

**STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS**

JOANNE WHITAKER MCSHANE,)	EEOC Case No. 15D996018
Petitioner,)	FCHR Case No. 99-04139
)	DOAH Case No. 01-004449
vs.)	FCHR Order No. 02-089
)	
BREVARD COUNTY SHERIFF`S DEPARTMENT,)	
Respondent)	

**ORDER REMANDING PETITION FOR RELIEF FROM AN UNLAWFUL
EMPLOYMENT PRACTICE**

Preliminary Matters

This cause came before the Commission for review of the Recommended Order of Dismissal issued in this matter on June 24, 2002, by Administrative Law Judge J. D. Parrish. Pursuant to notice, public deliberations were held on October 22, 2002, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order of Dismissal.

Findings of Facts and Conclusions of Law

The Administrative Law Judge found that Petitioner had filed a Charge of Discrimination with the Commission alleging that Respondent had discriminated against Petitioner on the basis of retaliation, that the Commission had issued a "Notice of Determination: No Jurisdiction" in this matter, and that Petitioner subsequently filed a Petition for Relief with the Commission which was transmitted to Division of Administrative Hearings (DOAH). See Recommended Order, Preliminary Matters section. The Administrative Law Judge found that under these circumstances, DOAH did not have jurisdiction to consider the merits of Petitioner's claim, but that DOAH did have jurisdiction to determine whether the Commission appropriately referred this matter to DOAH for a formal administrative hearing. Id. The Administrative Law Judge concluded that the Commission, by rule, attempted to expand its jurisdiction and that of DOAH to include cases where the Commission issued a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness. See Recommended Order, Conclusions of Law, 6. The Administrative Law Judge concluded that the Commission could not expand its jurisdiction, nor that of DOAH, to determine the merits of cases other than those in which the complainant elects a DOAH hearing after a finding of reasonable cause, or is required to go through one following a finding that there is no reasonable cause, and that in the instant case neither of those conditions precedent were met. Id. The Administrative Law Judge recommended that the Commission resume jurisdiction of this matter and complete the investigation of the Charge of Discrimination or permit Petitioner to make her election of remedies pursuant to Section 760.11(8), Florida Statutes. See Recommended Order, Recommendation section. We conclude that the Administrative Law Judge committed an error of law in not resolving disputed issues of material fact

regarding whether the Commission has jurisdiction of this matter, and in failing to issue a Recommended Order to the Commission resolving those issues. The Administrative Law Judge noted that the statute enabling the Commission to adopt rules, "only empowers the FCHR '[t]o adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992 and govern the proceeding[s] (sp.) of the commission, in accordance with Chapter 120," citing Section 760.06(12), Florida Statutes. Recommended Order, Conclusions of Law, 6. As stated, above, the Administrative Law Judge concluded that the Commission "nonetheless attempted to expand the instances where it could refer matters to the DOAH through rulemaking, where complaints of employment discrimination included instances in which the FCHR has issued 'a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness.' Rule 60Y-5.008, Florida Administrative Code (2001)." Id. The Administrative Law Judge is correct that the Commission's rules provide that a complainant may file a Petition for Relief from an Unlawful Employment Practice after the service of a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness. See Fla. Admin. Code R. 60Y-5.008(1). The Commission's rules also reflect that if the investigation of a case yields a recommendation to the Executive Director based upon a lack of jurisdiction over the Respondent or subject matter of the complaint, the Executive Director may dismiss the complaint pursuant to Fla. Admin. Code R. 60Y-5.006(11) (dealing with administrative dismissals by the Executive Director), "provided that the investigation does not reveal any disputed issues of material fact. The Executive Director shall issue a determination on the foregoing [basis] of lack of jurisdiction...where disputed issues of material fact appear to exist." Fla. Admin. Code R. 60Y-5.004(2). In this case, the Executive Director issued a determination as opposed to dismissing the case administratively, in accordance with the above-cited Commission rule. In our view, the Administrative Law Judge minimizes the authority the Commission has to promulgate rules by using the word "only" in stating that the statute section that grants the Commission the authority to make rules, "only empowers the FCHR '[t]o adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992 and govern the proceeding[s] (sp.) of the commission, in accordance with Chapter 120." Recommended Order, Conclusions of Law, 6. Actually, the Florida Civil Rights Act of 1992 contains two provisions granting rulemaking authority to the Commission, the section cited by the Administrative Law Judge and a subsection of Section 760.11, Florida Statutes, entitled "Administrative and civil remedies; construction," which states, "The commission may adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of this section and to govern the proceedings of the commission under this section." Section 760.11(14), Florida Statutes (2001). To restate, this second grant of rulemaking authority specifically grants to the Commission the authority to adopt, promulgate, amend and rescind rules "to govern the proceedings of the commission under this section." Id. In our view, the rules cited by the Administrative Law Judge as improperly expanding the instances where the Commission could refer matters to DOAH, simply govern, as specifically authorized by the Legislature, the proceedings of the Commission as it determines whether it has jurisdiction over a case filed with it. Finally, it should be noted that DOAH has in the past accepted from the Commission the transmittal of a Petition for Relief following the issuance of a "Notice of Determination: No Jurisdiction," and made findings of fact and conclusions of law as to whether DOAH and the Commission had jurisdiction of the matter. In that instance, the Administrative Law Judge issued a Recommended Order of Dismissal, finding facts that reflected that the site of the discrimination alleged was a federal enclave, and making conclusions of law that, therefore, DOAH and the Commission did not have jurisdiction of the matter, and ultimately recommending that the Commission dismiss the Petition for Relief with prejudice. See Faulconer v. Tracor Services Corporation, 22 F.A.L.R. 1752 (FCHR 1999). In making the indicated correction to the conclusions of law of the Administrative Law Judge, we find: (1) that the Administrative Law Judge's conclusions of law being corrected are within the substantive jurisdiction of the Florida Commission on Human Relations, namely the interpretation of administrative rules promulgated by the Commission; (2) that the reason the correction is being made is that the conclusions of law as stated by the Administrative Law Judge run contrary to the Commission's rules; and (3) that in making this correction the conclusions of law being substituted are as or more reasonable than the conclusions which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2001).

Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Respondent's Exceptions to Recommended Order." Respondent objects to the Administrative Law Judge's recommendation that the Commission resume jurisdiction of the matter and complete the investigation of the Charge of Discrimination. Specifically, Respondent argues that, since the Commission determined that it lacked jurisdiction over the charge, the Commission is now without authority to resume jurisdiction and reinstate an investigation or render a determination with regard to cause. Respondent argues that if the determination of jurisdiction made by the Commission is not subject to review by DOAH, as determined by the Administrative Law Judge, then the Commission's determination can only be deemed to constitute final agency action, and the proper avenue for further review would be an appropriate District Court of Appeal. See Filing. Because the Administrative Law Judge made no findings or recommendation on the issue of jurisdiction, and because, in our view, as discussed above, the Commission has the authority to transmit the matter to the Administrative Law Judge for recommended findings on the jurisdiction issue, it is unnecessary at this point to reach the issue of the Commission's jurisdiction to investigate the matter further, and for this reason Respondent's exceptions are rejected.

Remand

This matter is hereby REMANDED to the Administrative Law Judge for further proceedings on the Petition for Relief.

DONE AND ORDERED this 8th day of November, 2002
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Aletta Shutes; and
Commissioner Billy W. Stall; and
Commissioner Gayle Cannon;

Filed this 8th day of November, 2002,
in Tallahassee, Florida

/s/

Violet Crawford, Clerk
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Daniel M. Kilbride, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/
Violet Crawford,
Clerk of the Commission
Florida Commission on Human Relations