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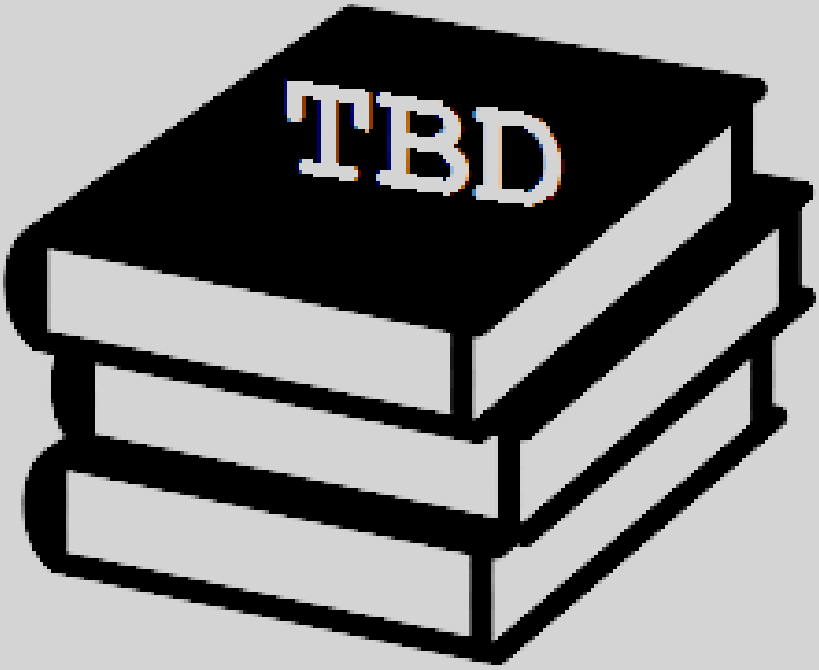

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STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEALS

IN RE: ELIAS MAKERE, FSA, MAAA)

Petitioner)

) **Case No.: ____-____**

v.)

)

)

)

)

PETITION FOR WRIT OF MANDAMUS

December 18, 2020

/s/ Elias Makere
ELIAS MAKERE, FSA, MAAA
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Upon the passage of 90 moons, her majesty was to declare a message. One which the people had beckoned.

Yet 100 nights passed, and she who presided over others resided under covers.

So, may this court command our beloved-yet-quivering emperor to appear at her brightest pulpit. Where she can rain down her quiver of declaratory arrows upon the shaded, quivering courtyard below.

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PREFACE

Petitioner, Elias Makere, was the Petitioner in the lower tribunal; and will be referred to in this petition as Petitioner. Pursuant to Rule 9.100(e)(2) Fla. R. App. P., the Florida Commission on Human Relations is a formal party to this action; and will be referred to as The Agency.

The following references will be used in this petition:

[A___] Appendix[1/]

The following abbreviations will also be used:

1DCA	Florida's First District Court of Appeals
DCA	District Court of Appeals
DMS	Florida Department of Management Services
FAC	Florida Administrative Code
FCHR	Florida Commission on Human Relations
FS	Florida Statute
LT	Lower Tribunal

All statutory and rule references are made to their 2020 versions (unless otherwise indicated).

I. INTRODUCTION

1. Pursuant to Rule 9.100 Fla. R. App. P., Petitioner respectfully petitions this Court for a Writ of Mandamus directed to The Agency, and shows the Court the following.

II. JURISDICTIONAL BASIS

2. This Court has jurisdiction to issue a Writ of Mandamus under Art. V §4(b)(3) Fla. Const., and Rule 9.030(b)(3) Fla. R. App. P.. Mandamus empowers 1DCA to command a state agency to complete a ministerial act (see Turner v Singletary, 623 So. 2d 537 (Fla. 1st DCA 1993)).
3. In the instant case, the state agency involved is the FCHR. An organization created by statute (see §760.03(1) FS) and assigned to DMS (see §760.04 FS). DMS, of course, is part of Florida's executive branch of government (pursuant to §20.22 FS). Therefore, the FCHR is accorded state agency status under Art. II §3 Fla. Const..
4. Moreover, Mandamus is the proper writ for compelling a lower tribunal to act (see Holcomb v Department of Corrections, 609 So. 2d 751, 753 (Fla. 1st DCA 1992). Which is the situation in the instant case, as outlined in the statement of facts.

III. STATEMENT OF PERTINENT FACTS

A. Petition for Declaratory Statement

5. On September 1, 2020, Petitioner filed his *Petition for Declaratory Statement Before the FCHR* ("The Inquiry") with The Agency (**[A0003]**).
6. Therein, he cited his constitutional rights (Art. I. §21 Fla. Const.), his statutory rights (§760 FS), and the regulations aimed at reconciling doubts about the two (Chapter 28-105 FAC).
   a. Please see **[A0005]-[A0013]**
7. Soon thereafter, The Agency published receipt of The Inquiry in the September 8th issue of the Florida Administrative Register (**[A0014]**).
8. On October 26, 2020 (ie, 55 days into The Inquiry), Petitioner followed up with The Agency (**[A0016]**). It told Petitioner that he would be notified of a deliberation hearing once one was set (**[A0018]**).
9. Petitioner followed up several more times in the weeks that followed. Culminating in a November 30, 2020 email notifying The Agency of his need to take legal action (**[A0019]-[A0021]**).
10. Yet, The Agency never responded. Moreover, The Agency never set a hearing.
11. Today marks the 108th day since Petitioner filed The Inquiry.

IV. ANALYSIS

12. Petitioner filed The Inquiry under §120.565 FS, which says – in pertinent part – the following (emphasis added):

> *"Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision... as it applies to the petitioner's particular set of circumstances."*
>
> *"..."*
>
> *"The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition."*

13. Rule 28-105.002 FAC expounds on the process (emphasis added):

> *"A petition seeking a declaratory statement shall be filed with the clerk of the agency that has the authority to interpret the statute..."*

14. Rule 28-105.003 FAC affirms an agency's ministerial duty to respond on time (emphasis added):

> *"Within 90 days of the filing of the petition, the agency shall render a final order denying the petition or issuing a declaratory statement"*

Ministerial Duty

15. A ministerial act is defined as one that is both required and nondiscretionary (*Barron's Legal Dictionary, 5th Edition*, Page 357):

> *"an act performed according to explicit directions (often embodied in a statute) by a subordinate official, allowing no judgment or discretion on the part of that official. See mandamus."*

16. Further examination shows that §120.565 FS placed a ministerial duty upon The Agency to respond to The Inquiry. Its use of the term "shall" was key (¶12, *supra*). In Chaky v State, 651 So. 2d 1169, 1172 (Fla. 1995), Florida's Supreme Court established that "shall" means "mandatory/ministerial":

> *"We find that the use of the word "shall" in rule 3.390(b) makes that rule mandatory, while the use of the word "may" in rule 3.400 makes that rule discretionary."*

17. So, since §120.565 FS used "shall" (and never "may"), The Agency was required to render a final order.
18. Likewise, Rule 28-105.003 FAC set out the "*explicit directions*"; which stated The Agency "*shall render a final order [within 90 days]*".
19. Altogether, The Agency had a ministerial duty to render a final order within 90 days of receipt.

Factual Application

20. It is indisputable that Petitioner filed The Inquiry with The Agency (see ¶5).
21. It is also irrefutable that The Agency acknowledged it (see ¶7).
22. It is incontrovertible that more than 90 days have passed since Petitioner filed The Inquiry (see ¶5 & ¶9).
23. Lastly, it is undeniable that The Agency has failed to render a final order (even to this day; see ¶11).

V. NATURE OF RELIEF BEING SOUGHT

25. On account of The Agency's dereliction of duty, Petitioner respectfully asks this Honorable Court to issue a Writ of Mandamus to the Florida Commission on Human Relations to have it render a final order responsive to Petitioner's '*Petition for Declaratory Statement Before the FCHR*' (filed on 9/1/2020).

VI. ARGUMENT

26. Petitioner argues that this Court should issue a Writ of Mandamus because The Agency has failed to complete a mandatory act.
27. Florida's Supreme Court established the standard for reviewing such a writ in Huffman v State, 813 So. 2d 10 (Fla. 2000). It stated the following:

> *"In order to be entitled to a writ of mandamus the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available."*

28. In other words, a 3-part test for permitting a writ of mandamus must be performed (as outlined here):
    - i) Petitioner must have a clear legal right to the requested relief;
    - ii) The Agency must have an indisputable duty to perform the requested action; and
    - iii) there must be an absence of any other adequate remedy.

This Petition satisfies all three items, as follows.

i) Clear Legal Right

29. Petitioner has a clear legal right to the requested relief.

    a. Requested Relief = Final Order on The Inquiry.

    b. Controlling Law = §120.565 FS; Chapter 28-105 FAC.

30. In Allstate Ins. Co. v Kaklamanos, 843 So. 2d 885 (Fla. 2003), the Supreme Court held that a statute grants someone a clear legal right:

> *"...'clearly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law."*

31. Thus, §120.565 FS provided Petitioner with a clearly established right to a final order from The Agency.

ii) Indisputable Duty to Perform

32. The Agency has an indisputable duty to render that final order.

33. This petition detailed as much in the analysis section (see ¶15-19).

34. As an added point, the ruling in Migliore v City of Lauderhill, 415 So. 2d 62 (Fla. 4th DCA 1982) held that ministerial/indisputable duties are ripe for mandamus action:

> *"It has long been established that mandamus lies to compel the performance of a specific imperative ministerial duty."*

35. In the instant case, the "*specific imperative ministerial duty*" is the entry of a final order on Petitioner's inquiry.

36. Thus, the law dictates that The Agency has an 'indisputable duty' to render a final order on The Inquiry.

iii) Proper Remedy

37. Although §120.565 FS places a ministerial duty on a state agency to comply, it does not create an opening for a petitioner to compel that agency into action.

38. The same can be said about Chapter 28-105 FAC.

39. When contrasted with other statutes that do provide such an avenue (eg, §119.0701(4) FS "*civil action is filed... to compel production of public records...*"; and §119.11 FS "*action is filed to enforce the provisions of this chapter*") it can be ascertained that no such pathway exists [for §120.565 FS].

40. Thus, Petitioner cannot file suit or take any other action to compel The Agency to complete its ministerial duty. His only remedy is this mandamus petition.

Exemplary Case

41. With all three prongs of the standard-for-review satisfied, Petitioner contends that this petition presents a textbook case for mandamus action.

42. Another case that can illustrate this is Hatten v State, 561 2d 562 (Fla. 1990). Similar to the instant case, the petitioner in Hatten requested mandamus relief due to a state agency's dereliction (emphasis added):

> "*[the state agency agrees] that Hatten's rights are being violated by the inability of the [agency] to prepare and timely file a brief in this case.*"

43. Likewise, Petitioner's rights are also being violated by The Agency's failure to prepare and timely render a final order on The Inquiry.

VII. CONCLUSION

WHEREFORE, Petitioner respectfully asks this Court to issue a Writ of Mandamus commanding the Florida Commission on Human Relations to enter a final order that is responsive to Petitioner's '*Petition for Declaratory Statement Before the FCHR*'.

Dated this 18th day of December 2020.

Respectfully submitted,

/s/ Elias Makere, Pro Se
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CERTIFICATE OF COMPLIANCE

I certify that the size and style of type used in this document is Times New Roman 14-point Font (caption) and Courier New 12-point Font (contents); thus complying with the font requirements of Rule 9.210(a)(2) Fla. R. App. P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December 2020, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal which will send a notice of electronic filing to the attached service list.

/s/ Elias Makere

Endnotes:

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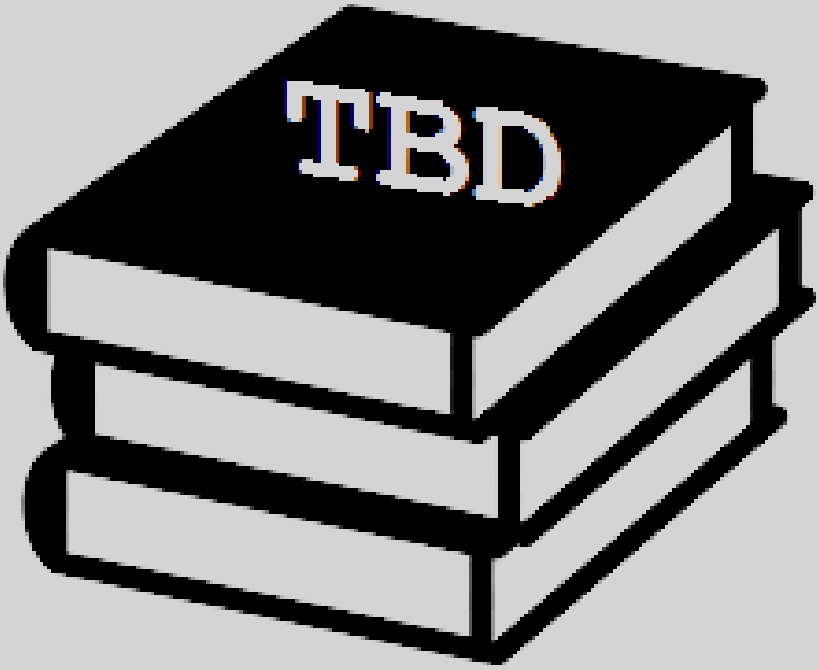

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