

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ONEL, LLC, A FLORIDA LIMITED LIABILITY
COMPANY, AND HOLIDAY RV'S KEYS, LLC,
A FLORIDA LIMITED LIABILITY COMPANY,

Petitioners,

vs.

Case No. 22-0118

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____ /

RECOMMENDED ORDER ON LIMITED REMAND

Pursuant to notice, a hearing was held in this case on March 23, 2022, by Zoom Conference before Francine M. Ffolkes, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Edgar R. Belaval, Esquire
Belaval Law, PLLC
55 Almeria Avenue
Coral Gables, Florida 33134

For Respondent: Richard E. Shine, Esquire
John Ashley Peacock, Esquire
Department of Transportation
605 Suwannee Street, Mail Station 58
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STATEMENT OF THE ISSUE

Whether the doctrine of equitable tolling applies to excuse the late filing of Petitioners, ONEL, LLC, and Holiday RV's Keys, LLC's (Petitioners), petition for administrative hearing with Respondent, Florida Department of Transportation (Respondent).

PRELIMINARY STATEMENT

This matter involves a challenge by Petitioners to Respondent's Notice of Intended Department Action dated August 25, 2021 (Notice). The Notice informed Petitioners of proposed changes to the existing configuration of Petitioners' driveway connections to State Road 5/Overseas Highway, Northbound from Mile Marker 97.0 to Mile Marker 100.00 in Monroe County. Petitioners received the Notice on September 7, 2021. Petitioners requested and received three extensions of time to file a petition for administrative hearing, through and including November 2, 2021. Respondent received Petitioners' initial petition (Petition) on November 3, 2021. Thereafter, Respondent issued an Order for Dismissal with Leave to Amend (Order of Dismissal), to which Petitioners responded with their Amended Petition.

Respondent referred the challenge to DOAH on January 13, 2022. On February 2, 2022, Respondent filed a Motion to Dismiss Petitioners' Petition for Administrative Hearing and Request for Mediation as Untimely With Incorporated Memorandum of Law. On February 16, 2022, the undersigned entered a Recommended Order of Dismissal concluding, "[t]he amended petition does not allege any facts that remedy this issue of untimeliness."¹

On February 28, 2022, Respondent issued an Order on Petitioners' Motion for Rehearing and Reconsideration/Exceptions to Recommended Order and Order of Remand on Limited Issue of Whether Equitable Tolling Applies (Limited Remand).² The undersigned accepted the Limited Remand and

¹ Petitioners' response was due on February 9, 2022. Florida Administrative Code Rule 28-106.204 governs motion practice in this case. Rule 28-106.204 does not permit the filing of amendments to motions by the same party. Accordingly, Petitioners' argument that the February 16, 2022, Recommended Order of Dismissal was issued prematurely is without merit.

² "Because the resolution of Nicks' equitable tolling claim requires credibility and factual determinations, we must remand this matter to the Board for an evidentiary hearing." *Nicks v. Dep't of Bus. and Pro. Regul.*, 957 So. 2d 65, 68 (Fla. 5th DCA 2007).

reopened the file on March 3, 2022. The evidentiary hearing on the issue of whether equitable tolling applies was scheduled for March 23, 2022, and the parties filed their Joint Prehearing Stipulation on March 21, 2022.

At the hearing, Respondent presented the testimony of Hector Di Donato, project engineer. Respondent's Exhibits 1, 2, 4, and 7 (certification and attachments excluding the affidavit) were entered into evidence. Petitioners presented the testimony of Damon Mount, general manager. Petitioners' Exhibit 1 was entered into evidence.

The one-volume Transcript of the hearing was filed with DOAH on April 6, 2022, and the parties were given until April 16, 2022, to file their post-hearing submittals. On April 8, 2022, the parties requested and were granted an extension of time until April 27, 2022, for their post-hearing submittals. Respondent timely filed its post-hearing submittal. Petitioners' post-hearing submittal was untimely. The undersigned duly considered the post-hearing submittals in preparing this Recommended Order on Limited Remand.

References to the Florida Statutes are to the 2021 version, unless otherwise indicated.

FINDINGS OF FACT

The following Findings of Fact are based on the parties' stipulations and evidence adduced at the hearing.

1. Respondent's Notice informed Petitioners of proposed changes to the existing configuration of Petitioners' driveway connections to State Road 5/Overseas Highway, Northbound from Mile Marker 97.0 to Mile Marker 100.00 in Monroe County.

2. Petitioners received the Notice on September 7, 2021. The Notice stated, in pertinent part:

This is to inform you that you have the right to challenge the action of the Department of Transportation ("Department") described in the attached notice. If you wish to challenge the Department's action, you may request an administrative hearing under Sections 120.569 and 120.57, Florida Statutes. An administrative hearing is similar to a trial and is held before an Administrative Law Judge. You must deliver your request by 5:00 p.m. no later than 21 days after you received the notice and Notice of Administrative Hearing Rights to:

Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building
605 Suwannee Street,
MS 58 Tallahassee, Florida 32399-0458
Facsimile: (850) 414-5264

3. The language of the Notice is clear and unambiguous. The language of the Notice is adequate to inform Petitioners of the right to request an administrative hearing under sections 120.569 and 120.57, Florida Statutes. The Notice also stated that "[i]f you timely request a hearing, mediation . . . may be available."

4. Petitioners requested and received three extensions of time to file a petition for administrative hearing, through and including November 2, 2021.

5. Respondent's facsimile record showed that the four-page Petition was received from FaxZero.com at 5:08 p.m. on November 2, 2021, and the Request for Mediation was received from FaxZero.com at 10:13 a.m. on November 3, 2021. Respondent's call detail phone record showed that a four-page document was received at 5:07 p.m. on November 2, 2021, from Petitioners' fax number, which is 3054513030.

6. The evidence established that Petitioners' counsel uses the service FaxZero.com to send faxes. An email from FaxZero.com to Petitioners' counsel attached to the Amended Petition informed him that a fax to the "State of Florida at 8504145264" was confirmed as successfully delivered "at 5:24 PM Eastern Daylight Time on November 2nd, 2021." Another attachment to the Amended Petition is a fax status from FaxZero.com informing him that his fax to "State of Florida . . . failed because the receiver's phone was busy 3 times in a row."

7. Petitioners' general manager testified that in preparation for the hearing, he discovered, in a filing cabinet, a copy of the Petition with a fax "Transmission Verification Report" stapled to the front. The Transmission Verification Report is blank where it should identify the name, fax number, and telephone number of the sender. The Transmission Verification Report purports to show that the Petition was sent to "8504145264" on "11/02[2021]" at "04:20PM."

8. The general manager testified that he did not recall personally sending a fax of the Petition to Respondent on November 2, 2021. Respondent's call detail phone record showed that a four-page document was received at 5:07 p.m. on November 2, 2021, from Petitioners' fax number, which is 3054513030. The preponderance of the evidence could not establish the veracity of the "Transmission Verification Report" to prove that the Petition was received by Respondent before 5:00 p.m. on November 2, 2021.

9. As discussed in the Conclusions of Law, the applicable rule required that the Petition must be received before 5 p.m. on the due date of November 2, 2021. Whether from FaxZero.com or Petitioners' fax number of 3054513030, the evidence established that the Petition was received after 5:00 p.m. on November 2, 2021. Therefore, the Petition was not filed until the next business day of November 3, 2021. The separate Request for Mediation was also untimely filed on November 3, 2021.

10. In the Amended Petition, Petitioners asserted that equitable tolling should apply to excuse the late-filed Petition. However, a busy fax machine is not an extraordinary circumstance. There is nothing extraordinary about the possibility of a busy fax machine, when one waits until the last minute to meet a filing deadline.

11. In the Amended Petition, Petitioners also asserted that the Notice did not comply with rule 28-104(8) because it did not provide an e-filing option. However, by clearly providing Respondent's mailing address and fax number, the Notice complied with the options identified in the rule.

12. Petitioners did not present any evidence of an extraordinary circumstance that prevented them from exercising their rights. In addition, Petitioners did not present any evidence that they were misled or lulled into inaction by Respondent.

13. Respondent's witness testified that it has an interest in timely completing the proposed changes to the existing configuration of Petitioners' driveway connections to State Road 5/Overseas Highway. The project, which he described as the "U.S. 1 safety project," is necessary for the safety of the public.

CONCLUSIONS OF LAW

Jurisdiction

14. DOAH has jurisdiction over the subject matter of, and parties to, this proceeding, pursuant to sections 120.569 and 120.57(1). Section 120.569(2)(c), which governs petitions for administrative hearing, states, in pertinent part: "[a] petition shall be dismissed if . . . it is untimely filed."

15. Rule 28-106.104(1) provides that "filing shall mean received by the office of the agency clerk during normal business hours." In addition, rule 28-106.104(3) provides that "[a]ny document received by the office of the agency clerk . . . after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day."

16. The preponderance of the evidence proved that the Petition was received after 5:00 p.m. on November 2, 2021. Therefore, the Petition was untimely filed the next business day, i.e., November 3, 2021. The separate Request for Mediation was also untimely.

Standard of Proof

17. Findings of fact shall be based on a preponderance of the evidence and exclusively on the evidence of record. *See* § 120.57(1)(j), Fla. Stat. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. *See* § 120.57(1)(j), Fla. Stat.

18. In this de novo hearing, it is the undersigned's "function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." *Heifetz v. Dep't of Bus. Regul.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

19. "If, as is often the case, the evidence presented supports two inconsistent findings, it is the [administrative law judge's] role to decide the issue one way or the other." *Id.*; *see Collier Med. Center, Inc. v. State Dep't of Health and Rehab. Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

Burden of Proof

20. Rule 28-106.111(4) states that "[a]ny person who receives written notice of an agency decision and who fails to file a written request for a hearing within [twenty-one] days waives the right to request a hearing on such matters." The burden to prove that it provided adequate notice constituting a clear point of entry rests with Respondent.

21. Due process requires that a person with substantial interests being determined by an agency must be given notice sufficient to provide a clear point of entry. *See Burnett Int'l Coll. v. State, Bd. Of Nursing*, 316 So. 3d 763 (Fla. 1st DCA 2021)(reflecting that the agency's notice of intent provided a

clear point entry for an administrative hearing); *Capeletti Bros., Inc. v. State, Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

22. The language of the Notice is clear and unambiguous. Respondent proved that the Notice provided a clear point of entry to request an administrative hearing.

23. Rule 28-106.111(4) also states, "[t]his provision does not eliminate the availability of equitable tolling as a defense." Thus, Petitioners may invoke the doctrine of equitable tolling to excuse the untimely filed Petition.

Equitable Tolling

24. The doctrine of equitable tolling can be applied to toll the time for seeking review of agency action. *See Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988); *Garcia v. Dep't of Bus. and Pro. Regul.*, 988 So. 2d 1199 (Fla. 3rd DCA 2008).

25. Equitable tolling is an extraordinary remedy that should be extended only sparingly. *See Justice v. United States*, 6 F.3d 1474, 1479-80 (11th Cir. 1993). Generally, a party who files late because of his own negligence may not invoke equity to avoid a filing limitations period. *See, id.*

26. The doctrine is generally applied only to excuse a late filing where the petitioner has been misled or lulled into inaction by the agency, or has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights in the wrong forum. *See Jancyn Mfg. Corp. v. Dep't of Health*, 742 So. 2d 473, 476 (Fla. 1st DCA 1999); *Env't Res. Ass'n of Fl., Inc. v. Dep't of Gen. Servs.*, 624 So. 2d 330, 330-31 (Fla. 1st DCA 1993), *rev. den. mem.*, 634 So. 2d 623 (Fla. 1994). In addition, prejudice to respondents must also be considered and found absent before applying the doctrine to excuse a late filing. *See Machules*, 523 So. 2d at 1134; *see also Stewart v. Dep't of Corr.*, 56 So. 2d 15, 16 (Fla. 4th DCA 1990)(finding no prejudice).

27. In *Environmental Resource Associates of Florida, Inc. v. Department of General Services*, 624 So. 2d 330 (Fla. 1st DCA 1993), the court found that the attendant circumstances did not warrant the application of equitable tolling

to excuse the late filing of a petition challenging agency action. In that case, a state contractor was informed by an agency that its contract was being terminated. The notice of agency action informed the contractor that it had 21 days in which to file its petition challenging the agency action. Rather than filing the petition, as required under the applicable procedural rules and as apprised in the notice of agency action, the contractor's attorney instead sent the petition by certified mail, resulting in the petition being filed four days late. The contractor contended that its late-filed petition should be accepted on equitable principles. Citing *Machules*, the court declined to apply equitable tolling to excuse the late filing of the petition under the circumstances, which involved attorney mistake rather than conduct on the agency's part which reasonably would have lulled or misled a person to miss the filing deadline.

28. Likewise, in *Aleong v. Department of Business and Professional Regulation*, 963 So. 2d 799 (Fla. 4th DCA 2007), the Court declined to apply equitable tolling to excuse the late filing of a petition, by an attorney, challenging agency action imposing discipline on a veterinarian for certain statutory and rule violations. In that case, as here, there was no dispute that an attorney's mistake resulted in the late filing of the petition. In holding that equitable tolling did not apply, the court in *Aleong* noted that three other Florida district courts of appeal also declined to apply equitable tolling when the cause of a late filing was due to attorney mistake. *Id.* at 801.

29. The facts of this case do not present an appropriate scenario for application of the doctrine of equitable tolling. *See, e.g., Vantage Healthcare Corp. v. Ag. for Health Care Admin.*, 687 So. 2d 306, 307 (Fla. 1st DCA 1997)(equitable tolling did not allow agency to accept letter of intent filed one day late even though fault was that of overnight carrier who failed to timely deliver letter next business day). First, Respondent's Notice did not mislead or lull Petitioners into inaction with regard to exercising their rights to an administrative hearing. In fact, the Notice was explicit on how and when to

go about requesting an administrative hearing in compliance with rule 28-106.104.

30. Second, Petitioners did not allege any extraordinary circumstance that prevented them from exercising their rights. There is nothing extraordinary about the possibility of a busy fax machine, when one waits until the last minute to meet a filing deadline. *See Env't. Res. Ass'n.*, 624 So. 2d at 331 ("There is nothing extraordinary in the failure to timely file in this case."). Third, Petitioners have not asserted their rights in the wrong legal forum, so there is no question of whether they timely did so.

31. In addition, the evidence established that prejudice to Respondent is not absent. Respondent has an interest in timely completing the proposed changes for public safety reasons.

Conclusion

32. Based on the clear facts above, the Petition filed on November 3, 2021, one day later than the November 2, 2021, deadline, is late. Respondent proved that its Notice provided a clear point of entry. Petitioners did not prove that this case presents an appropriate scenario for the application of the doctrine of equitable tolling.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order dismissing Petitioners' amended and initial petitions, and request for mediation, with prejudice.

DONE AND ENTERED this 2nd day of May, 2022, in Tallahassee, Leon
County, Florida.



FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
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this 2nd day of May, 2022.

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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.