STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA J. GREEN, Petitioner, vs. AMERICAN HOME COMPANIONS, INC., f/k/a CENTRAL LIVE IN AGENCY, INC., Respondent.	)	Case No. 00-1127

RECOMMENDED ORDER OF DISMISSAL

On April 11, 2000, an Order to Show Cause required the parties to file a written response stating why this case should or should not be dismissed for the reasons stated in the Order to Show Cause. Petitioner did not file a response to the Order to Show Cause. Respondent timely filed its response on May 15, 2000.

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner's claim is barred by Section 760.11(7), Florida Statutes (1999), because Petitioner filed a request for hearing more than 35 days after the time prescribed in Section 760.11(3) for a determination of reasonable cause by the Florida Commission on Human Relations (the "Commission"). (All statutory references are to Florida Statutes (1999) unless otherwise stated).

FINDINGS OF FACT

1. Respondent employed Petitioner until June 15, 1995.

Petitioner filed a Charge of Discrimination with the Commission on July 10, 1995.

2. The Charge of Discrimination alleges that Petitioner was forced to leave her position of employment because of Petitioner's religion. The Charge of Discrimination alleges, in relevant part, that Respondent terminated Petitioner's employment because she is Christian and "always trying to convert people."

Time Limits

3. The Charge of Discrimination was timely filed pursuant to Section 760.11(1). The filing date of July 10, 1995, fell within 365 days of June 15, 1995, which is the date of the alleged discrimination.

4. Section 760.11(3) authorizes the Commission to issue a determination of reasonable cause within 180 days of July 10, 1995; the date Petitioner filed the Charge of Discrimination. Counting July 11, 1995, as the first day of the 180-day time limit, Section 760.11(3) authorized the Commission to determine reasonable cause no later than January 6, 1996. The Commission issued a Notice of Determination: No Cause on January 31, 2000.

5. Section 760.11(7) required Petitioner to file a request for hearing within 35 days of January 6, 1996. Counting January 7, 1996, as the first day of the 35-day period, Section 760.11(7) required Petitioner to file a request for hearing no later than February 10, 1996.

6. Petitioner did not timely file a request for hearing. Petitioner first requested a hearing in the Petition for Relief filed on February 18, 2000. Petitioner filed her request for

hearing approximately 1,468 days late and 1,503 days after the expiration of the 180-day time limit prescribed in Section 760.11(3). Petitioner did not respond to the Order to Show Cause to explain why she filed the request for hearing late.

7. Section 760.11(7) statutorily bars Petitioner's claim. Section 760.11(7) expressly provides, in relevant part:

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

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this proceeding. The parties received adequate notice of the administrative hearing. Section 120.57(1).

Time Limits

9. Section 760.11(3), in relevant part, provides that the Commission "shall determine," within 180 days from the date that an aggrieved party files a Charge of Discrimination, whether there is reasonable cause to believe a discriminatory practice has occurred. If the Commission issues a determination of reasonable cause within the 180-day time limit and the aggrieved party wishes to pursue the claim, Sections 760.11(4)(a) and (b), respectively, authorize the aggrieved party to either bring a civil action in court or request an administrative hearing; but not both. Sections 760.11(5) and (7), respectively, require the civil action or request for administrative hearing to be filed within one year or 35 days of the date the Commission determines reasonable cause.

10. If the Commission does not determine reasonable cause within 180 days, Section 760.11(8) authorizes an aggrieved party to file either a civil action or request for administrative hearing as if the Commission had determined reasonable cause within the 180-day time limit in Section 760.11(3). However, Section 760.11 is silent as to the point at which the one-year and 35-day filing requirements in Section 760.11(5) and (7) begin to run when the Commission fails to act within 180 days.

11. The one-year and 35-day filing requirements in Sections 760.11(5) and (7) begin to run at the same point. Both filing requirements were enacted in the same act and relate to the same subject matter, i.e., time limits applicable to the mutually exclusive remedies authorized in Section 760.11(4)(a) or (b). Joshua v. City of Gainesville, 734 So. 2d 1068, 1069-1070 (Fla. 1st DCA 1999). The filing requirements in Section 760.11(5) and (7) are imbued with the same spirit, are actuated by the same policy, and must be considered in pari materia in a manner that harmonizes them and gives effect to legislative intent for the entire act. See, e.g., Major v. State, 180 So. 2d 335, 337 (Fla. 1965); Abood v. City of Jacksonville, 80 So. 2d 443, 444-445 (Fla. 1955); Tyson v. Stoutamire, 140 So 454, 456 (Fla. 1932); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA June 27, 1997); Armas v. Ross, 680 So. 2d 1130, 1130 (Fla. 3d DCA 1996); State Farm Mutual Automobile Insurance Company v. Hassen, 650 So. 2d 128, 133 n. 5 (Fla. 2d DCA 1995); Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989); Escambia County Council on Aging v. Goldsmith, 465 So. 2d

655, 656 (Fla. 1st DCA 1985); Jackson v. State, 463 So. 2d 373, 373 (Fla. 5th DCA 1985), reh'g denied.

12. The one-year filing requirement in Section 760.11(5) begins to run on the first day after the 180-day time limit in Section 760.11(3). If the Commission issues a determination of reasonable cause after 180 days or never issues a determination of reasonable cause, a civil action filed more than one year after the 180-day time limit is statutorily barred by Section 760.11(5). Joshua, 734 So. 2d at 1070-1071 (question certified to the Florida Supreme Court) rev. granted 735 So. 2d 1285 (Fla. 1999); Adams v. Wellington Regional Medical Center, Inc., 727 So. 2d 1139 (Fla. 4th DCA 1999) (question certified to the Florida Supreme Court); Daugherty v. City of Kissimmee, 722 So. 2d 288 (Fla. 5th DCA 1998); Crumbie v. Leon County School Board, 721 So. 2d 1211 (Fla. 1st DCA 1998); Kalkai v. Emergency One, 717 So. 2d 626 (Fla. 5th DCA 1998); Milano v. Moldmaster, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1998). See also Sasser M. and Stafford S., "Defining the Hourglass: When Is a Claim Under the Florida Civil Rights Act Time Barred?", 73 Fla. B.J. 68 (Dec. 1999).

13. The 35-day filing requirement in Section 760.11(7) also begins to run on the first day after the 180-day time limit in Section 760.11(3). If the Commission issues a determination of reasonable cause after 180 days or never issues a determination of reasonable cause, a request for an administrative hearing filed more than 35 days after the 180-day time limit is statutorily barred by Section 760.11(7). See, e.g., Joshua, 734

So. 2d at 1070-1071; Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai, 717 So. 2d at 626; Milano, 703 So. 2d at 1094-1095. See also Hall v. Boeing Aerospace Operation, 20 FALR 2596 (1998); Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993), reh. denied, dismissed, 634 So. 2d 624 (Fla. 1994)(agency is bound by its administrative orders pursuant to the doctrine of stare decisis). Compare Nordheim v. Department of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998) (agency refusal to consider its prior decision is abuse of discretion) with Caserta v. Department of Business and Professional Regulation, 686 So. 2d 651, 653 (Fla. 5th DCA 1996) (Section 120.53 requirement for subject matter index does not begin until effective date of 1992 amendment).

14. In this case, Petitioner filed her Charge of Discrimination on July 10, 1995. Counting July 11, 1995, as the first day of the 180-day period, Section 760.11(3) authorized the Commission to issue a determination of reasonable cause no later than January 6, 1996.

15. The 35-day filing requirement in Section 760.11(7) began to run in this case on January 7, 1996. Section 760.11(7) required Petitioner to file a request for hearing in the Petition for Relief no later than February 10, 1996.

16. Petitioner did not file a request for hearing until February 18, 2000. Petitioner filed the request for hearing 1,468 days late and 1,503 days after the 180-day time limit in Section 760.11(3).

Statutory Authority

17. Section 760.11(3) provides that the Commission "shall determine" reasonable cause within 180 days of the date Petitioner filed the Charge of Discrimination on July 10, 1995. The statute does not state that the Commission shall determine reasonable cause within 180 days or anytime thereafter. After January 6, 1996, the Commission had no statutory authority to act. Neither the Commission nor DOAH can adopt an interpretation of Section 760.11(3) that enlarges, modifies, or contravenes the 180-day time limit 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, 213-214 (Fla. 4th DCA 1994), rev. denied, 659 So. 2d 1086 (Fla. 1995) (agency lacks authority to impose time requirement not found in statute); Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 362 (Fla. 1st DCA 1984) (agency action that ignores some statutory criteria and emphasizes others is arbitrary and capricious).

18. Florida Administrative Code Rule 60Y-5.008(1) requires an aggrieved party to file a Petition for Relief requesting an administrative hearing within 30 days of service of a Notice of Determination of No Reasonable Cause. (Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.) Rule 60Y-5.008(2) provides that the Commission may grant an extension of time to file a request for hearing upon a showing

of good cause if the aggrieved party files a motion for extension of time within the 30-day period prescribed in Rule 60Y-5.008(1).

19. Rule 60Y-5.008 is limited in scope to cases in which the Commission issues a valid determination of reasonable cause in 180 days. The express terms of the rule do not reach situations where the Commission fails to issue a determination of reasonable cause. Neither the Commission nor DOAH can deviate from Rule 60Y-5.008. Section 120.68(7)(e)2. An agency's deviation from a valid existing rule is invalid and unenforceable. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977).

20. Even if Rule 60Y-5.008 applied to situations in which the Commission fails to issue a notice of determination in 180 days, the rule's authority to extend the 30-day filing requirement cannot be construed in a manner that effectively extends the 180-day time limit in Section 760.11(3). The 30-day filing requirement in Rule 60Y-5.008 begins to run on the first day after the 180-day period in Section 760.11(3). Cf. Joshua, 734 So. 2d at 1070-1071; Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai, 717 So. 2d at 626; Milano, 703 So. 2d at 1094-1095. Petitioner did not file a motion to extend the 30-day filing requirement within 30 days after the 180-day period.

21. Neither the Commission nor DOAH can construe Rule 60Y-5.008 to enlarge, modify, or contravene the 180-day time limit the legislature prescribed in Section 760.11(3). A rule cannot impose a requirement not found in a statute or otherwise enlarge, modify, or contravene the terms of a statute. See, e.g., DeMario, 648 So. 2d at 213-214 (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) reh. denied. Where an agency rule conflicts with a statute, the statute prevails. Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Johnson v. Department of Highway Safety & Motore Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997), reh'g denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992), reh'g denied; Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991) reh. denied. 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.

22. The record does not disclose why the Commission failed to issue a determination of reasonable cause within the 180-day time limit in Section 760.11(3). The reason may be attributable to administrative convenience or expediency related to a heavy

caseload that prevents the agency from completing its investigation within 180 days. However, administrative convenience or expediency cannot dictate the terms of the time limits prescribed by the legislature in Section 760.11(3). Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1241 (Fla. 1st DCA 1996) reh. denied; Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995) reh. denied; Flamingo Lake RV Resort, Inc. v. Department of Transportation, 599 So. 2d 732, 732 (Fla. 1st DCA 1992).

23. If administrative convenience 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) (barring Title VII lawsuit filed outside the 90-day period). Such a result ". . . could render the statutory limitation meaningless." Id.

Jurisdiction

24. Petitioner's claim is statutorily barred by Section 760.11(7). In relevant part, Section 760.11(7) requires that Petitioner's request for hearing in the Petition for Relief:

> . . . must be made within 35 days of the date of determination of reasonable cause [by the Commission]. . . . If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred. (emphasis supplied)

25. The statutory bar to a claim filed more than 35 days after the expiration of the 180-day time limit in Section 760.11(3) is not a jurisdictional bar to Petitioner's claim. Rather, failure to comply with the 35-day filing requirement in

Section 760.11(7) admits a defense analogous to a statute of limitations. Milano v. Moldmaster, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1997) reh. en banc clarification and certification. Accord Joshua, 734 So. 2d at 1068; Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai, 717 So. 2d at 626.

26. Florida courts holding that noncompliance with statutory filing requirements is a jurisdictional bar generally do so on the basis of specific statutory language. Relying on language in Section 194.171(6), for example, the Florida Supreme Court has held that the 60-day filing requirement in Section 194.171(2) is a "jurisdictional statute of nonclaim." Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 815 (Fla. 1988). Accord Wal-Mart Stores, Inc. v. Day, 742 So. 2d 408, 409 (Fla. 5th DCA 1999); Palmer Trinity Private School, Inc. v. Robbins, 681 So. 2d 809 (Fla. 3d DCA 1996); Hall v. Leesburg Regional Medical Center, 651 So. 2d 231 (Fla. 5th DCA 1995); Walker v. Garrison, 610 So. 2d 716 (Fla. 4th DCA 1992); Markham v. Moriarty, 575 So. 2d 1307 (Fla. 4th DCA 1991), cert. denied, 502 U.S. 968, 112 S. Ct. 440 (1991); Gulfside Interval Vacations, Inc. v. Schultz, 479 So. 2d 776 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 830 (Fla. 1986). See also Davis v. Macedonia Housing Authority, 641 So. 2d 131, 132 (Fla. 1st DCA 1994) (the 60-day filing requirement in Section 194.171(2) is a jurisdictional bar to an action to contest loss of tax exemption for 1990). Cf. Pogge v. Department of Revenue, 703 So. 2d 523, 525-526 (Fla. 1st DCA 1997) (the 60-day filing requirement in Section 72.011(2) is

a jurisdictional bar to an action contesting the assessment of taxes but was not a jurisdictional bar to an action for a refund of taxes prior to 1991 when the legislature amended former Section 72.011(6) to delete express language that Section 72.011 was inapplicable to refunds); Mikos v. Parker, 571 So. 2d 8, 9 (Fla. 2d DCA 1990) (the 60-day filing requirement in Section 194.171 was not a jurisdictional bar to a claim for refund of taxes assessed in 1989). Compare City of Fernandina Beach v. Page, 682 So. 2d 573 (Fla. 1st DCA 1996); Joyner v. Roberts, 642 So. 2d 826 (Fla. 1st DCA 1994); and Chihocky v. Crapo, 632 So. 2d 230 (Fla. 1st DCA 1994) (the failure to strictly comply with statutory notice procedures may toll the running of the 60-day filing requirement in Section 194.171(2)).

27. Federal courts generally view the filing requirements in discrimination cases as statutes of limitation rather than as jurisdictional prerequisites to filing suit. For example, 42 U.S.C. Section 2000e-5(f)(1) requires an aggrieved party to file suit within 90 days after receipt of a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). In Espinoza v. Missouri Pacific Railroad Co., 754 F.2d 1247, 1250 (5th Cir. 1985), the court held that the 90-day filing requirement in 42 U.S.C. Section 2000e-5(f)(1) is not a jurisdictional prerequisite to suit but is a statute of limitations subject to the doctrine of equitable tolling.

28. The Supreme Court has adopted a similar construction of the requirement in 42 U.S.C. Section 2000e-16(c) for an aggrieved party to file suit within 30 days after receipt of a right to sue

letter from the EEOC. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92, 111 S. Ct. 453, 455 (1990), the Court resolved a conflict between federal appellate courts over whether a late-filed claim deprived federal courts of jurisdiction. In Irwin, the Fifth Circuit Court of Appeals had held that federal courts lacked jurisdiction over claims filed more than 30 days after receipt of a right to sue letter. Irwin v. Department of Veterans Affairs, 874 F.2d 1092 (5th Cir 1989). The holding by the Fifth Circuit was in direct conflict with decisions in four other courts of appeals. Boddy v. Dean, 821 F.2d 346, 350 (6th Cir. 1987); Martinez v. Orr, 738 F.2d 1107, 1109 (10th Cir. 1984); Milam v. United States Postal Service, 674 F.2d 860, 862 (11th Cir. 1982); Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir. 1982). The Supreme Court held that the 30-day filing requirement is not jurisdictional but creates a "rebuttable presumption of equitable tolling." Irwin, 498 U.S. at 95-96, 111 S. Ct. at 457.

Equitable Tolling

29. Florida courts have applied the doctrine of equitable tolling to excuse an otherwise untimely initiation of an administrative proceeding when four requirements are satisfied. First, the filing requirement is not jurisdictional. Cf. Environmental Resource Associates of Florida, Inc. v. State, Department of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993) (Judge Zehmer dissenting, in relevant part, because the 21-day time limit in that case was "not jurisdictional"); Castillo v. Department of Administration, Division of Retirement, 593 So. 2d 1116 (Fla. 2d DCA 1992) (remanding the case for equitable

considerations related to the "not jurisdictional" 21-day period for challenging agency action). 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 other party. Stewart, 561 So. 2d at 16. Fourth, the delay is caused by the affected party's 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 1132, 1133-1134 (Fla. 1988). See Burnaman, R., "Equitable Tolling in Florida Administrative Proceedings," 74 Fla. B.J. 60 (February 2000).

30. The first requirement for equitable tolling is the only requirement that is satisfied in this case. The 35-day filing requirement in Section 760.11(7) 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.

31. 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 1,468 days. 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); 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).

32. The third requirement of the doctrine of equitable tolling is not satisfied in this case. The delay sought by Petitioner would prejudice Respondent by adding 1,468 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(7)(35 days).

33. Petitioner did not explain that the fourth requirement of the doctrine of equitable tolling was satisfied in this case. Petitioner failed to explain the delay in filing the request for hearing as the result of being misled or lulled into inaction, of being prevented in some extraordinary way from asserting his rights, or of having timely asserted his rights mistakenly in the wrong forum. See, e.g., Perdue v. TJ Palm Associates, Ltd., 24 Fla. L. Weekly D1399 (Fla. 4th DCA June 16, 1999) (refusing to remand a denial of a request for hearing where the recommended order contained findings of fact and conclusions of law supporting the denial of an untimely request for hearing). Petitioner did not explain why she failed to request a hearing earlier.

34. Even if Petitioner showed that she had been lulled into inaction, Petitioner failed to show that she was lulled into inaction by Respondent. It is mere supposition to conclude that Petitioner was lulled into inaction by the failure of the

Commission to issue a notice of determination within the 180-day time limit prescribed in Section 760.11(3). Even if Petitioner's evidence supported such a finding, the Commission is not a named party to this proceeding.

35. The doctrine of equitable tolling generally has been 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 the party's adversary. In Irwin, for example, the Court held that the doctrine of equitable tolling applied to an action brought by a discharged government employee against the government. The Court noted that the doctrine of equitable tolling generally was 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.

36. The Florida Supreme Court has not limited the doctrine of equitable tolling to cases in which a party is tricked or induced by the misconduct of an adversary into allowing a filing deadline to pass. The Florida Supreme Court has expanded the doctrine to reach cases where a party allows a filing deadline to pass through the party's own inadvertence or mistake of law. In Machules, 523 So. 2d at 1132, the court held that a discharged agency employee who chose to pursue a claim through union grievance, and thereby allowed the time limits for requesting a hearing to lapse, did not waive the right to a hearing.

37. In Machules, the court's expansion of equitable tolling to inadvertence and mistake of law involved a state agency that

was both a named party and an adversary to the discharged agency employee. The decision in Machules did not involve a state agency that was a non-party in a case such as this in which two or more named parties are adversaries and who are the real parties in interest. Machules, 523 So. 2d at 1132.

38. Florida appellate courts have limited the doctrine of equitable tolling in administrative cases to those involving state agencies that are adversaries to substantially affected parties. See, e.g., Mathis v. Florida Department of Corrections, 726 So. 2d 389 (Fla. 1st DCA 1999), the court applied (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) (state agency was adversary in action to recover Medicaid payments); 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) (state agency was adversary in employee dismissal action); 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 that was adversary in contract termination case did nothing to cause four-day delay in filing request for hearing); 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).

39. Florida courts have been reluctant to extend the doctrine of equitable tolling to administrative cases in which a state agency is only a nominal party rather than an adversary to the affected party. In Vantage Healthcare, 687 So. 2d at 307, a state agency awarded a certificate of need to an applicant after allowing the applicant to file its letter of intent one day late. The agency applied the doctrine of equitable tolling to extend the filing deadline by one day. The court held that the doctrine of equitable tolling does not apply to the certificate of need application process because the application 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.

Cf. Perdue, 1999 WL 393464 (Fla. 4th DCA 1999) (refusing to apply the doctrine of equitable tolling to extend the deadline for challenging a notice of intent to issue a conceptual permit approving overall master project design).

40. Unlike the state agency in Vantage Healthcare, the Commission is not a party to this proceeding. Assuming arguendo Petitioner showed that the Commission's failure to issue a written notice within the 180-day time limit in Section 760.11(3) lulled Petitioner into inaction, application of the doctrine of equitable tolling to the facts in this case would extend the

doctrine to administrative proceedings in which a party is lulled into inaction by the inaction of a non-party.

Clear Point of Entry

41. The clear point of entry doctrine is a judicial doctrine that requires state agencies to provide parties who are substantially affected by proposed agency action with a clear point of entry to formal or informal proceedings authorized in Chapter 120. The clear point of entry 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). Since 1979, the doctrine has been followed by Florida courts. See, e.g., Environmental Resource, 624 So. 2d at 331-332 (concurring opinion of Judge Ervin); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). See also Southeast Grove Management, Inc. v. McKinness, 578 So. 2d 883 (Fla. 1st DCA 1991); 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).

42. An agency provides a clear point of entry to an affected party by satisfying several fundamental requirements. First, the agency must notify the affected party of the proposed

agency action. In addition, the notice must inform the affected party of the right to request an administrative hearing pursuant to Section 120.57 and inform the affected party of the time limits within which the party must file a request for hearing. If the affected party fails to file a request for hearing within the time prescribed in the clear point of entry, the affected party waives the right to request a hearing. See, e.g., Environmental Resource, 624 So. 2d at 331-332 (citing Capeletti Brothers, 368 So. 2d at 348).

43. The Commission satisfied the requirements of the clear point of entry doctrine when the Commission issued a Notice of Determination: No Cause on January 1, 2000. On February 18, 2000, Petitioner requested an administrative hearing within 35 days of the determination of reasonable cause by the Commission.

44. The failure of the Commission to act within the time prescribed in Section 760.11(3) raises at least four issues. The first issue is whether Sections 760.11(3), (7) and (8) provide an aggrieved party with a clear point of entry in the absence of agency action. If so, the second issue is whether uncertainty, if any, created by agency inaction can operate to negate the clear point of entry provided by statute. The third issue is whether the clear point of entry doctrine operates any differently in cases in which the state agency is neither an adversary of the affected party nor a nominal party. If the doctrine does apply with equal force to such cases, the fourth issue is whether the inaction of a non-party can effectively

enlarge statutes of limitation intended, in part, to protect the affected party's adversary.

45. Sections 760.11(3), (7), and (8) provide a clear point of entry by notifying an aggrieved party that a request for an administrative hearing must be filed within 35-days of the earlier of: the determination of reasonable cause; or the 180-day time limit prescribed in Section 760.11(3). If the Commission fails to act within 180 days, the 35-day filing requirement in Section 760.11(7) begins to run immediately after the 180-day time limit in Section 760.11(3). Cf. Joshua, 734 So. 2d at 1068); Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai 717 So. 2d at 626. Any other construction is unreasonable. Milano, 703 So. 2d at 1093.

46. Agency action taken after the 180-day time limit in Section 760.11(3) is neither statutorily authorized nor statutorily required as a prerequisite of the 35-day filing requirement in Section 760.11(7). In the absence of agency action by the Commission, Section 760.11(8) authorizes an aggrieved party to proceed under Section 760.11(4) as if the Commission had issued a notice of determination within the 180-day time limit in Section 760.11(3).

47. The inaction of the Commission cannot enlarge, modify, or contravene the terms of a statute. An agency cannot impose by inaction or other practice a requirement not found in a statute or otherwise enlarge, modify, or contravene the terms of a statute. Sections 120.52(8)(c) and 120.68(7)(e)4. See also, DeMario, 648 So. 2d at 213-214 (agency lacked authority to impose

time requirement not found in statute); Booker Creek, 534 So. 2d at 423. If an agency rule or 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.

48. If the Commission is concerned that its rules or practices may cloud the clear point of entry provided in Sections 760.11(3), (7), and (8), the Commission has no authority to enlarge the 180-day time limit in Section 760.11(3). However, the Commission does have authority to issue a written notice of rights to the parties within the time authorized in Section 760.11(3).

49. Assuming arguendo that the requirements of the clear point of entry doctrine are not satisfied in the statutory notice provided in Sections 760.11(3), (7), and (8), the issue is whether the clear point of entry doctrine operates any differently in cases such as this one in which the state agency is neither an adversary to the aggrieved party nor a nominal party. Courts have most frequently applied the clear point of entry doctrine in cases involving a state agency that is an adversary to the affected party. See, e.g., Florida League of Cities v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991); Capital Copy, Inc. v. University of Florida, 526 So. 2d 989 (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, 1358 (Fla. 1st DCA 1986); Henry v. State, Department

of Administration, 431 So. 2d 677, 680 (Fla. 1st DCA 1983); Manasota 88, Inc. v. Department of Environmental Regulation, 417 So. 2d 846 (Fla. 1st DCA 1982); Sterman v. Florida State University Board of Regents, 414 So. 2d 1102 (Fla. 1st DCA 1982).

50. Less frequently, courts have applied the clear point of entry doctrine in cases involving a state agency that is a nominal party but not an adversary to the affected party. In a certificate of need case, for example, the court held that failure of the state agency to notify competing hospitals that the hospital-applicant had submitted a 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 extend the time limits in a clear point of entry for an applicant to file its letter of intent. Vantage Healthcare, 687 So. 2d at 308 (refusing to apply equitable tolling to the certificate of need process).

51. At least one court has applied the clear point of entry doctrine in a case in which the state agency was neither an adversary to the affected party nor a nominal party. In a proceeding between a fruit dealer and the grower, the court held that the failure of the dealer to request a hearing within the time limit prescribed in a statutorily required 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).

52. Unlike the statutory requirement for agency notice in Southeast, nothing in Section 760.11 requires agency action after 180 days as a prerequisite to the 35-day filing requirement in Section 760.11(7). If the Commission fails to complete its investigation and issue a notice of rights within 180 days, Section 760.11(8) authorizes an aggrieved party to proceed under Section 760.11(4) as if the Commission had issued a notice of rights within the 180-day time limit.

53. The Commission can accelerate the point at which the 35-day filing requirement begins to run by issuing a notice of determination in less than 180 days. However, the Commission has no statutory authority to delay the point at which the 35-day requirement begins to run by acting beyond the 180-day time limit in Section 760.11(3) or by failing to act altogether.

Equitable Estoppel

54. The doctrine of equitable estoppel is distinguishable from the doctrine of equitable tolling. The latter doctrine is concerned with the point at which a limitations period begins to run and with the circumstances in which the running of the limitations 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 the limitations period has run and addresses the circumstances in which a party is estopped from asserting the statute of limitations as a defense to an admittedly untimely action. Id. See also Ovadia v. Bloom, 2000 WL 227961 (Fla. 3d DCA March 1, 2000).

55. Like equitable tolling, equitable estoppel can be applied to a state agency where the state agency is a named party and an adversary to the affected party. Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212, 215 (Fla. 1st DCA 1986). A party must specifically plead equitable estoppel in administrative cases. University Community Hospital v. Department of Health and Rehabilitative Services, 610 So. 2d 1342, 1346 (Fla. 1st DCA 1992). Equitable estoppel does not apply in cases where the delay is caused by a mistake of law. 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); Tri-State, 500 So. 2d 216. Equitable tolling may apply in cases where the delay is caused by mistake of law or inadvertence. See, e.g., Machules, 523 So. 2d at 1134 (pursuing claim through union grievance procedure instead of requesting hearing tolls the clear point of entry).

56. Petitioner is not subject to a lesser standard of conduct than a licensed attorney. Petitioner has constructive knowledge of applicable statutes and rules. A contrary rule would insulate a party from the consequences of applicable time limits whenever a party chose lay representation. Barrett v. City of Margate, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999); Pearson v. Pefkarou, 734 So. 2d 551, 551 (Fla. 3d DCA 1999); Jancyn Manufacturing Corporation v. Florida Department of Health, 24 Fla. L. Weekly D2232, 2233 (Fla. 1st 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). Accord Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So. 2d 324 (Fla. 3d DCA 1992).

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order dismissing this proceeding as barred by Section 760.11(7).

DONE AND ENTERED this 6th day of June, 2000, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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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