8-13-04

FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

SEP 21 2004

Treasurer and
Insurance Commissioner
Docketed by:

IN THE MATTER OF:

RIVERA & COMPANY
OF S.W. FLORIDA, INC.

Case No.75475-04-WC

04-1107

DSM-CWS

FINAL ORDER

This cause came on for consideration of the Recommended Order entered on August 13, 2004, by Administrative Law Judge Daniel Manry, to which Respondent replied by serving exceptions via facsimile transmission and regular U.S. mail to the agency's attorney of record in this cause on August 30, 2004. The Department timely filed Responses to those Exceptions.

However, Rule 28-106.204 F.A.C. clearly requires that pleadings and other documents to be filed with an agency are to be received by the agency clerk, and Section 120.57(1)(k), Fla. Stat., allows no more than fifteen days for receipt of exceptions. Filing is accomplished when the paper in question is delivered or placed into the hands *of the officer entitled to receive it.* U.S. v. Missco Homestead Assn., 185 F.2d 283 (8th Cir. 1950). Filing is complete once the paper in question is delivered to and received by *the proper officer.* Brooks By And Through McCook v. Elliott, 593 So.2d 1209 (Fla. 5th DCA 1992); Bituminous Casualty Corp. v. Clements, 3 So.2d 865 (Fla. 1941); Cook v. Walgreen Co. 399 So.2d 523 (Fla. 2nd DCA 1981). The instant exceptions were not filed in accordance with Rule 28-106.104, F.A.C, because they

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were not delivered to the agency clerk (the proper officer entitled to receive them) as required, but were instead transmitted by facsimile machine to the agency's attorney of record in this matter. Because the agency attorney of record is not an officer entitled to receive exceptions, and because the department has adopted no rule authorizing filings with its clerk to be accomplished by facsimile transmission, the exceptions have not been filed with the agency within the fifteen days prescribed by Section 120.57(1)(k), Fla. Stat., and Rule 28-106.217, F.A.C.

Moreover, that fifteen-day limitation is embodied in a statute enacted by the legislature. Unlike an administrative rule promulgated by an agency, which is necessarily directory State of Florida, Department of Environmental Regulation v. Puckett Oil Co., Inc., 577 So.2d 988 (Fla. 1st DCA 1991), the fifteen day limitation in Section 120.57(1)(k), Fla. Stat., should be seen as a jurisdictional bar against a later filing, enacted by the legislature to promote the timely administration of justice. Therefore, it seems that the instant exceptions are jurisdictionally barred from consideration by this agency.

However, in the absence of appellate case law directly on point, and in an abundance of caution, the exceptions, and the department's Response thereto, have been considered. That consideration shows that the exceptions are not persuasive, and display a substantial misunderstanding of the administrative law process.

The first five exceptions urge error based on the contention that the Administrative Law Judge (ALJ) did not find certain facts. The sixth exception urges error on a relevancy ground that has no apparent nexus to any material fact at issue in the proceeding, and the seventh exception seems to urge error because the finding of

fact coincides with a concession made by the Petitioner. None of those seven exceptions contend that the challenged findings of fact made by the ALJ are not supported by competent substantial evidence.

An agency can modify or reject a finding of fact made by an ALJ only if from a review of the entire record it can state with particularity that the finding in question is not supported by competent substantial evidence. Section 120.57(1)(l), Fla. Stat. Here, to the contrary, the record shows such support for the findings in question. Additionally, the first four exceptions are defective under Section 120.57(1)(k), Fla. Stat., because they fail to identify the disputed portion of the Recommended Order, and because they contain no citations to the record. Accordingly, the first seven exceptions are rejected.

The eighth exception attacks findings of fact not made by the ALJ within the paragraphs referenced in the exception. None of the quoted passages in the exception appear anywhere within the findings attacked in the exception, and the touted issue of "fair and proper" behavior by the department appears to be irrelevant and immaterial to the question of whether Petitioner should have secured workers compensation coverage for its non-independent contractor subcontractors. The record shows substantial competent evidence to support the ALJ's findings in paragraphs 25, 26, and 27 of the Recommended Order. Accordingly, the eighth exception is rejected.

The ninth exception attacks the conclusion of law announced in paragraph 30 of the Recommended Order, which, in some detail stated that the department had met its burden of proof. The ALJ's conclusion of law is amply supported by substantial competent evidence. Therefore the ninth exception is rejected.

The tenth, thirteenth, fourteenth, and fifteenth exceptions urge the unconstitutionality of the Florida Statutes referenced therein. The law is very well settled that state agencies, including the Division of Administrative Hearings, are without the judicial authority to hear constitutional challenges to statutes. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249 (Fla. 1987); Hays v. State Dept. of Business Regulation, Div. of Pari-Mutuel Wagering, 418 So.2d 331 (Fla. 3rd DCA 1982); Cook v. Florida Parole and Probation Comm'n, 415 So.2d 845 (Fla. 1st DCA 1982); Metropolitan Dade County v. Department of Commerce, 365 So.2d 432 (Fla. 3rd DCA 1978); Florida Hosp. v. Agency for Health Care Admin., 823 So.2d 844 (Fla. 1st DCA 2002). While constitutional challenges may be raised in an administrative forum, they cannot be disposed of in that forum but may be raised and disposed of on appeal. Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Imp. Trust Fund, 427 So.2d 153 (Fla. 1982); Florida Public Employees Council 79, AFSCME v. Department of Children and Families, 745 So.2d 487 (Fla. 1st DCA 1999); Cafe Erotica v. Florida Dept. of Transp., 830 So.2d 181 (Fla. 1st DCA 2002), reh. den. 845 So.2d 888. Therefore, while it was proper for Respondent to raise constitutional issues at final hearing, it is incorrect for Respondent to ascribe error to the ALJ for not disposing of those issues. Accordingly, the tenth, thirteenth, fourteenth, and fifteenth exceptions are rejected.

The eleventh exception, challenging the conclusions of law announced in paragraphs 31, 32, and 3 of the Recommended Order, is nothing more than a series of incorrect legal arguments made without record support or even a citation to the record. The challenged conclusions of law are correct statements of the law, and are supported

by competent substantial evidence in the record. Accordingly, the eleventh exception is rejected.

The twelfth exception is not directed to any conclusion of law or finding of fact, does not identify the disputed portion of the record, and contains no citations to the record. Thus, it is defective under Section 120.57(1)(k), Fla. Stat. Rather, it singularly posits a legal argument that is not clearly set forth in the record (and therefore cannot be assigned as error), and is incorrect. Section 120.57, Fla. Stat., cited in the exception, provides specified procedures designed to safeguard rights and interests extant under other laws; it does not in and of itself grant any substantive rights to anyone. To argue, as it seems the exception attempts, that the relief afforded by the procedures specified in Section 120.57, Fla. Stat. will come too late and is therefore inadequate to protect the interest at issue is to iterate an established exception to the doctrine of exhaustion of administrative remedies Mayflower Property, Inc. v. City of Fort Lauderdale, 137 So.2d 849 (Fla. 4th DCA 1962); Bruce v. City of Deerfield Beach, 423 So.2d 404 (Fla. 4th DCA 1982); Cherry v. Bronson, 384 So.2d 169 (Fla. 5th DCA 1980); Greenberg v. Mount Siani Medical Center of Greater Miami, Inc., 629 So.2d 252 (Fla. 3rd DCA 1993), but that iteration is not a basis on which to argue that agency action already tested in a 120.57 proceeding already concluded "violated F.S. 120.57". Section 120.57, Fla. Stat., cannot be "violated" through its invocation and usage; it can be violated only if its procedures are not followed during the administrative proceedings it governs. Moreover, an argument about an exception to the exhaustion doctrine is properly raised before and as an alternative to the invocation of Section 120.57 procedures, not afterwards. Accordingly, the twelfth exception is rejected.

Having considered the Recommended Order, the Respondent's Exceptions, the Department's Response, the record of proceedings conducted in accordance with Section 120.57(1), Florida Statutes, and being fully apprised in all material premises:

IT IS HEREBY ORDERED that the findings of fact and conclusions of law set forth in the Recommended Order are hereby adopted as the findings of fact and conclusions of law of the Department of Financial Services in this cause, and

IT IS FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is adopted by the Department, and that Respondent Rivera & Company of S.W. Florida, Inc. (Rivera), is required pay the sum of $66,920.26 to the Department.

IT IS ACKNOWLEDGED that on March 23, 2004, Rivera obtained a Release Of Stop Work Order from the Department by procuring the insurance coverage required by Chapter 440, Florida Statutes, and by paying the sum of $90,131.51 to the Department in accord with the then controlling Second Amended Order of Penalty Assessment.

IT IS FURTHER ACKNOWLEDGED that the difference between $90,131.51 and $66,920.26 has been refunded to Rivera by the Department.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla. R. App. P. Review proceedings must be instituted by filing a petition or Notice Of Appeal with the General Counsel, acting as the agency clerk, at 200 East Gaines Street, Tallahassee,

FL 32399-0333, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 14TH day of September, 2004.

Tom Gallagher
Chief Financial Officer

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