

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS
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WALTER BOOTH,

Petitioner,

v.

CITY OF GAINESVILLE,

Respondent.

DIVISION OF
ADMINISTRATIVE
HEARINGS

EEOC Case No. NONE

FCHR Case No. 2006-02160

DOAH Case No. 07-1579

FCHR Order No. 07-053

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Walter Booth filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2005), alleging that Respondent City of Gainesville committed an unlawful employment practice on the basis of Petitioner's race (Black) by suspending Petitioner for five days from his position as a Code Enforcement Officer.

The allegations set forth in the complaint were investigated, and, on February 19, 2007, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held on June 21, 2007, in Gainesville, Florida, before Administrative Law Judge Don W. Davis.

Judge Davis issued a Recommended Order of dismissal, dated July 19, 2007.

Pursuant to notice, public deliberations were held on October 10, 2007, 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.

Findings of Fact

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the

Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Beach-Gutierrez v. Bay Medical Center, FCHR Order No. 05-011 (January 19, 2005), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a letter addressed to Commission Chief Legal Counsel, Cecil Howard, dated July 30, 2007, and received by the Commission on August 3, 2007.

With regard to exceptions to Recommended Orders, the Administrative Procedure Act states, "The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Section 120.57(1)(k), Florida Statutes (2007).

A review of Petitioner's exceptions document suggests that all the exceptions set out therein do not comply with this statutory provision.

In addition, parts of the document "except" to indicated findings of fact contained in the Recommended Order, but in the absence of a transcript of the proceeding before the Administrative Law Judge, the Commission is bound by the facts found in the Recommended Order, since there is no way for the Commission to determine the extent to which the facts found are supported by the testimony presented.

As indicated, the Commission's file does not contain a transcript of the proceeding on the merits before the Administrative Law Judge. With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, "The 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 the essential requirements of law [emphasis added]." Section 120.57(1)(l), Florida Statutes (2007). As stated above, in the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See, National Industries, Inc., supra. Accord, Jones v. Suwannee County School Board, FCHR Order No. 06-088

(September 11, 2006), Johnson v. Tree of Life, Inc., FCHR Order No 05-087 (July 12, 2005), Beach-Gutierrez, supra, and Waaser, supra.

Further, the Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

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. 28-106.104(2)(f) and (4), and Fla. Admin. Code R. 28-106.110.

Petitioner's exceptions are rejected.

Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 12th day of October, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Shahrukh S. Dhanji; and
Commissioner Anice R. Prosser

Filed this 12th day of October, 2007,
in Tallahassee, Florida.



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Don W. Davis, 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 October, 2007.

By: 
Clerk of the Commission
Florida Commission on Human Relations