Department of Environmental Protection

Jeb Bush
Governor

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

David Struhs
Secretary

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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CLARENCE ROWE, Petitioner, vs. SEA RAY BOATS, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents,	DOAH Case No. 00-0218 OGC Case No. 99-2075

FINAL ORDER

On April 4, 2000, an Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH"), submitted his Recommended Order to the Respondent, Department of Environmental Protection (hereafter "Department"). Copies of the Recommended Order were simultaneously served on the Petitioner Clarence Rowe (hereafter "Petitioner") and the Respondent Sea Ray Boats, Inc.. A copy of the Recommended Order is attached hereto as Exhibit A. Pursuant to Section 120.57(1)(k), Florida Statutes, the parties to this proceeding were provided 15 days in which to file exceptions to the Recommended Order. Nevertheless, no exceptions have been filed on behalf of the Department, Petitioner, or Sea Ray Boats. The matter is now before the Secretary of the Department for final agency action.

On May 10, 1999, Sea Ray Boats filed an application for an air construction permit with the Department. On October 7, 1999, the Department published its Intent to Issue Air Construction Permit. Petitioner received actual notice of this

Intent on October 14, 1999, which included language specifically informing Petitioner that he had 14 days from receipt of notice to file a petition. On October 31, 1999, the Department published its Public Notice in The Florida Today. On November 15, 1999, Petitioner filed a letter with the Department requesting an administrative hearing to contest the proposed permit (the "original petition"). The Department dismissed the original petition on December 15, 1999, and gave Petitioner 15 days to file an amended petition. On January 6, 2000, Petitioner filed an amended petition. The Department referred the matter to DOAH for assignment of an ALJ to conduct the administrative hearing. On January 24, 2000, DOAH issued an Initial Order to the parties, and Sea Ray filed the Motion to Dismiss that is the subject of the Recommended Order of Dismissal. An evidentiary hearing was held on March 2, 2000.

The Administrative Law Judge found that Petitioner had filed the original petition 18 days late, and the amended petition one day late. He also found that Petitioner had received adequate and unambiguous notice of his right to timely request an administrative hearing. Finally, the ALJ concluded that Petitioner had not demonstrated that the principles of equitable tolling or equitable estoppel should be applied in this case.

Rule 62-110.106(2), Florida Administrative Code (F.A.C.), provides that "receipt of notice of agency action" means either receipt of written notice or publication of the notice in a newspaper, whichever first occurs. Rule 62-110.106(3), F.A.C., provides that a petition for administrative hearing must be filed with the Department within 14 days after "receipt of notice of agency action." In

this case, Petitioner received written notice on October 14, and was therefore required to file a petition no later than October 28, regardless of the fact that notice was published on October 31. Absent a showing that this time should be extended for equitable reasons, the Department is required to dismiss the petition as untimely filed.

Having considered the Recommended Order and having reviewed the applicable law, I conclude that the factual findings, legal conclusions, and recommendation of the ALJ are correct. It is therefore ORDERED:

A. The Recommended Order is adopted in its entirety and is incorporated herein by reference.

B. The original and amended petitions filed by Petitioner are dismissed as untimely filed.

C. The Department shall forthwith issue permit number 0090093-003-AC to Sea Ray Boats, Inc.

Any party to this order has the right to seek judicial review of it under Section 120.68, F.S., by filing a notice of appeal under Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000, and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within thirty days after this order is filed with the clerk of the Department.

DONE AND ORDERED this 8 day of May, 2000, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

David B. Struhs
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Filing And Acknowledgment
Filed, On This Date, Pursuant
To §120.52 Florida Statutes,
With The Designated
Department Clerk, Receipt Of
Which Is Hereby
Acknowledged.

Clerk 5/9/00
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent via United States Postal Service on this 10th day of May, 2000, to:

Clarence Rowe
418 Pennsylvania Avenue
Rockledge, Florida 32955

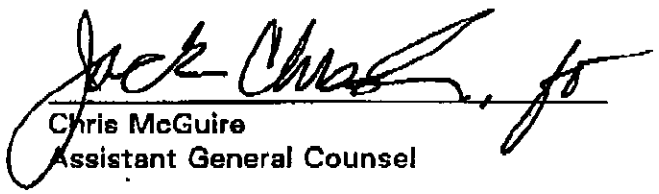
Gary Hunter, Jr., Esquire
Angela R. Morrison, Esquire
Hopping, Green, Sams and Smith, P.A.
Post Office Box 6526
123 South Calhoun Street (32301)
Tallahassee, Florida 32314

Ann Cole, Clerk and
Daniel Manry, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

and by hand delivery to:

Douglas Beason, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE ROWE, Petitioner, vs. SEA RAY BOATS, INC., and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 00-0218

RECOMMENDED ORDER OF DISMISSAL

An evidentiary hearing was conducted on March 2, 2000, in Melbourne, Florida by Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH"). Petitioner, his witness, a court reporter, and members of the public attended the hearing in Melbourne, Florida. Respondents, another court reporter, two witnesses, and the ALJ participated by videoconference from Tallahassee, Florida.

APPEARANCES

For Petitioner: Clarence Rowe, pro se
418 Pennsylvania Avenue
Rockledge, Florida 32955

For Respondent Department of Environmental Protection: W. Douglas Beason, Esquire
Office of General Counsel
Florida Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, Florida 32399-2600

For Respondent Sea Ray Boats, Inc.: Gary Hunter, Jr., Esquire
Angela R. Morrison, Esquire
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Tallahassee, Florida 32314

"Public Notice"), and a draft permit to interested persons including Sea Ray.

3. On October 11, 1999, Petitioner telephoned the Department's Bureau of Air Regulation and requested a copy of correspondence between Sea Ray and the Department. Petitioner also requested that the Department place Petitioner on the list of interested persons.

4. On October 11, 1999, the Department mailed Petitioner, by certified mail return receipt requested, copies of the Notice of Intent, the Public Notice, and the draft permit. Petitioner received the documents from the Department on October 14, 1999, and executed the return receipt on the same date.

5. Both the Notice of Intent and the Public Notice included a notice of rights to substantially affected parties. In relevant part, the notice of rights stated:

> A person whose substantial interests are affected by the proposed permitting . . . may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57 of the Florida Statutes. The petition must contain the information set forth below and must be filed (received) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station #35, Tallahassee, Florida, 32399-3000. . . . Petitions filed by any persons other than those entitled to written notice under Section 120.60(3) . . . must be filed within fourteen days of publication of the public notice or within fourteen days of receipt of this notice of intent, <u>whichever occurs first</u>. . . . The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, or to intervene in this proceeding and participate as a party to it . . . . (emphasis supplied)

6. Petitioner incorrectly concluded that the 14-day filing requirement did not begin to run when he received the Notice of Intent on October 14, 1999, but began to run on a future date when the Department published the Public Notice in the newspaper. In reaching that conclusion, Petitioner did not rely on any representations by any agent or employee of the Department or Sea Ray. Neither Respondent made any representations to Petitioner.

7. On October 31, 1999, the Department published its Public Notice in The Florida Today. No substantive differences exist between the Public Notice published on October 31, 1999, and the Notice of Intent received by Petitioner on October 14, 1999.

8. Petitioner had 14 days from October 14, 1999, or until October 28, 1999, to file his original petition for hearing. Petitioner filed his original petition on November 15, 1999. The original petition was filed 18 days late.

9. On December 15, 1999, the Department dismissed the original petition on the grounds that the petition failed to provide the information required in Section 120.569(2)(c) and the rules incorporated therein. The dismissal was without prejudice as to the grounds for dismissal as required by Section 120.569(2)(c). The dismissal gave Petitioner 15 days from December 21, 1999, the date in the certificate of service, to file an amended petition curing the informational defects in the original petition.

10. The dismissal gave Petitioner until January 5, 2000, to file an amended petition for hearing. Petitioner filed the amended petition one day late on January 6, 2000. Even if the

original petition were deemed timely filed on November 15, 1999, the 14th day after publication of the Public Notice on October 31, 1999, the amended petition was not timely filed.

CONCLUSIONS OF LAW

11. Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this proceeding. The parties received adequate notice of the evidentiary hearing. Section 120.57(1).

12. On October 14, 1999, Petitioner received adequate notice of his right to request an administrative hearing. The Notice of Intent and Public Notice clearly stated the proposed agency action, the right to file a petition for hearing, and the requirement that any petition for hearing must be filed within 14 days of the earlier of: (1) receipt of the Notice of Intent; or (2) publication of the Public Notice.

13. Petitioner had 14 days from October 14, 1999, or until October 28, 1999, to file a petition for hearing with the Department. The notice clearly stated that a petition was not filed until the Department received it. Use of the term "filed," rather than "served," unambiguously advised Petitioner that a petition for hearing must be received by the Department within the 14-day time limit. See Environmental Resource Associates of Florida, Inc. v. Department of General Services, 624 So. 2d 330, 332 (Fla. 1st DCA 1993) (Judge Ervin concurring), reh. denied. See also Rule 62-110.106(2) (defining receipt of notice from the agency as the earlier of receipt of written notice or publication in the newspaper).

14. Petitioner filed the original petition for hearing 18 days late on November 15, 1999. Section 120.569(2)(c) requires dismissal of a petition that is not timely filed. In relevant part, Section 120.569(2)(c) provides:

> A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect . . . . (emphasis supplied)

15. The amended petition did not cure the late-filing defect in the original petition. Even if the original petition were deemed timely because it was filed within 14 days of publication of the Public Notice, the amended petition was filed late in violation of Section 120.569(2)(c).

Statutory Authority

16. Section 120.569(2)(c) requires the Department to dismiss an untimely petition for hearing. Agencies, including the Department and DOAH, cannot enlarge, modify, or contravene the plain and unambiguous terms of a statute. Sections 120.52(8)(c) and 120.58(7)(3)4.

17. Neither the Department nor DOAH has authority to adopt an interpretation of Section 120.569(2)(c) that enlarges, modifies, or contravenes the terms of the statute. See, e.g. DeMario v. Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 213-214 (Fla. 4th DCA 1994), rev. denied, 659 So. 2d 1086 (Fla. 1995) (agency lacks authority to impose time requirement not found in statute); Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447

So. 2d 361, 362 (Fla. 1st DCA 1984) (agency action that ignores some statutory criteria and emphasizes others is arbitrary and capricious). Nor can administrative convenience or expediency dictate the terms of a statute. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1241 (Fla. 1st DCA 1996) reh. denied; Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995) reh. denied; Flamingo Lake RV Resort, Inc. v. Department of Transportation, 599 So. 2d 732, 732 (Fla. 1st DCA 1992).

18. Rule 62-110.106(3)(b) provides that the failure to timely file a petition for hearing waives any right to request a hearing. Neither the Department nor DOAH can deviate from a valid existing rule. Section 120.68(7)(e)2. An agency's deviation from a valid existing rule is invalid and unenforceable. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977).

19. Neither the Department nor DOAH can construe Rule 62-110.106(3)(b) to enlarge, modify, or contravene the requirement for dismissal in Section 120.569(2)(c). A rule cannot impose a requirement not found in a statute or otherwise enlarge, modify, or contravene the terms of a statute. See, e.g., DeMario, 648 So. 2d at 213-214 (agency lacked authority to impose time requirement not found in statute); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d

419, 423 (Fla. 5th DCA 1988) (agency cannot vary impact of statute by creating waivers or exemptions) reh. denied. Where an agency rule conflicts with a statute, the statute prevails. Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Johnson v. Department of Highway Safety & Motore Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997), reh. denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992), reh. denied; Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991) reh. denied. See also Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117.

20. The Department has previously construed applicable statutes and rules to require dismissal of untimely petitions for hearing. See e.g. Dunn v. Phelps, 19 FALR 2595 (Department of Environmental Protection 1997)(filing requires receipt rather than mailing); Gardner v. The Psalms 2100 Ocean Boulevard, Ltd., 19 FALR 2712 (Department of Environmental Protection 1997)(dismissing petition for hearing as untimely when filed beyond 14 days of publication but within 14 days of receipt of written notice); Pettit v. Department of Environmental Protection, ER FALR 97:037 (Department of Environmental Protection 1996)(dismissing as untimely petition for hearing that was five days late). Administrative stare decisis requires the

Department to follow its earlier decisions that involve similar facts and law. Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993), reh. denied, dismissed, 634 So. 2d 624 (Fla. 1994). Compare Nordheim v. Department of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998) (agency refusal to consider its prior decision is abuse of discretion) with Caserta v. Department of Business and Professional Regulation, 686 So. 2d 651, 653 (Fla. 5th DCA 1996) (Section 120.53 requirement for subject matter index begins on effective date of 1992 amendment).

Clear Point of Entry

21. The clear point of entry doctrine is a judicial doctrine that requires state agencies to provide affected parties with a clear point of entry to proceedings authorized in Sections 120.569 and 120.57. A state agency provides an affected party with a clear point of entry by satisfying several fundamental requirements. First, the agency must notify the affected party of the proposed agency action. Second, the notice must inform the affected party of the right to petition for an administrative hearing pursuant to Sections 120.569 and 120.57. Third, the notice must inform the affected party of the time limits within which the party must file a petition for hearing. Section 120.569(1). If the agency's notice satisfies the requirements of a clear point of entry and the affected party fails to file a petition for hearing within the time prescribed in the clear point of entry, the affected party waives his or her right to a

hearing, and the petition must be dismissed. See e.g. Environmental Resource, 624 So. 2d at 331-332.

22. The clear point of entry doctrine was first enunciated in Capeletti Brothers, Inc. v. State, Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1374 (Fla. 1979). Since 1979, Florida courts have consistently applied the doctrine. See e.g. Environmental Resource, 624 So. 2d at 331-332 (concurring opinion of Judge Ervin); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). See also Southeast Grove Management, Inc. v. McKinness, 578 So. 2d 883 (Fla. 1st DCA 1991); Capital Copy, Inc. v. University of Florida, 526 So. 2d 988 (Fla. 1st DCA 1988); Lamar Advertising Company v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988); City of St. Cloud v. Department of Environmental Regulation, 490 So. 2d 1356 (Fla. 5th DCA 1986); Henry v. Department of Administration, Division of Retirement, 431 So. 2d 677 (Fla. 1st DCA 1983). See also Shirley S., "In Search of a Clear Point of Entry," 68 Fla. B.J. 61 (May 1994).

23. The clear point of entry doctrine requires a state agency to provide adequate notice of proposed agency action regardless of the party-status of the agency. Courts have applied the clear point of entry doctrine to cases in which the state agency is a party litigant. See e.g. Florida League of Cities, 586 So. 2d at 413(agency attempting to impose sanctions, including the withholding of state funds, to the affected party); Lamar Advertising, 523 So. 2d at 712 (agency denied of sign

permit); Henry, 431 So. 2d at 680 (agency denied retirement benefits); Sterman v. Florida State University Board of Regents, 414 So. 2d 1102 (Fla. 1st DCA 1982) (agency denied degree to a student).

24. Courts have also applied the clear point of entry doctrine to cases in which the state agency is a nominal party rather than a real party in interest. Capital Copy, 526 So. 2d at 988 (agency reviewing bids); City of St. Cloud, 490 So. 2d at 1358 (agency reviewing application for approval of wastewater system); Manasota 88, Inc. v. Department of Environmental Regulation, 417 So. 2d 846 (Fla. 1st DCA 1982) (agency reviewing revised operating permit for a crude oil splitter).

25. When an agency is a nominal party in a case involving two private party litigants, courts have applied the clear point of entry doctrine strictly. In a certificate of need case, for example, one court held that failure of the state agency to provide notice to competing hospitals disclosing the submission of a revised application by the original applicant denied competing hospitals of a clear point of entry. NME Hospitals, Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 379, 384-385 (Fla. 1st DCA 1986) (opinion on Motion for rehearing), reh. denied. In another certificate of need case, the court refused to extend the time limits for filing a letter of intent. Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306, 307 (Fla. 1st DCA 1997) (letters of intent filed one day late in certificate of need

process are untimely and cannot be extended by equitable tolling).

26. At least one case has applied the clear point of entry doctrine where the state agency was neither a party litigant nor a nominal party. In a proceeding between a fruit dealer and a grower, the court held that the failure of the dealer to request a hearing within the time limit prescribed in a statutorily required agency notice waived the dealer's right to a de novo hearing. Southeast Grove Management, Inc. v. McKiness, 578 So. 2d 883, 886 (Fla. 1st DCA 1991).

27. The evidence in this case shows that the Department provided Petitioner with a clear point of entry on October 14, 1999. The written notice received by Petitioner provided adequate notice of the proposed agency action, the right to request a hearing, and the 14-day filing requirement for requesting a hearing.

Jurisdiction

28. No statutes, rules, or cases expressly state whether Petitioner's failure to comply with the filing requirement in a clear point of entry, such as that provided to Petitioner in the Notice of Intent, is a jurisdictional prerequisite to Petitioner's right to a hearing or a waiver by Petitioner that is subject to equitable tolling under certain circumstances. Rule 62-110.106(3)(b) states that an affected party who fails to timely file a petition for hearing waives his right to request a hearing.

29. The conclusion that failure to comply with the filing requirements prescribed in an agency's clear point of entry results in a waiver rather than a jurisdictional bar is consistent with analogous cases in other areas of the law that have addressed the failure to comply with statutory filing requirements. Florida courts have generally held that the failure to comply with a statutory filing requirement is not jurisdictional but admits a defense analogous to a statute of limitations. Joshua v. City of Gainesville, 734 So. 2d 1068, 1069-1071 (Fla. 1st DCA 1999) (question certified to the Florida Supreme Court) rev. granted 735 So. 2d 1285 (Fla. 1999); Adams v. Wellington Regional Medical Center, Inc., 727 So. 2d 1139 (Fla. 4th DCA 1999) (question certified to the Florida Supreme Court); Daugherty v. City of Kissimmee, 722 So. 2d 288 (Fla. 5th DCA 1998); Crumbie v. Leon County School Board, 721 So. 2d 1211 (Fla. 1st DCA 1998); Kalkai v. Emergency One, 717 So. 2d 626 (Fla. 5th DCA 1998); Milano v. Moldmaster, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1998). See also Sasser M. and Stafford S., "Defining the Hourglass: When Is a Claim Under the Florida Civil Rights Act Time Barred?", 73 Fla. B.J. 68 (Dec. 1999).

30. Florida courts that have held statutory filing requirements to be jurisdictional have generally done so based on specific statutory language. Relying on language in Section 194.171(6), for example, the Florida Supreme Court has held that the 60-day filing requirement in Section 194.171(2) is a "jurisdictional statute of nonclaim." Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 815 (Fla. 1988). Accord

Wal-Mart Stores, Inc. v. Day, 742 So. 2d 408, 409 (Fla. 5th DCA 1999); Palmer Trinity Private School, Inc. v. Robbins, 681 So. 2d 809 (Fla. 3d DCA 1996); Hall v. Leesburg Regional Medical Center, 651 So. 2d 231 (Fla. 5th DCA 1995); Walker v. Garrison, 610 So. 2d 716 (Fla. 4th DCA 1992); Markham v. Moriarty, 575 So. 2d 1307 (Fla. 4th DCA 1991), cert. denied, 502 U.S. 968, 112 S. Ct. 440 (1991); Gulfside Interval Vacations, Inc. v. Schultz, 479 So. 2d 776 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 830 (Fla. 1986). See also Davis v. Macedonia Housing Authority, 641 So. 2d 131, 132 (Fla. 1st DCA 1994) (the 60-day filing requirement in Section 194.171(2) is a jurisdictional bar to an action to contest loss of tax exemption for 1990). Cf. Pogge v. Department of Revenue, 703 So. 2d 523, 525-526 (Fla. 1st DCA 1997) (the 60-day filing requirement in Section 72.011(2) is a jurisdictional bar to an action contesting the assessment of taxes but was not a jurisdictional bar to an action for a refund of taxes prior to 1991 when the legislature amended former Section 72.011(6) to delete express language that Section 72.011 was inapplicable to refunds); Mikos v. Parker, 571 So. 2d 8, 9 (Fla. 2d DCA 1990) (the 60-day filing requirement in Section 194.171 was not a jurisdictional bar to a claim for refund of taxes assessed in 1989). Compare City of Fernandina Beach v. Page, 682 So. 2d 573 (Fla. 1st DCA 1995); Joyner v. Roberts, 642 So. 2d 826 (Fla. 1st DCA 1994); and Chihocky v. Crapo, 632 So. 2d 230 (Fla. 1st DCA 1994) (the failure to strictly comply with statutory notice procedures may toll the running of the 60-day filing requirement in Section 194.171(2)).

31. Federal courts generally view statutory filing requirements in discrimination cases as statutes of limitations rather than as jurisdictional prerequisites to filing suit. For example, 42 U.S.C. Section 2000e-5(f)(1) requires an aggrieved party to file suit within 90 days after receipt of a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). In Espinoza v. Missouri Pacific Railroad Co., 754 F.2d 1247, 1250 (5th Cir. 1985), the court held that the 90-day filing requirement in 42 U.S.C. Section 2000e-5(f)(1) is not a jurisdictional prerequisite to suit but is a statute of limitations subject to the doctrine of equitable tolling.

32. The Supreme Court has adopted a similar construction of the requirement in 42 U.S.C. Section 2000e-16(c) for an aggrieved party to file suit within 30 days after receipt of a right to sue letter from the EEOC. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92, 111 S. Ct. 453, 455 (1990), the Court resolved a conflict between federal appellate courts over whether a late-filed claim deprived federal courts of jurisdiction. The Fifth Circuit Court of Appeals had held that federal courts lacked jurisdiction over claims filed more than 30 days after receipt of a right to sue letter. Irwin v. Department of Veterans Affairs, 874 F.2d 1092 (5th Cir 1989). The holding by the Fifth Circuit was in direct conflict with decisions in four other Courts of Appeals. Boddy v. Dean, 821 F.2d 346, 350 (6th Cir. 1987); Martinez v. Orr, 738 F.2d 1107, 1109 (10th Cir. 1984); Milam v. United States Postal Service, 674 F.2d 860, 862 (11th Cir. 1982); Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir.

1982). The Supreme Court held that the 30-day filing requirement is not jurisdictional but creates a "rebuttable presumption of equitable tolling." Irwin, 498 U.S. at 95-96, 111 S. Ct. at 457.

Equitable Tolling

33. Florida courts have applied the doctrine of equitable tolling to excuse an otherwise untimely initiation of an administrative proceeding when four requirements are satisfied. First, the filing requirement is not jurisdictional. Cf. Environmental Resource, 624 So. 2d at 332-333 (Judge Zehmer dissenting, in relevant part, because the 21-day time limit in that case was "not jurisdictional"); Castillo v. Department of Administration, Division of Retirement, 593 So. 2d 1116 (Fla. 2d DCA 1992) (remanding the case for equitable considerations related to the "not jurisdictional" 21-day period for challenging agency action). Second, the delay is a minor infraction of the filing requirement. Stewart v. Department of Corrections, 561 So. 2d 15 (Fla. 4th DCA 1990)(applying the doctrine to excuse a request for hearing that was one day late); Environmental Resource, 624 So. at 332-333 (Judge Zehmer's dissenting opinion found that the delay was a minor infraction). Third, the delay does not result in prejudice to the other party. Stewart, 561 So. 2d at 16. Fourth, the delay is caused by the affected party being misled or lulled into inaction, being prevented in some extraordinary way from asserting his or her rights, or having timely asserted his or her rights mistakenly in the wrong forum. Machules v. Department of Administration, 523 So. 2d 1132, 1133-1134 (Fla. 1988). See Burnaman, R., "Equitable Tolling in

Florida Administrative Proceedings," 74 Fla. B.J. 60 (February 2000).

34. The first requirement for equitable tolling is satisfied in this case. The 14-day filing requirement in the notice of rights received by Petitioner on October 14, 1999, is not a jurisdictional prerequisite to Petitioner's claim. Irwin, 498 U.S. at 92, 111 S. Ct. at 455; Milano, 703 So. 2d at 1094-1095.

35. The second requirement for equitable tolling is not satisfied in this case. The 18-day delay caused by Petitioner's failure to timely file a request for hearing was not a minor infraction. See e.g. Vantage Healthcare, 687 So. 2d at 307 (refusing to allow filing of letters of intent one day late in certificate of need process); Environmental Resource, 624 So. 2d at 331 (court refused to reverse a final order denying a hearing where the request for hearing was four days late).

36. The third requirement of the doctrine of equitable tolling is not satisfied in this case. The delay sought by Petitioner would prejudice the interests of a private party by requiring Sea Ray to incur the expense and delay caused by disregard of the mandatory dismissal language in Section 120.569(2)(c) and the mandatory waiver language in Rule 62-110.106(3)(b).

37. Petitioner submitted no evidence that the fourth requirement of the doctrine of equitable tolling was satisfied in this case. Petitioner failed to show that the delay in filing his original and amended petitions was the result of being misled

or lulled into inaction, of being prevented in some extraordinary way from asserting his rights, or of having timely asserted his rights mistakenly in the wrong forum. See e.g. Perdue v. TJ Palm Associates, Ltd., 24 Fla. L. Weekly D1399 (Fla. 4th DCA June 16, 1999) (refusing to remand a denial of a request for hearing where the recommended order contained findings of fact and conclusions of law supporting the denial of an untimely request for hearing).

38. The evidence shows that Petitioner relied on his own belief that the 14-day filing requirement did not begin to run until publication of the Public Notice. Although Petitioner is experienced in administrative proceedings authorized by Sections 120.569 and 120.57, Petitioner has repeatedly asked throughout this proceeding that his inaction be excused, in part, because he is not an attorney. The lack of legal representation does not excuse inaction that results in an untimely petition for hearing. Jancyn Manufacturing Corporation v. Florida Department of Health, 24 Fla. L. Weekly D2232, 2233 (Fla. 1st DCA 1999).

39. Petitioner is not subject to a lesser standard of conduct, as distinguished from legal competence, than a licensed attorney. A contrary rule would insulate a party from applicable time limits by choosing lay representation. Cf. Burke v. Harbor Estate Associates, Inc., 591 So. 2d 1034, 1037-1038 (Fla. 1st DCA 1991) (a party cannot avoid fees and costs in frivolous actions by choosing lay representation). Accord Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So. 2d 324 (Fla. 3d DCA 1992).

40. Petitioner failed to show that he was lulled into inaction by a party to this proceeding. The doctrine of equitable tolling generally has been limited to cases in which one party has been lulled into inaction or prevented from asserting his or her rights by the acts or omissions of the party's adversary. In Irwin, for example, the Court held that the doctrine of equitable tolling applied to an action brought by a discharged government employee against the government. The Court noted that the doctrine of equitable tolling generally was limited to situations where a complainant was induced or tricked by an adversary's misconduct into allowing a filing deadline to pass. Irwin, 498 U.S. at 96, 111 S. Ct. at 455.

41. The Florida Supreme Court has not limited the doctrine of equitable tolling to cases where a party is tricked or induced by the misconduct of an adversary into allowing a filing deadline to pass. The Florida court has expanded the doctrine to reach cases where a party allows a filing deadline to pass through inadvertence or mistake of law. See e.g. Machules, 523 So. 2d at 1132 (discharged agency employee who chose union grievance instead of requesting hearing did not waive his right to a hearing). However, the court's expansion of equitable tolling to inadvertence and mistake of law in Machules involved a state agency that was both a named party and an adversary, or party litigant, to the discharged agency employee. The decision did not involve a state agency that was a nominal party in a case such as this in which two or more other parties who are adversaries and who are the real parties in interest. Machules,

523 So. 2d at 1132. See e.g. Section 120.569(2)(a) (using the term "party litigant").

42. Florida appellate decisions have generally been limited to facts involving state agencies with a party status analogous to that of the state agency in Machules. These decisions have generally applied the doctrine of equitable tolling in cases where the state agency is a party litigant rather than a nominal party. See e.g. Mathis v. Florida Department of Corrections, 726 So. 2d 389 (Fla. 1st DCA 1999)(state agency was adversary in claim for back pay by agency's employee); Avante, Inc. v. Agency for Health Care Administration, 722 So. 2d 965 (Fla. 1st DCA 1998) (state agency was adversary in action to recover Medicaid payments); Unimed Laboratory, Inc. v. Agency for Health Care Administration, 715 So. 2d 1036 (Fla. 3d DCA 1998)(state agency was adversary in action to recover Medicaid payments); Haynes v. Public Employees Relations Commission, 694 So. 2d 821 (Fla. 4th DCA 1997) (state agency was adversary in employee dismissal action); Phillip v. University of Florida, 680 So. 2d 508 (Fla. 1st DCA 1996)(state agency was adversary in employee dismissal action). Abusalameh v. Department of Business Regulation, 627 So. 2d 560 (Fla. 4th DCA 1993)(state agency was adversary in license revocation proceeding); Environmental Resource, 624 So. 2d at 331 (state agency that was adversary in contract termination case did nothing to cause four-day delay in filing request for hearing); Castillo, 593 So. 2d at 1117 (state agency was adversary in beneficiary's claim for retirement benefits); Department of Environmental Regulation v. Puckett Oil Co.,

577 So. 2d 988 (Fla. 1st DCA 1991) (state agency was adversary in action seeking reimbursement of cleanup costs); Stewart, 561 So. 2d 15 (state agency was adversary in employee dismissal action).

43. Florida courts have been reluctant to extend the doctrine of equitable tolling to administrative proceedings in which a state agency is only a nominal party rather than a party litigant. In Vantage Healthcare, 687 So. 2d at 307, a state agency awarded a certificate of need to an applicant after allowing the applicant to file its letter of intent one day late. The agency applied the doctrine of equitable tolling to extend the filing deadline by one day. The court held that the doctrine of equitable tolling does not apply to the certificate of need application process because the application process:

> . . . is not comparable to . . . judicial or quasi-judicial proceedings. We have found no authority extending the doctrine of equitable tolling to facts such as in the present case.

Cf. Perdue, 1999 WL 393464 (Fla. 4th DCA 1999) (refusing, as a factual matter, to apply the doctrine of equitable tolling to extend the deadline for challenging a notice of intent to issue a conceptual permit approving overall master project design).

44. Like the state agency in Vantage Healthcare, the Department is a nominal party in this proceeding rather than a party litigant. The Department is proposing approval of an application and is required by law to construe applicable statutes and rules, including those pertaining to the timeliness of the petition for hearing. The equitable tolling doctrine may not apply to the application process involved in this case.

Vantage Healthcare, 687 So. 2d at 307. Alternatively, the equitable tolling doctrine may not be apply where a party fails to file a petition within the time period provided in a clear point of entry. Environmental Resource, 624 So. 2d 331. See also Section 120.569(2)(c).

45. Eight years after the decision in Machules, the legislature enacted the mandatory dismissal language in Section 120.569(2)(c). The 1996 mandatory dismissal language was not present in the statutes construed by earlier courts that applied the doctrine of equitable tolling to suspend the filing requirements prescribed in an agency's clear point of entry. The enactment of Section 120.569(2)(c) distinguishes this case from earlier cases on the basis of the controlling statutory language.

Equitable Estoppel

46. The doctrine of equitable tolling is distinguishable from the doctrine of equitable estoppel. The former doctrine is concerned with the point at which a limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. Morsani v. Major League Baseball, 739 So. 2d 610, 614-615 (Fla. 2d DCA 1999). Equitable estoppel comes into play only after the limitations period has run and addresses the circumstances in which a party is estopped from asserting the statute of limitations as a defense to an admittedly untimely action. Id. See also Ovadia v. Bloom, 2000 WL 227961 (Fla. 3d DCA March 1, 2000).

47. Like equitable tolling, equitable estoppel can be applied to a state agency. However, most cases involve a state

agency that is a party litigant rather than a nominal party. Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212, 215 (Fla. 1st DCA 1986).

48. A party must specifically plead equitable estoppel in administrative cases. University Community Hospital v. Department of Health and Rehabilitative Services, 610 So. 2d 1342, 1346 (Fla. 1st DCA 1992). Petitioner did not specifically plead equitable estoppel in this case.

49. Unlike equitable tolling, equitable estoppel does not apply in cases where the delay is caused by a mistake of law. Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994); Dolphin Outdoor Advertising v. Department of Transportation, 582 So. 2d 709, 710 (Fla. 1st DCA 1991); Tri-State, 500 So. 2d 216. Petitioner's mistaken belief that the 14-day filing requirement in the notice of rights did not begin to run until publication of the Public Notice was a mistake of law.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order dismissing the original and amended petitions as untimely filed.

DONE AND ENTERED this 4th day of April, 2000, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 4th day of April, 2000.

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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.