

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.

**IN THE SIXTH JUDICIAL CIRCUIT COURT
IN AND FOR PINELLAS COUNTY, FLORIDA**

**EVERETT S. RICE,
PINELLAS COUNTY SHERIFF,**

Petitioner,

CASE NO: 00-008122-CI-888

vs.

**Lower Tribunal Case No. 00-2
DOAH Case No. 00-0998**

**JAMES B. MOORE, and
PINELLAS COUNTY SHERIFF'S OFFICE
CIVIL SERVICE BOARD,**

Respondents.

00-0998
DSM

PETITION FOR WRIT OF CERTIORARI

Petitioner, Everett S. Rice, in his capacity as Sheriff of Pinellas County, Florida, hereby files this Petition for Writ of Certiorari requesting review of the order containing the decision of the Pinellas County Sheriff's Civil Service Board concerning certain disciplinary actions taken against Respondent, James B. Moore. The order for which review is sought reversed the Recommended Order of the Administrative Law Judge (ALJ) assigned to hear Respondent's appeal of his discipline. The Recommended Order of the ALJ sustained the decision of the Petitioner to demote Respondent and suspend him for five days as a result of sustained allegations of misconduct. For the reasons stated below, the Civil Service Board (Board) departed from the essential requirements of law in reversing the decision of the ALJ on an issue of discretion, the denial of Respondent's motion to continue the final hearing before DOAH.

I. JURISDICTION

The Pinellas County Sheriff's Civil Service Board is a local administrative agency, which reviews disciplinary actions involving Sheriff's Office employees pursuant to Laws of Florida, Chapter 89-404 and Chapter 93-367. Consequently, this Court has jurisdiction to consider orders of the Civil Service Board pursuant to Florida Rules of Appellate Procedure 9.030 (c) (2) and 9.100. Haines City v. Heggs, 658 So.2d 523 (Fla. 1995).

II. STANDARD OF REVIEW

When a circuit court reviews the decision of an administrative agency under Florida Rule of Appellate Procedure 9.030(c)(2), there are three distinct components to the certiorari review. The circuit court must first determine whether procedural due process was accorded. It must then determine whether the essential requirements of the law have been observed. Finally, it must determine whether the administrative findings and judgment are supported by competent, substantial evidence. City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982); Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106, 108 (Fla. 1989); Netz v. Jacksonville Sheriff's Office, 668 So.2d 235 (Fla. 1st DCA 1996). The scope of review by common-law certiorari is traditionally limited and much narrower than the scope of review on appeal. Haines City Community Development v. Heggs, 658 So.2d 523, 526, n.3 (Fla. 1995). In the instant case it is only the essential requirements of law component that is at issue.

III. STATEMENT OF THE CASE AND FACTS

1. The Florida Legislature has enacted a special act applicable to the Pinellas County Sheriff's Office setting forth certain rights and obligations for employees of the Pinellas County Sheriff. Chapter 89-404, Section 6, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida, authorizes the Sheriff to suspend, dismiss or demote classified employees for offenses enumerated therein. That section provides in pertinent part that "Cause for suspension, dismissal or demotion shall include, but shall not be limited to: negligence, inefficiency, or inadequate job performance; inability to perform the assigned duties, incompetence, dishonesty, insubordination, violation of the provisions of law or the rules, regulations, and operating procedures of the Office of the Sheriff, conduct unbecoming to a public servant, misconduct, or proof and/or admission use of illegal drugs. . . ." The law further provides that "The listing of causes for suspension, demotion, or dismissal in this section is not intended to be exclusive. The Sheriff, by department rule, may add to this list of causes for suspension, dismissal or demotion." Chapter 89-404, Section 2, Laws of Florida, authorizes the Sheriff to adopt rules and regulations as are necessary to implement and administer this section. Pursuant to this authority, Petitioner has adopted rules, regulations and policies that establish the standard of conduct, which must be followed by all employees of the Pinellas County Sheriff's Office.¹

2. In conjunction with the above referenced provisions, the legislature also created a Civil Service Board (Board) to oversee the discipline process. In the special act

¹ A copy of Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida is attached to this Petition as Appendix Z.

governing the Petitioner, the legislature also provided to the Civil Service Board the authority to delegate to the State of Florida, Division of Administrative Hearings (DOAH) the authority to conduct evidentiary hearings with regard to discipline imposed upon employees of the Pinellas County Sheriff. The Board has chosen to do so by rule.² Therefore, for purposes of the evidentiary hearing held with regard to the discipline of Respondent, jurisdiction of the subject matter and the parties to this action, pursuant to Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida, was vested in DOAH. The hearing and all proceedings pertaining thereto were thereby governed by Section 120.57(1), and 120.68(8), Florida Statutes, and the rules adopted by DOAH for the conduct of such hearings.

3. By Inter-Office memo dated February 17, 2000, Respondent was notified by Petitioner that a Sheriff's Office Administrative Review Board had determined that Respondent had violated the Pinellas County Sheriff Office Civil Service Act and the rules and regulations of the Pinellas County Sheriff's Office. As a result, Respondent was notified that disciplinary action in the form of a five-day suspension, without pay, was imposed, in addition to Respondent's demotion from his probationary rank of lieutenant to the rank of sergeant.³ (Appendix A)

² The Civil Service Board has adopted rules governing the conduct of appeals and hearings before the Board, a copy of which is attached as Appendix Z.

³ Effective January 31, 1999, Respondent was promoted from the rank of sergeant to the rank of lieutenant. Attendant to that promotion was a one-year probationary period imposed pursuant to Laws of Florida, Chapter 89-404, Section 4 (3). After the complaints had been made against Respondent and while the investigation was ongoing, on January 19, 2000, Respondent's one-year probationary period in his promoted position of lieutenant was extended for an additional six months until July 31, 2000, pursuant to Laws of Florida, Chapter 89-404, Section 4 (4). It is within the discretion of the Petitioner

4. The conduct allegedly engaged in by Respondent involved his propositioning Detention Deputy (D/D) Mechelle Sabin and making other inappropriate comments to her with regard to his sexual life and practices and her sexual life and practices. During the course of the investigation, additional allegations of misconduct were made that Respondent treated Sabin more harshly than her male counterparts after she rebuffed his advances. It was also alleged that Respondent had made derogatory comments about another female, Donna Hughey, stating she had engaged in inappropriate conduct in order to obtain a desired assignment.

5. Pursuant to the provisions of Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida, Respondent submitted his notice of appeal on February 21, 2000, identifying the issues he intended to raise on appeal. (Appendix B) In Respondent's Notice of Appeal seeking review he identified the basis for his appeal being: (1) the manner in which the investigation was conducted; (2) the manner in which the Administrative Review Board conducted its proceedings; (3) that due process had been denied; and (4) that he had been the subject of disparate treatment in the discipline imposed. Pursuant to the provisions of Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida and the decision of the Civil

to extend the probation of a promoted employee for six months beyond the initial one-year probationary term. Respondent remained in this probationary status in his rank of lieutenant at the time of his Administrative Review Board hearing and at the time of the imposition of discipline by the Petitioner. The Civil Service Board affirmed the decision of the ALJ in this case upholding the decision of the Sheriff to demote the Respondent. This decision by the Petitioner, the administrative law judge or the Board is not the subject of this Petition.

Service Board, the appeal of discipline by Respondent was then referred to DOAH for an evidentiary hearing before an administrative law judge.

6. After receiving Respondent's appeal, the Division of Administrative Hearings (DOAH) entered an Initial Order on March 9, 2000 requiring the parties to consult and to report certain matters, including proposed dates for the final hearing of the case. (Appendix C) On March 14, 2000, counsel for Petitioner sought input from counsel for Respondent with regard to submitting a response to the Initial Order. (Appendix D) No response in any form was received. Counsel for Respondent did not, at that time, indicate he was ill and unable to participate. As such, Petitioner submitted a unilateral response to DOAH on March 17, 2000. (Appendix E) Had Respondent's counsel's office simply provided some indication of his inability to participate at the time, accommodations could have been made. However, in the absence of any response, Petitioner's counsel suggested hearing dates available to him. Respondent thereafter never provided any response to the ALJ with regard to the suggested hearing dates set forth in Petitioner's response to the Initial Order. More specifically, Respondent's counsel, Edward Foreman, never indicated that any illness rendered the proposed dates unavailable. The ALJ issued an order on April 4 setting a final hearing date of May 25. (Appendix F)

7. After the order setting the final hearing in this matter was entered, counsel for Respondent took no action to object to the scheduled date or to seek a continuance at that time, again never indicating the dates were not satisfactory for any reason or that any illness on the part of Respondent's counsel rendered the proposed dates unavailable. In the only communication between counsel for Petitioner and Mr. Foreman, no mention

was made of any medical condition or illness that required a continuance; instead scheduling conflicts were the only reason stated by Mr. Foreman for delay. Petitioner's position in this regard was memorialized in a letter to Respondent's attorney and he was invited at that time to bring the matter to the attention of DOAH or the ALJ. (Appendix G) Petitioner did not do so at that time.

8. It was not until May 17, 2000, when the final hearing was but seven days away that Respondent first sought relief in the form of a continuance or advised the ALJ of the alleged illness. (Appendix H) The motion for continuance of Respondent was not verified or offered under oath. Mr. Foreman provided no affidavit, swearing to his medical condition and no evidence was ever offered to the either of the ALJ's in support of his contention of an extended illness. Moreover, the motion did not so much as describe the nature of Mr. Foreman's "illness." Petitioner opposed the request for a continuance. (Appendix I)

9. In his Motion for Continuance, Respondent claimed that because of his counsel's undescribed illness, he could not conduct discovery. However, in the Initial Order entered in this case a Summary of Procedures was provided. In that Summary of Procedures the parties were directed to initiate discovery immediately if desired. The Summary of Procedures further provided that all discovery must be completed five days prior to the final hearing. (Appendix B) Instead, Respondent delayed until May 9, 2000, to mail his first discovery request, which would not require a response until after the date set for the final hearing. Respondent's discovery included interrogatories, request for production and request for admissions directed toward the issues raised by Respondent in defense of the proposed discipline, such as those set forth in his notice of appeal.

Respondent further waited until May 22, 2000 to conduct his first depositions.⁴ The illness of Mr. Foreman provides no excuse in this regard as the discovery sent was obviously prepared and signed by another attorney in the office, Mr. Bart Colorafi, who appeared to be well aware of the issues and evidence in the case. (Appendix K) Additionally, at the deposition of James Moore conducted on May 11, 2000, two attorneys from Mr. Foreman's office (Mr. Colorafi and Mr. Tom Reynolds) attended and offered objections and consulted with Mr. Moore during the course of the deposition. (Appendix L) Respondent's tardy discovery requests necessitated the filing of a Motion to Shorten the Time for Petitioner to Respond to the Discovery, which was not ruled upon by the ALJ prior to the final hearing in this case. (Appendix M)

10. By order of May 22, 2000 Administrative Law Judge Carolyn Holifield denied Respondent's request for a continuance because Respondent had failed to show "good cause." (Appendix N) While Respondent's motion to continue was pending, Respondent participated in the preparation of the pre-hearing stipulation required by the ALJ, including a discussion of the issues, a statement of position and witness and exhibit lists. (Appendix O)

⁴ Although Petitioner sought to accommodate counsel for the Respondent by waiving the five day notice rule for depositions, thereby allowing him to conduct depositions on May 22, 2000 another attorney in the office of Respondent's counsel showed up for the scheduled depositions only to cancel them. The reason given was again the undescribed illness of counsel for the Respondent. No attempt was made by Mr. Foreman's office to notify counsel for the Petitioner of the cancelled depositions prior to counsel traveling from Tallahassee to Clearwater to attend the depositions. This resulted in a motion for sanctions by the Petitioner against counsel for the Respondent to recover the fees, costs and expenses incurred in travelling to Clearwater for the depositions. (Appendix J).

11. Failing in his attempt to otherwise obtain a continuance of the final hearing, Respondent and his attorneys charted a new course by attacking the administrative law judge assigned to the case. On the day following the denial of the continuance by the ALJ, May 23, 2000, Respondent filed a Motion for Disqualification seeking Judge Holifield's removal, which was opposed by the Petitioner. (Appendix P) The Motion for Disqualification was denied, but at the final hearing Administrative Law Judge Daniel Manry substituted for Administrative Law Judge Holifield. (Appendix Q)

12. On the same day, May 23, 2000 Respondent filed in the Second District Court of Appeal an Emergency Motion for Stay and a Petition for Review of Non-Final Agency Action Pursuant to Chapter 120, Florida Statutes. The court denied the stay and dismissed the petition for review for lack of jurisdiction. (Appendix R)

13. At the hearing on May 25, 2000, the attorney appearing on behalf of Respondent, Mr. Tom Reynolds, again renewed Respondent's motion for a continuance based upon Mr. Foreman's undescribed illness. Reynolds claimed that he was not familiar enough with the case to examine and cross-examine witnesses, even though he had represented Respondent when his deposition was taken by the Petitioner. (Appendix S, p. 6-7) No evidence, such as an affidavit from Mr. Foreman or his health care provider, was presented concerning the nature or degree of Mr. Foreman's alleged illness. When asked by Administrative Law Judge Manry to describe the nature of Mr. Foreman's illness, Mr. Reynolds refused to do so. (Appendix S, p. 8) The *ore tenus* renewed motion for continuance was vigorously opposed by Petitioner because it appeared to be nothing more than a ploy to obtain more time to conduct discovery and prepare for hearing. (Appendix S, p. 9-13) Administrative Law Judge Manry denied the

renewed motion for continuance since the Respondent had not presented any new grounds that were not before Administrative Law Judge Holifield when the initial motion was denied. (Appendix S, p. 19-20) Thereafter, Petitioner presented his case calling six witnesses and introducing 39 exhibits. Included in the evidence presented to the ALJ was the sworn statement given by Respondent to the investigators investigating the complaints that included Respondent's version of the events.

14. On June 20, 2000, the ALJ issued his Recommended Order in which he made findings of fact and conclusions of law. (Appendix T) He first repeated his ruling on the record denying the *ore tenus* motion for continuance. Next he found that after a subordinate of Respondent's had rebuffed his unwanted sexual advances, Respondent had begun to treat the subordinate much more harshly than other male subordinates. The ALJ further found that the demotion of Respondent occurred while Respondent was on probation and that the five-day suspension was within the range of discipline for the offenses charged. Consequently, the ALJ recommended that the Civil Service Board enter a final order upholding Respondent's demotion and five-day suspension. (Appendix T)

15. Respondent filed Exceptions to the Recommended Order based primarily on the denial of Respondent's Motion for Continuance, but also arguing that the decision of the ALJ was not supported by competent and substantial evidence. (Appendix U) In the Exceptions submitted by Respondent no affidavit was submitted by Mr. Foreman or by one of his doctors on his behalf. Petitioner filed a Response in Opposition to the Exceptions. (Appendix V) On October 23, 2000 the Civil Service Board held a hearing on the recommended order of the ALJ and the exceptions of the Respondent. At the

hearing the first evidence of Mr. Foreman's illness appeared. Mr. Foreman presented to the Board an affidavit in which he claimed a series of medical conditions which had prevented him from representing the Respondent during the months of April and May 2000. He also attached a letter from his doctor dated June 9, 2000, stating that Mr. Foreman should not be under any stress. (Appendix W) Notably, this letter from Mr. Foreman's doctor is not under oath and is dated some 15 days after the final hearing was held in this matter. This is the first time any evidence of illness was ever provided by Mr. Foreman to any tribunal considering the appeal of Respondent. The Board accepted and relied upon this new evidence at their hearing. (Appendix X)

16. After completion of the hearing and by Order dated October 31, 2000, the Civil Service Board remanded the appeal of Respondent back to DOAH to conduct further an evidentiary hearing to determine if Respondent was guilty of the conduct alleged and if the five-day suspension was appropriate. The Civil Service Board based its decision upon the following rationale:

Based upon all the evidence presented in arguments of counsel, the Board finds that the denial of a continuance by the administrative law judges prior to hearing and at the hearing, were a denial to the petitioner of his fundamental rights to a hearing pursuant to law and, did not comply with the essential requirements of law.

(Appendix Y).

IV. ARGUMENT:

THE CIVIL SERVICE BOARD WAS WITHOUT AUTHORITY TO OVERRULE THE DECISION OF THE ADMINISTRATIVE LAW JUDGE WITH REGARD TO THE DENIAL OF A CONTINUANCE ABSENT A SHOWING OF AN ABUSE OF DISCRETION. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW

The Civil Service Board for the Pinellas County Sheriff's Office has, pursuant the option allowed it by the Florida Legislature, delegated to the State of Florida, Division of Administrative Hearings, the task of conducting evidentiary hearings pertaining to discipline of employees of the Pinellas County Sheriff. Chapter 89-404, Section 8, Laws of Florida, as amended by Chapter 90-395, Section 8, Laws of Florida. Inherent in this delegation is the corresponding delegation of the authority to determine the manner in which the procedural aspects of the appeal and hearing shall be conducted, so long as those proceedings are in conformance with the applicable rules and concepts of due process. These decisions are delegated to the administrative law judges assigned to such appeals by DOAH.

In so delegating these decisions, the manner in which the administrative law judge conducts the hearing is governed by an "abuse of discretion" standard. Scharrer v. Department of Professional Regulation, 536 So.2d 320 (Fla. 3rd DCA 1988), rev.dis., 542 So.2d 1334. This includes determinations made by the administrative law judge pertaining to the granting of continuances. Winslow v. Department of Professional and Occupational Regulation, 348 So.2d 352 (Fla. 1st DCA 1977), cert.den., 365 So.2d 716. The Civil Service Board's review of these decisions of the administrative law judges is thereby governed by an "abuse of discretion" standard, not the "essential requirements of law" standard utilized by the Board in this case. By utilizing the incorrect standard in

this case, the Civil Service Board itself failed to comply with the essential requirements of law rendering its decision subject to being vacated by this Court.

Florida Administrative Code Rule 28-106.210 provides the appropriate standard for an administrative law judge from the Division of Administrative Hearings to consider a motion for continuance. The rule requires the presiding officer to grant a continuance only upon the showing of "good cause." The predecessor to this rule, Florida Administrative Code Rule 22I-6.017, which also required a showing of good cause in order to grant a continuance was considered by the First District Court of Appeal in City of Palm Bay v. State Department of Transportation, 588 So.2d 624 (Fla. 1st DCA 1991). There the court held that the decision to grant or deny a continuance based upon the "good cause" standard was an issue of discretion for the hearing officer (now called administrative law judge). Id. at 628. Consequently, in order for the Civil Service Board in this case to reverse the administrative law judges on whether Respondent should have received a continuance, the Board must determine that the both Administrative Law Judge Holifield and Manry abused their discretion. As demonstrated by the above facts, the administrative law judges appropriately exercised the discretion in denying the Respondent's motion for a continuance and the Board's reversal of the hearing officer on this issue itself fails to comport with the essential requirements of law.

First, the Respondent failed to present sufficient evidence to the hearing officer to constitute good cause for granting a continuance. The motion for continuance of Respondent was not verified or offered under oath. No affidavit was ever provided by Mr. Foreman to the ALJ swearing to his medical condition and no evidence was offered in the form of medical records or an affidavit from a health care provider supporting his

contention of an extended illness. This was the case as to the initial motion and also as to the motion made on the day of the hearing. Even after Administrative Law Judge Holifield denied Respondent's first motion for lack of "good cause," neither Respondent nor his attorneys undertook to provide the Administrative Law Judge Manry with the "good cause" required to grant the motion: an affidavit or some other form of proof either from Mr. Foreman or from one of his doctors. This could have easily been accomplished by the mere submission to the administrative law judge of a sworn affidavit by Mr. Foreman or one of his doctors regarding the nature and seriousness of his illness. Not only was an affidavit not presented, but substitute counsel for Respondent who appeared at hearing to renew the motion for continuance blatantly refused to even describe the nature of Mr. Foreman's illness, so that the hearing officer could make an informed decision.

This refusal to produce evidence remained the strategy of Respondent until the day of the Civil Service Board hearing where Mr. Foreman appeared for the first time with an affidavit. Notably, attached to the affidavit was a letter from Mr. Foreman's doctor containing a date some 15 days after the final hearing in this matter. The letter was not under oath and contains no reference to Mr. Foreman's condition between March and May 2000, the time frame applicable to the decisions made by the administrative law judges in this case.

To grant the relief sought on the basis of illness or infirmity, supporting evidence may be required. In re Rutherford's Estate, 304 So.2d 517 (Fla. DCA 1974) (application for continuance should be supported by affidavit as to factual basis for request so as to thwart frivolous efforts for delay and to expedite resolution of issues in dispute). In

Zeigler v. Klein, 590 So.2d 1066 (Fla. 4th DCA 1991) the court recognized that where an illness is fabricated by counsel and not documented a continuance may be denied. It is within the discretion of a tribunal whether to grant a continuance and the ruling will only be disturbed when that discretion has been abused. Alsobrook v. State, Div. Of Retirement, 600 So.2d 1173 (Fla. 1st DCA 1992).

Second, the allegation regarding Mr. Foreman's illness was made under highly suspicious circumstances. The initial written motion was made at the eleventh hour, only five days before a hearing that had been scheduled for well over two months. It is not an abuse of discretion to deny a continuance on the eve of a hearing set months previously. King v. King, 379 So.2d 994 (Fla. 4th DCA 1980). Although the parties were warned by the initial order to immediately begin discovery, Respondent did not undertake any written discovery until May 9, 2000, which would have resulted in responses submitted after the scheduled hearing date of May 25, 2000. Respondent also did not schedule any depositions until May 22, 2000, only three days before the hearing. These depositions were cancelled on the date they were to begin without any warning from the Respondent. Thus, Respondent's motion for continuance made at the eleventh hour was submitted under circumstances indicating that counsel may have misrepresented or exaggerated his condition because he was not prepared to proceed to final hearing.

Third, Respondent failed to submit sufficient facts to demonstrate why another attorney in Mr. Foreman's office could not have represented Respondent at the final hearing. Assuming arguendo, that Mr. Foreman had an extended illness during the time frame between the filing of the initial DOAH order and the scheduled hearing date, he was under an obligation to withdraw from the case or to allow another attorney in his

office to represent Respondent. In Jean v. County Sanitation, Inc., 596 So.2d 1245 (Fla. 4th DCA 1992), the court recognized that a continuance might be properly denied where the attorneys could have anticipated the unavailability of counsel and failed to make arrangements to provide for that contingency. Here, Mr. Colorafi signed the request for admissions and interrogatories submitted by the Respondent. Mr. Colorafi and Mr. Reynolds represented Respondent when counsel for the Petitioner deposed him. Mr. Reynolds appeared at hearing to renew Respondent's motion for a continuance, but then declined to take any further action during the hearing while Petitioner was presenting its case.

Consequently, insufficient evidence was submitted as to why, knowing of Mr. Foreman's alleged illness, neither Mr. Colorafi nor Mr. Reynolds could represent Respondent during the evidentiary hearing in this case. Notably, at the hearing held by the Civil Service Board, Respondent and his counsel agreed that should the matter be remanded to DOAH for further proceedings he would agree to allow another attorney in Mr. Foreman's office to handle the matter. (Appendix X, page 69) Why this alternative is available now but was not possible when Mr. Foreman was so ill is not explained, nor is the reason for Respondent's agreement to this alternative now when he allegedly would not agree to it previously. The questionable nature of this accommodation at this point in time cannot be ignored and further calls into question the nature of the assertions offered by Respondent and his attorneys and the basis for the asserted need for the continuance.

In an effort to avoid the consequences of his past omissions, Respondent's attorney argued to the Board that his errors should not be visited upon Respondent and that Respondent was without guilt. This argument fails for two reasons. First, the case

law is replete with adverse consequences being imposed upon clients due to the miscues of counsel. Missed appeal dates, waiver of defenses, failure to object or preserve issues for appeal are all errors of counsel that will bar claims or defenses, even if the client is innocent of any wrongdoing himself. Second, if Mr. Foreman was as ill as he would have us believe this should have been apparent to Respondent when he initially retained Mr. Foreman as his attorney. It has been represented that Mr. Foreman knew of his illness and made DOAH aware of the illness at the time the Initial Order was entered.

If this is the case, Mr. Foreman or Respondent should have immediately brought this to the attention of the Judge or sought alternate counsel. This problem with his attorney should have become more apparent to Respondent when Mr. Foreman did not appear at his deposition and did not personally initiate any discovery on his behalf. Under these circumstances, Respondent himself possessed an obligation to protect his own interests and to either find alternate counsel or act to make sure one of the other attorneys in Mr. Foreman's office was adequately prepared to handle the case. This matter was pending for over two months prior to the final hearing, allowing Respondent sufficient time find alternate counsel due to Mr. Foreman's illness or for the other attorneys in Mr. Foreman's office to conduct discovery in this case or prepare themselves for final hearing. Thus, Respondent's assertions with regard to an inability to prepare for the final hearing in this case or to participate in the case are without merit. Petitioner should not be held responsible for the failures of Respondent or his counsel in this regard.

This was not a complicated case. It did not involve a termination of employment and Respondent had been provided a copy of the investigation conducted by Petitioner, including transcripts of the sworn statements of the pertinent witnesses. At most, there

were only ten witnesses who possessed relevant information with regard to the events that resulted in the discipline imposed against Respondent. DOAH proceedings are far more relaxed than a civil trial in the court system. This case did not involve complicated issues of fact or law. As such, with the amount of notice provided by DOAH in advance of the final hearing there was sufficient time for any attorney of even moderate competence to prepare for the final hearing. There is no reason why another attorney in Mr. Foreman's office could not have prepared and presented a defense or why another attorney could not have been retained to defend Respondent. Had Respondent or his attorneys spent the time expended in attempting to delay the proceeding in preparing a defense for Respondent they could have adequately represented him in the DOAH hearing.

Instead Respondent and his attorneys chose a futile tactic of delay, then attacked the integrity of the administrative law judge and then refused to participate in the hearing, thereby waiving their right or opportunity to present evidence, to cross-examine witnesses, to offer argument or to otherwise present a defense. See, State, Dept. of Environmental Regulation v. Puckett Oil Co., Inc., 577 So.2d 988 (Fla. 1st DCA 1991). The decision of the trial tribunal to grant or deny a continuance lies within the discretion of that tribunal. Martin v. Garrison, 658 So.2d 1019 (Fla. 4th DCA 1995). Under similar circumstances, in Florida Bar v. Kandekore, ___ So.2d ___, 25 Fla. L. Weekly S439 (Fla. 2000) denial of a continuance was found not to be an abuse of discretion where, at the hearing, Kandekore presented no evidence and only asked for a continuance. The court further found no violation of Kandekore's right to due process since he could have, at the hearing, presented mitigating evidence. To grant the relief sought by Respondent in this

case will only serve to sanction and encourage tactics of delay and obfuscation and allow manipulation of the system under which Petitioner and this Board operates.

Under the law applied to administrative determinations in the State of Florida, it is well established that an agency may reject the findings of fact only if there is an absence of competent and substantial evidence to support the conclusions of the administrative law judge. Bay County School Bd. v. Bryan, 679 So.2d 1246 (Fla. 1st DCA 1996). An agency may not substitute its judgement for that of the administrative law judge on issues of credibility or the weight of the evidence. Department of Health and Rehabilitative Services v. Yhap, 680 So.2d 559 (Fla.1st DCA 1996); Dunham v. Highlands County School Bd., 652 So.2d 894 (Fla. 2nd DCA 1995). Wash & Dry Vending Co. v. State, Dept. of Business Regulation, 429 So.2d 790 (Fla. 3rd DCA 1983). Nor may the agency reweigh the evidence or substitute its judgement for that of the administrative law judge on issues of fact. Bay County School Bd. v. Bryan, *supra.*; School Board of Leon County v. Hargis, 400 So.2d 103 (Fla. 1st DCA 1981). The agency's role is limited to determining if the ascertaining if the factual findings of the administrative law judge are supported by competent and substantial evidence. City of North Port v. Consolodated Minerals, Inc., 645 So.2d 485 (Fla.2nd DCA 1994). This court has previously quashed an order of the Pinellas County Sheriff's Civil Service Board that overturned the recommended order of an administrative law judge when the Board failed to find that the findings of the administrative law judge were not supported by competent and substantial evidence and where competent and substantial evidence existed for the ruling of the administrative law judge. Jerry J. Robinson v. Everett S. Rice, Case No. 99-2809-CI-88B, (Cir.Ct., 6th Cir., January 7, 2000) (included as a part of Appendix Z).

In this case the ALJs both made findings of fact on the continuance issue that the Respondent had failed to show "good cause" for the motion to be granted. No evidence was presented in the initial motion or at the hearing to establish Respondent's entitlement to the continuance. The Civil Service Board cannot reweigh this finding by the ALJ or reverse the decision of the ALJ based upon evidence presented at the Board's hearing, but which was not presented to the ALJ. By doing so the Civil Service Board departed from the essential requirements of law applicable to Board review of recommended orders from administrative law judges under both Section 120.57, Florida Statutes and the Board's own rules.

Finally, the law is well established that in reviewing the recommended order of the administrative law judge, the agency, in this case the Board, is limited to consideration of the evidence presented to the administrative law judge. The Board therefore was not authorized to accept or consider the evidence presented by Mr. Foreman at the hearing before the Board on October 23, 2000. In Lawnwood Medical Center, Inc. v. Agency for Health Care Administration, 678 So.2d 421 (Fla. 1st DCA 1996), rehear.den., rev.den., 690 So.2d 1299, the court held that an agency reviewing the decision of the hearing officer (administrative law judge) has no authority to reopen the record to receive additional evidence and make additional findings. In Short v. Florida Department of Law Enforcement, 589 So.2d 364 (Fla. 1st DCA 1991) the court held an agency cannot use new facts not presented at the hearing held by the hearing officer (administrative law judge) to support rejection of the findings of the hearing officer. In the instant case, this is precisely what the Board did. By accepting and relying upon the affidavit of Mr. Foreman and the un-sworn letter from his doctor, the Board reopened the

record and considered new evidence not before the administrative law judges at the time they made their respective findings of fact on the issue of whether good cause existed for the granting of a continuance. Based upon this "new evidence" the Board made additional findings of fact upon which they based their decision overruling the administrative law judges and rejecting their findings.

In summary, Respondent was provided due process in that he received notice and the opportunity to be heard. Respondent's counsel failed to show good cause for the granting of a continuance under the circumstances in this case. The denial of the continuance by the ALJs was simply not an abuse of discretion under the facts. The Civil Service Board's second-guessing of the ALJs did not comply with the essential requirements of law. Consequently, Petitioner respectfully requests this Court to reverse the order of the Pinellas County Civil Service Board and remand this case back to the Board to consider Respondent's exceptions on the merits of the hearing officer's Recommended Order.

Respectfully submitted this ____ day of November 2000.

KEITH C. TISCHLER, ESQUIRE
Florida Bar No: 0334081

PHILLIP P. QUASCHNICK, ESQUIRE
Florida Bar No.: 224677

POWERS, QUASCHNICK, TISCHLER,
EVANS & DIETZEN
Post Office Box 12186
Tallahassee, Florida 32317-2186
(850) 942-5522
(850) 942-5524 (Facsimile)

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of foregoing has been furnished by:

____ U.S. Mail ____ Facsimile ____ Express Mail ____ Hand Delivery to:
Edward D. Foreman, 100 2ND Avenue, North, Suite 300, St. Petersburg, FL, 33701, and
to the Pinellas County Sheriff's Office Civil Service Board, c/o B. Norris Rickey,
Esquire, Assistant County Attorney, 315 Court Street, Clearwater, FL 33756 this ____
day of November 2000.

KEITH C. TISCHLER, ESQUIRE

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)



BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.