

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

DAVID BELGRAVE,

Petitioner,

v.

HUGHES SUPPLY, INC.,

Respondent.

EEOC Case No. 15DA301375-10

FCHR Case No. 23-03854

DOAH Case No. 04-3073

FCHR Order No. 05-088

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STATE COMMISSION ON HUMAN RELATIONS

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**ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

This cause came before the Commission for review of the Recommended Order of Dismissal issued in this matter on December 17, 2004, by Administrative Law Judge Daniel M. Kilbride.

After three continuances, pursuant to notice, public deliberations were held on July 7, 2005, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order of Dismissal.

Findings of Fact and Conclusions of Law

The Administrative Law Judge found that Petitioner failed to appear at the scheduled final hearing of this matter, and consequently recommended that the Petition for Relief be dismissed.

The Commission typically adopts the recommendation of the Administrative Law Judge that the Petition for Relief and Complaint of Discrimination be dismissed when the Petitioner has failed to appear at the scheduled final hearing of the case. See, e.g., Elam v. Flagler County, FCHR Order No. 04-062 (June 25, 2004), Collins v. Tallahassee Housing Authority, FCHR Order No. 03-080 (December 26, 2003), Peterson v. Pep Boys, FCHR Order No. 03-047 (August 11, 2003), and Knotts v. Department of Corrections, FCHR Order No. 03-052 (August 11, 2003).

However, a review of the record in this case raises some questions with regard to the adequacy of the notice of hearing to the Petitioner.

The Uniform Rules governing administrative proceedings state, "The presiding officer shall set the time and place for all hearings and shall serve written notice on all parties at their address of record. No less than 14 days notice shall be given for the hearing on the merits of the petition unless otherwise agreed by the parties or unless otherwise provided by law." Fla. Admin. Code R. 28-106.208.

The Administrative Procedure Act states that, in reviewing Recommended Orders of Administrative Law Judges, "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Section 120.57(1)(l), Florida Statutes (2003).

A review of the record reveals the following: (1) On the Petition for Relief, received by the Commission on August 23, 2004, Petitioner indicates that his address is 1864 Crystal Grove Drive, Lakeland, FL 33801; (2) The Notice of Hearing, scheduling a hearing in the matter for October 27, 2004, was sent to Petitioner at 1864 Crystal Grove Drive, Lakeland, FL 33801; (3) On October 22, 2004, Petitioner filed a document entitled, "Continuance Of Hearing," requesting that the scheduled October 27, 2004 hearing be continued and indicating that Petitioner's address is 3113 Woodhill Road, Winter Haven, FL 33881; (4) On October 22, 2004, Respondent filed a Response to Petitioner's Motion for Continuance and the certificate of service on that response indicates that it was served on the Petitioner by mailing it to him at 3113 Woodhill Road, Winter Haven, FL 33881-2200; (5) On November 2, 2004, the Administrative Law Judge issued an order granting Petitioner's request for continuance and re-scheduling the hearing for December 1, 2004, that indicates that it was served on Petitioner at 1864 Crystal Grove Drive, Lakeland, FL 33801.

Applying the above indicated legal provisions to the record, it would appear that the proceeding leading to the Recommended Order of Dismissal did not comply with the essential requirements of law in that the notice of the December 1, 2004, hearing does not appear to have been sent to Petitioner's address of record.

In recommending the Commission dismiss the Petition for Relief because of Petitioner's failure to appear at the scheduled hearing, the Administrative Law Judge stated, "The notices sent to Petitioner were addressed to the address provided by Petitioner, and prior to his letter of December 1, 2004, Petitioner has not attempted to inform DOAH of a new mailing address."

In our view, this is not what the record reflects. The record reflects that Petitioner filed a motion for continuance on October 22, 2004, containing a new address, and Respondent even responded to this motion, serving Petitioner at this new address. The Administrative Law Judge then issued an order granting the motion and re-scheduling the hearing, but inexplicably mailed this order to Petitioner's old address.

We conclude that the proceeding that led to the Recommended Order of Dismissal did not comply with the essential requirements of law because the notice of the hearing at which Petitioner failed to appear was not mailed to Petitioner's address of record. Fla. Admin. Code R. 28-106.208, and Section 120.57(1)(l), Florida Statutes (2003).

Exceptions / Motion to Reopen Case

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order of Dismissal in a document entitled, "Re-Schedule of Hearing," received by the Commission on January 10, 2005.

The document essentially argues that the notice of hearing for the hearing at which Petitioner failed to appear was sent to the wrong address.

The document was received by the Commission well past the 15-day time period from the date of the Recommended Order of Dismissal (December 17, 2004) for filing exceptions. See, Recommended Order of Dismissal, Notice of Right to Submit Exceptions; Section 120.57(1)(k), Florida Statutes (2003); and Fla. Admin. Code R. 28-106.217(1).

The Recommended Order of Dismissal indicates it was mailed to Petitioner's latest address. See Recommended Order of Dismissal, page 6.

Finally, there is no indication on Petitioner's exception document that it was served on Respondent by Petitioner as is required by Fla. Admin. Code R. 28-106.110.

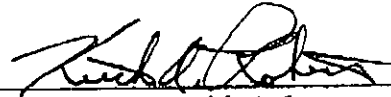
Petitioner's exceptions are rejected. Accord, generally, Francis v. Holmes Regional Medical Center, FCHR Order No. 04-138 (October 1, 2004), a "failure to appear" case where Petitioner's exceptions were rejected, but where a Commission panel remanded the case to the Administrative Law Judge for determination of whether Petitioner had received notice of the proceeding at which she failed to appear, where the record raised a question as to whether Petitioner had received notice of the hearing.

In our view, this Order is also dispositive of Petitioner's "Motion to Reopen Case," received by the Commission on April 7, 2005.

Remand

The Petition for Relief and Complaint of Discrimination are REMANDED to the Administrative Law Judge for further proceedings on the Petition for Relief consistent with this Order.

DONE AND ORDERED this ____ day of _____, 2005.
FOR THE COMMISSION ON HUMAN RELATIONS:



Commissioner Keith Roberts,
Panel Chairperson;
Commissioner Billy Whitefox Stall; and
Commissioner Mario M. Valle

Filed this 12th day of July, 2005,
in Tallahassee, Florida.



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Daniel M. Kilbride, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 12th day of July, 2005.

By: Verita Crawford
Clerk of the Commission
Florida Commission on Human Relations