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**STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEALS**

IN RE: ELIAS MAKERE, FSA, MAAA

)

Appellant/Petitioner,

)

)

1DCA Case No: 1D12-1312

v.

)

FCHR Case No: n/a

)

Order No: 21-029

FLORIDA COMMISSION ON HUMAN
RELATIONS, THE

)

Appellee/Respondent

)

INITIAL BRIEF

ELIAS MAKERE, FSA, MAAA

s/ Elias Makere, Appellant

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Appellant's Brief

♪ ♪ ♪

*The agency takes money but says that it's not a thing/
Likening it to the honey in the empire of a queen/*

*When asked about it, **the agency heard nothing yet said it heard everything**/
Well, this particular being is susceptible to its sting/*

*So, may this Court direct the agency beneath/
To hold a hearing on the allergic's preemptive inquiry//*

♪ ♪ ♪



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PREFACE

Appellant, Elias Makere, was the Petitioner in the lower tribunal; and will be referred to in this brief as Appellant. Appellee, the Florida Commission on Human Relations, was the lower tribunal itself; and will be referred to as Appellee.

The following references will be used in this brief:

[A____] Appendix^{1/}

The following abbreviations will also be used:

FAC	Florida Administrative Code
FAR	Florida Administrative Register
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).

POINTS ON APPEAL

- I. Whether Appellee erred by not providing a clear point of entry into the proceedings below.
- II. Whether Appellee erred by not holding a hearing on the material facts of Appellant's petition.

STATEMENT OF THE CASE

1. This is an appeal from a final order of the Florida Commission on Human Relations. Appellee declined to issue a declaratory statement on Appellant's petition.

STATEMENT OF THE FACTS

2. On September 1, 2020, Petitioner filed his *Petition for Declaratory Statement Before the FCHR* ("The Inquiry") with Appellee. [A0003]
3. 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). [A0005] - [A0013]
4. Soon thereafter, Appellee published receipt of The Inquiry in the September 8th issue of the Florida Administrative Register (46 FAR 175). [A0014]
5. Out-of-step with §120.565(3) FS, the FCHR failed to enter an order on The Inquiry within the mandatory 90-day timeframe.
6. So, on December 18, 2020, Appellant petitioned this Court for a Writ of Mandamus (Rule 9.100 Fla. R. App. P.). Asking it to command Appellee to complete its ministerial duty (regarding The Inquiry). Appellee - at the time - was several weeks late; and had made no indications it would even respond. [A0015]

7. On March 10, 2021 - and after this Court's intervention - Appellee notified the public (via 47 FAR 47) that March 31st 2021 marked the date in which it would vote on The Inquiry.

[A0037]

8. Appellant thereby submitted two comments in support of his petition.

a. The first (filed on March 12, 2021), gave the definition for the term "bribe". **[A0040]**

b. The second (filed on March 17, 2021), corrected a typo and provided clarification. **[A0046]**

9. On March 19, 2021, Appellant also filed a request for a hearing. **[A0052]**. He followed up several times regarding the hearing - to no avail **[A0024] - [A0036]**.

10. On March 31, 2021, Appellee voted on The Inquiry, and entered its *Final Order Denying Petition for Declaratory Statement* ("FO"). **[A0058]**

a. Publishing notice in 47 FAR 64. **[A0062]**

This appeal began soon thereafter.

Procedural Analysis

11. None of Appellee's FAR notices outlined how a hearing could commence on The Inquiry.

12.The first notice read, in pertinent part, as follows:

"The petition seeks the agency's opinion as to the applicability of subsection 760.06(4), Fla. Stat. as it applies to the petitioner. Petitioner asks whether a respondent is allowed to bribe the Florida Commission on Human Relations during the investigative phase of a discrimination case. A copy of the Petition for Declaratory Statement may be obtained by contacting: Tammy Barton, Clerk of the Commission, tammy.barton@fchr.myflorida.com, 4075 Esplanade Way, Suite 110, Tallahassee, FL 32399. Please refer all comments to: Tammy Barton, Clerk of the Commission, tammy.barton@fchr.myflorida.com, 4075 Esplanade Way, Suite 110, Tallahassee, FL 32399."

- 46 FAR 175 at 14 | 9/8/2020

13.The second notice read, in pertinent part, as follows:

"The purpose of the meeting is for the Commission to vote on the disposition of cases, and a petition for a declaratory statement, pending before it for decision. A copy of the agenda may be obtained by contacting: John Scotese at (850)907-6823 or John.Scotese@fchr.myflorida.com."

- 47 FAR 47 at 32 | 3/10/2021

14.The third & final notice read, in pertinent part, as follows:

"Petitioner did not meet the requirement of alleging facts that show a bona fide, actual, present and practical need for a declaration. Subsection 760.06(4), Fla. Stat., (2020) does not indicate more than one interpretation of the provision in question. A copy of the Order Declining of the Petition for Declaratory Statement may be obtained by contacting: Florida Commission on Human Relations, c/o Tammy Barton, Clerk of the Commission, 4075 esplanade Way, Suite 110, Tallahassee, FL 32399, (850)907-6788, tammy.barton@fchr.myflorida.com."

- 47 FAR 64 at 32 | 4/2/2021

15. Pursuant to Rule 28-105.0024(6) FAC, Appellee was required to describe how the public could request hearings. Yet, Appellee's first notice failed to do so.

a. Instead, it only provided the information delineated by subsections (1)-(5) of the rule.

Appellee's two remaining notices fell even further below the mark prescribed by the regulation.

16. Moreover, Appellee's FO made no mention of Appellant's hearing request. Appellee also prohibited communication from Appellant (or the public) during its March 31st vote tally (§10, *supra*) (highlights added):

"The purpose of the March 31 deliberation is for a Commission Panel to vote on the Commission's disposition of cases and your petition for declaratory statement, and as stated in the Commission's March 11, 2021 Notice, no oral argument is permitted.

Sincerely,
John Scotese"

- **[A0027]** | Appellee Email to Appellant | 3/18/2021

ISSUE I

APPELLEE ERRED BY FAILING TO CREATE A
'CLEAR POINT OF ENTRY'
INTO THE PROCEEDINGS

SUMMARY OF ARGUMENT I

17.Appellee departed from the essential requirements of law when it decided not to provide a clear point of entry into the proceedings below. An act that violated Appellant's due process rights. Resulting in an error which this Court has the power to fix (pursuant to §120.68(7)).

STANDARD OF REVIEW I

18.The standard of review for constitutional violations (like Issue I) is *de novo* (highlights added):

"Cooper's petition for a writ of certiorari asked us to decide whether the Court of Appeals reviewed the constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria we articulated in *Gore*. We granted the petition to resolve confusion among the Courts of Appeals on the first question.[4] 531 U. S. 923 (2000). We now conclude that the constitutional issue merits *de novo* review."

- *Cooper v. Leatherman*, 532 US 424

ARGUMENT I

A. Due Process Definition

19. Florida's appellate courts define due process as follows
(highlights added):

"The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, §9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As this Court explained in Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla.1991), "[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard."

- *Keys Citizens v Florida Keys*, 795 So.2d 940 (Fla. 2001)

B. Administrative Due Process

20. Administrative agencies (eg, Appellee), must afford all parties due process (citations omitted):

"The Administrative Procedure Act is intended to afford due process to parties whose legal rights, duties, privileges or immunities may be determined by administrative action on agency level.

- *Wilson v Pest Control*, 199 So. 2d 777 (Fla. 4th DCA 1967)

Appellate case law further emphasizes this requirement:

"[Due process] is specifically required by Chapter 120... ...[it sets] the minimum requirements of law applicable to the commission's actions in this case. Its failure to apply and faithfully adhere to these administrative principles constituted a departure from the essential requirements of law."

- *Dusseau v Metro Dade County*, 794 So. 2d 1270 (Fla. 2001)

C. Appellant's Due Process Rights

21. Appellee was required to give notice of The Inquiry:

"Section 120.565(2), Florida Statutes (Supp.1996), requires the agency to give notice of the filing of each petition for declaratory statement in the Florida Administrative Law Weekly."

- *Chiles v. Dept of State*, 711 So. 2d 151 (Fla. 1st DCA 1998)

22. That required notice needed to follow the rules.

"Since no statute or rule superseded Rule 28-5.111 in the declaratory statement proceedings below, the Board was required to comply with the requirements of Rule 28-5.111 in giving notice of the declaratory statement proceedings. The published notice of the declaratory statement petition obviously failed to comply with Rule 28-5.111, in that it neither specified the time limit for requesting a hearing, nor referenced the relevant procedural rules. Further, even if the published notice of the petition for declaratory statement had complied with Rule 28-5.111, the optometrists' petition would have been timely, because it was filed just eleven days following the April 21, 1989 publication."

- *FL Optometric v. DPR*, 567 So. 2d 928 (Fla. 1st DCA 1990)

23. Those rules, as previously noted (§15 *supra*), stated that Appellee **needed to notify** the public of the clear point of entry (highlights added):

"Yet the agency's rules must clearly signal when the agency's free-form decisional process is completed or at a point when it is appropriate for an affected party to request formal proceedings, if authorized, or to accept his statutory opportunity for informally structured proceedings under Section 120.57(2). In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57."

- *Gopman v. DOE*, 908 So. 2d 1118 (Fla. 1st DCA 2005)

24. Similarly, Appellant **had a right to be notified** of an opportunity to be heard (highlights added, citations omitted):

"Due process requires that a party be given the opportunity to be heard and to testify and call witnesses on his behalf, and the denial of this right is fundamental error... Perhaps the additional witnesses would not have impressed the court, but the husband had the right to present them and to argue his case at the conclusion of all the testimony. Denial of those rights was harmful error."

- *Pettry v Pettry*, 706 So. 2d 107 (Fla. 5th DCA 1998)

25. Altogether, Appellee had a well-established duty to notify Appellant of a clear point of entry, and Appellant had a right to receive that notification. **Appellee's dereliction amounted to a violation of Appellant's due process rights.**

D. Solution: Reversal & Remand

26. Since Appellee violated Appellant's constitutional right to due process, this Court is compelled to reverse the error below. The analysis goes as follows.

27. First, due process equates to "fundamental fairness":

"Due Process in essence means fundamental fairness..."

- *Hampton v United States*, 425 US 484, 494 (1976)

28. Second, this appeal was taken under §120.68 FS; a statute which deals with fundamental fairness (highlights added):

"Section 120.68, Florida Statutes (Supp.1996), provides the parameters within which we review the School Board's action. According to the statute, we must separately address issues of agency procedure, interpretations of law, and determinations of fact. § 120.68(7), Fla. Stat. (Supp.1996). From a procedural standpoint, the inquiry is whether "the fairness of the proceedings or the correctness of the [agency] action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." § 120.68(7)(c), Fla. Stat. (Supp.1996)."

- *Schrimsher v Palm Beach*, 694 So. 2d 856 (Fla. 4th DCA 1997)

29. Material errors on fundamental fairness require reversal:

"Reversal is mandated when a procedural error is material to the fairness of the proceedings."

- *Schrimsher v Palm Beach*, 694 So. 2d 856 (Fla. 4th DCA 1997)

CONCLUSION I

30. Thus, since Appellee abandoned its duty to notify Appellant of the clear point of entry, it committed a material error violative of Appellant's due process rights. That error requires reversal.

ISSUE II

APPELLEE ERRED BY NOT HOLDING THE HEARING
THAT APPELLANT REQUESTED

SUMMARY OF ARGUMENT II

31.Appellee erred and departed from the essential requirements of law. It did so by wrongfully disregarding Appellant's formal request for a hearing. A material error that violated Appellant's due process rights; one which this Court can amend (pursuant to §120.68(7)(e)4).

STANDARD OF REVIEW II

32.Similar to Issue I, the standard of review for Issue II is also *de novo* (highlights added; citations omitted):

"Our review is governed by section 120.68(7)(c), Florida Statutes (2009), which provides that a reviewing court may set aside agency action when it finds that the action is dependent on a material error in procedure. Guided by this standard, as well as by the concept of procedural due process."

- *Withers v Blomberg*, 41 So. 3d 398, 400 (Fla. 2d DCA 2010)

ARGUMENT II

A. Appellant's Right to a Hearing

33.In addition to Appellant's right to be notified [of an opportunity to be heard] was Appellant's right to be heard:

"A party whose substantial interests are or will be affected by agency action is entitled to a Section 120.57 hearing."

- *McDonald v. DBF*, 346 So. 2d 569 (1st DCA 1977)

34. That right can only be defeated by waiver:

"Consequently, the right of persons whose substantial interests may be affected by such agency decisions are not waived, unless they have failed to petition for a 120.57 hearing within the period specified following notice given under the applicable rule."

- *FL Optometric v. DPR*, 567 So. 2d 928 (Fla. 1st DCA 1990)

35. Rule 28-106.111(2) FAC states that the "period specified" is twenty-one (21) days:

"(2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision."

- 28-106.111(2) FAC

36. In a free-form proceeding like the one below "written notice of the decision" comes in the form of a cognizable update:

"In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57."

- *Gopman v. DOE*, 908 So. 2d 1118 (Fla. 1st DCA 2005)

37. As the record shows, Appellant never waived his right to a hearing. Just the opposite, in fact; Appellant exercised that right by requesting a hearing (§9, *supra*).

a. He did so just nine (9) days after Appellee published notice of its upcoming voting date (ie, well-within the 21-day window prescribed by regulation).

38. Thus, the material points of this issue are clear: Appellant had a right to a hearing, he exercised that right, and therefore he was entitled to a hearing.

B. Appellee Erred by Not Holding a Hearing on 'The Inquiry'

39. In Gopman, this Court further explained that failing to hold a hearing on a Petition for Declaratory Statement amounts to error:

"DOE erred in failing to afford Mr. Gopman a formal administrative hearing at which duly sworn witnesses and other evidence could have established the material facts in dispute between the parties."

- *Gopman v. DOE*, 908 So. 2d 1118 (Fla. 1st DCA 2005)

40. Accordingly, Appellant's presentation of facts would have nullified the basis of Appellee's FO denial (citations omitted):

"At a formal hearing, too, DOE could have articulated and elucidated the non-rule policy it deems determinative here. ('The principal objective of many APA processes is to expose policy errors which have become habitual in an agency's free-form routine and to subject agency heads to the sobering realization [that] their policies lack convincing wisdom....')

- *Gopman v. DOE*, 908 So. 2d 1118 (Fla. 1st DCA 2005)

For instance, Appellant could have presented statistical facts surrounding Appellee's pattern & practice. Or, he could have shared case law regarding the impropriety of government bribes (ie, The Inquiry's basis). Appellant could have even

disclosed his circumstantial facts on the asylum-like outcomes of Appellee's questionable statute (§760.06(4) FS).

C. Solution: Reversal & Remand

41. Similar to Issue I, the proper resolution to this due process error is reversal & remand. Doing so with the explicit instruction to permit a formal hearing on The Inquiry:

"On remand, DOE should refer this matter to the Division of Administrative Hearings unless the Florida Board of Education (or a member of the Board) decides to hear the case, see § 120.57(1)(a), Fla. Stat. (2004) ("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."), given the disputes of material fact that have been alleged. A formal administrative hearing will also afford a full opportunity to test the agency's policies. In section 120.57(1) proceedings, the hearing officer can "independently serve[] the public interest by providing a forum to expose, inform and challenge agency policy and discretion." State ex rel. Dep't of Gen. Servs. v. Willis, 344 So.2d 580, 591 (Fla. 1st DCA 1977)."

- *Gopman v. DOE*, 908 So. 2d 1118 (Fla. 1st DCA 2005)

CONCLUSION II

42. Thus, since Appellee ignored Appellant's request for a formal hearing on The Inquiry, this Court is empowered to (a) reverse the FO; and (b) remand for a hearing on The Inquiry.

♪ ♪ ♪

*Now, that what's here is clear, may
this higher Court merely steer this
inquiry down towards the hearing
ears.*

♪ ♪ ♪

CONCLUSION

WHEREFORE, based on these two violations of due process, Appellant asks this Court to reverse and remand the lower tribunal's Final Order.

Dated this 11th day of August 2021.

Respectfully submitted,

/s/ Elias Makere, Appellant

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I HEREBY CERTIFY that on this 11th day of August 2021, 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 people on the attached service list.

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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.

/s/ Elias Makere

Endnotes:

^{1/} [A0120] means page 120 from
the appendix.

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