

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

JAYSON PRZYBYL,)	
)	
Petitioner,)	
)	
vs.)	OGC CASE NO. 20-1347
)	DOAH CASE NO. 21-0388
WILLIAM EURICE and DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
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FINAL ORDER

On March 26, 2021, An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. No party filed exceptions to the ALJ’s RO. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On May 20, 2020, the Department issued an agency action (the Exemption Determination) that confirmed a regulatory exemption and proprietary consent by rule for the installation of channel markers, with pilings, as proposed by Respondent William Eurice (Applicant). The Exemption Determination provided a point of entry and advised recipients of a 21-day deadline for the filing of a petition.

Petitioner Jayson Przbyla (Petitioner) filed a request to extend the time for filing a petition challenging the exemption order, and the Department granted that request by an order

dated October 6, 2020. Petitioner filed a second request for extension of time, which the Department granted by an order dated October 29, 2020. Specifically the October 29 order granted leave for the Petitioner to file a petition by 5:00 p.m. on November 25, 2020, with the Department's Agency Clerk. The certificate of service to the October 29 letter reflects that the Order was served by electronic mail on that date, to the e-mail address provided in the previous requests for extension of time.

On November 25, Petitioner sent the Agency Clerk an e-mail stating that "The petition was sent via certified mail due to file size." The Agency Clerk replied and advised that the Petitioner had not included an attachment with the e-mail. Petitioner responded that he had sent the Petition by certified mail. The Department received the original petition on December 3, 2020, eight days after the deadline from the October 29 order. The Department then issued an order dismissing the petition as untimely, but giving leave for the Petitioner to file an amended petition to address the timeliness issue.

On December 16, 2020, Petitioner filed his Amended Petition and at the same time, a "Motion For Relief From An Order Of Dismissal Based On Excusable Neglect Pursuant To Florida Administrative Code § 62.1.10.106(4)," together with an affidavit signed by the Petitioner. On July 21, 2020, the Department referred this case to DOAH for a formal administrative hearing. Based upon the "disputed nature of the facts" concerning timeliness, the Petitioner requested a telephonic hearing on his Motion for Relief, which the ALJ granted. Following that motion hearing, the ALJ issued an order recommending that the Department dismiss the petition for hearing as untimely. The parties have not filed any transcript of the hearing on the Motion for Relief. Otherwise, the attached RO accurately describes the procedural history in proceedings before DOAH.

SUMMARY OF THE RECOMMENDED ORDER

The Petitioner argued that the petition should be deemed timely because he sent the original petition within five days of the deadline, based on the assumption that he was entitled to five additional days after the deadline stated in the October 28 order. The Petitioner also argued that the ALJ should excuse the untimeliness based on the doctrine of excusable neglect, as reflected in Department rules and adopted as an exception in rule 62-110.106(4) of the Florida Administrative Code. The Department and the Applicant argued, in their joint response, that the petition could not be deemed timely. Respondents also argued that rule 62-100.106(4) did not apply and that only the doctrine of equitable tolling could “save” the untimely petition. The ALJ rejected Petitioner’s argument that the petition should be deemed timely, and also concluded that the Petitioner did not “present facts” that would constitute excusable neglect.

CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm’n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep’t of Health, Bd. of Nursing*, 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep’t of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield v. Dep’t of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). In this case, no party filed any exceptions to the RO objecting to the ALJ’s findings, conclusions of law, recommendations or to the DOAH hearing procedures.

Section 120.57(1)(1) of the Florida Statutes authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules over which it has "substantive jurisdiction." See *Barfield v. Dep't of Health*, 805 So. 2d 1008,1012 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140,1141-42 (Fla. 2d DCA 2001). The agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise or "substantive jurisdiction." See, e.g., *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d at 1088; *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). The application of excusable neglect to a given set of facts is not within the substantive jurisdiction of the Department. See *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001) (addressing a conclusion of law that "required applying a legal concept typically resolved by judicial or quasi-judicial officers.")

The Department generally concurs with the ALJ's legal conclusions and recommendations. However, because the ALJ concluded that the Petitioner had not alleged sufficient facts to show excusable neglect, it is not necessary to consider the alternative argument that the doctrine of excusable neglect does not apply.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as it may have been modified by the rulings in this Final Order, and is incorporated by reference herein.

B. The Exemption Determination in file number 41-0385063-002-EE is APPROVED.

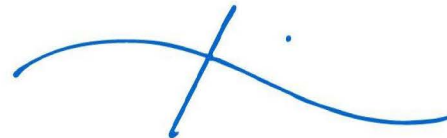
JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order

pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, 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 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 5th day of May 2021 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



NOAH VALENSTEIN
Secretary

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

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Syndie Kinsey Digitally signed by Syndie Kinsey
Date: 2021.05.05 15:01:01 -04'00'

CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by
electronic mail to:

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on this 5th day of May 2021.

/s/ Jeffrey Brown

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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

JAYSON PRZYBYLA,

Petitioner,

vs.

Case No. 21-0388

WILLIAM EURICE AND DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

RECOMMENDED ORDER OF DISMISSAL

This cause came before the undersigned on Petitioner, Jason Przybyla's, Motion for Relief from an Order of Dismissal Based on Excusable Neglect Pursuant to Florida Administrative Code §62[-]110.106(4) (Motion), filed on February 3, 2021; and Respondents' joint response, filed on February 24, 2021. Attached to the Motion was an affidavit from Petitioner's counsel. Attached to Respondents' joint response were copies of relevant orders issued by Respondent, Department of Environmental Protection (DEP), before jurisdiction of this matter was transferred to the Division of Administrative Hearings (DOAH).

On March 22, 2021, the undersigned held a telephone hearing, and heard arguments from the parties regarding the Motion and joint response. What became clear to the undersigned was that DEP's explicit deadline in its order granting a second extension of the time to file the petition for hearing was "November 25, 2020, by 5:00 p.m. EST." *See* Ex. 4 to Resp.'s joint response. The order was served "via electronic mail only" to Petitioner. *Id.* However, Petitioner's counsel was under the mistaken impression that five days should be automatically added to that explicit deadline, even though the order was served by electronic mail to Petitioner's email address. *See* Fla. Admin. Code R. 28-106.103 ("[F]ive days shall be added to the time

limits when service has been made by regular U.S. mail. . . . No additional time shall be added if service is made by . . . electronic mail . . .").

Petitioner's counsel also represented that she was working with the notice in the agency exemption letter in order to prepare the petition for hearing. The notice did not contain an email address or e-filing instructions for DEP's Agency Clerk. However, Florida Administrative Code Rule 28-106.103 also provides that when the time period begins to run pursuant to that type of notice, no additional time shall be added to the time limit. DEP's orders granting extensions of the notice's time limit, when served by electronic mail, do not authorize the addition of five days to the extended time limit. *See Smith v. Sylvester*, 82 So. 3d 1159 (Fla. 1st DCA 2012)(reflecting that five days should be added when the agency communicates a discretionary deadline by regular U.S. mail); *see also Dixon v. Dep't of Agric. & Consumer Servs.*, -- So. 3d --, 2021 WL 261982 (Fla. 3d DCA 2021)(reflecting that a request for informal hearing was untimely although the election of rights form was postmarked on the date it was required to be filed).

Petitioner's counsel placed a hard copy of the petition for hearing in the U.S. mail with the United States Postal Service (USPS) on November 25, 2020, expecting that it would arrive at DEP on or before the alleged deadline of November 30, 2020. The petition for hearing was received and docketed by DEP on December 3, 2020. *See* Ex. 6 to Resp.'s joint response. Petitioner's counsel relied on the representations of the USPS regarding delivery by November 30, 2020. Such reliance could constitute excusable neglect if the filing deadline was November 30, 2020. *See* Fla. Admin. Code R. 62-110.106(4); *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985)(holding that a matter should be heard on the merits when "inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry, or any of the other foibles to which human nature is heir.").

Exhibit A

DEP argued that section 120.569(2)(c), Florida Statutes, rule 28-106.111(4), and applicable case law make clear that the appropriate doctrine that may save an untimely petition is equitable tolling. *See, e.g., Aleong v. Dep't of Bus. & Prof'l Reg.*, 963 So. 2d 799 (Fla. 4th DCA 2007); *Patz v. Dep't of Health*, 864 So. 2d 79 (Fla. 3d DCA 2003). DEP argued that Petitioner was asserting the wrong legal doctrine, and the facts did not rise to the level of equitable tolling. However, as an exception to the Uniform Rules of Procedure, DEP has discretionary authority to "allow the act to be done even if the period has expired, upon motion showing that the failure to act was the result of excusable neglect." *See* Fla. Admin. Code R. 62-110.106(4); *Smith*, 82 So. 3d at 1162 n.1.

Since the deadline communicated by electronic mail to Petitioner was November 25, 2020, the petition for hearing filed on December 3, 2020, was untimely. Petitioner's Motion and argument did not present facts that constituted excusable neglect to save the untimely petition. Therefore, it is,

RECOMMENDED that DEP enter a final order dismissing the petition for hearing as untimely.

DONE AND ORDERED this 26th day of March, 2021, in Tallahassee, Leon County, Florida.



FRANCINE M. FFOLKES
Administrative Law Judge
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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.