursuant to Section 760.11(4). Woodham, 829 So. 2d at 898.

13. If Petitioner had elected to proceed under Section 760.11(4)(a) by filing a civil action, Section 95.011(3)(f) authorized Petitioner to do so within four years. However, Petitioner elected to proceed under Section 760.11(4)(b) by requesting an administrative hearing.

14. Section 760.11(6) required Petitioner to file a request for administrative hearing within 35 days of the "determination of reasonable cause." Section 760.11(6) provides:

> An administrative hearing pursuant to paragraph (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause. . . .(emphasis supplied)

15. When the Commission did not make an agency determination of reasonable cause by March 31, 1996, the determination of reasonable cause referred to in Section 760.11(6) was the legislative determination of reasonable cause that occurred on April 1, 1996, by operation of Section 760.11(8). Related statutory provisions such as Section 760.11(6) and Section 760.11(8) "must be read together to achieve a consistent whole." Woodham, 829 So. 2d at 898.

16. The express terms of Section 760.11(7) also required Petitioner to file a request for administrative hearing within 35 days of the "determination of reasonable cause." (emphasis supplied) In relevant part, Section 760.11(7) provides:

> If the commission determines that there is not reasonable cause . . ., the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing . . ., but any such request must be made within 35 days of the date of determination of reasonable cause. (emphasis supplied)

17. The preceding underscored reference to the term "reasonable cause" has been construed by the Florida Supreme Court to mean "no [reasonable] cause."

> We construe the language in section 760.11(7) to require a specific determination "that there is not reasonable cause" to believe a violation occurred. . . . [W]e hold that the EEOC dismissal and notice of rights form in this case does not satisfy the requirements of a "no cause" determination under section 760.11 . . . (7). (emphasis not supplied)

Woodham, 829 So. 2d at 897.

18. Based on the decision in Woodham, Section 760.11(7) applies when the Commission makes an agency determination of "no reasonable cause" within the 180-day time limit in Section 760.11(3). If the Commission makes an agency determination of "reasonable cause" within the 180-day time limit or if a legislative determination of "reasonable cause" occurs pursuant to Section 760.11(8), Section 760.11(6) applies.

19. The 35-day time limit in Section 760.11(7) does not apply in this case because the Commission did not make an agency determination of "no reasonable cause" within the 180-day time limit in Section 760.11(3). Rather, the 35-day time limit in Section 760.11(6) applies because a legislative determination of "reasonable cause" occurred pursuant to Section 760.11(8). In Woodham, the court explained:

> Without . . . a proper "no cause" determination, Woodham was not required to make the subsection (7) request for [a] hearing within 35 days. Rather, Woodham was permitted to proceed under subsection (4) "as if the [Commission] made a 'reasonable cause' determination . . . ."

Id.

20. If Petitioner wished to proceed under Subsection 760.11(4)(b), Section 760.11(6) required Petitioner to request an administrative hearing within 35 days of the legislative determination of reasonable cause that occurred on April 1, 1996. Petitioner requested an administrative hearing on August 13, 1999, approximately 1,220 days later.

21. The Commission and DOAH are statutorily barred from granting Petitioner's request for administrative hearing. In relevant part, Section 760.11(6) provides:

> . . . an administrative hearing must be requested no later than 35 days after the date of determination of reasonable cause by the commission.

22. Unlike Section 760.11(7), Section 760.11(6) does not contain an express statutory bar. The express statutory bar in Section 760.11(7) provides:

> If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred. (emphasis supplied)

The statutory bar in Section 760.11(6) arises by necessary implication from the holding in Woodham that "related statutory provisions must be read together to achieve a consistent whole." Woodham, 829 So. 2d at 898.

23. This case involves administrative law issues that were not before the Florida Supreme Court in Joshua and Woodham. The purpose of a proceeding conducted pursuant to Section 120.57(1) is to formulate final agency action rather than to review agency action previously taken. McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). The proposed agency action in this case is not the legislative determination of reasonable cause that occurred on April 1, 1996, by operation of Section 760.11(8).

24. If a determination of reasonable cause were proposed agency action, Section 760.11(4) would not provide an employer with a clear point of entry to challenge the agency action because the procedures in Section 760.11(4) are available only to an aggrieved person. Although the ALJ does not have jurisdiction to decide constitutional issues, the ALJ should, whenever possible, avoid recommending final agency action that depends on an unconstitutional construction of applicable statutes.

25. The legislative determination of reasonable cause that occurred by operation of Section 760.11(8) is a legislative construct that serves two functions. The construct enables Petitioner to pursue his claim under Section 760.11(4) without undue delay from an administrative investigation authorized in Section 760.11(3), and it protects Respondent from the unfair requirement of defending a stale claim that otherwise may be caused by an administrative investigation.

26. The proposed agency action at issue in this case is set forth in the first remand. The first remand proposes to grant a request for administrative hearing that is barred by the 35-day time limit in Section 760.11(6).

27. The non-delegation doctrine in Article II, Section 3, of the Florida Constitution prohibits the legislature from delegating power to enact law or the right to exercise unrestricted discretion in applying the law. Sims v. State, 754 So. 2d 657, 668 (Fla. 2000); Florida League of Cities, Inc. v.

Administration Commission, 586 So. 2d 397, 410 (Fla. 1st DCA 1991). A state agency such as DOAH and the Commission cannot take final agency action that is an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8).

28. Respondent does not challenge the proposed agency action as an invalid rule pursuant to Section 120.56. Nor does Respondent challenge the proposed agency action as an unadopted rule pursuant to Section 120.57(1)(e). The proposed agency action may not satisfy the test of general applicability in Section 120.52(15).

29. The absence of a rule challenge does not deprive the ALJ of jurisdiction to determine whether incipient nonrule agency action is an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8)(b)-(f). An agency cannot take action that is an invalid exercise of delegated legislative authority irrespective of whether the proposed action is a rule defined in Section 120.52(15) or is an incipient nonrule that does not satisfy the test of general applicability in Section 120.52(15). An agency cannot do in the form of incipient nonrule action that which Chapter 120 prohibits the agency from doing in the form of a rule.

30. Jurisdiction of an ALJ to apply Subsection 120.52(8)(b)-(f) to determine whether incipient nonrule agency action is an invalid exercise of delegated legislative authority is analogous to the jurisdiction of an ALJ to consider the

constitutional implications of proposed agency action. An ALJ never has jurisdiction to determine the constitutionality of a statute but must, whenever possible, recommend final agency action that is not unconstitutional. Similarly, an ALJ who is not presented with a rule challenge lacks jurisdiction to declare that proposed agency action is an invalid rule but must, whenever possible, recommend final incipient nonrule action that is not an invalid exercise of delegated legislative authority.

31. Rule challenge cases brought pursuant to Section 120.56 or 120.57(1)(e) establish judicial standards for determining whether proposed agency action is an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8). The ALJ relies on those judicial standards to formulate incipient nonrule action that is not an invalid exercise of delegated legislative authority.

32. After March 31, 1996, the Commission had no statutory authority to make an agency determination. On April 1, 1996, a legislative determination of reasonable cause occurred by operation of Section 760.11(8). The Commission must give full effect to all provisions in Section 760.11, including Section 760.11(8). Woodham, 829 So. 2d at 898.

33. The legislature did not delegate authority for the Commission to make an agency determination after the 180-day time limit prescribed in Section 760.11(3). Nor did the legislature authorize the Commission to grant Petitioner more than 35 days

after the legislative determination in Section 760.11(8) to request an administrative hearing. Neither the Commission nor DOAH can adopt an interpretation of Subsections 760.11(3) and (6) that enlarges, modifies, or contravenes time limits prescribed by the legislature. Sections 120.52(8)(c) and 120.68(7)(e)4. See also DeMario v. Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 214 (Fla. 4th DCA 1994), rev. denied, 659 So. 2d 1086 (Fla. 1995) (agency lacks authority to impose time requirement not found in statute). Neither the Commission nor DOAH can ignore the legislative determination in Section 760.11(8). Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 363 (Fla. 1st DCA 1984)(agency action that ignores some statutory criteria and emphasizes others is arbitrary and capricious).

34. Rule 60Y-5.008(1) required Petitioner to file a Petition for Relief requesting an administrative hearing within 30 days of service of the Notice of Determination on July 14, 1999. Neither DOAH nor the Commission can construe a rule in a manner that violates the 180-day time limit prescribed by statute in Section 760.11(3) or that obviates the legislative determination of reasonable cause in Section 760.11(8). Section 120.68(7)(e)4. A rule cannot enlarge, modify, or contravene the terms of a statute. Section 120.52(8)(c). See, e.g., DeMario, 648 So. 2d at 214 (agency lacked authority to impose time requirement not found in statute); Booker Creek Preservation,

Inc. v. Southwest Florida Water Management District, 534 So. 2d 419, 423 (Fla. 5th DCA 1988)(agency cannot vary impact of statute by creating waivers or exemptions). Where an agency rule conflicts with a statute, the statute prevails. Hughes v. Variety Children's Hospital, 710 So. 2d 683, 686 (Fla. 3d DCA 1998); Johnson v. State, 709 So. 2d 623, 624 (Fla. 4th DCA 1998); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997); Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992); See also Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117.

35. Rule 60Y-5.008(2) authorized the Commission to grant an extension of time to file a request for hearing based on good cause if Petitioner had filed a motion for extension of time within 30 days of the legislative determination of reasonable cause. Petitioner did not file a motion for extension of time.

36. Neither the Commission nor DOAH can deviate from Rule 60Y-5.008(2) by granting an extension of time in the absence of a timely motion. Section 120.68(7)(e)2. An agency's deviation from an existing rule is invalid and unenforceable. Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995); Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977). An agency

cannot effectively repeal its own rule in a manner that vests unbridled discretion in the agency. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996).

37. The reason that the Commission did not make a determination within the 180-day time limit in Section 760.11(3) may be attributable to a heavy caseload and inadequate staffing that prevented the completion of the investigation in a timely manner. Administrative expedience, however, cannot dictate the terms of time limits prescribed by the legislature. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996).

38. If administrative expedience were allowed to extend the 180-day time limit prescribed in Section 760.11(3), the result would subject the statutory time limit to a "manipulable open-ended time extension. . . ." Cf. Lewis v. Conners Steel Company, 673 F.2d 1240, 1242 (11th Cir. 1982)(involving Title VII lawsuit filed outside the 90-day period). Such a result ". . . could render the statutory limitation meaningless." Id. If an agency practice conflicts with a statute, the statute prevails. Hughes, 710 So. 2d at 685; Johnson 709 So. 2d at 624; A Duda & Sons, 608 So. 2d at 884; Wingfield Development, 581 So. 2d at 197.

39. The clear point of entry doctrine requires adequate notice of the right to challenge proposed agency action in a proceeding conducted pursuant to Chapter 120. The doctrine was

first enunciated in Capeletti Brothers, Inc. v. State, Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1374 (Fla. 1979). Florida courts have since followed the doctrine. See, e.g., Environmental Resource, 624 So. 2d at 331-332; Florida League of Cities, 586 So. 2d at 413. See also Capital Copy, Inc. v. University of Florida, 526 So. 2d 988 (Fla. 1st DCA 1988); Lamar Advertising Company v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988); City of St. Cloud v. Department of Environmental Regulation, 490 So. 2d 1356 (Fla. 5th DCA 1986); Henry v. Department of Administration, Division of Retirement, 431 So. 2d 677 (Fla. 1st DCA 1983). See also Shirley S., In Search of a Clear Point of Entry, 68 Fla. B.J. 61 (May 1994).

40. In relevant part, the clear point of entry doctrine requires adequate notice to persons whose substantial interests are affected by proposed agency action. When the Commission failed to act within the 180-day time limit prescribed in Section 760.11(3), Subsections 760.11(4)(b), (6), and (8) provided Petitioner with a clear point of entry to an administrative remedy that is subject to judicial review. Section 760.11(8) created a legislative determination of reasonable cause on April 1, 1996, and authorized Petitioner to proceed under Section 760.11(4)(b) by requesting an administrative hearing. Section 760.11(6) required a request for

administrative hearing to be made no later than May 5, 1996, and barred any later request.

41. Subsections 760.11(4), (6), and (8) provide adequate notice of a clear point of entry that was intended by the legislature to both enable Petitioner and protect Respondent whenever the Commission did not make an agency determination within the 180-day time limit in Section 760.11(3). Petitioner is not subject to a different standard than a licensed attorney. A contrary rule would insulate a party from the consequences of relevant time limits whenever a party chose lay representation. Barrett v. City of Margate, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999); Jancyn Manufacturing Corporation v. Florida Department of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999); Pearson v. Pefkarou, 734 So. 2d 551, 551 (Fla. 3d DCA 1999); Carr v. Grace, 321 So. 2d 618 (Fla. 3d DCA 1975), cert. denied, 348 So. 2d 945 (Fla. 1977). See also Burke v. Harbor Estate Associates, Inc., 591 So. 2d 1034, 1037-1038 (Fla. 1st DCA 1991)(involving similar standard for attorney's fees); accord Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So. 2d 324 (Fla. 3d DCA 1992).

42. In Machules, the court excused a lay person from time limits prescribed in an agency's clear point of entry when the agency lulled the lay person into pursuing a different procedure until the applicable time limit passed. Machules, 523 So. 2d at 1135. There is no evidence in this case that Respondent induced

Petitioner to pursue a different procedure while the time for requesting an administrative hearing elapsed.

43. The authority of the Commission to remedy perceived deficiencies in the clear point of entry provided in Subsections 760.11(4), (6), and (8) is limited by the delegation doctrine. One administrative remedy is for the Commission to issue a prompt written notice that a legislative determination of reasonable cause occurred pursuant to Section 760.11(8) and that Section 760.11(6) gives the person 35 days to request an administrative hearing or four years to file a civil action.

44. Petitioner may, or may not, be entitled to equitable relief that would toll the four-year statute of limitations in Section 95.11(3)(f); or that would effectuate Petitioner's request for an administrative hearing. However, equitable relief is the exclusive province of the courts.

45. Courts have utilized the doctrine of equitable tolling to provide relief from statutory time limits. Irwin, 498 U.S. at 95-96, 111 S. Ct. at 457. If it were determined that the Commission had authority to invoke equitable tolling, application of the doctrine in this case would be problematic.

46. Florida courts have applied equitable tolling to excuse an otherwise untimely initiation of an administrative proceeding when four requirements are satisfied. First, the filing requirement is not jurisdictional. Castillo v. Department of Administration, Division of Retirement, 593 So. 2d 1116 (Fla. 2d

DCA 1992)(21-day period for challenging agency action "not jurisdictional"). Cf. Environmental Resource, 624 So. 2d at 332 (Judge Zehmer dissenting, in relevant part, because rigid adherence to statutory 21-day time limit would be tantamount to making time limit "jurisdictional"). Second, the delay is a minor infraction of the filing requirement. Stewart v. Department of Corrections, 561 So. 2d 15 (Fla. 4th DCA 1990)(applying the doctrine to excuse a request for hearing that was one day late); Environmental Resource, 624 So. at 332-333 (Judge Zehmer's dissenting opinion found that the delay was a minor infraction). Third, the delay does not result in prejudice to the adverse party. Stewart, 561 So. 2d at 16. Fourth, the delay is caused by the affected party being misled or lulled into inaction, being prevented in some extraordinary way from asserting his or her rights, or having timely asserted his or her rights mistakenly in the wrong forum. Machules v. Department of Administration, 523 So. 2d at 1133-1134. See Burnaman, R., Equitable Tolling in Florida Administrative Proceedings, 74 Fla. B.J. 60 (February 2000).

47. The first requirement for equitable tolling is satisfied in this case. The 35-day filing requirement in Section 760.11(6) is not a jurisdictional prerequisite to Petitioner's claim. Irwin, 498 U.S. at 92, 111 S. Ct. at 455; Milano, 703 So. 2d at 1094-1095, n.1.

48. The second requirement for equitable tolling is not satisfied in this case. The delay caused by the failure to timely file a request for hearing was not a minor infraction but was significant and lasted 1,185 days. Compare Machules, 523 So. 2d at 1133 (tolling time limit during 21 day delay) with Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306, 307 (Fla. 1st DCA 1997)(refusing to allow filing of letters of intent one day late in certificate of need process); and Environmental Resource, 624 So. 2d at 331 (court refused to reverse a final order denying a hearing where the request for hearing was four days late).

49. The third requirement for equitable tolling is not satisfied in this case. The delay caused by the administrative investigation would prejudice Respondent by adding 1,185 days to the 580-day time limit prescribed by the legislature in Section 760.11(1) (365 days), Section 760.11(3) (180 days), and Section 760.11(6) (35 days). Such a delay would require Respondent to defend a stale claim and thereby emasculate a primary function of Section 760.11(8).

50. Petitioner submitted no evidence that the fourth requirement of the doctrine of equitable tolling is satisfied in this case. There is no evidence that Respondent caused Petitioner to delay his request for hearing by misleading or lulling Petitioner into inaction, by preventing Petitioner in some extraordinary way from asserting his rights, or that

Petitioner timely asserted his rights mistakenly in the wrong forum. See, e.g., Perdue v. TJ Palm Associates, Ltd., 755 So. 2d 660 (Fla. 4th DCA 1999). The evidence shows that Petitioner did not request a hearing in a timely manner because he did not have the form entitled Petition for Relief.

51. The facts in this case are distinguishable from those in Machules. In Machules, the Department of Insurance discharged one of its employees. The notice of discharge stated the employee had 20 days to request an administrative hearing. A union representative pursued an informal grievance within the Department of Insurance in accordance with the terms of the union contract. The Department participated in the grievance procedure and set an informal hearing for the day after the expiration of the 20-day limit for requesting an administrative hearing. The court found that the state agency misled or lulled its employee into inaction by participating in the grievance procedure until the appeal period had run. Machules, 523 So. 2d at 1134.

52. Unlike the facts in Machules, Respondent did not lull Petitioner into delaying his request for administrative hearing during a grievance procedure with Respondent. There is no evidence that Respondent misled Petitioner into waiting for the Commission to complete its investigation rather than requesting an administrative hearing within 35 days of the legislative determination of reasonable cause in Section 760.11(8).

53. The delay in the Commission's investigation has been detrimental to both Petitioner and Respondent. As the court explained in Machules:

> The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant. (emphasis supplied)

Machules, 523 So. 2d at 1134. Application of equitable tolling in this case would eviscerate Respondent's right "not to . . . defend a stale claim."

54. Equitable tolling generally is limited to cases in which one party has been lulled into inaction or prevented from asserting his or her rights by the acts or omissions of an adversary. Machules, 523 So. at 1134. In Irwin, the United States Supreme Court noted that equitable tolling generally is limited to situations where a complainant was induced or tricked by an adversary's misconduct into allowing a filing deadline to pass. Irwin, 498 U.S. at 96, 111 S. Ct. at 455.

55. In cases where Florida courts have applied equitable tolling in administrative proceedings, a state agency is generally an adversary to a person substantially affected by the agency's proposed action. See, e.g., Machules, 523 So. at 1133 (state agency sought discharge of its employee); Mathis v.

Florida Department of Corrections, 726 So. 2d 389 (Fla. 1st DCA 1999)(state agency was adversary in claim for back pay by agency's employee); Avante, Inc. v. Agency for Health Care Administration, 722 So. 2d 965 (Fla. 1st DCA 1998) and Unimed Laboratory, Inc. v. Agency for Health Care Administration, 715 So. 2d 1036 (Fla. 3d DCA 1998)(state agency was adversary in action to recover Medicaid payments); Haynes v. Public Employees Relations Commission, 694 So. 2d 821 (Fla. 4th DCA 1997) and Phillip v. University of Florida, 680 So. 2d 508 (Fla. 1st DCA 1996)(state agency was adversary in employee dismissal action); Abusalameh v. Department of Business Regulation, 627 So. 2d 560 (Fla. 4th DCA 1993)(state agency was adversary in license revocation proceeding); Environmental Resource, 624 So. 2d at 331 (state agency was adversary in contract termination case); Castillo, 593 So. 2d at 1117 (state agency was adversary in beneficiary's claim for retirement benefits); Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988 (Fla. 1st DCA 1991)(state agency was adversary in action seeking reimbursement of cleanup costs); Stewart, 561 So. 2d 15 (state agency was adversary in employee dismissal action). Similarly, Florida cases addressing the clear point of entry doctrine have generally involved a state agency that is an adversary to the person affected by proposed agency action. See, e.g., Florida League of Cities, 586 So. 2d at 413; Capital Copy, 526 So. 2d 988; Lamar Advertising, 523 So. 2d 712; City of St. Cloud, 490

So. 2d at 1358; Henry, 431 So. 2d at 680; Manasota 88, Inc. v. Department of Environmental Regulation, 417 So. 2d 846, 847 (Fla. 1st DCA 1982); Sterman v. Florida State University Board of Regents, 414 So. 2d 1102, 1104 (Fla. 1st DCA 1982).

56. Some courts have addressed the clear point entry and equitable tolling doctrines in cases involving a state agency that is a nominal party rather than an adversary. In a certificate of need case, for example, the court held that failure of a state agency to notify competing hospitals of an applicant's revised application denied competing hospitals of a clear point of entry. NME Hospitals, Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 379, 384-385 (Fla. 1st DCA 1986)(opinion on Motion for rehearing), reh. denied. In another certificate of need case, the court refused to apply equitable tolling to extend time limits for filing a letter of intent. Vantage Healthcare, 687 So. 2d at 308.

57. In Vantage Healthcare, an agency utilized equitable tolling to award a certificate of need to an applicant after the applicant filed a letter of intent one day late. The court held that the doctrine of equitable tolling does not apply to the certificate of need process because the process:

> . . . is not comparable to . . . judicial or quasi-judicial proceedings. We have found no authority extending the doctrine of equitable tolling to facts such as in the present case.

Vantage Healthcare, 687 So. 2d at 307.

Like the application process Vantage, the investigation process in Section 760.11(3) is not comparable to quasi-judicial proceedings. Cf. Perdue, 755 So. 2d at 667(refusing to apply equitable tolling to extend deadline for challenging a notice of intent to issue a conceptual permit).

58. Unlike the state agency in Vantage Healthcare, the Commission is not a named party. Application of equitable tolling in this case would expand the doctrine to administrative proceedings in which a party is arguably lulled into inaction by a state agency that is neither a party to the administrative proceeding nor an adversary of either party.

59. At least one court has considered the clear point of entry and equitable tolling doctrines where the state agency was neither an adversary to the affected party nor a named party. In an administrative proceeding involving a fruit dealer and grower, the court held that failure of the dealer to request a hearing within the time prescribed in a statutorily mandated agency notice waived the dealer's right to a de novo hearing. Southeast Grove Management, Inc. v. McKiness, 578 So. 2d 883, 886 (Fla. 1st DCA 1991). Unlike the statutory requirement for agency notice in Southeast, nothing in Section 760.11(8) requires agency action after 180 days as a prerequisite to the 35-day filing requirement in Section 760.11(6). Rather, Subsections 760.11(3), (6), and (8) provide statutory notice to an aggrieved person.

60. Courts have also utilized equitable estoppel to provide relief from time limits in administrative proceedings. Although Petitioner has not pled equitable estoppel in this case, differences between the two doctrines are informative.

61. Equitable tolling is concerned with the point at which a period of limitation begins to run and with the circumstances in which the running of the period may be suspended. Morsani v. Major League Baseball, 739 So. 2d 610, 614-615 (Fla. 2d DCA 1999). Equitable estoppel comes into play only after time limits have run and addresses the circumstances in which an adverse party is estopped from asserting the statute of limitations as a defense to an admittedly untimely action. Id. See also Ovadia v. Bloom, 756 So. 2d 137, 139-140 (Fla. 3d DCA 2000).

62. Like equitable tolling, courts have applied equitable estoppel when a state agency is an adversary to the affected party. Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212, 215-216 (Fla. 1st DCA 1986). A party must specifically plead equitable estoppel. University Community Hospital v. Department of Health and Rehabilitative Services, 610 So. 2d 1342, 1346 (Fla. 1st DCA 1992). Unlike equitable tolling, equitable estoppel does not apply where the delay is caused by a mistake of law. Compare Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994); Dolphin Outdoor Advertising v. Department of Transportation, 582 So. 2d 709, 710 (Fla. 1st DCA 1991), and Tri-State, 500 So. 2d 216 with

Machules, 523 So. 2d at 1134 (mistaken pursuit of union grievance tolls time for requesting administrative hearing).

63. The courts enjoy exclusive jurisdiction to determine whether Petitioner "slept on his rights" or is entitled to equitable relief from the time limits in Section 760.11(6). See Machules, 523 So. 2d at 1135 and Jancyn, 742 So. 2d at 475 (for references to the phrase "slept on his rights"). Final agency action should not amend, enlarge, or disregard statutory time limits delegated by the legislature. Ambiguity in Section 760.11 is best corrected legislatively.

64. The issue of whether equitable tolling applies in this case will not be ripe for judicial determination until the Commission either enters a final order or obtains a writ of mandamus ordering the ALJ to comply with the first remand. Either alternative will facilitate judicial resolution of significant administrative law issues that were not before the Florida Supreme Court in Joshua and Woodham.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the first remand is refused.

DONE AND ORDERED this 24th day of January, 2003, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.