STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOANNE WHITAKER MCSHANE, Petitioner, vs. BREVARD COUNTY SHERIFF'S OFFICE, Respondent.	)	Case No. 01-4449

RECOMMENDED ORDER OF DISMISSAL

This cause came on to be heard on Petitioner's Suggestion of Absence of Jurisdiction filed before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings. Respondent filed a response, through counsel, to the motion. The arguments presented in the motion have been fully considered. The following appearances were entered:

APPEARANCES

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For Respondent: Keith C. Tischler, Esquire
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STATEMENT OF THE ISSUES

Whether the Division of Administrative Hearings (DOAH) has jurisdiction to conduct a formal hearing under the provisions of Sections 120.569 and 120.57(1), Florida Statutes, if a Petition for Relief is referred to the DOAH for formal hearing based on a Notice of Determination: No Jurisdiction issued by the Florida Commission on Human Relations (FCHR).

PRELIMINARY STATEMENT

On May 4, 1999, Petitioner filed with the FCHR a charge of discrimination against Respondent based on retaliation. The FCHR processed the Charge and issued a Notice of Determination: No Jurisdiction and mailed a copy to Petitioner on October 1, 2001. Petitioner was advised that she must file a Petition for Relief with the FCHR requesting a formal hearing within 35 days of the date of the Notice of Determination or her claim would be barred, pursuant to Section 760.11(7), Florida Statutes. Petitioner filed a Petition for Relief with the FCHR on November 5, 2001. Petitioner requested a formal hearing under the provisions of Section 120.57(1), Florida Statutes. The FCHR referred this matter to the DOAH on November 15, 2001, for a formal hearing. Respondent filed its Answer and Affirmative Defenses to the Petition for Relief on November 20, 2001. The hearing scheduled for January 15, 2002, on this matter was continued in order to permit Petitioner's newly retained counsel

time to prepare for hearing. Petitioner filed a Suggestion of Absence of Jurisdiction with supporting Memorandum of Law and Respondent filed a response to the Suggestion on January 16, 2002. Following review of the file and a careful review of the parties' positions, it is

FOUND AND DETERMINED that on or about October 1, 2001, the FCHR issued a "Determination: No Jurisdiction." The FCHR's Determination specifically stated that "[s]ince the Commission lacks jurisdiction over the Complaint of Discrimination, the Determination will not address the merits of the allegations contained in the Complaint." The "Notice of Determination: No Jurisdiction" instructed Petitioner that a Request for Hearing/Petition for Relief "must be filed within 35 days of mailing of this notice" and prescribed, through enclosing a Petition for Relief form, what the contents needed to be. Neither the Determination, nor the Notice of Determination advised Petitioner that she had the right to bring a civil action in circuit court or any other rights. Thus, Petitioner filed a Request for Hearing/Petition for Relief that sought review of the merits as well as the threshold issue of jurisdiction. Under the circumstances, the DOAH has no jurisdiction to consider the merits of Petitioner's claim. However, it does have jurisdiction to determine whether the FCHR

appropriately referred this matter to the DOAH for a formal administrative hearing.

CONCLUSIONS OF LAW

1. The Florida Civil Rights Act (FCRA) makes it a condition precedent for a complainant to seek relief in the circuit court that "the commission determines [sic] that there is reasonable cause to believe that a discriminatory practice has occurred," Section 760.11(4), Florida Statutes, but provides that if no such determination is made within 180 days, the aggrieved party may proceed to elect either a lawsuit or a DOAH proceeding. Section 760.11(8), Florida Statutes.

2. The FCRA provides two circumstances under which someone who has filed an administrative Charge of Discrimination with the FCHR either can or must take her case to the DOAH:

One, "[i]n the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred," Section 760.11(4), Florida Statutes, the complainant "may" request a DOAH hearing in lieu to filing a civil action, in which case the election of remedies is irreversible; and

Two, "[i]f the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred," the complaint may only

proceed with a DOAH hearing. Section 760.11(7), Florida Statutes.

3. The Administrative Procedures Act, Chapter 120, was substantially revised in 1996, and amended in 1999 and 2000. The 1999 amendments to Section 120.52(8), Florida Statutes, were intended to overrule St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998) which had created a "class of powers" test to determine the required authority of agencies to engage in rulemaking. The Legislature amended Section 120.52(8), Florida Statutes, with the clear intent to limit agencies' rulemaking authority. The amended provisions stated that it was not sufficient for a rule to fall within a class of powers granted to the agency; rather, it must "implement or interpret the specific powers or duties granted by the enabling statute." Section 120.52(8), Florida Statutes. See, Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000) and Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001).

4. Section 120.536, Florida Statutes 2001, provides in pertinent part:

> (1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be

> implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

5. The rationale of the FCRA's requirement that "[e]very charging party goes through initial screening by FCHR" is to avoid further congesting court dockets and also to avoid the impact on employers of having to defend against non-meritorious claims, by requiring an initial determination of cause before a litigant may go to circuit court. . . ." McElrath v. Burley, 707 So. 2d 836, 840 (Fla. 1st DCA 1998). Such a purpose contemplates an investigation into the merits of a claim prior to requiring a complainant to seek relief in the circuit court or through an administrative hearing.

6. The enabling statute, Section 760.06(12), Florida Statutes, only empowers the FCHR "[t]o adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992 and govern the proceeding of

the commission, in accordance with Chapter 120." The FCHR nonetheless attempted to expand the instances where it could refer matters to the DOAH through rulemaking, where complaints of employment discrimination included instances in which the FCHR has issued "a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness." Rule 60Y-5.008, Florida Administrative Code (2001).

The FCHR, however, cannot expand its jurisdiction, nor that of the DOAH, to determine the merits of cases other than those in which the complainant elects a DOAH hearing after a finding of reasonable cause, or is required to go through one following a finding that there is no reasonable cause. Swebilius v. Florida Constr. Industry Licensing Board, 365 So. 2d 1069, 1070 (Fla. 1st DCA 1979).

The issue here - a case in which neither of the conditions precedent to invoking the DOAH's jurisdiction have been met - is one of subject matter jurisdiction, which the FCHR can not waive nor confer upon itself or the DOAH. As the Swebilius court observed:

> Subject matter jurisdiction means the power of the court to deal with a class of cases to which the particular case belongs, Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926), and it concerns the power of the

> court to adjudge as to the general question involved before it. Quigley v. Cremin, 94 Fla. 104, 113 So. 892 (1927); Crill v. State Road Dept., 96 Fla. 110, 117 So. 795 (1928); Curtis v. Albritton, 101 Fla. 853, 132 So. 677 (1931). If a court has no jurisdiction over the subject matter, it has no jurisdiction to entertain questions pertaining thereto. Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927). Moreover such jurisdiction cannot be waived. Judicial proceedings which are taken without subject matter jurisdiction are void in the strictest sense of the term. Roberts v. Seaboard Surety Co., 158 Fla. 689, 29 So. 2d 743 (1947). For example, it has been held that the failure to make a timely objection to the circuit court's assumption of jurisdiction over an action for declaratory relief does not later preclude the objection from being raised on appeal. Pushkin v. Lombard, 279 So. 2d 79 (Fla. 3d DCA 1973), cert. den., Fla., 284 So. 2d 396 . . . .

Id. at 1070-1071.

Therefore, the DOAH has no jurisdiction over this claim since neither of the conditions precedent established by the statute, Sections 760.11(4)(b) or (7), have been satisfied.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that the FCHR resume jurisdiction of the matter and complete the investigation of the Charge of Discrimination, pursuant to Section 760.11(3), Florida Statutes, or permit Petitioner to make her election of remedies pursuant to Section 760.11(8), Florida Statutes.

DONE AND ENTERED this 15th day of February, 2002, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of February, 2002.

COPIES FURNISHED:

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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.