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IN THE DISTRICT COURT OF APPEAL OF
FLORIDA, FIRST DISTRICT

CASE NO.: 01-2490

ON ADMINISTRATIVE APPEAL FROM THE
FLORIDA COMMISSION ON HUMAN RELATIONS

FCHR CASE NO.: 95-J752
DOAH CASE NO.: 98-5090
USEEOC Case No.: 15D950818
(DISCRIMINATION)

FCHR CASE NO.: 96-L298
DOAH CASE NO.: 98-3611
USEEOC Case No.: 15D960366
(RETALIATION)

DONALD A. GARREPY
Petitioner/Appellant

Vs.

STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondent/Appellee

APPELLANT'S INITIAL BRIEF ON APPEAL

SUBMITTED BY:
DONALD A. GARREPY
PRO SE
P.O. BOX 276
PORTSMOUTH NH 03802
904-234-0768

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ABBREVIATIONS

ALJ	Administrative Law Judge
App	Appendix
ROA	Record On Appeal
SROA	Supplemental Record On Appeal
MCR	Appellant's Motion To Correct Record
4SMCR	Appellant's 4 th Supplemental Motion To Correct Record
5SMCR	Appellant's 5 th Supplemental Motion To Correct Record

ISSUES PRESENTED FOR REVIEW

1. That the Commission on Human Relations and Division of Administrative Hearings denied Appellant / Petitioner his fundamental rights to due process;
2. That the Commission on Human Relations violated the Florida Civil Rights Act of 1992 and associated Administrative Code Rules when they failed to issue a determination concerning Appellant's original discrimination complaint; and in so doing, denied Appellant / Petitioner his rights, protections and remedies afforded by said Act.
3. That the Administrative Law Judge was not an impartial, objective finder of fact but, instead, continually demonstrated his inclination towards Respondent.
4. That the Administrative Law Judge committed repetitive errors of law, on very basic administrative matters, that clearly demonstrated a lack of competence, which adversely affected the outcome of these proceedings.
5. That Counsel for Respondent egregiously impugned Petitioner and a key Petitioner witness, which effectively neutralized evidence in support of Petitioner's case.
6. That Counsel for Respondent and the Administrative Law Judge engaged in an ex parte communication, during the proceedings.
7. That, in view of Appeal Issues 1 through 6, the Administrative Law Judge's findings of fact are not supported by competent evidence and thus should be reviewed.

8. That the Commission on Human Relations effectively denied Appellant his basic right to judicial review when they failed to issue their Final Order in a timely manner and when they failed to submit the Record On Appeal to the Court in a timely manner.

TABLE OF CITATIONS

Fla. Admin. Code R. 28-106 ... Pages 26, 27, 33, 37

Fla. Admin. Code R. 60Y-4 ... Pages 27, 36

Fla. Admin. Code R. 60Y-5 ... Pages 19, 22

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§ 95.11(3), Fla. Stat. (1995) ... Page 18

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STATEMENT OF THE CASE AND THE FACTS

NATURE OF THE CASE:

Appellant/Petitioner Donald Garrepy (Garrepy) complained to the Commission on Human Relations (the Commission) that he was the victim of unlawful employment practices, i.e., discrimination, retaliation (including loss of wages and constructive discharge), by Respondent Department of Environmental Protection (Department). More than 3 years later, these cases were transferred to the Division of Administrative Hearings (DOAH). After an additional year and a half, a formal hearing was conducted, pursuant to which the Administrative Law Judge (ALJ) issued a Recommended Order of Dismissal. Thereafter, the Commission dismissed Garrepy's Petitions for Relief and Complaints of Discrimination.

STATEMENT OF FACTS:

On 1 October 1992, Garrepy began his employment as an Engineer III for the Department's Southwest District in Tampa.

On 3 June 1994, Garrepy transferred to the Department's Central District in Orlando.

On 12 September 1994, Department posted a Job Opportunity Announcement for the position of Central District Environmental Manager. The closing date for submitting applications was 26 September 1994 (RE: Supplement To Record On Appeal dated 10/1/02 (SROA), Vol 1, Pages 1-3).

All applications were submitted between the job posting date and the closing date, except that of the selectee, Ruth McLemore.

Her application was submitted on 31 August 1994, 2 weeks before the posting date (RE: SROA, Vol 2, Pages 118 & 121).

9 of 13 applicants were deemed to have met the minimum qualifications for the position. Of these 9, there were 6 males and 3 females. There were 3 applicants over the age of 40, all males. 4 applicants were interviewed by the selecting official, all 3 females and 1 male. None of the male applicants over 40 years of age was interviewed.

On 18 October 1994, Garrepy received a letter from the Department which informed him that another candidate had been offered the position of Environmental Manager (RE: SROA, Vol 1, Page 47).

The person selected for promotion to this position was Ms. Ruth McLemore, who, at the time, was living with the Department's Central District Administrative & Operations Manager, Mr. T. Patrick Price (RE: Record On Appeal dated 6/7/02 (ROA), Transcripts, Vol II, Pages 295 & 372).

On 13 April 1995, Garrepy delivered a letter to the Department's Central District Director, Vivien Garfein (Garfein) complaining about the conduct of the selection process for the Environmental Manager position (RE: SROA, Vol 1, Page 64).

On 13 April 1995, Garrepy was confronted by his immediate supervisor, Ali Kazi (Kazi) when Kazi expressed his displeasure with Garrepy for meeting with Garfein without Kazi knowing about it and also when Kazi incorrectly asserted that Garrepy did not fill out a time sheet properly. Garrepy alleges that this meeting constituted the onset of a pattern of harassment and

retaliation, including loss of wages, the creation of a hostile work environment and ultimately Garrepy's employment termination (RE: SROA, Vol 1, Pages 65-66).

On 19 May 1995, Garrepy submitted a formal complaint of discrimination with the Commission (RE: ROA, Vol I, Page 1).

On 15 December 1995, Garrepy delivered his letter of resignation, in-hand, to Garfein alleging retaliation, for his having filed a complaint of discrimination against the Department, as the basis for his resignation (RE: SROA, Vol I, Page 116-117).

On 28 December 1995, Garrepy's employment with the Department was terminated, subsequent to his having been placed on administrative leave on 18 December 1995 by Garfein.

COURSE OF PROCEEDINGS AND DISPOSITION:

A complete, detailed, chronological description of events and proceedings associated with these Discrimination and Retaliation Complaints is presented in Appendix A to Garrepy's Motion to Correct Record (MCR) filed on 30 August 2001 and, by reference, should be considered an integral part of this Initial Brief. None of the parties to this proceeding has objected to or taken issue with the accuracy or completeness of that chronology. Thus, it should be found as fact.

On 19 May 1995, Garrepy filed a complaint with the Commission alleging age discrimination and sex discrimination by the Department in violation of the Florida Civil Rights Act (the Act), sections 760.01-760.11, Florida Statutes (1992). Garrepy

alleged the Department denied him a promotion because he was over age 40 and because he was a male (RE: ROA, Vol I, Page 1).

On 29 January 1996, Garrepy filed a complaint with the Commission alleging retaliation by the Department in violation of the Act. Garrepy alleged the Department retaliated against him because he had filed a discrimination complaint against the Department and that he was forced to resign due to the Department having created a hostile work environment (RE: ROA, Vol I, Page 3).

On 24 September 1996 (457 days after Discrimination Complaint filing), the Commission notified Garrepy by letter that they had been unable to complete their investigation of his Discrimination Complaint and provided a list of 4 options Garrepy could choose from, vice the 2 allowed by the Act (RE: ROA, Vol I, Pages 4-5).

On 21 October 1996, the Commission investigator, Iliana Haddock, submitted her Investigation Report/Memorandum to the Commission Office of General Counsel with Recommended Cause Determination in Discrimination Complaint (RE: SROA, Vol 2, Pages 294-300).

On 29 April 1998 (920 days after Retaliation Complaint filing), the Commission filed Notice of Determination in Retaliation Complaint. Their determination was for "No Cause" (RE: Appellant's 4th Supplemental Motion To Correct Record filed 9/20/02 (4SMCR), App C).

On 31 May 1998, Garrepy mailed Petition For Relief to the Commission pursuant to Notice of Determination in Retaliation Case (RE: 4SMCR, App F).

On 7 July 1998, the Commission issued Notice of Dismissal in Retaliation Complaint due to their determination that Petition For Relief was untimely (RE: ROA, Vol 1, Page 27).

On 4 August 1998, the Commission issue Recission of Notice of Dismissal due to their re-determination that Petition For Relief was, in fact, timely filed (RE: ROA, Vol 1, Page 28).

On 11 August 1998, the Commission transmitted Petition For Relief to DOAH and requested the assignment of an ALJ (RE: ROA, Vol 1, Page 29).

On 22 October 1998, Garrepy mailed Petition For Relief and Administrative Hearing in Discrimination Complaint to the Commission (RE: ROA, Vol 1, Pages 57-62).

On 30 December 1998, DOAH ALJ Daniel Kilbride issued Recommended Order of Dismissal of Retaliation Complaint on his finding that Petition For Relief was untimely filed (RE: ROA, Vol 1, Pages 72-79).

On 8 January 1999, Garrepy served Exceptions to Recommended Order of Dismissal of Retaliation Complaint (RE: ROA, Vol 1, Pages 80-85).

On 9 April 1999, DOAH ALJ Daniel Kilbride issued Recommended Order of Dismissal of Discrimination Complaint on his finding that Petition For Relief was untimely filed (RE: ROA, Vol 1, Pages 147-157).

On 22 April 1999, Garrepy served Exceptions to Recommended Order of Dismissal of Discrimination Complaint (RE: ROA, Vol 1, Pages 158-165).

On 20 August 1999, the Commission issued Order Remanding Petition For Relief in Discrimination Complaint after concluding that ALJ Kilbride committed an error of law and that the Petition For Relief had been timely filed (RE: 5SMCR, App A).

On 20 August 1999, the Commission issued Order Remanding Petition For Relief in Retaliation Complaint after concluding that ALJ Kilbride committed an error of law and that the Petition For Relief had been timely filed (RE: ROA, Vol 1, Pages 172-175).

On 26 August 1999, Garrepy filed Affidavit for DOAH ALJ Kilbride Disqualification (RE: ROA, Vol 1, Pages 178-182).

On 9 September 1999, DOAH ALJ Kilbride denied Garrepy's Motion for Disqualification (RE:ROA, Vol 1, Pages 190-191).

On 7 March 2000 through 10 March 2000, DOAH ALJ Kilbride conducted hearing on consolidated cases of Discrimination and Retaliation (RE: ROA, Transcripts, Vol I - VI).

On 14 July 2000, DOAH ALJ Kilbride issued Recommended Order dismissing Petitions in Discrimination and Retaliation cases (RE: ROA, Vol 2, Pages 309-327).

On 29 July 2000, Garrepy served Exceptions to Recommended Orders of Dismissal in Discrimination and Retaliation cases (RE: ROA, Vol 2, Pages 328-341 - Note that ROA Index date is incorrectly shown as 02/26/2001 by Commission).

On 23 May 2001, the Commission issued Final Order Dismissing Petitions For Relief from an Unlawful Employment Practice (RE: ROA, Vol 2, Pages 362-366 - Note that ROA Index date is incorrectly shown as 04-19-2001 by Commission).

On 19 June 2001, Garrepy filed Notice of Administrative Appeal (RE: ROA, Vol 2, Pages 368-369).

On 7 November 2002, the Court accepted the Record On Appeal and Supplements thereto, pursuant to Garrepy's 5 Motions To Correct The Record and the Court's 7 Orders to the Commission to file a complete and correct Record On Appeal.

SUMMARY OF ARGUMENTS

ISSUE #1: Appellant asserts that his procedural due process rights were violated in that he was effectively deprived of a constitutionally protected property interest without timely notice and without a timely opportunity to be heard. Commission delays, inaction, deceit, attempts to mislead Petitioner, repetitive failures to comply with statutes and rules together with DOAH ALJ errors of law and administrative mistakes caused these proceedings to drag on for almost 5 years between complaint filing and a formal hearing. By the time Petitioner's complaints were finally heard, some witnesses were no longer available and those witnesses who did testify could not remember relevant facts and details due to the inordinate amount of elapsed time since the alleged discrimination.

ISSUE #2: Appellant asserts that the Commission is bound by the Florida Civil Rights Act, associated Administrative Code Rules and Legislative intent to timely investigate discrimination

complaints and to issue determinations. There is nothing in the Act or the Rules which allows the Commission the option of not completing its investigations or of not issuing a determination pursuant to the completion of an investigation. That the Act provides complainants with some recourse subsequent to Commission failure to issue a determination, can not and should not be construed as a legislatively built-in waiver of Commission responsibilities.

ISSUE #3: Appellant asserts that the Record of these proceedings, while in the jurisdiction of DOAH, is replete with examples of ALJ predisposition towards Department. Examples include: ALJ acceptance of frivolous Department motions on timeliness issues that were clearly within the jurisdiction of the Commission and which had been previously dispositioned by the Commission in favor of Appellant; ALJ maintaining a totally rigid, inelastic position on his interpretation of a timeliness requirement involving 3 days, when it took over 3 years for these matters to be brought before him; ALJ forcing Appellant to spend a year fighting Petition timeliness issues, thus diverting him from preparation for a hearing and delaying onset of the hearing; ALJ allowing Department to cause inordinate delays in reaching a hearing by their practice of attorney switching; ALJ allowing Department counsel to assert, without factual basis, that Commission Investigator feared for her life if Appellant learned of her whereabouts so he could serve her with a witness subpoena; and ALJ attempting to justify, during witness testimony, the

selectee filing her application 2 weeks before the position of Environmental Manager position was posted when this matter was brought to light by Appellant during his cross-examination.

ISSUE NO. 4: Appellant asserts that the errors of law committed by the ALJ, in his Recommended Orders and throughout the 2 years this proceeding was before DOAH, concerning very basic matters which are addressed in explicit clear language in the relevant Florida Administrative Code Rules, constitute valid grounds for questioning his competence in dealing with the more complex issues involving the merits of this case.

ISSUE NO. 5: Appellant asserts that Counsel for Department, acting intentionally, egregiously and unethically during a teleconference hearing before the ALJ, impugned both Appellant and the Commission Investigator to the extent that key evidence in support of Appellant was effectively neutralized and disregarded by the ALJ.

ISSUE NO. 6: Appellant asserts that Counsel for Department and the ALJ engaged in an ex parte communication, during a break in the hearing, further demonstrating the ALJ's predisposition to the Department.

ISSUE NO. 7: Appellant considers that his successfully establishing credibility with regard to Issues 1 through 6 will result in the conclusion that the ALJ's findings of fact are not

supported by competent evidence and thus should be reviewed. Examples of the evidence and testimony that should be reviewed are: the Commission Investigator's professional credentials; the Commission Investigator's Report/Memorandum in which she recommended a Cause Finding of Discrimination; the contradictory and false testimony provided by certain Department employees; and the pattern of subtle retaliatory activities conducted by the Department, as documented by Appellant.

ISSUE NO. 8: Appellant asserts that his basic, fundamental right to judicial review in this proceeding has been adversely affected, and thus effectively denied, by the Commission's failures to issue their final order or to submit the Record On Appeal in anyway approaching a timely manner.

PREFACE TO ARGUMENTS

In creating this Initial Brief, I have made a good-faith attempt to comply with all the provisions delineated in the Rules of Appellate Procedure. However, there will undoubtedly be instances found where I have not totally complied with some administrative requirement(s). For example, I may not have made citations or reference to the record exactly as required. In these matters, I ask for the Court's indulgence.

I also ask for the Court's understanding that I am not a legal professional in spite of my 7 ½ years of on-the-job training.

Perhaps one of the biggest obstacles I have had throughout this proceeding is my lack of access to applicable case law, legal precedents, etc. For example, I could only cite 6 cases, the latter 5 of which were sent to me pursuant to my request at a pre-hearing teleconference.

ARGUMENTS

The following are Appellant's arguments concerning the issues under review. However, they are not totally separate and distinct issues to be reviewed and dispositioned in a vacuum. These issues are interrelated and they should be evaluated in context of each other. Furthermore, it should be kept in mind that this proceeding has been on-going for over 7 1/2 years as a result of Florida Agencies' inaction, error, deceit, incompetence and willful violations of the Florida Civil Rights Act.

ISSUE NO. 1: Garrepy filed a charge of Discrimination against Department on 19 May 1995 (RE: ROA, Vol 1, Pages 1). Garrepy filed charge of Retaliation against Department on 29 January 1996 (RE: ROA, Vol 1, Page 3). These charges were heard before DOAH ALJ Kilbride on 7-10 March 2000 which corresponds with 1717 days and 1598 days, respectively, after complaint filing.

Garrepy did not receive formal notice from the Commission with regard to their investigation of the Discrimination Complaint until 24 September 1996, 457 days after complaint filing (RE: ROA, Vol 1, Pages 4-5). This Notice contained false and misleading information which was contradictory to the provisions of Section 760.11(4), Florida Statutes, as well as being contradictory to what Garrepy had been told in person by the Commission investigator 2 months previously (See Issue #2).

Garrepy never received formal notice and election of rights from the Commission with regard to their investigation of the

Retaliation Complaint. On 22 July 1997, the Commission Investigator sent Garrepy a letter stating that her Investigator's report should be submitted by the end of that month (RE: ROA, Vol 1, Page 14). This was the first and only written notification as to the status of the Retaliation Complaint investigation and it was issued 539 days after complaint filing.

Garrepy was advised in that letter that both reports of investigations, Discrimination and Retaliation, would be reviewed.

The next document Garrepy received from the Commission was a Notice of Determination, No Cause, in his Retaliation Complaint (Re: 4SMCR, App C). This was issued on 29 April 1998, which corresponds with 920 days after complaint filing.

Thereupon, Garrepy served his Petition For Relief (Retaliation) on 31 May 1998 (RE: 4SMCR, App F); and when it became apparent that the Commission did not intend to issue its Determination in the Discrimination Complaint, Garrepy served his Petition For Relief in that matter on 22 October 1998 (RE: ROA, Vol 1, Pages 57-62). As discussed in further detail in Issue #3, the DOAH ALJ originally attempted to dismiss these Petitions but his conclusions of law in his recommended orders were in error. The fact that the Petitions were remanded for hearing provided some relief but another year was wasted in the pursuit of these complaints on the merits. The Commission Remand Orders are dated 20 August 1999, which corresponds with 1517 days and 1398 days after Discrimination and Retaliation Complaint filing,

respectively. Thus, a combination of Commission staff failure to do their jobs, Commission violations of the Act and their own rules, Commission intentionally misleading Petitioner, Commission mishandling of these claims and DOAH ALJ errors caused the Discrimination Complaint to take 4.7 years and the Retaliation Complaint 4.4 years to finally be heard.

These inordinate delays constitute deprivation of a constitutionally protected property interest. The Florida Civil Rights Act was created to protect that property interest and violations of the Act are themselves deprivations of a property interest, as the Court held in *Joshua v City of Gainesville*, 768 So. 2d 432 (Fla. 2000).

This case involves administrative inaction, error, deceit, and incompetence. As the Court also held in Joshua: "Since the Legislature has undertaken to address the problem of discrimination, we believe that its agents should take the necessary steps to protect the interests of the claimants who fall within its purview." Neither the Commission nor DOAH followed these precepts as Petitioner attempted to pursue his claims through the administrative process. The Court concluded in Joshua that the Legislature wanted persons who believe they have been the object of discrimination to go through the administrative process prior to bringing a circuit court civil action. In that it took over 4 years for these complaints to be heard due to Commission delays and ALJ errors, Petitioner was precluded from bringing such a civil action due to the four-year statute of limitations for statutory causes of action under

section 95.11(3), Florida Statutes (1995). This would constitute a further deprivation of a constitutionally protected property interest.

One could argue that Appellant suffered no harm from all the delays because eventually his complaints were heard, thereby providing complete remedy to the earlier deprivations of his rights. A review of the hearing transcripts will dispel that argument. For what good is a hearing if witnesses to the discrimination and retaliation are no longer available or they can't remember the events of 5 year's prior?

Examples of these failed memories are plentiful: (1) Ms. Minnie Yates, Department Central District Personnel Assistant (RE: ROA, Transcripts, Vol II, Pages 209, 239, 240, 260, 261, 262); (2) Ms. Vivian Garfein, Department Central District Director (RE: ROA Transcripts, Vol II, Pages 329, 330, 337, 338, 342, 343, 344, 346, 348, 350, 352, 355, 356, 358); Mr. T. Patrick Price, Department Central District Administration & Operations Manager (RE: ROA, Transcripts, Vol II, Pages 378, 379); Mr. James Bradner, Department Central District Engineer (RE: ROA, Transcripts, Vol II, Pages 393, 394, 395, 396, 397, 398, 399, 400); Mr. Ali Kazi, Garrepy's supervisor (RE: ROA, Transcripts, Vol IV, Pages 454, 455, 459, 460, 461, 463, 467, 470, 471, 487, 488, 489, 493, 494, 495, 497, 498, 499, 500, 503, 511, 512, 515, 521, 528, 535, 543, 548, 549, 553, 556, 568, 569, 574, 600, 604); Ms. Iliana Haddock, Commission Investigator (RE: ROA, Transcripts, Vol VI, Pages 678, 680, 685, 589, 690, 691).

Two of Garrepy's witnesses were no longer available to testify due to the length of time between the alleged discrimination/retaliation and the hearing. One of them, who was an applicant for the position, was no longer employed by the Department and her whereabouts was unknown. Another, Mr. Peter Dentice, an applicant who was also over 40 years of age was unavailable due to medical reasons. Mr. Dentice was also Garrepy's co-worker and he was a witness to the alleged retaliation as well as a victim of the discrimination. Garrepy asserts that Dentice would have provided very valuable testimony in support of Garrepy's claims and if the Commission and DOAH had not created such inordinate delays, he would have been available to appear and testify at a timely hearing.

ISSUE NO. 2: On 29 January 1996, the Commission assigned Iliana Haddock to investigate the Discrimination Complaint, 253 days after the complaint was filed. On 21 October 1996, Investigator Haddock completed her investigation and submitted her report, with a recommended determination of cause, to the Commission Office of General Counsel. This was 484 days after complaint filing. Rule 60Y-5.004(1), FAC, require that the OGC review the report and make a recommendation to the Executive Director as to whether there is reasonable cause to believe that an unlawful employment practice has occurred. Rule 60Y-5.004(2) requires the Executive Director to issue a determination.

Commission failure to issue a determination pursuant to the submittal of the investigator's report, while the Commission was

deliberately misleading Appellant for a prolonged period of time into thinking a determination was forthcoming, constitutes a denial of Appellant's administrative and civil remedies provided by the Act. Neither the Act nor the Commission's own rules provide the option of their not issuing a determination.

On 23 July 1996, Garrepy met with Haddock and her supervisor at the Commission office (RE: MCR, App A, Event #36). They told Garrepy the investigation was complete; the report would be submitted within 30 to 45 days; then reviewed by legal staff; and followed by Executive Director determination.

On 24 September 1996, the Commission sent Garrepy a letter (RE: ROA, Vol 1, Pages 4-5) stating that the Commission had not been able to complete the investigation and provided Garrepy 4 options from which to choose further pursuit of his complaint. Not only did this letter contradict what he had been told 2 months earlier, but being provided 4 options contradicted what was allowed by sections 760.11(8) and 760.11(4), FS.

Thereupon, Garrepy initiated a series of letters requesting Commission clarification of these contradictions, requesting the status of the review of the Investigator's report and requesting that the determination be issued (RE: ROA, Vol 1, Pages 6-7, 8-9, 12-13, 16, 17, 18-19,). These contradictions were never resolved, but both the Commission and the US EEOC continually assured Garrepy that the Investigator's report was being reviewed and a determination would be issued (RE: ROA, Vol 1, Pages 10-11, 14, 15). Garrepy's efforts stretched out almost 2 years because along the way he was continually being mislead by the Commission's assurances. The ALJ found as fact that the staff of

the Commission mislead or lulled Garrepy (RE: ROA, Vol 1, Pages 147-157, Para 5). In a conclusion of law, the ALJ had to agree with Garrepy that Commission "lulled him into inaction" (RE: ROA, Vol 2, Pages 309-327, Para 46). The facts and the record show that Garrepy was not "inactive". Garrepy continually tried to get the Commission to issue the determination, a specific requirement of their own rules. Even Department characterized the Commission as a "dead horse" and said that it was unfortunate Petitioner was unable to force the Commission to do its job (RE: ROA, Vol 1, Pages 104-119, Para 5).

Appellant asserts that he was intentionally mislead by the Commission. Commission staff were well aware that if Garrepy had opted to pursue this matter in civil court, at that point in time, then his complaint would have been dismissed on the basis of being untimely, pursuant to *Milano v. Moldmaster Inc.* 703 So. 2d 1093 at 1094 (Fla. 4th DCA 1997). Commission staff knew they had provided false and misleading information when they provided the civil action option 457 days after complaint filing (Re: MCR, App A, Event #37; ROA, Vol 1, Pages 4-5). From the time the Investigator submitted her report with a recommended cause finding in the Discrimination Complaint until the Commission issued a determination in the Retaliation Complaint, 18 months had elapsed, and it became apparent that the Commission never intended to act on the earlier recommended cause finding in spite of their repeated assurances. This was an intentional, egregious denial of Appellant's rights and remedies provided by the Act.

Furthermore, when the Commission issued their determination of no cause in the Retaliation Complaint (RE: 4SMCR, App C), they

failed to advise Appellant of his right to request their redetermination pursuant to Rule 60Y-5.004(6), FAC. This further denial of a basic right lead into another year long delay described in detail in Issue #3.

ISSUE NO. 3: These cases came before the DOAH ALJ on 17 August 1998. Yet the merits of these matters were not heard until March of 2000, a year and a half later. The record shows that most of this delay is directly attributable to the predisposition of the ALJ towards the Department.

It began with the ALJ accepting and considering an untimely Department Motion To Dismiss on their assertion Appellant's Petition was itself untimely filed. The specifics are addressed in more detail in Issue No. 4. With regard to this Argument, the matter of timeliness of petitions filed with the Commission has been reviewed and adjudicated long before this proceeding. These established standards and precedents were known or should have been known to both Department counsel and the ALJ. For the Department to file such motions (RE: ROA, Vol 1, Pages 33-34 and Pages 104-119) in the face of such established precedents should be consider frivolous filings. For the ALJ to accept such filings and to rule on them in Department's favor should be considered predisposition. Furthermore, for the ALJ to accept an untimely Department motion which asserted an untimely Appellant action can only be construed as contradictory, at a minimum. It should also be construed as predisposition.

The ALJ insisted on holding this Appellant to a totally rigid, inelastic filing time-line, yet did not hold the other

parties, i.e., the Department and the Commission to the same standard. Even if the ALJ had not been in error on the matter of Petition timeliness involving a span of 3 days, he refused to consider that the Commission had taken over 3 years to that point in the proceedings. The ALJ could have exercised his discretionary authority in this matter by considering the extenuating and relevant circumstances. The fact that he chose not to should be construed as predisposition.

The results of his rigidity were both significant and adverse, with regard to Appellant's preparations for an eventual hearing. The ALJ effectively forced this Appellant to spend a year defending against these frivolous motions on timeliness and his resulting Recommended Orders of Dismissal. That Appellant eventually prevailed did not offset the undeniable facts that I had been diverted for an inordinate length of time from the preparation for a hearing; the onset of the hearing had been delayed for a year; and witness memories were further decreased by this additional time since the alleged violations. This inordinate delay should be construed as being favorable to the Department. It was certainly not favorable to Appellant.

Throughout the month of January 1999, Department initiated a series of attorney swaps which eventually resulted in the original lead attorney resuming his role. This was nothing more than an intentional delay and ploy to effectively prevent Appellant from pursuing this matter to an orderly hearing on the merits. On 1/31/99, Appellant filed a Motion (RE: ROA, Vol 1, Pages 89-92) requesting the ALJ to impose sanctions on the Department. No action was taken by the ALJ, not even the

slightest admonishment. The motion was denied. Appellant asserts that this is an indication of predisposition.

Issue #5 addresses the matter of Department counsel making slanderous remarks attributed to a key Appellant witness which cast extremely negative aspersions on the character and deportment of Appellant (RE: ROA, Tape Recording - Garrepy, Smallridge, Kilbride - 3/17/1999, Side B, Beginning with Garrepy saying: "There's one other issue that needs to be resolved"). With regard to this argument, the fact that this egregious and unethical action, during a hearing before the ALJ, was allowed to stand and that the ALJ took not the slightest action to admonish Department counsel is another indicator of his predisposition.

Another example of the ALJ's predisposition was his interjecting himself into the cross-examination of a Department witness by Appellant. Through this examination, Garrepy was able to establish that the application of the selectee, Ruth McLemore, was submitted to the Department's Central District Personnel Office, which was managed by the man with whom she was living, two weeks before the posting date of the position (RE: ROA, Transcripts, Vol 6, Pages 723-728 & Page 743) also (RE: SROA, Vol 2, Respondents Exhibit A). Thus, it became very clear that the selectee had the advantage of "insider information" over the other applicants and furthermore she had more time in which to prepare her application. This also established that the previous testimony of the Central District Personnel Office manager, with regard to his recusal from the application review process, was blatantly false. Garrepy had clearly demonstrated that similarly situated employees were not treated equally, thereby meeting his

burden established in McDonnell Douglas Corp v. Green, 411 U.S. 792; 93 S.Ct. 1817 (1973) and Texas Dept of Community Affairs v. Burdine, 450 U.S. 248; 101 S.Ct. 1089 (1981).

Instead of objectively evaluating this testimony and evidence, the ALJ jumped in and asked three leading questions of the witness (RE: ROA, Transcripts, Vol 6, Page 750). His questions were framed so as to elicit only an affirmative response, which would tend to justify the selectee's early filing, and he got the desired result. The ALJ tried to establish, for the Department, that the selectee's early filing was based upon knowledge of Central District personnel matters that was common to everyone in the District who would have been interested in filing for the position that was about to become vacant.

What the ALJ did not establish and could not establish were two key factors: (1) The position had been classified as Engineer IV but was reclassified as Environmental Manager per the job posting, yet selectee's application was submitted for the position of Environmental Manager, which could only result from advance, "insider information"; and (2) Of the 13 applications submitted for the Environmental Manager position, only the selectee's was submitted before the posting date, and if the knowledge of the upcoming vacancy and promotional opportunity was common to everyone then it could reasonably be expected that more than one application would be submitted early. The undeniable facts are that 12 of the 13 applicants became aware of a promotional opportunity in a reclassified position by the job posting; that 12 of the 13 applicants proceeded on the basis of

the information provided in the job posting; and that 1 of the applicants, the selectee, had the advantage of insider information which provided her with access to the reclassified position description and additional time in which to craft her application to the specific knowledge, skills and abilities associated with the position.

The ALJ effectively rescued this witness and the Department from this very damaging testimony and evidence. Furthermore, he provided himself with the rationale and self-fulfilling excuse for not considering this testimony and evidence in his findings of fact and conclusions of law. This was totally inappropriate conduct on the part of the ALJ and a flagrant example of the ALJ's predisposition toward the Department.

ISSUE NO. 4: On 17 August 1998, Appellant's Retaliation Complaint and associated Petition For Relief were assigned to DOAH ALJ Kilbride (RE: 4SMCR, App F). Thereupon ensued a series of ALJ errors that caused adjudication of the merits to be delayed for an additional year.

His first error was his acceptance of a Department Motion To Dismiss submitted on 8/14/98 (RE: ROA, Vol 1, Pages 33-34). Department asserted that Petition was untimely. The ALJ overlooked Florida Administrative Code Rule 28-106.204(2) which allowed Department 20 days, i.e., until 6/28/98 to file motions to dismiss. This was compounded by his next error of overlooking the fact that the Commission had already ruled on the timeliness of the Petition in Appellant's favor on 8/4/98 (RE: ROA, Vol 1, Page 28). Likewise, the ALJ failed to correctly apply the

timeliness provisions of Florida Administrative Code Rules 28-106.103, 60Y-4.004(1), 60Y-4.007(1) and 60Y-4.007(2). These errors lead the ALJ on 12/30/98 to issue his Recommended Order of Dismissal of my Retaliation Complaint based on his finding that the Petition For Relief was untimely filed (RE: ROA, Vol 1, Pages 72-79).

On 24 November 1998, Appellant's original Discrimination Complaint and associated Petition For Relief And Administrative Hearing (RE: ROA, Vol 1, Pages 57-62) were assigned to DOAH ALJ Kilbride. Thereupon ensued another round of Department motions and telephone hearings about the timeliness of this Petition. The Department asserted and the ALJ agreed that *Milano v. Moldmaster, Inc.*, 703 So. 2d 1093 at 1094 (Fla. 4th DCA 1997) applied to this case in spite of rulings to the contrary, e.g., *Wilson v. Scotty's, Inc.*, FCHR Order No. 98-032. Regardless of precedent, the ALJ pressed on and issued his Recommended Order of Dismissal on 4/9/99 (RE: ROA, Vol 1, Pages 147-157).

Appellant attacked these errors with a direct frontal assault in his Exceptions to these recommended orders (RE: ROA, Vol 1, Pages 80-85 and Pages 158-165) and in his testimony before the Commission Panel on 29 July 1999. For example, these Exceptions document, in no uncertain terms, ALJ commission of at least 13 errors. Furthermore, this Appellant posed the following question to the Commission Panel: "How many errors can an Administrative Law Judge commit before his submittal is rejected on the basis that it does not meet requisite standards?"

Appellant's arguments were so overwhelming that both ALJ Recommended Orders of Dismissal were remanded on the basis of ALJ

errors of law (RE: ROA, Vol 1, Pages 172-175 and 5SMCR, App A). ALJ Kilbride was provided copies of Appellant's Exceptions. Thus, he was fully aware of this affront to his competence.

Appellant immediately sought the disqualification of Judge Kilbride with his 8/26/99 submittal of an Affidavit for ALJ Disqualification to the DOAH Chief Judge (RE: ROA, Vol 1, Pages 178-182). This Affidavit reiterates, with particularity, all of the substantiated errors committed by the ALJ and expresses the valid and legitimate fears over not receiving an impartial, objective hearing presided over by Judge Kilbride. Furthermore, Appellant expressed his legitimate fear over the ALJ becoming alienated towards him as a result of having two fundamentally flawed recommended orders overturned on the basis of Petitioner's Exceptions.

Surprisingly, the DOAH Chief Judge did not rule on the Motion For Disqualification. ALJ Kilbride denied the motion on the basis it was not legally sufficient (RE: ROA, Vol 1, Pages 190-191). He would not address his ability, or lack thereof, to rise above Appellant's frontal assault on the ALJ's competence.

In their Final Order of Dismissal (RE: ROA, Vol 2, Pages 362-366), the Commission found that the ALJ's findings of fact to be supported by competent substantial evidence. Then they immediately sailed into a dissertation of the ALJ's errors of law which were the same ones they had to correct and remand almost 2 years earlier. It is an interesting concept indeed when previously corrected errors are again committed, on basic administrative matters, and from this it is concluded that the perpetrator is competent in more complex matters.

The Commission further indicated that to be entitled to recusal, the movant must have a well-grounded fear that he would not receive a fair hearing and that the fears of judicial bias must be objectively reasonable. However, the Commission wouldn't specifically rule on Appellant's fears meeting the established standards. They simply skirted the issue by deferring to DOAH's purview in the matter of ALJ assignments. Thus, there was no objective, impartial assessment as to whether or not Appellant's documented fears, i.e., his Motion for ALJ Disqualification, met the standards for ALJ recusal. It was not likely that the ALJ could make such an objective, impartial assessment, having been the target of Appellant's attack on his competence. And the record shows that he did not make such an assessment. The record further shows that he did not address Appellant's fears in any way whatsoever.

In his Recommended Order of Dismissal (RE: ROA, Vol 2, Pages 309-327, Paragraphs 52 & 53), the ALJ includes a dissertation on the favoring of a "paramour" which the courts have held does not constitute discrimination. The Department first raised this issue on 3/10/99 with their Motion For Recommended Order Dismissing Petition With Prejudice (RE: ROA, Vol 1, Pages 120-123). The Department was attempting to show that Appellant had asserted a "paramour" relationship between the selectee and a high level Department manager as the basis for her being chosen for the Environmental Manager position. Appellant successfully argued against this motion in his 3/21/99 Answer (RE: ROA, Vol 1, Pages 129-132) and in his 3/31/99 Supplemental Answer (RE: ROA, Vol 1, Pages 136-138). The ALJ denied Department motion in his

Order of 11/12/99 (RE: ROA, Vol 2, Pages 203-204). Thus, the "paramour" issue had been decided as having no applicability to this case. The ALJ resurrecting this issue, which he had already ruled against, is a direct reflection on his competence. Having been denied on this issue via the ALJ's Order, prior to the hearing, the Department attempted to get it included in the Recommended Order by making it part of their Proposed Recommended Order (RE: ROA, Vol 2, Pages 269-285, Paragraph 16). The fact that this "paramour" issue was not discussed or addressed during the hearing did not deter either the Department or the ALJ. The ALJ simply excerpted Department's proposed paragraph 16, verbatim, and included it in his Recommended Order. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248; 101 S.Ct 1089 (1981) the Court ruled: *"An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel."*

This latter example gets to the crux of the ALJ's failure to independently and objectively review the records of the hearing and the matters leading up to the hearing over which he presided. This example also serves to demonstrate the inequities and inadequacies of an administrative hearing system that relies on the parties submitting "proposed recommended orders" and the unfairness of such a system when one of the parties is not a legal professional. The product of such a system should be rejected as it is set up solely to relieve the ALJ of a workload which is incumbent upon him to perform.

ISSUE NO. 5: On 17 March 1999, a teleconference hearing with the Appellant and the Department was conducted before the ALJ. Department lead counsel, at that time, was Gary Smallridge. Participating at the hearing with Mr. Smallridge were Department Attorneys Wiseheart and Shira and other Department employees, some of whom were on Department's witness list. Pursuant to the request of Smallridge and the concurrence of Garrepy, the ALJ approved the Department tape recording the hearing provided that Garrepy was to be provided a copy of the recording (RE: ROA, Tape Recording, 3/17/1999, Garrepy, Smallridge, Kilbride). One of the issues discussed at this hearing was the whereabouts of former Commission Investigator Iliana Haddock, who was on Garrepy's approved witness list. However, Garrepy was unable to locate Haddock through the Commission and thus was unable to issue her a witness subpoena. Since the record showed that Attorney Smallridge had been in contact with Haddock and thus knew how to reach her, Garrepy requested the ALJ to order the Department to provide this information to Garrepy.

Smallridge stated for the record, and for all present to hear, that Haddock did not want her address and phone number revealed to Garrepy because **she feared for her life if Garrepy was given this information** (RE: ROA, Tape Recording - Garrepy, Smallridge, Kilbride - 3/17/1999, Side B, Beginning with Garrepy saying: "There is one more issue that needs to be resolved.").

Garrepy immediately took issue with this baseless statement. However, the ALJ said nothing. He allowed the unsupported assertion to stand without the slightest admonishment of Smallridge.

On 25 March 1999, Garrepy filed Motion For Recommended Orders with DOAH (RE: ROA, Vol 1, Pages 133-135), pursuant to the aforementioned slanderous statement and because the ALJ had allowed it to stand. Pertinent excerpts from this motion are repeated here because of their importance to this argument:

"This totally irresponsible statement, hearsay at best, by Attorney Smallridge was made without any factual basis or supporting evidence. As a senior attorney, with many years of practice, Mr. Smallridge is fully aware that he is ethically and legally prohibited from making slanderous, defamatory statements about a party to a court or administrative proceeding.

Attorney Smallridge's assertion does not pass the 'common sense' test. In her report of investigation, Ms. Haddock recommended a 'CAUSE FINDING'. The Petitioner is of the considered opinion that Ms. Haddock was the only Commission staff member who did their job relative to this case and her report finds in favor of Petitioner.

It is obvious that Attorney Smallridge is attempting to discredit Ms. Haddock's investigation and he is suggesting that Petitioner threatened Ms. Haddock unless she recommended a cause finding.

It is likewise apparent that Attorney Smallridge's statement is blatant character assassination and a continuing example of the institutional retaliation to which Petitioner has been subjected at the hands of various Respondent employees pursuant to his filing a Discrimination Complaint.

Respondent, through their lead attorney is suggesting that Petitioner may be a potential murderer. Attorney Smallridge knew, before the fact, that he should not have made the statement he did. He did so with malice aforethought. Attorney Smallridge's action is another example of Respondent's willful intent to harm, thus it falls in the category of an egregious violation of the rules of administrative procedure.

By making this unfounded, deprecatory and injurious statement, during a formal, recorded hearing, Senior Attorney Smallridge has so tarnished and smeared Petitioner and Petitioner's case and claims that Petitioner believes his case and his reputation may have been prejudiced and damaged beyond repair.

Respondent's Lead Attorney's statement is forever in the public record for all to see.

Petitioner also points out that Attorney Smallridge made his vicious, injurious statement in the presence of other FDEP employees, some of whom Attorney Smallridge intends to call as witnesses.

Petitioner further points out that Attorney Smallridge's taped record of the teleconference hearing has undoubtedly been played back to other FDEP employees, damaging further still Petitioner's professional and personal reputation.

Therefore, Petitioner requests that the Administrative Law Judge grant Petitioner's Motion For Recommended Order for a cause finding in favor of Petitioner, that the total relief sought by Petitioner be granted, that Petitioner's retaliation complaint/petition be reinstated, and that appropriate sanctions be imposed upon Respondent and their lead attorney."

The ALJ never ruled on this motion; and only after much prodding by Garrepy (RE: ROA, Vol 1, Pages 199; Vol 2, Pages 202, 205, 209-212), it still took the ALJ until 15 December 1999 to order the Department to reveal the address and phone number of this key witness so she could be served with a subpoena (RE: ROA, Vol 2, Pages 215-216).

Florida Administrative Code Rule 28-106.107 provides the Standards of Conduct for Qualified Representatives. Subsection(1) requires representatives to exercise due diligence to insure that any motion or pleading is filed and argued in good faith. Subsection(3)(a) prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. Subsection(3)(b) prohibits conduct that is prejudicial to the administration of justice. Department Counsel Smallridge knowingly, intentionally and egregiously violated these rules with his slanderous remarks during the hearing of 17 March 1999.

Subsection(4) authorizes the presiding officer to disqualify any representative who fails to comply with these standards. The

ALJ took absolutely no action, not even a verbal admonishment, with regard to Smallridge's violations.

The fact that Smallridge retired in September 1999 is not relevant. The damage was done and there had been no remedy provided and none was forthcoming.

The most impartial, the most independent and the most objective person involved in Garrepy's complaints was the Commission Investigator, Ilana Haddock. Her professional, investigative credentials were introduced during direct examination at the hearing on 10 March 2000 (RE: ROA, Transcripts, Vol 6, Pages 676-697) and they are beyond reproach. Her report of investigation was introduced as evidence (RE: SROA, Vol 2, Pages 294-300).

In his Recommended Order of Dismissal (RE: ROA, Vol 2, Pages 309-327), the ALJ in Para 29 states: *"Further, there was no credible evidence that Respondent's actions were a pretext of discrimination, that the employment decision was grounded in discriminatory animus, or that a discriminatory reason motivated Respondent in its actions"*. The ALJ also said in Para 55: *"There was no evidence that these actions were a pretext for discrimination or that Respondent was motivated by a discriminatory reason..."*

These statement are a direct contradiction to the evidence. The Commission Investigator clearly stated in her report: *"Respondent's defense has been tested for pretext. Documentation and evidence does not support the Respondent's reason for the alleged treatment of the Complainant."*

Appellant suggests the obvious, i.e., there must be an

underlying reason why the ALJ deemed Investigator Haddock's report as lacking in credibility despite her proven investigative track record which spanned over 3 years (RE: ROA, Transcripts, Vol 6, Page 697). Appellant further suggests that the ALJ's finding that Haddock's report lacked credibility is a direct result of the slanderous, egregious attack made by Department Counsel Smallridge.

ISSUE NO. 6: On 10 March 2000, which was the final day of the hearing before the ALJ, in an off-the-record private conversation, Judge Kilbride asked Department Counsel Wiseheart if he would address the issue of Petition timeliness in his recommended findings of fact and conclusions of law. Wiseheart responded in the affirmative. Neither Judge Kilbride nor Attorney Wiseheart were aware that Appellant had overheard their conversation.

Department Counsel dutifully complied with ALJ request. His Proposed Recommended Order (RE: ROA, Vol 2, Pages 269-285) is approximately 40% re-hash of issues, primarily Petition timeliness, that had been dispositioned in Appellant's favor by the Commission, who had found the ALJ in error. Regardless, these Department Counsel recommendations made their way into the ALJ's Recommended Order of Dismissal (RE: ROA, Vol 2, Pages 309-327) in a verbatim transposition.

In Petitioner's Exceptions to Recommended Orders of Dismissal (RE: ROA, Vol 2, Pages 328-341, Para 8e), Appellant documented this ex parte communication to the Commission. Department Counsel and the DOAH Chief Judge were served with

copies of these Exceptions.

Department Counsel opted not to file a response to these Exceptions nor did he deny an ex parte communication with the ALJ, when he had the opportunity to do so during the teleconference hearing on Commission Deliberations held 19 April 2001.

Likewise, Neither the DOAH Chief Judge nor the ALJ denied Appellant's assertion of an ex parte communication in the 9 months between Appellant's filing Exceptions and the Commission's Deliberations, which preceded their Final Order of Dismissal.

It is noteworthy that the Commission side-stepped this issue in their 23 May 2001 Final Order Dismissing Petitions For Relief From An Unlawful Employment Practice (RE: ROA, Vol 2, Pages 362-366, note that ROA Index date is incorrectly shown as 04-19-2001 by Commission). Their Final Order includes a section entitled "Exceptions" in which they address the issues raised by Appellant, paragraph by paragraph. They specifically discuss, in detail, the matter of alleged ALJ predisposition towards Department contained in Appellant Exceptions para 8. Thus, it is obvious that the Commission Panel was aware of Appellant's assertion of an ex parte communication between the ALJ and Department Counsel, yet chose to deliberately ignore the matter.

In the absence of a denial, from either Department Counsel or DOAH, of an ex parte communication during the hearing before the ALJ, in spite of several opportunities to do so, Appellant's assertion should be accepted as fact by the Court.

Fla. Admin. Code Rule 60Y-4.002 prohibits ex parte communication relative to any pending case before the Commission

at any stage of a proceeding after the filing of a petition by any party to the proceeding, by any person who has direct or indirect interest in the proceeding or by any authorized representative or counsel. Furthermore, this Rule requires that any violation of this section shall be reported, in writing, by the Commissioner or hearing officer affected, and the report, which shall include a description of the substance of the communication, any response, and a copy of any written communication, shall be part of the record.

Appellant complied with this Rule, by reporting the violation of this section to both the Commission and the DOAH Chief Judge, in writing, via Exceptions to ALJ Recommended Order. The Department and DOAH had a duty to respond to the reported violation and the Commission had a duty to specifically address the violation and to properly adjudicate the matter.

Fla. Admin. Code Rule 28-106.107(3)(e) prohibits communication with the presiding officer as to the merits of the proceeding except on the record or in writing with a copy promptly delivered to the opposing party. Fla. Admin. Code Rule 28-106.107(4) authorizes the presiding officer to disqualify the representative who fails to comply with these provisions. In view of the presiding officer being the initiator of the prohibited communication, the ALJ should have disqualified himself and Department Counsel or the ALJ should have been disqualified by the DOAH Chief Judge or by the Commission.

ISSUE NO. 7: Based upon the arguments provided in Issues 1 thru 6, Appellant asserts that the ALJ's finding of fact are not

supported by competent evidence. The Court's review of a relatively small amount of evidence and testimony will dispel Department's position that there was a non-discriminatory reason for their selection and for their treatment of Appellant.

The Commission Investigator, Iliana Haddock, had over 3 years experience investigating discrimination complaints and during that time closed between 90 and 100 cases per year (RE: ROA, Transcripts, Vol VI, Pages 678, 697, 702). Her report of investigation (RE: SROA, Vol 2, Petitioner's Exhibit HH) contains a recommendation for a cause finding. Prior to arriving at that recommendation, Haddock tested Department's defense for pretext. She found that documentation and evidence does not support Respondent's reason for the alleged treatment of the Complainant. Haddock also found that some of the other applicants that were interviewed had less experience and seniority than the Complainant and the other applicants over the age of 40. Furthermore she found: "Respondent's articulated reasons that Complainant and other applicants over the age of 40 were not selected for interview is not supported by the evidence and comparatives provided." Haddock's report was submitted to her supervisor and to the Commission's Office of General Counsel on 21 October 1996 (RE: ROA, Transcripts, Vol VI, Pages 700-701 & SROA, Vol 2, Petitioner's Exhibit HH). That Commission managers, including the General Counsel and Executive Director, mislead Garrepy into believing a determination would be issued is beyond dispute. Their reasons for this deceit are unknown. Regardless, their inaction is a violation of the Act and their own rules for processing investigations and issuing determinations.

Ms. Minnies Yates, Department Personnel Assistant and subordinate of Mr. T. Patrick Price, Department Central District Administration & Operations Manager, testified that Price reviewed the first few applications but once he found out that Ms. McLemore (his girlfriend) was going to apply he told Yates: "that he would not have anything to do with this package due to the fact that she was going to apply" (RE: ROA, Transcripts, Vol II, Page 249). Price testified that: "I wanted to recuse myself because my girlfriend had applied for the position" (RE: ROA, Transcripts, Vol II, Page 373). He also testified that Yates had reviewed McLemore's application (RE: ROA, Transcripts, Vol II, Pages 372-373). In view of testimony and evidence that McLemore's application was submitted 2 weeks before the job posting, both Yates and Price would have known well in advance of receiving the other applications that McLemore had applied. Therefore, the aforementioned testimony of both Yates and Price must be found as false. And it could reasonably be concluded that their other statements made before the hearing officer were likewise false and then the entire Department's defense crumbles. For example, Yates testified that Price would not have had any involvement in the selection of the candidate or in deciding who was going to be interviewed (RE: ROA, Transcripts, Vol II, Page 249). By Price's own testimony, he reported directly to the District Director along with the other Central District top managers. For someone to believe that this top echelon of management has no involvement in personnel selections would be delusional.

Furthermore, consideration must be given to the testimony of

Jim Bradner (the previous incumbent of the position under consideration) and Alex Alexander (the selecting official and District Director) (RE: ROA, Transcripts, Vol II, Pages 382-400 and Vol III, Pages 401-449). First of all they provided contradictory testimony, i.e., Bradner said he reviewed the applications of all 9 qualified applicants while Alexander said he had Bradner review only the applications of the 4 people selected for interview. From both Bradner and Alexander, it is clear that Alexander restructured this position, at his whim, to suit who he wanted in the position. Neither Bradner nor Alexander had any systematic approach for scoring or evaluating the candidates with regard to their meeting the multiple criteria commonly referred to as knowledge, skills and abilities (KSAs) associated with the position. They both said they had rough notes but these were not submitted with the application package nor were they retained. Thus, there is no way to review the selection package and determine the relative ranking of the candidates with regard to each KSA factor.

In addition, Alexander testified that he had personal prior knowledge of 4 people in the Central District who had the KSAs he was including in the restructured position. Coincidentally, these were the same 4 who he selected to be interviewed.

When all of these factors are considered in context, it is clear what transpired. A position was restructured to suit a particular candidate or group of candidates and the selection was influenced by top management personal involvement to the exclusion and detriment of a protected class of qualified applicants. And that is an unlawful personnel practice referred

to as discrimination.

Lastly, with regard to this argument, the Record includes the documents that, when taken in context, show a pattern of retaliation pursuant to Garrepy filing a complaint against the Department (RE: SROA, Vol 1, Petitioner's Exhibits I through Z). The testimony provided by Garrepy's very hostile "chain of command" at the hearing, Mr. Kazi, Ms. Ferraro and Ms. Garfein, support this assertion of retaliation, even in the face of the extreme difficulty of proving retaliation in view of the fact that it is usually very subtle and not conducted out in the open.

ISSUE NO. 8: Appellant's basic, fundamental right to judicial review in this proceeding has been adversely affected, and thus effectively denied, by the Commission's failure to issue their Final Order or to submit the Record On Appeal in anyway approaching a timely manner.

7 ½ years have elapsed since the onset of this case, primarily due to Commission failure to comply with statutes, rules, orders and legislative intent.

The DOAH ALJ issued his Recommended Order of Dismissal on 14 July 2000 and jurisdiction of this proceeding was returned to the Commission. On 23 May 2001, the Commission's Final Order was filed with the Clerk and served on the parties. Thus, 10 months expired between ALJ Recommended Order and Commission Final Order; and it would have been even longer had the Appellant not expended an inordinate amount of time, energy and money by way of his pleadings with the Commission (RE: Motion To Correct Record filed 8/30/01, App A, Event Nos. 172, 173, 175 & 176) and his filing

with this Court (RE: Case No. 1D01-694).

Sections 760.11(6) and 760.11(7), Florida Statutes, allow the Commission 90 days, from the date the recommended order is rendered, to issue the Final Order, in the absence of the consent of all parties to extend the time. Since there was no such consent requested or granted, and in view of aforementioned pleadings, the Commission knowingly violated these sections.

Appellant believes that it was the intent of the Legislature, in their creation of the Act, for discrimination proceedings to progress through the entire process from complaint filing to judicial review in a continuous, orderly fashion. Thus, when the Legislature invoked 90 days to issue a final order, they did not intend for the Commission to take 300 days. However, they did provide some elasticity in the form of an extension, if all parties agreed. The Commission simply ignored the statute and the Legislature's intent, to the detriment of Appellant.

Their inability to maintain the documents and records of this case is unconscionable. From the filing date of the Notice of Appeal, it took over a year for the Commission to re-construct the Record of this case due to their inability/failure to perform basic document custodial duties and they had to be lead out of their chaos, step-by-step, by Appellant. Florida Rule of Appellate Procedure 9.110(e) allows 110 days for the Commission to transmit the Record to the Court.

This additional, inordinate delay, caused by a combination of Commission staff incompetence and egregious behavior, common throughout this proceeding, diverted Appellant from the task at-hand, which was the timely preparation of this Initial Brief

while the events leading up to and including the hearing were relatively fresh and memorable as well as accurately re-callable.

That this is not the case and that there can be no total remedy, constitutes an abridgement of a constitutionally protected property interest. The documents already on file with the Court clearly establish the factual basis for this argument.

According to the Act and the Rules of Appellate Procedure, the time allowed by the Legislature, from the date the ALJ rendered his Recommended Order to the submittal of the Record On Appeal, is 220 days. The Commission actually took 846 days.

That there is finally going to be a judicial review can not be construed as providing a complete remedy for the Commission's violations of the Act and the Rules of Appellate Procedure which have been detrimental to Appellant. In view of the inordinately long elapsed time noted above, which results in some loss of recall and which can also result in other extenuating factors, e.g., aging and medical issues, coming into play, for anyone to suggest that this Initial Brief is as thorough and as comprehensive and as complete as it could have been had the timelines been followed would be incredulous, ludicrous and absurd.

My right to judicial review is a constitutionally protected property interest. The Florida Civil Right Act, sections 760.01-760.11 (1995), was created to protect that property interest. It follows that violations of the Act are themselves deprivations of a property interest. See *Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000)

In his Recommended Order of Dismissal (RE: ROA, Vol 2, Pages 309-327), the ALJ stated in Paragraph 46: "...The District Court

of Appeal has held that a Petitioner may not enjoy a manipulable, open-ended time extension which could render the statutory limitation meaningless. Milano v. Moldmaster, Inc., supra, at 1095, cf. Lewis v. Conners Steel Company, 673 F.2d 1240, 1242 (11th Cir. 1982)".

By the same token and to be consistent, the Court should rule that the Commission likewise does not enjoy a manipulable open-ended time extension which would render the statutory limitation meaningless.

CONCLUSIONS

Based on the aforementioned arguments, there are several conclusions that the Court is expected to reach, including:

- (1) That the Appellant was denied his right to due process;
- (2) That the Commission violated the Florida Civil Rights Act on multiple occasions which deprived Appellant of his basic rights afforded by the Act;
- (3) That the Commission and the ALJ caused such inordinate and extensive delays so as to preclude Appellant from having a thorough hearing and from seeking remedy in a civil court;
- (4) That neither the ALJ, counsels for Department nor Commission staff conducted themselves properly during these proceedings;
- (5) That the errors of law committed in his pre-hearing recommended orders, and repeated in his post-hearing recommended order, are indicative of the ALJ's lack of competence;
- (6) That the ALJ's findings of fact and conclusions of law were not based on competent evidence.

RELIEF REQUESTED

Therefore, Appellant requests that the following relief be granted:

(a) That the Final Orders of the Florida Commission on Human Relations, rendered on 19 April 2001 and filed on 23 May 2001, be reversed;

(b) That Appellant be promoted to Department Central District Environmental Manager, or equivalent, retroactive to 18 October 1994;

(c) That Appellant be reinstated to his position with the Department effective 28 December 1995; and

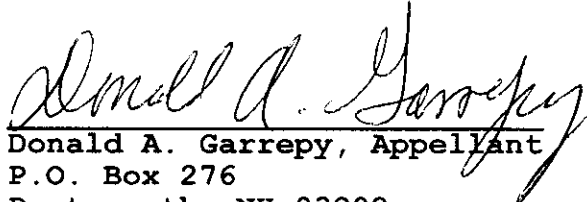
(d) That Appellant be awarded full back-pay, including annual increases, and complete restoration of all annual leave, sick leave, retirement contributions and social security contributions, computed from 28 December 1995 to the reinstatement date.

Appellant also requests, as applicable, that the Court certify to the Florida Supreme Court the following questions as matters of great public importance:

(e) Insofar as the Supreme Court held in Joshua that the Legislature wanted persons who believe they have been the object of discrimination to go through the administrative process prior to bringing a circuit court civil action, do administrative inactions and errors by the Commission and the Division of Administrative Hearings, which cause the administrative process to be delayed beyond the four-year statute of limitations, constitute a deprivation of a constitutionally protected property interest?

(f) Insofar as sections 760.11(6) and 760.11(7), Florida Statutes, allows the Commission 90 days from the date the recommended order is rendered to issue the final order and insofar as Fla. R. App. P. 9.110(e) allows the Commission 110 days to transmit the Record On Appeal to the District Court of Appeal, do the violations noted herein, 10 months to serve the Final Order and over a year to submit the Record on Appeal, constitute deprivation of a constitutionally protected property interest since said violations caused judicial review to be inordinately delayed?

**Respectfully submitted by US Mail
This 28th day of December 2002**


Donald A. Garrepy, Appellant
P.O. Box 276
Portsmouth, NH 03802
904-234-0768

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Initial Brief has been sent to the following parties by US Mail on 28 December 2002:

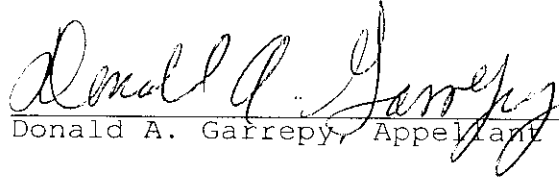
Marshall G. Wiseheart, Esq.
Assistant General Counsel
Department of Environmental Protection
3900 Commonwealth Blvd, MS 35
Tallahassee, FL 32399-3000

Daniel M. Kilbride
Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Denise Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301

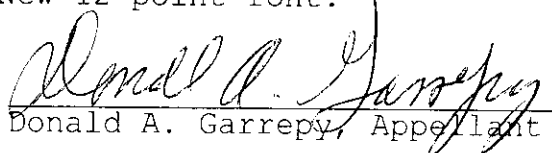
Cecil Howard, General Counsel
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301

James Mallue, Assistant General Counsel
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301


Donald A. Garrepy, Appellant

CERTIFICATION OF FONT COMPLIANCE

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Donald A. Garrepy, Appellant

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