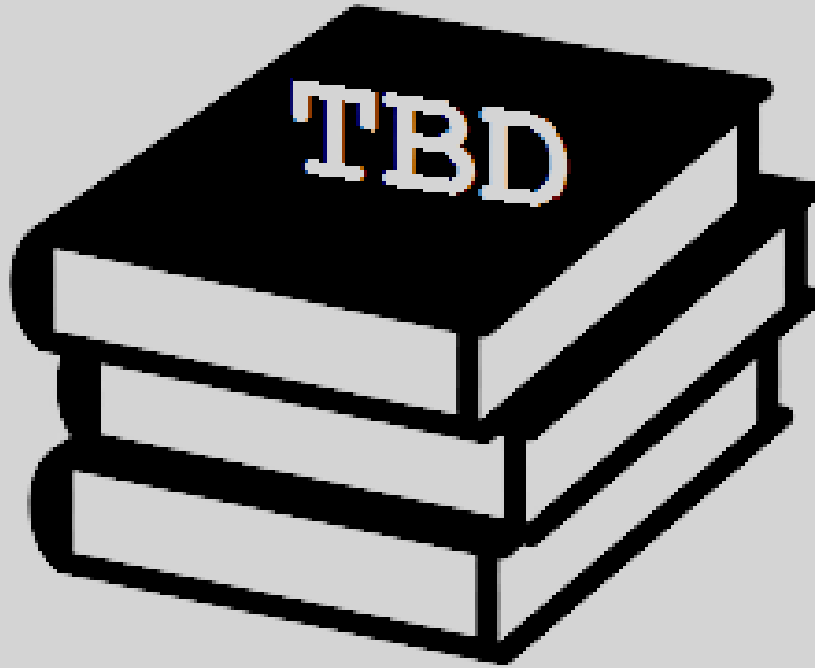


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STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

05 FEB -8 AM 9:15
DIVISION OF
ADMINISTRATIVE
HEARINGS

LUIS F. HERNANDEZ,

EEOC Case No. 15D961043

Petitioner,

FCHR Case No. 96-0033

v.

DOAH Case No. 99-3576

TRANSPON ELECTRONICS, INC.,

FCHR Order No. 05-027

Respondent.

DSM
CWS

**ORDER REJECTING CONCLUSION OF ADMINISTRATIVE LAW JUDGE
THAT PETITION FOR RELIEF IS UNTIMELY AND DIRECTING
MATTER BE ASSIGNED TO A COMMISSIONER TO CONDUCT FURTHER
PROCEEDINGS ON THE PETITION FOR RELIEF**

Preliminary Matters

This matter is before the Commission for consideration of the "Order Refusing Remand," dated November 9, 2004, issued in the above-styled matter by Administrative Law Judge Daniel Manry.

This is the fourth time this case is before a panel of Commissioners.

In a Recommended Order dated June 6, 2000, the Administrative Law Judge concluded that Petitioner's claim was barred because the Petition for Relief was not timely filed.

A Commission panel consisting of Commissioners Paige, Cannon and Elam found this to be error and remanded the case to the Administrative Law Judge in an order filed December 4, 2001.

Respondent then filed a motion to dismiss the Petitioner's amended Petition for Relief, alleging that the amended Petition for Relief failed to state a cause of action because the allegations and claims stated therein are outside the scope of the Charge of Discrimination filed with the Commission.

The Administrative Law Judge accepted the remand and then issued an "Order Closing File," dated January 22, 2002, indicating that the cause was before the Administrative Law Judge on Respondent's Motion to Dismiss, and that "being fully advised," the file of the Division of Administrative Hearings was closed.

A Commission panel consisting of Commissioners Roberts, Montes and Shutes again remanded the case to the Administrative Law Judge in an order filed September 5, 2002, noting that the Administrative Law Judge's order was not sufficient for the Commission to take final agency action, since it contained no findings of fact and conclusions of law.

The Administrative Law Judge then issued an “Order Accepting Second Remand Dated September 5, 2002, and Refusing First Remand Dated December 4, 2001,” dated January 24, 2003, in which he accepted the second remand and refused the first remand even though he had initially accepted it on December 18, 2001. The Administrative Law Judge further revisited the issue of the timeliness of the Petition for Relief, and concluded, again, that the Petition for Relief was not timely filed.

A Commission panel consisting of Commissioners Cannon, Corbett and Roberts, in an order dated August 16, 2004, again found this to be error and again remanded the matter to “the Division of Administrative Hearings for assignment to an Administrative Law Judge willing to conduct further proceedings on the Petition for Relief in accordance with this Order.”

The Administrative Law Judge then issued the Order Refusing Remand currently before the Commission, dated November 9, 2004, stating, “The undersigned refuses the remand on the ground that Petitioner’s request for administrative hearing is time-barred by Subsections 760.11(6) and (7), Florida Statutes (1995).”

Findings of Fact and Conclusions of Law

The Florida Civil Rights Act of 1992 states that if, as in the instant case, the Commission’s investigation results in the issuance of a determination that no reasonable cause exists to believe that an unlawful employment practice has occurred, the aggrieved person may request an administrative hearing under ss. 120.569 and 120.57. Section 760.11(7), Florida Statutes (2003).

The referred-to section 120.57, a section of the Administrative Procedure Act, states, “Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof.” Section 120.57(1)(a), Florida Statutes (2003).

Sections 120.80 and 120.81, Florida Statutes, provide no exception for an administrative hearing brought pursuant to the Florida Civil Rights Act of 1992 to be heard by someone other than an administrative law judge assigned by the Division of Administrative Hearings, unless the Division of Administrative Hearings is itself a party to the action. See, Sections 120.80 and 120.81, Florida Statutes (2004).

The Florida Civil Rights Act of 1992 provides that in situations in which the Commission’s investigation has yielded a determination that there is reasonable cause to believe that an unlawful employment practice has occurred, “The [C]ommission may hear the case provided that the final order is issued by members of the [C]ommission who did not conduct the hearing... If the [C]ommission elects to hear the case, it may be heard by a [C]ommissioner. See Section 760.11(6), Florida Statutes (2003).

The Florida Civil Rights Act of 1992 also provides that in situations in which the Commission’s investigation has yielded a determination that there is no reasonable cause to believe that an unlawful employment practice has occurred a requested administrative hearing “shall be heard by an administrative law judge and not by the [C]ommission or a [C]ommissioner.” Section 760.11(7), Florida Statutes (2003).

Finally, the Florida Civil Rights Act of 1992 provides, “In the event the [C]ommission fails to conciliate or determine whether there is reasonable cause on any

complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the [C]ommission determined that there was reasonable cause.” Section 760.11(8), Florida Statutes (2003). An administrative hearing sought pursuant to the referred-to subsection (4), “must be requested no later than 35 days after the date of determination of reasonable cause by the [C]ommission.” Section 760.11(6), Florida Statutes (2003).

In the instant case, the Administrative Law Judge has concluded that the Petition for Relief, filed within 35 days after the Commission’s investigation yielded a determination that there was no reasonable cause to believe that an unlawful employment practice had occurred, was not timely-filed, and refuses to proceed further with the action despite the Commission’s repeated conclusion that the Petition for Relief was timely filed.

In reaching this conclusion, the Administrative Law Judge reasons that by the Commission not issuing a determination within the initial 180-day period following the filing of the complaint, a “legislative determination of reasonable cause” has been made requiring Petitioner to file a Petition for Relief within 35-days of the expiration of that 180-day period.

Applying the above cited statutory provisions to the instant case, it is clear that the Administrative Law Judge views the case a “cause” case, concluding that since no investigative determination was made within the initial 180-day period a “legislative determination of reasonable cause” has been made, while the Commission views the case as a “no cause” case, having issued an investigative determination indicating this.

Even though the Commission views the case as a “no cause” case, we conclude that the Administrative Law Judge’s conclusion that the case is a “cause” case, coupled with the Administrative Law Judge’s refusal to abide by the Commission’s remand orders to conduct further proceedings on the Petition for Relief, allows the Commission to assign a Commissioner to hear this matter, pursuant to the terms of Section 760.11(6), Florida Statutes, which allows that the Commission or a Commissioner may hear cases in which a “cause” determination has been made.

In reaching this conclusion, we incorporate by reference the Commission’s previous Orders in this matter which specifically reject the Administrative Law Judge’s conclusion of law that the Petition for Relief was not timely-filed.

Exceptions

Petitioner filed a document, received by the Commission on November 29, 2004, that, although untitled, might be considered an exception to the Order Refusing Remand.

The document disagrees with the Administrative Law Judge’s conclusion that the Petition for Relief was not timely-filed, and discusses the merits of Petitioner’s claim.

There is no indication on the document that it was served on Respondent by Petitioner as is required by Fla. Admin. Code R. 28-106.110.

The timeliness of the filing of this document also appears in question, given the Commission’s receipt of the document five days after the 15-day time period from the date of the Administrative Law Judge’s Order for filing exceptions. See, Order Refusing Remand, Notice of Right to Submit Exceptions; Section 120.57(1)(k), Florida Statutes (2003); and Fla. Admin. Code R. 28-106.217(1).

While we agree with Petitioner that the Administrative Law Judge's conclusion that the Petition for Relief was not timely-filed is erroneous, given the posture of the case, the Commission's action ordered in this Order, and questions as to whether the document was served on Respondent and whether the document was timely filed, we find it unnecessary to deal with this filing as an exceptions document.

Assignment of Commissioner to Conduct Further Proceedings
on the Petition for Relief

For reasons set out above, and pursuant to Fla. Admin. Code R. 60Y-2.003(6)(e), we direct the Commission Chairperson to assign a Commissioner to hear this matter and order the matter remanded to that Commissioner for further proceedings on the Petition for Relief in accordance with the Commission's previous orders issued in this matter, and in accordance with Section 760.11(6), Florida Statutes (2003).

DONE AND ORDERED this 7th day of February, 2005.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Roosevelt Paige, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Dominique B. Saliba, M.D.

Filed this 7th day of February, 2005,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

Copies furnished to:

Luis F. Hernandez
2070 Excalibur Drive
Orlando, FL 32822

Transpo Electronics, Inc.
c/o Charles Williams, Jr., Esq.
Ford & Harrison, LLP
300 South Orange Avenue, Suite 1300
Orlando, FL 32801

Daniel Manry, Administrative Law Judge, DOAH

Robert S. Cohen, Director and Chief Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

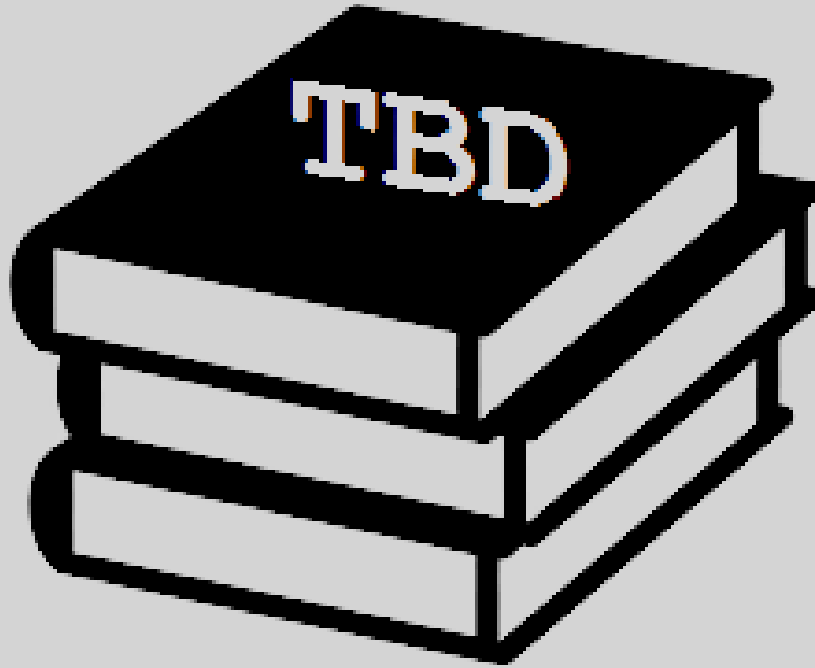
I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 7th day of February, 2005.

By: 
Clerk of the Commission
Florida Commission on Human Relations

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