

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

SUPPLEMENTAL
RECOMMENDED ORDER OF DISMISSAL ON REMAND

This Supplement to Recommended Order of Dismissal is issued for the purpose of addressing Petitioner's (second) request to reschedule the final hearing, with affidavit, which was not filed until after issuance of the Recommended Order of Dismissal and the closure of the file of the Division of Administrative Hearings.

STATEMENT OF THE ISSUE

The issue in this Supplement to Recommended Order of Dismissal is whether Petitioner's second request to reschedule the final hearing, with affidavit, which was not filed until after issuance of the Recommended Order of Dismissal, should be granted or whether the request should be denied for the reasons stated in the Recommended Order of Dismissal, as supplemented here.

PRELIMINARY STATEMENT

Following Petitioner's failure to appear at the scheduled final hearing on February 15, 2011, or to timely notify anyone that he would be delayed, on February 16, 2011, Petitioner submitted a request to reschedule the final hearing. Since Petitioner's request was not served on Respondent, the undersigned issued a Notice of Ex-Parte Communication and attached Petitioner's request to reschedule the final hearing to the Notice.

On February 28, 2011, Respondent filed its Objection to Petitioner's Request for Re-Hearing.

Upon consideration of the filings by both parties, the undersigned issued a Recommended Order of Dismissal on March 8, 2011, based on Petitioner's failure to appear at the scheduled hearing and, also, based on Petitioner's failure to adequately demonstrate that an emergency justified his after-the-fact request for continuance to reschedule the final hearing, to demonstrate good cause for his failure to appear at the hearing when scheduled, or to notify those present for the hearing of his delay.

After the Recommended Order of Dismissal was issued and the Division of Administrative Hearings case file was closed, on March 9, 2011, Petitioner filed another Request to Reschedule

the Final Hearing, this time accompanied by an affidavit executed by Petitioner.

The Florida Commission on Human Relations (Commission) issued an Order on May 13, 2011, remanding this case to the Division of Administrative Hearings (DOAH) for the following purpose:

We are not yet ready to adopt the Administrative Law Judge's conclusion that the case be dismissed.

The day after the issuance of the Recommended Order of Dismissal, Petitioner filed with the Division of Administrative Hearings (with a copy to the Clerk of the Commission) a "Request for Rescheduled Hearing," and accompanying affidavit. For the disposition of this filing we follow the guidance of Shaker Lakes Apartments Company d/b/a Seasons v. Dolinger, 714 So. 2d 1040 (Fla. 1st DCA 1998).

In Dolinger, the Respondent failed to appear at the scheduled administrative hearing in the case, and the Court found that the Commission abused its discretion in not considering Respondent's motion for remand asking for a new evidentiary hearing, filed after the issuance of the recommended order but prior to the issuance of the Commission's final order. The Court remanded the case to the Commission to either consider the motion or remand the matter to the Administrative Law Judge to consider the motion. In addition, in a concurring opinion, it was suggested by one of the Judges considering the case that the appropriate action for the Commission to take would be to remand the case to the Administrative Law Judge since "the question whether to reopen or redo the formal administrative hearing does not depend on

legal conclusions 'over which [the Commission] has substantive jurisdiction'"--referring to the section of the Administrative Procedure Act which limits an agency to rejecting or modifying only those conclusions of law over which it has "substantive jurisdiction"--at the time of the Dolinger decision, Section 120.57(1)(j), Florida Statutes (Supp. 1996), now codified as Section 120.57(1)(1), Florida Statutes (2010).

Following the guidance of Dolinger, supra, we conclude that the matter should be remanded to the Administrative Law Judge for consideration of Petitioner's "Request for Rescheduled Hearing," and accompanying affidavit, filed March 9, 2011.

The Commission's Order also stated that neither Petitioner, nor Respondent, had filed any exceptions to the March 8, 2011, Recommended Order of Dismissal.

Following receipt of the Commission's Order, the undersigned issued an Order Reopening Case on May 16, 2011, for consideration of Petitioner's (second) request for rescheduled hearing, with accompanying affidavit. As stated in the Order Reopening Case, Petitioner's second request to reschedule the final hearing would be treated as a motion in accordance with DOAH procedural rules. Pursuant to Florida Administrative Code Rule 28-106.204, Respondent was entitled to an opportunity to file a written response to the motion, and, accordingly, the Order Reopening Case provided that Respondent would be allowed to submit a written response by May 31, 2011.

Respondent timely filed its objection to Petitioner's second request to reschedule the final hearing.

FINDINGS OF FACT

Upon due consideration of Petitioner's second request for rescheduled hearing, with affidavit, filed on March 9, 2011, and Respondent's objection thereto, the following Findings of Fact are made to supplement those in the Recommended Order of Dismissal:

1. Petitioner has now filed two different requests to reschedule the final hearing after he did not appear or timely notify anyone that he would be delayed to the scheduled final hearing. Petitioner's first request to reschedule the final hearing and Respondent's objection to that request were addressed in the March 8, 2011, Recommended Order of Dismissal.

2. Petitioner's second request for rescheduled hearing adds nothing material to his first request for rescheduled hearing; indeed, in several respects, facts asserted in the second request and affidavit are facially inconsistent with facts stated in the first request, undermining both submissions.

3. In sum, Petitioner's second request for rescheduled hearing and supporting affidavit confirm and document that at 8:11 a.m., on February 15, 2011, Petitioner was given an unrestricted discharge from his visit to an emergency room. Petitioner had more than ample time to go to the hearing site

before the scheduled start time of 9:00 a.m. Yet, Petitioner did not call and did not arrive until sometime after 9:35 a.m., when the undersigned had left the premises.

4. According to Petitioner's affidavit, Petitioner woke up that morning not feeling well, but admittedly was well enough to drive himself to a hospital emergency room that was apparently just minutes from the hearing site and, also, from wherever he was when he woke up that morning. Petitioner claims that in the short time between waking up that morning, driving himself to the emergency room, and being discharged at 8:11 a.m., that he underwent a "battery of tests." Apparently, nothing was found to be wrong with Petitioner, because he attributed his feelings that morning to "anxiety to the fact that I had to go to court, which then caused a panic attack[.]"

5. Petitioner claims to have been given an unnamed "sedative" at the emergency room, but there was no documentation of any such treatment or of a "battery of tests." Instead, the only documentation attached to the affidavit was Petitioner's discharge paperwork, giving as the only discharge instruction that Petitioner should make an appointment for a follow-up visit in three days with a Naples physician at a gastroenterology office.

6. Petitioner's discharge instructions issued at 8:11 a.m., contained no restrictions on any activities,

including driving, and so he apparently was considered sufficiently recovered from his ailment and whatever treatment he may have been given to be fully functional and able to drive by 8:11 a.m.

7. Petitioner claims that he did not leave the hospital campus immediately upon his discharge at 8:11 a.m., because he chose to take the time to try to fill a prescription at the hospital's pharmacy and to call the doctor's office to schedule his follow-up visit in three days, rather than leave right away to go to the hearing scheduled to begin at 9:00 a.m.

8. Petitioner claims, as he did in his first request to reschedule the final hearing, that he did not have his mobile phone with him, apparently to explain why he did not attempt to call DOAH or the hearing site to advise that he might be delayed. The Recommended Order of Dismissal addresses why the failure to have a mobile phone was insufficient to excuse Petitioner from not finding another phone to use to contact either DOAH or the hearing site at the point when it became apparent that he would be delayed. As detailed therein, the hearing was scheduled to begin at 9:00 a.m., and Petitioner knew that. The undersigned, Respondent's counsel, Respondent's five witnesses, and the court reporter arranged by Respondent were all on site by 8:30 a.m. The undersigned did not leave the hearing site until 9:35 a.m. Petitioner somehow managed to have

his mobile phone by 9:45 a.m., when he called the undersigned's assistant at DOAH in Tallahassee to say he was at the hearing site, but no one else was there.

9. Petitioner's second request for rescheduled hearing and affidavit add this to the consideration: Apparently, Petitioner indeed had access to a telephone while still at the hospital and claims to have used that access not to call DOAH or the hearing site, but to call the doctor's office to schedule a follow-up appointment three days hence. Yet, Petitioner's first request to reschedule the hearing represented that Petitioner left Naples to fly back to New York the next day. That fact is corroborated by Petitioner's first request itself, which was sent via facsimile from a "212" area code on February 16, 2011, the day after the scheduled hearing. Thus, it is unclear why Petitioner would have been scheduling a doctor's appointment in Naples two days after he left Naples. But in any event, Petitioner could have, and should have, utilized that phone access to contact DOAH or the hearing site to let those waiting know that he might be delayed.

10. Petitioner's stated choice to wait around for 30 minutes to attempt to fill a prescription and make his doctor's appointment for three days later, only to leave before getting the prescription when he realized he "wasn't going to make it to my hearing unless I left right away", does not

justify or excuse Petitioner's failure to make it to his hearing on time or even within 30 minutes of the scheduled start time, when the hearing participants would have still been present.

11. Petitioner also claims, as he did in the first request for rescheduled hearing, that he did not have the notice of hearing with him in the car and so he did not have the address for his hearing. Yet he claims to have stopped at a CVS drug store to ask directions and that he wrote down the directions to take him the few short blocks to "Osceola Trail" where the hearing was. Thus, Petitioner's assertion that he did not have the address for his hearing is contradicted by his own statement that he knew where he was going so as to ask for directions.^{1/}

12. The most glaring omission in the second request for rescheduled hearing and supporting affidavit, as with the first request, is Petitioner's failure to provide any excuse or explanation for not attempting to call DOAH or the hearing site at any time before 9:45 a.m., when Petitioner finally called the undersigned's assistant upon arriving at the hearing site after everyone had left. That Petitioner was able to call the undersigned's assistant at 9:45 a.m., belies any suggestion that Petitioner did not know what number to call or that Petitioner did not have access to a telephone. Indeed Petitioner's affidavit admits to having access to telephones at numerous junctures--at the hospital after being given an unrestricted

discharge; at the CVS drugstore where he stopped for directions; and at 9:45 a.m., when he told the undersigned's assistant that he was calling from his mobile phone.

13. A further omission to Petitioner's first request for rescheduled hearing noted in the Recommended Order of Dismissal is not cured by Petitioner's second request for rescheduled hearing and affidavit. Petitioner's second request and affidavit fail to provide any excuse or justification 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 could have met his burden of proof, even if he had appeared at the scheduled final hearing.

CONCLUSIONS OF LAW

14. 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); FCHR Order of remand.

15. Based on the Supplemental facts found above, the undersigned concludes that Petitioner's second request for rescheduled hearing, with supporting affidavit, fail to excuse or justify Petitioner's failure to appear or contact anyone to advise of his delay to the final hearing. Thus, the Recommended Order of Dismissal entered on March 8, 2011, is reaffirmed, as

supplemented by this Supplement to Recommended Order of Dismissal.

16. The FCHR Order remanding this matter instructed the undersigned to give due consideration to Petitioner's second request for rescheduled hearing and supporting affidavit. As found above, Petitioner's request for rescheduled hearing and supporting affidavit, filed on March 9, 2011, add nothing material to Petitioner's first request for rescheduled hearing filed on February 16, 2011, which was fully addressed in the Recommended Order of Dismissal.

17. Thus, this case is unlike Shaker Lakes Apartments Co. d/b/a Seasons v. Dolinger, 714 So. 2d 1040 (Fla. 1st DCA 1998), cited in the FCHR Order of remand. In Dolinger, it was the respondent who failed to appear at the scheduled administrative hearing and did not file anything in the case at all until after issuance of the recommended order. At that point, the respondent, Shaker Lakes, filed a motion to remand asking for a new evidentiary hearing, because it had been erroneously informed that it was being represented in that hearing by counsel for its insurance company. Shaker Lakes first learned that it was not represented at the hearing when it received the recommended order. FCHR did not consider the motion to remand, because the respondent did not file exceptions to the recommended order and did not file a transcript of the final

hearing. However, as the court pointed out, the respondent was in no position to file exceptions, which must be based on the administrative hearing record, when the respondent's complaint was that he was deprived of an opportunity to participate in the hearing.

18. In contrast, in this case Petitioner has had every opportunity to participate in the administrative hearing that he requested. Petitioner admits that he was well aware of when and where the hearing was scheduled to take place and that his visit to the nearby emergency room was completed by 8:11 a.m., in plenty of time for him to make it to the hearing on time had Petitioner been exercising due diligence. Petitioner has given no excuse or justification for not appearing at the hearing site for more than one hour and 24 minutes after he was given an unrestricted discharge. Petitioner has given no excuse or justification for not calling anyone to say he would be delayed, at any time before the parties left the hearing site at 9:35 a.m. Petitioner failed to exercise due diligence and has shown no grounds for granting an after-the-fact continuance to reschedule the hearing that Petitioner failed to attend.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, which supplement the Findings of Fact and Conclusions of Law in the March 8, 2011, Recommended Order of Dismissal, 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 29th day of June, 2011, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2011.

ENDNOTE

^{1/} Petitioner's assertion that he stopped at a CVS drugstore and got directions to the hearing site, the Martin Luther King Jr., Administrative Center on Osceola Trail, is inconsistent with Petitioner's first request to reschedule the final hearing, in which he stated that he "went straight from the hospital to the Administrative center" and that he "didn't have . . . directions to the Administrative center[.]"

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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.