

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DOMINICK DAVIS,

Petitioner,

vs.

Case No. 15-6002

JACKSONVILLE HOUSING AUTHORITY,

Respondent.

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RECOMMENDED ORDER OF DISMISSAL

This cause comes before W. David Watkins, an Administrative Law Judge of the Division of Administrative Hearings, without an evidentiary hearing, for resolution upon the pleadings and papers filed in a housing discrimination case referred by the Florida Commission on Human Relations (FCHR or Commission).

STATEMENT OF THE ISSUE

Does the Division of Administrative Hearings have jurisdiction of this housing discrimination petition?

PRELIMINARY STATEMENT

This cause was referred to the Division of Administrative Hearings (DOAH or Division) by FCHR on or about October 22, 2015. By Order dated November 12, 2015, the final hearing was scheduled for February 9 and 10, 2016, in Jacksonville, Florida.

On January 21, 2016, Respondent filed a Motion to Dismiss the Petition for Relief (Petition) as untimely. The following

day Petitioner filed a response in opposition to the Motion as permitted by Florida Administrative Code Rule 28-106.204.

Petitioner's sole defense to the allegation that his Petition was untimely was that on January 15, 2016, the undersigned had entered an Order Granting in Part, and Denying in Part, Jacksonville Housing Authority's Motion to Strike. Contained within that Order was the statement, not germane to the substance of the Order, that "On October 9, 2015, Petitioner timely filed a Petition for Relief from Discriminatory Housing Practices . . . ." (Emphasis added). It is notable that the January 15, 2016, Order was entered before the issue of the timeliness of the Petition was raised by Respondent on January 21, 2016.

So as to be fully advised in the premises, the undersigned next entered an Order to Show Cause on January 25, 2016, acknowledging the erroneous statement contained in the January 15, 2016, Order, and informing the pro se Petitioner that he would consider the doctrine of equitable tolling in his ruling on the motion to dismiss should the facts warrant it.

The January 25, 2016, Order stated, inter alia:

Given Petitioner's sole reliance on the erroneous statement contained in the January 15, 2016 Order, in all fairness Petitioner should be given an opportunity to assert any other defenses he may have under the doctrine of equitable tolling, as set forth above.

On January 26, 2016, Petitioner filed a response to the Order to Show Cause. In his response, Petitioner raised the defense that his former attorney delayed sending the Notice of Determination of No Cause to him, and that the "mailbox rule" should apply such that the Petition should be considered "filed" as of the date it was delivered to the local post office.

This Recommended Order of Dismissal is entered upon these representations and filed documents.

#### FINDING OF FACTS

1. Petitioner filed a Housing Discrimination Complaint with FCHR on or about April 27, 2015. It was assigned Inquiry Number 401204.

2. FCHR filed and mailed to the parties its document entitled, Notice of Determination of No Cause (Notice), in FCHR Case No. 2015H0271, on September 3, 2015. This document was included in FCHR's referral packet forwarded to DOAH on or about October 22, 2015. Petitioner was served with the Notice via certified mail by care of his attorney, Gloria Einstein, Esquire, of the Jacksonville Area Legal Aid office.

3. In his response to the January 25, 2016, Order to Show Cause, Petitioner stated that he received a copy of the Notice from his former attorney on September 29, 2015.

4. The September 3, 2015, Notice stated in pertinent part:

The parties are further advised that the Complainant may request that a formal administrative proceeding be conducted. The request (i.e. Petition for Relief) must be filed with the FCHR within 30 days of the date of service of this Notice and should be in compliance with the provisions of rule 60Y-8.001 and Chapter 60Y-4, Florida Administrative Code, entitled General Procedures. A Petition for Relief form is enclosed. If you elect to file a Petition for Relief, it may be beneficial to seek legal counsel prior to filing the Petition.

This action will not become final until time has expired for Complainant to file a Petition for Relief. Failure of Complainant to timely file a Petition will result in dismissal of the complaint within the purview of Rule 60Y-2.004(2)(g), Florida Administrative Code. (Emphasis Added).

5. The Certificate of Filing and Service contained in the Notice, and certified by Tammy Barton, Clerk of the Commission, reflect a date of service of September 3, 2015. October 3, 2015 was the 30th day after September 3, 2015. October 3, 2015, was a Saturday.

6. Petitioner has submitted proof that he mailed his Petition for Relief in Jacksonville, via United States Postal Service (USPS) Certified Mail, on October 5, 2015. The receipt provided to Petitioner reflected an "expected delivery day" of Wednesday, October 7, 2015.

7. FCHR's date stamp shows that the Petition for Relief was received by FCHR on October 9, 2015.

8. The Petition clearly has on it a check in the box marked "Discriminatory Housing Practice," and it was signed by Petitioner on October 5, 2015.

9. On October 9, 2015, FCHR's Clerk signed the Transmittal of Petition, forwarding the case to DOAH for proceedings pursuant to section 120.57, Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has the authority and the obligation to determine jurisdiction in this matter.

11. The relevant FCHR Rule governing Fair Housing Discrimination Proceedings reads, in pertinent part, as follows:

60Y-8.001 Petition for Relief from a  
Discriminatory Housing Practice.

(1) Petition. A complainant may file a Petition for Relief from a Discriminatory Housing Practice within 30 days of service of a Notice of Determination (No Cause) or Notice of Determination (Cause). . . .

(2) For good cause shown, the Chairperson may grant an extension of time to the complainant to file the Petition for Relief, provided the motion for extension of time is filed within the 30-day period.

(3) Procedures. Petitions for Relief, and proceedings thereupon, are governed by the provisions of Chapters 28-106 and 60Y-4, F.A.C., except as otherwise provided by this section. (Parenthetical material in original)

12. FCHR has adopted chapters 28-101 through 28-106 of the Uniform Rules of Procedure. Fla. Admin. Code R. 60Y-2.006.

Rule 28-106.103 provides in relevant part:

In computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday.

13. Inasmuch as the 30th day following service of the Notice was Saturday, October 3, 2015, pursuant to rule 28-106.103, the Petition was due not later than the following Monday, October 5, 2015.

14. By FCHR's rule, Petitioner had until Monday, October 5, 2015, to file his Petition with FCHR. Petitioner signed and mailed his Petition on October 5, 2015, the last day it could be timely filed with FCHR in Tallahassee. At the time Petitioner placed his Petition in the custody of the USPS in Jacksonville, he was advised that he could not expect the item to be delivered in Tallahassee before October 7, 2015. In fact, the Petition was not received by FCHR until Friday, October 9, 2015.

15. Rule 28-106.104 states, in relevant part, that "filing shall mean received by the office of the agency clerk during

normal business hours or by the presiding officer during the course of a hearing." Petitioner's Petition for Relief was date-stamped received by FCHR on October 9, 2015, and under rule 28-106.104, the Petition was deemed "filed" with FCHR on that date, which is 36 days after FCHR mailed its Notice to him.

16. Section 120.569(2)(c), Florida Statutes, provides in relevant part, that "[a] petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed." The Petition in the instant case was not timely filed.

17. Based on the foregoing, the Petition for Relief herein is time-barred and should be dismissed. Appellate courts have upheld dismissals for tardiness as minimal as one day past the filing deadline. See Whiting v. Fla. Dep't of Law Enf., 849 So. 2d 1149 (Fla. 5th DCA 2003) (dismissal of employee's administrative appeal from notice of final agency action upheld where appeal was filed one day late.); Cann v. Dep't of Child. and Fam. Servs., 813 So. 2d 237 (Fla. 2d DCA 2002) (request for administrative hearing untimely filed where request filed one day late with the Department). Likewise, the administrative forum has not hesitated to dismiss time-barred Petitions in employment discrimination cases. See Clardy v. Dep't of Corr., Case No. 04-1020 (Fla. DOAH May 6, 2004) (Petition for Relief dismissed where petition untimely filed with FCHR three days

late); Perdraza v. Int'l Brotherhood Local 2008, Case No. 02-0238 (Fla. DOAH June 21, 2002) (Petition for Relief time-barred where petition filed four days late with FCHR); Perry v. Speedway Superamerica, LLC, d/b/a Starvin' Marvin, Case No. 02-1624 (Fla. DOAH June 18, 2002) (Petition for Relief time-barred where petition filed with FCHR two days late); Oliveras v. Aero Decal, Case No. 01-3928 (Fla. DOAH November 28, 2001) (Petition for Relief time-barred where petition filed with FCHR one day late).

18. In some instances, courts have examined whether the doctrine of equitable tolling could be applied to extend an administrative time limit. In Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988), the Florida Supreme Court stated:

Generally, the tolling doctrine had been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.

523 So. at 1134. In Cann v. Department of Children and Family Services, 813 So. 2d 237 (Fla. 2d DCA 2002), the Department of Family Services issued the Appellants, the Canns, a notice of intent to dismiss their request for an administrative hearing because it was filed untimely, as it was filed with the Department one day late. The facts indicated that the Canns'



attorney had prepared and delivered their request to the post office two days before it was due, but the Department did not receive the request until one day past the deadline. The Second District Court of Appeal applied the Supreme Court's requirement for equitable tolling as espoused in Machules and concluded that the requirements for equitable tolling were not met in the Cann case. The Court upheld the Department's dismissal of the Canns' untimely request for administrative hearing. See also Whiting v. Fla. Dep't of Law Enf., *Supra*, (notice of appeal from final agency action filed one day late was insufficient to support claim of equitable tolling and agency's dismissal of untimely notice upheld).

19. In the instant case, Petitioner has filed a Petition for Relief with FCHR six days after the October 3, 2015, deadline. FCHR's Notice was proper and Petitioner knew the proper forum. Under Machules and Cann, Petitioner's assertions as to why he failed to timely file his Petition for Relief are insufficient to support equitable tolling.

20. Petitioner has represented that he did not physically receive the Notice from his former attorney until September 29, 2015. Even assuming that to be true, Petitioner still would have had six days to make arrangements for his Petition to be timely filed with FCHR by October 5, 2015. Alternatively, Petitioner could have requested an extension of time from FCHR

for filing his Petition, predicated upon the delay in his receipt of the Notice. However, Petitioner did not request such an extension.

21. Finally, Petitioner's contention that the "mailbox rule" applies in this instance is non-persuasive. Such a defense has specifically been rejected in proceedings pursuant to chapter 120, Florida Statutes. McKenna v. Dep't of Corr., Case No. 91-3767RP (DOAH March 2, 1992).

22. The Petition for Relief must be dismissed.

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 the Petition herein.

DONE AND ENTERED this 29th day of January, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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this 29th day of January, 2016.

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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.