

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANK M. BAFFORD, SR.,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 05-0966RU
)	05-1211RU
FLORIDA COMMISSION ON HUMAN)	05-1219RU
RELATIONS,)	05-1462RU
)	05-1664RU
Respondent.)	05-2050RU
_____)	

SUMMARY FINAL ORDER OF DISMISSAL

These causes came on for review upon numerous motions and the waiver by the parties of the need for an evidentiary hearing before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings (DOAH), in Tallahassee, Florida.

APPEARANCES

For Petitioner: Frank M. Bafford, Sr., pro se
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For Respondent: William J. Tait, Jr., Esquire
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STATEMENT OF THE ISSUES

Whether the Motions for Rule Challenge Proceedings (referred to as Petition(s)) filed in each of the above-cited cases meet the requirements both in form and substance, pursuant to Subsection 120.56(4)(a), Florida Statutes (2004);

Whether Respondent, Florida Commission on Human Relations (FCHR), has inherent authority to reconsider a Final Order it has issued; and

Whether FCHR should adopt a rule which would permit the granting of a motion to reconsider a Final Order.

PRELIMINARY STATEMENT

A. Petitioner, Frank M. Bafford, Sr., filed his first Petition against FCHR on March 15, 2005, and the case was assigned to the undersigned Administrative Law Judge (ALJ) and given DOAH Case No. 05-0966RU.

B. Petitioner requested a procedural change in his first Petition on March 23, 2005, and later gave a Notice of Clarification or Stay on March 28, 2005. Following a conference call, the undersigned ALJ issued an Order on April 1, 2005, placing the proceeding in abeyance, noting that the parties agreed that there are no disputed issues of material fact; that the issues remaining for determination are legal in nature, which can be determined by submittal of legal briefs; and that Petitioner fully understood that he was waiving his right to an evidentiary hearing in this matter. A schedule was set for the filing of the initial reply and response briefs on two issues. Petitioner submitted his initial "argument" on April 4, 2005.

C. Petitioner also submitted a second (April 1, 2005--DOAH Case No. 05-1211RU) and a third (April 4, 2005--DOAH Case

No. 05-1219RU) rule challenge. An Order was issued consolidating the two new rule challenges into the previous one and specifying dates for the briefs for those challenges. Petitioner submitted his initial brief on the two additional rule challenges and denoted "arguments" on April 14, 2005.

D. Petitioner submitted a fourth rule challenge (April 19, 2005--DOAH Case No. 05-1462RU), which was consolidated with the three previous cases.

E. On April 24, 2005, Petitioner submitted a Motion to Stay. A telephonic hearing took place on April 25, 2005, at which time Petitioner, Respondent's attorney, and the undersigned ALJ conferred about Petitioner's request. An Order placing the four pending rule challenge cases in abeyance was issued on May 4, 2005, suspending the briefing schedule and requiring a status briefing by the parties prior to June 1, 2005.

F. Petitioner then submitted his fifth (May 10, 2005--DOAH Case No. 05-1664RU) rule challenge and a third Order (May 13, 2005) consolidating that challenge with the four earlier ones was issued.

G. Petitioner, subsequently, filed a Motion for Extension of Stay on May 18, 2005, in which Petitioner requested a six-month stay on all pending cases. Petitioner alleged that he had "seen a professional and they [sic] have suggested that he take

this amount of time away from his cases." Respondent did not object to the motion, and on May 23, 2005, an Order was issued to abate the five consolidated cases until December 1, 2005.

H. Nevertheless, Petitioner then submitted his sixth (June 5, 2005--DOAH Case No. 05-2050RU) rule challenge, and a fourth Order (June 13, 2005) consolidating that challenge with the five earlier ones was issued. On June 16, 2005, an Order to abate the six consolidated cases until December 1, 2005, was issued.

I. While pursuing the above rule challenges, Petitioner had also filed two additional complaints of discrimination with FCHR based on the same set of events that occurred in the Spring of 2004 leading up to his initial complaint (FCHR Case No. 24-91007H) that was, subsequently, dismissed by FCHR upon his withdrawal of the Complaint that was pending before another ALJ (Bafford v. Hediger, et al., Case No. 04-3272 (DOAH December 16, 2004, Recommended Order of Dismissal and FCHR Final Order No. 05-017, February 22, 2005)).

J. While reserving its ruling on jurisdiction, FCHR accepted the two complaints for investigation on June 3, 2005, and July 27, 2005, respectively. The June 3, 2005, Complaint (FCHR Case No. 25-91671H) consisted of the same or similar facts and the same Respondents (with several additional Respondents in the same ownership group) as the initial complaint filed and,

subsequently, abandoned by Petitioner. The July 27, 2005, Complaint (FCHR Case No. 25-91672H) consisted of the same basic set of events leading to the initial and June 3, 2005, Complaints, but also included allegations of later actions. In addition, new allegations were filed against Petitioner's three sets of former attorneys and one of the original Respondents. It alleged a violation of Section 818 of the Federal Fair Housing Act (FHA), relating to intimidation, coercion and interference (harassment), and retaliation.

K. During the investigative phase of these new complaints, Petitioner filed additional rule challenges with the DOAH directed towards challenging FCHR's investigatory procedures and actions.

L. Petitioner filed his seventh (August 18, 2005--DOAH Case No. 05-2985RU) and eighth (August 18, 2005--DOAH Case No. 05-2986RU) rule challenge and moved for a telephonic conference. An Order consolidating the two cases was issued, as well as the Order Following Telephone Conference dated August 26, 2005. The Order required Respondent to file a response to Petitioner's motions on or before September 2, 2005, and allowed Petitioner to file a reply thereto on or before September 9, 2005. Both Respondent and Petitioner filed a timely response and reply, respectively.

M. Petitioner filed his ninth and tenth rule challenges (September 1, 2005--DOAH Case Nos. 05-3167RU and 05-3168RU). Petitioner, subsequently, filed a "Notice as Reminder" indicating that he seemed ready for a hearing on the challenge and had no current disabilities.

N. Petitioner filed his eleventh, twelfth, and thirteenth rule challenges (September 13, 2005--DOAH Case No. 05-3294RU; October 17, 2005--DOAH Case No. 05-3808RU; and October 26, 2005--DOAH Case No. 05-3981RU, respectively).

O. Petitioner has also brought suit against the same Respondents as in DOAH Case No. 04-3272, other than his attorneys, in both state and federal court based on the same set of alleged circumstances leading to his complaints with FCHR.

P. The Honorable James S. Moody, Jr., Judge of the United States District Court for the Middle District of Florida, Tampa Division, dismissed his federal case (Case No. 8:04-CV-1502-T-30MSS), on March 3, 2005, specifically finding that the facts of his case as alleged, including his "intent to dwell," did not change the finding that the underlying complaint was not covered by the FHA, citing Home Quest Mortgage LLC v. American Family Mutual Insurance Co., 340 F. Supp. 1177, 1186 (D. Kan. 2004); Shaikh v. City of Chicago, No. 00-C-4235, WL 123784, *4 (N.D. Ill. Feb. 13, 2001). The United States Court of Appeals for the Eleventh Circuit dismissed his appeal (Case No.

05-11309-11) on June 10, 2005, as frivolous. The court cited Eleventh Circuit Rule No. 42-4, which states: "Frivolous Appeals. If it shall appear to the court at any time that an appeal is frivolous and entirely without merit, the appeal may be dismissed." The rule also cross-references Rules 3 and 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. Section 1927.

Q. DOAH Case Nos. 05-2985RU, 05-2986RU, 05-3167RU, 05-3168RU, 05-3294RU, 05-3808RU, and 05-3981RU have been consolidated and abated.

R. The cases cited in paragraphs Q are being treated in a separate Summary Final Order of Dismissal.

S. Petitioner has also brought suit against the same Respondents as in DOAH Case No. 04-3272, other than his attorneys, in state circuit court, Case No. 04-04230 (Division E), in the Thirteenth Judicial Circuit in and for Hillsborough County. The Court dismissed the action with leave to amend and dissolved a Lis Pendens. Petitioner, subsequently, served a Second Amended Complaint and obtained a stay. It appears that this case is still pending.

T. Petitioner has also filed complaints with the Florida Bar against his former attorneys based on the same set of alleged circumstances leading to his complaints with FCHR. The

Florida Bar found no ethical violations by any of the attorneys involved and dismissed his complaints.

U. Petitioner has provided "arguments" for his petitions in DOAH Case Nos. 05-0966RU, 05-1211RU, and 05-1219RU and a "Reply to Respondent's Responses" for his petitions in DOAH Case Nos. 05-2985RU and 05-2986RU. Where Petitioner has supplied additional information beyond that contained in the Petition (as in DOAH Case Nos. 05-0966RU, 05-2985RU and 05-2986RU), Respondent has provided responses. In all other Petitions, including DOAH Case Nos. 05-1211RU and 05-1219RU, where Petitioner's "argument" merely consisted of attaching his original Petition, Respondent has provided responses to the extent possible.

V. On December 23, 2005, Petitioner filed his fourteenth (DOAH Case No. 05-4681RU) and fifteenth (DOAH Case No. 05-4688RU) rule challenge. Upon review by this ALJ, it was determined that the Petitions failed to comply with the statutory requirements of Subsection 120.54(1) and/or (4), Florida Statutes (2004), and were dismissed without prejudice. Petitioner was given 21 days to amend the Petitions in order to comply with the statute or the cases would be automatically dismissed with prejudice. The deadline has passed, and no amendment to the Petitions have been filed.

W. On January 3, 2006, Petitioner filed his sixteenth rule challenge (DOAH Case No. 06-0001RU). Upon review, it was determined that the Petition failed to comply with the statutory requirements of Subsection 120.54(1) and/or (4), Florida Statutes (2004), and was dismissed without prejudice. Petitioner was given 21 days to amend the Petition in order to comply with the statute or the case would be automatically dismissed with prejudice. The deadline has passed, and no amendment to the Petition has been filed.

X. On January 26, 2006, Petitioner filed four additional rule challenges (DOAH Case Nos. 06-0332RU, 06-0333RU, 06-0334RU, and 06-0335RU). Upon review, it was determined that the Petitions failed to comply with the statutory requirements of Subsection 120.54(1) and/or (4), Florida Statutes (2004), and were dismissed without prejudice. Petitioner was given 21 days to amend the Petitions in order to comply with the statute or the cases would be automatically dismissed with prejudice. The deadline has passed, and no amendment to the Petitions have been filed.

Y. During the Fall of 2005, while Petitioner continued to file additional rule challenges at DOAH, FCHR issued its Notice of Determination: No Cause in FCHR Case Nos. 25-91671H and 25-91672H (referred to in paragraph J). Petitioner timely filed his Petitions for Relief alleging housing discrimination and

other allegations on December 15, 2005, which were assigned DOAH Case Nos. 05-4562 and 05-4563, respectively. Immediately thereafter, Petitioner filed various motions with the undersigned ALJ seeking a stay or for the Petitions to be referred back to FCHR for further investigation. These motions were denied, and the matter set for hearing in Tampa on February 15 and 16, 2006. In addition to various other motions, on February 6, 2006, Petitioner filed a Motion for 90 Day Stay to Gather Thoughts, which was denied. On February 9, 2006, Petitioner filed a Notice of Impairment and other motions. In response thereto, an Order was issued directing Petitioner to show proof that Petitioner was under the care of a physician and that he was impaired and unable to appear at the final hearing and present his case. On February 13, 2006, Petitioner filed a Notice of Dr.'s Determination. Upon review, the notice was determined to be inadequate; and on February 14, 2006, the parties were notified that all pending motions would be heard before the undersigned ALJ prior to the commencement of the formal hearing scheduled for February 15 and 16, 2006, in Tampa. At 5:00 p.m. that same day, Petitioner filed a Notice of Dismissal in both cases. An Order Closing Files was issued on February 15, 2006, and the matter was referred back to FCHR for final agency action. FCHR has not entered a final order on those cases, as of the date of this Summary Final Order of

Dismissal. However, Petitioner has filed an appeal with the Second District Court of Appeal, which is still pending.

Upon a complete review of each of these files and being fully advised in the premises, it is

FOUND AND DETERMINED as follows:

1. In DOAH Case Nos. 05-0966RU; 05-1211RU; 05-1219RU, 05-1462RU, 05-1664RU and 05-2050RU, as to each case, there are no genuine issues as to any material fact. Fla. Admin. Code R. 28-106.204(4).

2. All petitions are found to be deficient in both form and substance, pursuant to the requirements set forth in Subsection 120.56(4)(a), Florida Statutes (2004). None of the Petitions include the text of the purported statement and few, if any, provide adequate descriptions of a purported statement. Where descriptions have been provided, the description does not state with particularity facts sufficient to show that the statement constitutes a rule under Section 120.52, Florida Statutes (2004), and that the agency has not adopted the statement by the rulemaking procedure provided by Section 120.54, Florida Statutes (2004).

AS TO DOAH CASE NO. 05-0966RU

3. Petitioner stated FCHR did not grant him his request for reconsideration of its Final Order dismissing his case (FCHR Order No. 05-017). In addition to being deficient in both form

and substance, as held above, the Petition is dismissed for the following additional reasons. Adding to his Petition filed on March 15, 2005, Petitioner filed a "Notice of Argument on Reconsideration" on April 4, 2005, pursuant to the Order dated April 1, 2005. In his "argument," he argues that FCHR has:

a. Inherent authority to reconsider its Final Order and cites several cases from Oregon and federal appellate courts in the sixth and second circuits. FCHR has not disputed that it has "inherent" authority to reopen cases for good cause in which it has issued Final Orders. However, a state agency's authority is limited. As cogently stated by the First District Court of Appeal in Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982), rev. den. 436 So. 2d 98 (Fla. 1983):

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights of individuals.

b. In the instant case, it is undisputed that Petitioner voluntarily dismissed his case before an ALJ in an open hearing after being advised that such withdrawal would cause his action to be dismissed with prejudice. Petitioner did not provide FCHR with any exceptions to the ALJ's Final Order dismissing the case and closing the file as provided in Florida Administrative Code Rule 28-106.217, and a FCHR panel on review determined that the case was appropriately dismissed. Even if FCHR granted a reconsideration of its Final Order dismissing the case and allowed Petitioner to file exceptions, FCHR is bound by the Finding of Facts in which the ALJ found that Petitioner, after being fully advised, voluntarily dismissed his case in an open hearing.

c. Petitioner further stated that FCHR provided an internal review process for complaints that are determined not to be within its jurisdiction by an intake investigator; that is, its letter informing a complainant that FCHR did not have jurisdiction to take their complaint contains a notice that the complainant can provide additional facts to modify the intake investigator's determination and have the issue reviewed by the legal department. Petitioner argued

that providing such a review constitutes a process for "reconsideration" by FCHR that should be available in his case.

d. Petitioner fails to appreciate the major differences in the nature of the decision in the intake case, that it was merely an initial determination by an intake investigator based on preliminary fact-finding. The Recommended Order entered in Petitioner's previous case before DOAH, in which the fact that his voluntary dismissal had been knowingly and voluntarily submitted, was determined by an ALJ in an open hearing and that determination was later reviewed by a panel of commissioners, who then issued the Final Order. Petitioner was informed of his proper remedy, appeal to the appropriate district court of appeal, in the Final Order. Petitioner has timely filed his Notice of Appeal.

e. Petitioner also argued that FCHR provided a "reconsideration" in two of its previous cases, thereby precluding it from not accepting Petitioner's request for reconsideration. The two cases he cites involve facts that are clearly distinguished from being applicable in the instant case (as discussed in paragraphs f and g below) and further support FCHR's

determination not to provide for reconsideration of its Final Orders. The law is clear that FCHR's Final Orders may be directly appealed to the appropriate district court of appeal.

f. In Youngs v. Toucan's Restaurant, Case No. 03-2457 (DOAH December 4, 2003, FCHR Case No. 21-00425), a FCHR panel reviewed an exception made by Petitioner arguing that "new evidence" should be taken on review of the Recommended Order of the ALJ. The panel determined that, although not provided in the "Uniform Rules of Administrative Procedure," a motion to remand to take new evidence could be considered by the panel. The panel considered the motion, construed it under Florida Rules of Civil Procedure 1.540, found it to be lacking and denied the motion (FCHR Final Order No. 04-116 dated September 22, 2004).

g. In Bamawo v. Department of Corrections, Case No. 02-3786 (DOAH September 13, 2003, FCHR Case No. 21-02010), a FCHR panel heard a motion by a petitioner to reopen his determination hearing (reviewing his Exceptions to the Recommended Order of an ALJ), since he was prevented from appearing (by telephone) by agents of the respondent. The panel recognized that the petitioner was prevented by the local prison

officials from appearing by telephone in his case. The panel did allow him to present his Exceptions and the Department of Corrections to rebut them, and proceeded to approve its initial determination to dismiss (FCHR Final Order No. 05-120 dated June 30, 2004).

h. Petitioner also fails to point out the fact that he was informed that FCHR at one time did have a rule for reconsideration in employment cases that was found to be confusing, misleading, and ineffective. It was repealed in 2000 in order to give adversely-affected parties a clear and immediate path to appellate review.

AS TO DOAH CASE NO. 05-1211RU

4. Petitioner stated that FCHR did not provide him with the standards to be used to determine "intent to dwell." In addition to being deficient in both form and substance, as set forth in paragraph 2 above, the Petition is also dismissed for the following additional reasons. Adding to his Petition filed on April 1, 2005, Petitioner filed a "Notice of Arguments" on April 14, 2005, pursuant to the Order dated April 11, 2005. The arguments consisted of the statements made in his Petition.

a. As stated by FCHR's attorney during the telephonic hearing, FCHR gathers, during its

investigation, the facts of a case from interviews, diaries of events, and other written statements provided by the parties and their witnesses in order to determine the facts relevant to a determination. A complainant is permitted to provide any information which he considers relevant to the complaint filed with FCHR. FCHR does not prejudge what facts are necessary, nor does it exclude any statements or facts provided. Upon establishing the facts of the case, based on the evidence provided or uncovered during its investigation, FCHR then applies the relevant legal standards to determine if, in fact, it has jurisdiction and whether there is reasonable cause to believe that an unlawful act of discrimination has occurred. The application of those standards is noted in the final determination.

AS TO DOAH CASE NO. 05-1219RU

5. Petitioner stated that FCHR did not have the authority to dismiss his case based on the fact that he dismissed his case at DOAH, because Petitioner had determined that "it was illegal and DOAH did not have jurisdiction over the case." In addition to being deficient in both form and substance, as set forth in paragraph 2 above, the Petition is also dismissed for the following reasons. Adding to this Motion for Rule Challenge

Proceeding filed on April 1, 2005, Petitioner filed a "Notice of Arguments" on April 14, 2005, pursuant to the Order dated April 11, 2005. The argument consisted of the statements made in his motion, which are both frivolous and have no basis in law or fact. The statements made by Petitioner are merely his opinion and belief. Petitioner has failed to cite any statute or case law to support his belief.

AS TO DOAH CASE NO. 05-1462RU

6. Petitioner stated in his Petition filed on April 19, 2005, that FCHR entered its Determination of "No Jurisdiction" without following the proper procedures. In addition to being deficient in both form and substance, as set forth in paragraph 2 above, the Petition is also dismissed for the following additional reasons. Petitioner stated that FCHR "reached a determination without doing an investigation." The statements made in his motion are both frivolous and have no basis in law or fact. FCHR issued its determination and detailed the results of its investigation resulting in its Finding of Facts and Law upon which it determined it had no jurisdiction.

AS TO DOAH CASE NO. 05-1664RU

7. Petitioner stated in his Petition filed on May 10, 2005, that FCHR has denied his request for hearing. In addition to being deficient in both form and substance, as set forth in

paragraph 2 above, the Petition is also dismissed for the following additional reasons. He has documented no evidence that he requested a hearing under Subsection 120.57(1), Florida Statutes (2004), or that he has shown the necessary elements for such a request.

a. Petitioner states "any party entitled to a hearing may demand that one be held even after the agency seemingly has taken final action [and cites] Capeletti Brothers, Inc. v. State, Department of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978)." Capeletti Brothers is not applicable to the facts in this case, because FCHR did not take any final action without a hearing. A determination by FCHR is a preliminary order from which a complainant may seek relief by filing a petition for a formal hearing to be conducted by DOAH, pursuant to Subsection 760.35(3)(b), Florida Statutes (2004). In this case, Petitioner filed such a petition, the case was transferred to DOAH, was granted a hearing, and later Petitioner withdrew his Petition before a ruling was made on the merits.

AS TO DOAH CASE NO. 05-2050RU

8. Petitioner stated in his Petition filed on June 5, 2005, that FCHR should withdraw its Final Order and correct it

for errors. In addition to being deficient in both form and substance, as set forth in paragraph 2 above, the Petition is also dismissed for the following additional reasons. Petitioner states FCHR should not "waste the tax payers [sic] money to argue their abuse of authority and lack of following the proper procedure in a host of Rule Challenge Proceedings and numerous hearings on disputed facts that Petitioner is legally entitled to, when they have the authority to simply correct the problem." This motion is clearly frivolous and made for improper purpose. It is also noted that Petitioner requested dismissal of this Petition in a motion filed on October 18, 2005.

ORDER

Based on the foregoing, it is

ORDERED that the Motion (Petition) for Rule Challenge Proceedings in Case Nos. 05-0966RU, 05-1211RU, 05-1219RU, 05-1462RU, 05-1664RU, and 05-2050RU are dismissed with prejudice.

DONE AND ORDERED this 27th day of March, 2006, in
Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
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Filed with the Clerk of the
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this 27th day of March, 2006.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.