

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RONALD J. CLARDY,)
)
 Petitioner,)
)
 vs.) Case No. 04-1020
)
 DEPARTMENT OF CORRECTIONS,)
)
 Respondent.)
 _____)

ORDER OF DISMISSAL

This matter came on for consideration on Respondent's Motion to Dismiss filed March 30, 2004. Having reviewed the file and being otherwise advised in the premises, it is

ORDERED:

1. Section 760.11 establishes the process to be followed by Florida Commission on Human Relations (FCHR) when a charge of discrimination is filed. Section 760.11(3) and (7), Florida Statutes, states, in part:

(3) Except as provided in subsection (2), the commission shall investigate the allegations in the complaint. Within 180 days of the filing of the complaint, the commission shall determine if there is reasonable cause to believe that discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992. When the commission determines whether or not there is reasonable cause, the commission by registered mail shall promptly notify the aggrieved person and the respondent of the reasonable cause

determination, the date of such determination, and the options available under this section.

* * *

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

2. On January 30, 2004, FCHR issued a Notice of Determination: No Cause, in FCHR No. 2201672, Ronald J. Clardy vs. FL Department of Corrections and informed Petitioner of the determination and his subsequent right to request an administrative hearing within 35 days of its determination. Petitioner had 35 days from January 30 or until March 5 to request a hearing.

3. FCHR received a Petition for Relief from Petitioner on March 8, 2004, more than 35 days after FCHR entered its determination. On March 9, 2004, FCHR properly issued a Notice of Dismissal for failure to timely file a Petition for Relief within 35 days after the date of its determination. Florida Administrative Code Rule 60Y-5.008 and Section 760.11.

4. In response to the dismissal, Petitioner provided FCHR with documentation that he sent, by next day delivery, his

Petition for Relief to FCHR on the afternoon of March 4, 2004, (approximately 34 days after the date of the Notice of Determination: No Cause). However, for unknown reasons, the petition was not delivered to or received by FCHR until March 8, 2004 more than 35 days after the date of its determination. The petition was filed on the same date. Based on Petitioner's documents, FCHR issued a Rescission of Notice of Dismissal on March 19, 2004. As sole reasoning for its decision to rescind the Notice of Dismissal, the Commission cited the fact that the petition was sent "in a timely manner as required pursuant to Rule 60Y-5.008(1)."

5. Rule 60Y-5.008(1) states:

Petition. A complainant may file a Petition for Relief from an Unlawful Employment Practice within 35 days of the Date of Determination of Reasonable Cause, No Reasonable Cause, No Jurisdiction or Untimeliness. A complainant who is not represented by an attorney may file a Petition for Relief without copies or proof of service, and the Clerk shall prepare copies and serve them upon all other parties. (emphasis added)

6. Rule 60Y-5.008(3) states:

Procedures. Petitions for Relief, and proceedings thereupon, are governed by the provisions of Chapters 28-106 and Florida Administrative Code Rule 60Y-4, except as otherwise provided by this section.

7. Section 120.569(2)(c), states, in pertinent part:

A petition [for relief/hearing] shall be dismissed if . . . it has been untimely filed.

8. The statute and the rule unambiguously provide that the Petition for Relief must be filed within 35 days of the date of the determination by FCHR. This time is jurisdictional and cannot be added to. There is a difference between filing a petition and serving a petition. Filing by definition occurs and is complete when an agency actually receives a document. Fla. Admin. Code R. 28-106-104. Service occurs and is complete when mailed or posted. The act required by the statutes and rule is filing of a petition, not service of a petition.

9. In this case, Petitioner's Petition for Relief was not filed until received by FCHR on March 8, 2004, more than 35 days after the determination by FCHR. The fact that Petitioner sent the petition to FCHR on March 4, 2004, is irrelevant to a determination of when the petition was filed. FCHR has no authority to ignore the clear language of the statutes and rules. Therefore, the Petition for Relief is dismissed.

DONE AND ORDERED this 6th day of May, 2004, in Tallahassee,
Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2004.

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.