

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN ZIOLKOWSKI,)
)
 Petitioner,)
)
 vs.) Case No. 10-9509
)
 PARK SHORE LANDING CONDOMINIUM)
 ASSOCIATION, ET AL.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, a final hearing was convened in this case on February 15, 2011, in Naples, Florida, before Elizabeth W. McArthur, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No appearance

For Respondent: James K. Parker, Esquire
Joseph G. Riopelle, Esquire
Boyd, Richards, Parker
and Colonnelli, P.L.
400 North Ashley Drive, Suite 1150
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether this case should be dismissed based on Petitioner's failure to appear at the scheduled final hearing.

PRELIMINARY STATEMENT

On June 25, 2010, Petitioner, John Ziolkowski (Petitioner or Mr. Ziolkowski), filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (FCHR), alleging that Petitioner had an unspecified disability and that Respondent, Park Shore Landings Condominium Association, Inc. (Respondent), discriminated against him by not providing a reasonable accommodation for his disability.

After investigation, the FCHR issued its Determination of No Cause, finding no reasonable cause to believe that a discriminatory housing practice occurred. Petitioner timely filed a Petition for Relief seeking an administrative hearing to contest the FCHR determination. On October 7, 2010, the case was forwarded to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

Due to the procedural nature of this decision, the remaining facts usually provided in a Preliminary Statement are set forth in the Findings of Fact below.

FINDINGS OF FACT

1. Upon receipt of the Petition for Relief at DOAH, an Initial Order was issued on October 8, 2010, requiring Petitioner to coordinate a joint response to provide certain information within seven days or to file a unilateral response,

if a joint response was not possible. Petitioner did not respond to the Initial Order.

2. On October 15, 2010, Respondent submitted a unilateral response indicating that Petitioner had not contacted Respondent to coordinate a response.

3. The undersigned issued a Notice of Hearing on November 5, 2010, scheduling the final hearing for December 8, 2010, at the Martin Luther King, Jr., Administrative Center in Naples, Florida. The notice included citations to the procedural statutes and rules governing the hearing and information about the parties' obligation to appear at the hearing with their witnesses and evidence. With the Notice of Hearing, the undersigned issued an Order of Pre-hearing Instructions, which required the parties to exchange witness lists and copies of their proposed exhibits at least seven days before the final hearing and to file their witness lists with DOAH. The Order warned that failure to comply with these requirements "may result in the exclusion at the final hearing of witnesses or exhibits not previously disclosed."

4. The foregoing Orders and notice were mailed to Petitioner at his address of record in New York, New York, and none of these envelopes was returned as undeliverable. Petitioner resides in New York, but as specified in the FCHR Determination of No Cause, Petitioner is a frequent visitor to

Naples, Florida, where his mother lives in a condominium she owns at Park Shore Landings. Indeed, it was Petitioner's rental of a unit at Park Shore Landings, on multiple occasions spanning multiple weeks that gave rise to Petitioner's complaint filed with FCHR.

5. On November 23, 2010, Respondent filed a Motion for Continuance because of difficulties coordinating Petitioner's deposition to accommodate Petitioner's holiday travel plans and scheduling conflicts. A continuance was granted for good cause shown, and the final hearing was rescheduled for February 15, 2011, at 9:00 a.m., in Naples, at a location to be determined at a later date. The Order stated that the previous Order of Pre-hearing Instructions remained in full force and effect.

6. An Amended Notice of Hearing was issued on December 9, 2010, to specify the hearing location: Martin Luther King, Jr., Administrative Center, 5775 Osceola Trail, Naples, Florida. This notice repeated the hearing date (February 15, 2011) and time (9:00 a.m.). The notice also reiterated that the parties were required to appear at the time and place of the hearing with their witnesses and evidence and that failure to appear may result in dismissal. The notice listed the name, address, and telephone number for the hearing room contact person at the hearing site. The notice was mailed to Petitioner at his address of record and was not returned undeliverable.

7. On December 15, 2010, Respondent filed a notice of taking Petitioner's deposition in Naples on December 22, 2010, at a court reporter's office near the scheduled location for the final hearing.

8. On February 2, 2011, the undersigned issued another Amended Notice of Hearing to advise that any party desiring a court reporter had to make arrangements at the party's own expense, with notice to the other party and to the undersigned. This notice repeated the final hearing date (February 15, 2011), time (9:00 a.m.), and location (Martin Luther King, Jr., Administrative Center, 5775 Osceola Trail, Naples). The notice also repeated the name, address, and telephone number for the hearing room confirmation contact person. Like all previous notices of hearing, the notice reiterated that parties were required to appear at the time and place of the hearing with their witnesses and evidence and that "[f]ailure to appear at this hearing may be grounds for entry of an order of dismissal."

9. On February 8, 2011, in accordance with the Order of Pre-Hearing Instructions, Respondent filed its witness list, with names and addresses for five witnesses and a certification that Respondent's exhibits had been provided to Petitioner. No witness list was filed by Petitioner.

10. On February 10, 2011, Respondent gave notice to the undersigned and to Petitioner that Respondent had retained a court reporter to record the February 15, 2011, final hearing.

11. The undersigned traveled from Tallahassee to Naples on Monday, February 14, 2011, and stayed overnight at a hotel in Naples, in order to convene the hearing scheduled for 9:00 a.m., the next morning.

12. On February 15, 2011, the undersigned arrived at the noticed hearing location at approximately 8:30 a.m. Counsel for Respondent (from Tampa) and four of Respondent's witnesses were already present. Arriving at the same time as the undersigned was Respondent's fifth witness and the court reporter.

13. At 9:00 a.m., the undersigned went on the record to convene the scheduled hearing to allow counsel for Respondent to enter his appearance for the record and to announce that Petitioner had not appeared or contacted anyone to explain his absence. The undersigned then recessed the hearing for 20 minutes in case Petitioner was running late.

14. At 9:12 a.m. (as time-recorded by the undersigned's mobile phone), the undersigned called her assistant at DOAH to determine whether Petitioner had called DOAH or submitted anything in writing that would explain his failure to appear for the scheduled hearing. The undersigned's assistant stated that no calls or filings had been received and that she would call

the undersigned on her mobile phone immediately, if Petitioner contacted her.

15. Meanwhile, to make sure that Petitioner was not on the premises unable to find the hearing room, one of Respondent's representatives checked at the front desk, where anyone entering the building would have to check in and go through the security procedures, and verified that Petitioner had not arrived.

16. Shortly after 9:20 a.m., the undersigned went back on the record to state that Petitioner had still not appeared, nor had Petitioner contacted DOAH or someone at the hearing site. The undersigned recited the steps taken to verify the absence of contact by Petitioner; reviewed the file, noting the multiple notices and Orders mailed to Petitioner; and confirmed Petitioner's address of record to which the notices and Orders were mailed and not returned as undeliverable.

17. Respondent represented that Petitioner did not show up for the first deposition scheduled in coordination with Petitioner's calendar, but that Petitioner did appear the second time his deposition was set. Respondent also represented that Petitioner did not provide Respondent with a witness list or copies of any proposed exhibits. Respondent had no other information about Petitioner's whereabouts or intentions.

18. Based on Petitioner's failure to appear and present a prima facie case to meet his burden of proof, the convened

hearing was adjourned shortly before 9:30 a.m. Those present took some time to pack up computers and files and move furniture to restore the room to its prior configuration. Thus, it was after 9:30 a.m., when the undersigned exited the building, after checking again at the front desk to verify there was still no sign of, or word from, Petitioner.

19. The undersigned drove to a hotel located eight minutes from the hearing site. Upon arrival, the undersigned's mobile phone rang, but could not be answered before the call went to voice mail. A voice mail message was left by the undersigned's assistant, time-recorded at 9:51 a.m.

20. The message was that the undersigned's assistant had just spoken with Mr. Ziolkowski, who had called to say that he was at the hearing site, but no one was there. Petitioner told the assistant that he had been at the emergency room until an hour earlier (i.e., until 8:45 a.m.), and he went straight to the hearing site. The undersigned's assistant asked Petitioner why he had not called sooner, and his only response was that he did not have his mobile phone; but when asked how he was calling her then, he said he was calling from his mobile phone, and he gave the assistant his mobile phone number, which had not been provided previously. Petitioner then asked the undersigned's assistant about rescheduling the hearing. She explained that she had no authority to address his request; if Petitioner

wanted the undersigned to consider a request for relief, it had to be submitted in writing and should provide any explanation and documentation he had as to why he could not be at the hearing and why he could not call.

21. A memorandum from Mr. Ziolkowski was filed at DOAH by fax on February 16, 2011, at 2:40 p.m. The one-page memorandum, with no attachments and no certificate of service indicating service on Respondent, stated in pertinent part:

Please accept my apologies for not being able to communicate with you yesterday regarding my delayed appearance to your courtroom.

I was in the emergency room at Naples Community Hospital until 8:11 am Tuesday (2/15/11).

I went straight from the hospital to the Administrative center and I didn't have my mobile phone or directions to the Administrative center and finally I reached the Administrative center at approximately 9:30 a.m.

Petitioner ended the memorandum with a request to reschedule the final hearing. Copied onto the bottom of the page was a small label, perhaps a hospital-issued identification bracelet bearing Petitioner's name and date of birth, a reference number and several other numbers, "NCH 02/15/11," and a bar code.

22. The undersigned issued a Notice of Ex-Parte Communication with the memorandum attached, which was mailed to both parties.

23. On February 28, 2011, Respondent filed its Objection to Petitioner's Request for Re-Hearing. Respondent's objection asserted that the documentation offered by Petitioner was insufficient to prove that Petitioner was at Naples Community Hospital until 8:11 a.m. on February 15, 2011, because the identification label only showed a date, February 15, 2011, which could be as early as 12:01 a.m., or as late as many hours after the scheduled hearing. Petitioner chose not to provide the documentation that he apparently had to show the precise time that he left the emergency room--8:11 a.m. (more than 30 minutes earlier than he told the undersigned's assistant on the telephone). Such documentation would also likely reveal such information as the time of day or night when Petitioner was clocked in at the emergency room; why Petitioner presented at the emergency room; what, if anything, was wrong with Petitioner; and whether he received any treatment or whether treatment was deemed unnecessary.

24. Respondent's objection went on to note that even assuming the accuracy of Petitioner's stated departure time of 8:11 a.m., from Naples Community Hospital, that hospital has only two campuses, "one of which is six minutes and the other is fifteen minutes away from the location of the hearing."

25. Respondent's objection concluded, "At bottom, Petitioner was not in the emergency room at the time of the

hearing, had ample time to attend the hearing, and has provided no evidence to support his request to re-schedule the duly-noticed February 15, 2011 hearing."

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.35, Fla. Stat. (2010).^{1/}

27. Petitioner has the burden of proof in this proceeding. He must prove by a preponderance of the evidence his allegations that he has a disability/handicap and that Respondent engaged in a housing discriminatory practice by not providing a reasonable accommodation for such disability/handicap. See §§ 760.34(5) and 120.57(1)(j).

28. Petitioner failed to appear at the time and place noticed for the final hearing. In addition, Petitioner failed to provide notice prior to or at the time the final hearing was scheduled to commence that he would be unable to attend the hearing at the time it was scheduled. Petitioner was required to appear at the scheduled hearing, with witnesses and evidence necessary to meet his burden of proof. As stated in the Notices of Hearing, Petitioner's failure to do so constitutes grounds for dismissal.

29. Petitioner's written submission the day after the scheduled hearing fails to provide sufficient excuse or documentation to explain Petitioner's failure to appear at the time and place of the scheduled hearing or to at least call to alert those convened, prepared to proceed, and waiting for Petitioner to appear that he would be delayed.

30. In effect, Petitioner's belated request to reschedule the hearing that was scheduled, convened, and adjourned on February 15, 2011, is an after-the-fact request for continuance. A motion for continuance must generally state good cause to cancel and reschedule a final hearing; however, the standard is substantially higher when a continuance is requested less than five days before the scheduled hearing. In such a case, the motion must demonstrate grounds that constitute an emergency. Fla. Admin. Code R. 28-106.210.

31. Petitioner's request fails to demonstrate any emergency that would justify rescheduling the final hearing. Instead, Petitioner's own written submission filed the day after the scheduled hearing admits that he was available and able to attend the final hearing at the time it was scheduled. Petitioner would have been at the hearing site on time with the exercise of reasonable diligence. Petitioner offered no reasonable excuse for not being able to travel a short distance (either six or 15 minutes from the hospital) in less than

49 minutes, so as to arrive at the hearing on time. Petitioner does not claim that he was incapacitated; Petitioner does not even state what prompted him to go to the hospital. Regardless, whatever problem may have existed earlier admittedly subsided by 8:11 a.m., when Petitioner acknowledges that he was fully capable of driving himself from the hospital to the hearing site. Petitioner's only excuse for not arriving at the hearing site on time was his claim that he did not have directions to the hearing site. Petitioner could have, and should have, asked for directions if, in fact, he was unsure of the way to the hearing site.

32. Even without being reasonably diligent, by having the slightest regard for the hearing process, Petitioner could have, and should have, gotten word to the undersigned by the time the hearing was scheduled to begin that he intended to appear, but might be delayed. Petitioner's written submission is wholly inadequate to excuse or explain his failure to call anyone--the undersigned's office; the Martin Luther King, Jr. Administrative Center; or the hearing room contact person, whose name, address, and telephone number appeared on the Notices of Hearing--at any time from 8:11 a.m., until Petitioner finally called the undersigned's office at approximately 9:45 a.m.

33. Petitioner's only offered explanation for failing to call when he left the hospital and supposedly went straight to

the hearing site (but took 90 minutes to get there), was that he did not have a cell phone. Petitioner's claim, even if true, does not excuse his failure to call. The lack of a mobile phone does not constitute an emergency. There are other phones available for use. For example, hospitals have phones. Surely, Petitioner would have been allowed to use a phone when leaving the emergency room to call for directions or to get word that he might be delayed. Knowing that the hearing was scheduled to start at 9:00 a.m., it was inexcusable for Petitioner to not seek out a telephone to get word of his delay, at least at some point in the 49 minutes after he left the hospital when it would have become obvious to Petitioner that he would not arrive to the hearing on time. Indeed, if Petitioner had called at any time within one hour and nine minutes after leaving the hospital, the hearing would have still been convened. Instead, Petitioner continued on for more than 30 minutes after the hearing began, knowing he was late, and still did not take any reasonable step to contact anyone.

34. Although Petitioner claims he did not have his mobile phone, inexplicably, Petitioner had his mobile phone to call the undersigned's assistant at 9:45 a.m., when he reported that he was at the hearing site but that no one else was there. Even if Petitioner meant to say that he had been to the hearing site and left to go retrieve his mobile phone, then his mobile phone was

awfully close to the hearing site, only minutes away. Thus, even if Petitioner had been unwilling to seek out another phone after he left the hospital at 8:11 a.m., it is inexplicable why he would not have gone to get his mobile phone instead of, apparently, spending over 90 minutes to drive directly to the hearing site that was 15 minutes away, or less, from the hospital.

35. Petitioner's submission lacks competent substantial evidence to support the unverified facts stated therein, but even if the facts were supported, the submission is insufficient to establish that an emergency kept Petitioner from appearing at the final hearing at the time it was scheduled or that an emergency kept Petitioner from contacting the undersigned's office before the final hearing was scheduled to commence. Moreover, Petitioner's written submission does not attempt to provide any excuse for not complying with the pre-hearing requirement to exchange witness lists and copies of exhibits with Respondent at least seven days before the final hearing. Thus, it is unclear how Petitioner intended to meet his burden of proof even if he had appeared at the scheduled final hearing.

36. In Lesia Patterson v. Panama City Housing Auth., Case No. 10-8661 (DOAH Oct. 21, 2010), adopted in Final Order 11-001 (FCHR Jan. 13, 2011), the Administrative Law Judge recommended, and the FCHR agreed, "when a Petitioner fails to appear at the

scheduled administrative hearing in their case, they fail to meet their burden of proof and the Petition for Relief should be dismissed." Final Order 11-001, at 2, Emphasis added. This FCHR Final Order provides a long list of citations to cases applying this principle. Id.

37. So too, in this case, Petitioner failed to appear at the scheduled administrative hearing, thus, failing to meet his burden of proof. Moreover, Petitioner failed to demonstrate that circumstances prevented him from appearing at the time and place noticed for the final hearing or that circumstances prevented him from contacting someone to get word to the undersigned that he would be delayed. Everyone else involved in the hearing process went to the time, effort, and expense of preparing for and appearing at the scheduled hearing requested by Petitioner. Petitioner's after-the-fact request to reschedule another final hearing does not demonstrate good cause, much less the sort of emergency required to support the requested extraordinary relief.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner, John Ziolkowski's, Petition for Relief.

DONE AND ENTERED this 8th day of March, 2011, in
Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 2011.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

COPIES FURNISHED:

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

John Ziolkowski
333 West 57th Street, Apartment 807
New York, New York 10019

James K. Parker, Esquire
Joseph G. Riopelle, Esquire
Boyd, Richards, Parker,
and Colonnelli, P.L.
400 North Ashley Drive, Suite 1150
Tampa, Florida 33602

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.