SUPREME COURT OF FLORIDA

JOHN J. MACHULES,

Appellant,

vs. Case No. 70,311

DEPARTMENT OF ADMINISTRATION,

Appellee.

_____/

PRINCIPAL BRIEF OF APPELLANT
ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

This case commenced in January, 1985. At that time John Machules, the appellant here, was an employee of the State of Florida and its Department of Insurance. He was classified as a Special Investigator and suffered from alcoholism. Between January 25 and January 29, 1985, because of his alcoholic condition, he missed three (3) consecutive workdays.

On January 30, 1985, the Department of Insurance sent him a letter which notified him that he was being separated from State employment by reason of abandonment of his position. The letter further notified him that he had no right to pursue an appeal of this separation to the Career Service Commission but that he had the right to file an appeal of the separation to the State of Florida's Department of Administration. He was told that the latter appeal must be filed within twenty (20) days of receipt of the notice.

As a Special Investigator, Mr. Machules, was in a bargaining unit certified by the Florida Public Employees Relations Commission under the provisions of Section 447.301, F.S. The designated representative of this bargaining unit was an is Florida Public Employees Council 79, AFSCME, hereafter referred to as AFSCME.

Mr. Machules took the notice to AFSCME and AFSCME filed a contractual grievance on his behalf. The grievance was filed under the discharge and discipline section of the agreement. No alternative appeal procedure was utilized because the labor agreement denies grievants the opportunity to pursue both a

contractual grievance and an administrative action. See, Article VI, Section 5 of the Master Contract between the State of Florida and Florida Public Employees Council 79.

The grievance was filed on February 4, 1985, with the Department in which Mr. Machules had been employed. ROA - 1. On February 21, 1985, the Agency notified the grievants of a scheduled meeting. Id. The scheduled meeting was held on February 25. Id. On March 11, 1985, the Department notified Machules and the Union that its finding of abandonment was not a disciplinary action which could, under the agreement, form the basis for a grievance. Id. The grievants were told to pursue the matter to the Department of Administration, (hereafter referred to as "DOA"), and its Office of Labor Relations.

On April 1, 1985, after such a filing had been made, the grievants were told by DOA and its Office of Labor Relations that abandonment was not covered by the bargaining agreement. ROA - 2. This led AFSCME and Mr. Machules to immediately file an appeal of abandonment finding to DOA.

At the time of this last filing, AFSCME requested that the time period for filing an appeal to DOA against an abandonment determination be tolled during the period that the union grievance was being pursued. ROA - 2. The petition which requested such a tolling stated:

> Had the Appellant [Machules] been timely advised by the Agency upon its receipt of the [Union] grievance , of the inappropriate forum/procedure, the Appellant would have had sufficient time to petition your office [DOA] for review of the alleged abandonment.

ROA - 1.

DOA responded on April 18 that Rule 22A-7.10(2)(b), Florida Administrative Code, required a petition against abandonment to be submitted within twenty calendar days "after the date that written notification is effectuated...." Since Machules' petition was neither postmarked nor received withi the time required, "the Department of Administration is without jurisdiction." ROA - 11. Machules was given thirty days to file any objections to the intended disposition, that is dismissal. Id.

Machules filed a Motion for Reconsideration on May 10, 1985, and DOA entered its final order dismissing the petition as untimely on May 17, 1985. ROA - 24, 25. An appeal followed to the District Court of Appeal, First District, by the filing of a Notice of Appeal on June 14, 1985.

The Appellant argued to the District Court of Appeal that the time during which a petition against abandonment could be filed should be tolled in this case by the Doctrine of Equitable Tolling. A majority of that Court concluded otherwise in an opinion dated November 25, 1986, but the Court did certify the following question as one of great public importance:

> May the tolling doctrine espoused in federal administrative law decisions be applied to toll the time for seeking review with the Department of Administration without being in conflict with the decision in Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982), and other decisions upholding the validity of the presumption of abandonment and the 20 day time requirement in rule 22A-7.10(2)?

A petition for rehearing was filed in a timely fashion. That petition was denied on March 3, 1987. This appeal was filed on April 2.

SUMMARY OF ARGUMENT

THE DOCTRINE OF EQUITABLE TOLLING MAY BE USED IN FLORIDA TO TOLL THE TIME FOR SEEKING REVIEW OF AN ADMINISTRATIVE DETERMINATION BY AN EMPLOYING AGENCY THAT AN EMPLOYEE HAS ABANDONED HIS POSITION OF EMPLOYMENT WITHOUT BEING IN CONFLICT WITH THE DECISION IN HADLEY V. DEPARTMENT OF ADMINISTRATION, 411 So.2d 184 (Fla. 1982).

The Doctrine of Equitable Tolling is a tool to ensure that the interest in fairness, which is inherently a part of the due process considerations, is not defeated by a mechanistically applied time limitations period for the filing of administrative appeals.

This case presents an appropriate vehicle for the application of the Doctrine of Equitable Tolling. The facts of the case show that the Appellant, John Machules, received a notice on or about January 30, 1985, informing him that his employing agency had determined that he had abandoned his employment and that he was therefore separated from the employment of the State. He was notified that he may appeal pursuant to the provisions of Rule 22A-7.10(2), F.A.C.

He took this notice to the labor organization which represented him. The Union grieved the separation under the discharge clause of its agreement with the State. The employing agency did not summarily reject the grievance. Instead it conducted a quasi-formal hearing on the grievance on February 25, 1985. At the hearing the representative of the employing agency called the notice of January 30, "a preliminary determination". After the hearing the employing agency considered the grievance for two weeks before sending correspondence to the Appellant dated March 11, 1985, which informed the Appellant and his Union

that the grievance against separation by reason of abandonment was not cognizable under the labor agreement and that such separation could only be appealed under the provisions of Rule 22A-7.10(2), F.A.C.

The Union pursued the grievance to its final step before arbitration, to DOA and its Office of Labor Relations. On April 1, 1985, DOA rejected the Union grievance and informed the Union that separations for reason of alleged abandonment could only be pursued under the provisions of Rule 22A-7.10(2), F.A.C. An immediate petition was then submitted.

The Union did not pursue both a Union grievance and an administrative appeal becuase the labor agreement prohibits such dual filings.

Under this scenario the Appellant's petition to DOA should be considered timely filed through application of the Doctrine of Equitable Tolling.

ARGUMENT

THE DOCTRINE OF EQUITABLE TOLLING MAY BE USED IN FLORIDA TO TOLL THE TIME FOR SEEKING REVIEW OF AN ADMINISTRATIVE DETERMINATION BY AN EMPLOYING AGENCY THAT AN EMPLOYEE HAS ABANDONED HIS POSITION OF EMPLOYMENT WITHOUT BEING IN CONFLICT WITH THE DECISON IN HADLEY V. DEPARTMENT OF ADMINISTRATION, 411 So.2d 184 (Fla. 1982).

The Doctrine of Equitable Tolling is a judicially created tool to ensure, when appropriately invoked, that a litigant's rights to procedural due process are not summarily rejected on the basis of some procedural flaw in his filing. It is a doctrine invoked to provide fairness to the litigant and to reach the substance of his case.

Most frequently the Doctrine of Equitable Tolling is invoked when the unrepresented litigant has clearly not been sitting idly by. The Doctrine is also invoked when the party who requests tolling has been misled or lulled into inaction. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

In this case, Machules did not sleep on his rights. He immediately went to his Union and asked for assistance. The Union, believing the action to taken was a discharge, filed a grievance against wrongful discharge. This would appear to be facially appropriate under the labor agreement between the State of Florida and AFSCME. See, Article VII, Section (1), Discipline and Discharge, of the Master Agreement between the State of Florida and Florida Public Employees Council 79.

The grievance was filed within the twenty day period provided by Rule 22A-7.10(2)(b), F.A.C., of the date of the notification given to Mr. Machules on January 30. The grievance was not summarily rejected by the employing agency. The employing

agency set a date for a formal hearing on the grievance. The hearing was scheduled for February 25. That hearing was actually held on February 25. The transcript of that hearing is available but it is not part of the record of this matter. One of the reasons it is not a part of the record is that Mr. Machules was never given a hearing before the Department of Administration to determine if the facts support his claim to the invocation of equitable tolling. If the transcript was part of the record, it would show that the hearing was conducted by Dennis Silverman, an attorney with the Department of Insurance. Mr. Silverman in that hearing described the notice of January 30, 1985, as "a preliminary determination...."

If Mr. Machules was ever given a hearing by the Department of Administration to determine whether the Doctrine of Equitable Tolling should be appropriately invoked as to the timeliness of any appeal to DOA against abandonment, Mr. Machules would submit that the Department of Insurance described its notice of January 30, 1985, as a preliminary determination.

> Silverman: Now, for the record, on January 30th, 1985, the Department in a preliminary determination decided that Mr. Machules had abandoned his position by being absent without authorized leave for three consecutive days.

Transcript, Stage II - Grievance Proceeding of John Machules, February 25, 1985, at page 4.

On March 11, 1985, the Department of Insurance informed Mr. Machules that his grievance under the labor agreement "is not susceptible of resolution in a grievance proceeding." It referred

Mr. Machules to the appeal process provided by Rule 22A-7.10(2)(a), F.A.C.

Mr. Machules and his Union immediately pursued the matter to DOA and its Office of Labor Relations. The matter was considered for several weeks and then DOA advised Mr. Machules that his only recourse was an appeal to DOA under Rule 22A-7.10(2), F.A.C. This advice was received on April 1, 1985, and Mr. Machules immediately submitted the appeal to DOA with the request that the time limit for filing his Rule 22A-7.10(2), F.A.C., petition be tolled by the filing of his grievance against discharge.

The above scenario is not the scenario of a person who is not seeking an appeal of an adverse employment decision. It is not a scenario that one would associate with abandonment which is defined in the dictionary as "to give up with the intent of never again claiming a right or interest in." Webster's Seventh New Collegiate Dictionary (1965). It is the scenario of one seeking to explain his plight and defend his interest in his employment.

Without providing a hearing DOA mechanistically applied the time frame of Rule 22A-7.10(2)(b), F.A.C., and denied the petition. Mr. Machules claims that this is error. He believes that he is entitled to a hearing to determine if the facts surrounding his attempt to pursue his appeal warrant equitable tolling. It is his belief that the facts will support his entitlement to the benefits of the Doctrine.

The facts presented here show that he was vigorously pursuing his Union grievance. His Union grievance appears facially appropriate. He could not pursue both a Union grievance and an administrative petition under Rule 22A-7.10(2), F.A.C.,

for the Union contract, Article VI, Section 5, forbids dual filing. The employing agency and DOA did not immediately reject the grievance. A quasi-formal hearing was held on February 25, 1985. The employing agency described its abandonment notice of January 30, 1985, as "a preliminary determination" at the February 25, 1985, hearing. After the hearing the employing agency considered the grievance for two weeks before issuing a letter of denial on March 11, 1985. DOA issued a letter of denial of the Union grievance on April 1, 1985, and Mr. Machules immediately filed his Rule 22A-7.10(2), F.A.C., petition. No prejudice has been asserted by DOA or the Department of Insurance by the short delay occasioned.

Mechanistic application of limitation periods has been visited by subordinate courts of this State in the context of Unemployment Compensation appeals. Significantly every court has required some hearing.

In Vayvoski v. Unemployment Appeals Commission, 443 So.2d 145 (Fla. 5th DCA 1984), the Court required a hearing to consider all relevant evidence on the issue on the timeliness of an appeal. Surely DOA should have given Mr. Machules a hearing on the jurisdictional issue rather than mechanistically applying the 20 day period to the January 30 notice.

In Waldron v. City of Arcadia, 409 So.2d 1138 (Fla. 2d DCA 1982), the Court noted that although the Unemployment Appeals Commission contended that the twenty day appeal period began to run as of the date that the Commission's records indicated mailing, February 9, the record contained affidavits from the

claimant, his mother and his attorney which stated that they never received notice until April 10, and immediately upon receipt of such notice, the claimant's counsel filed an appeal. The appeal was order received as timely filed.

Here, the evidence would indicate that an immediate appeal was filed albeit in the wrong forum. Upon final notification by DOA of the appropriate forum, an appeal was immediately filed in the appropriate forum. It should be accepted as timely filed.

Although the Courts in the Vayvoski and Waldron cases do not speak of equitable tolling, it is equitable tolling which is invoked. Teater v. Department of Commerce Board of Review, 370 So.2d 847 (Fla. 3d DCA 1979), best illustrates the invocation of the doctrine for it says, after describing evidence on the issue of timeliness of an appeal, "all taken together served to create such uncertainty in the matter that, in our view, the ends of justice will best be served by acceptance of the appeal." Id., at 848.

Certainly the argument to be made here is that these cases concern appellants who complained that they did not receive timely notice of the action to be appealed. Undoubtedly the DOA will contend that Mr. Machules received the January 30 notice. The issue of receipt which is present in the aforegoing referenced cases is not present here.

While Mr. Machules may have received a notice, was it the final notice or "a preliminary determination"? When did he receive notice from which the time commenced to run of his appeal to DOA as against the abandonment determination? Was it upon receipt of the letter issued on March 11, 1985, when the

Department of Insurance mailed a letter to AFSCME stating that the issue was abandonment and the only appeal was to DOA under Rule 22A-7.10(2), F.A.C., or was it on April 1, 1985, when DOA told AFSCME and Mr. Machules that abandonment matters could not be grieved and must be appealed to DOA under the provisions of Rule 22A-7.10(2), F.A.C. ? Are not these issues also issues of notice?

The question certified by the District Court of Appeal suggests that there is a question that the invocation of the Doctrine of Equitable Tolling in the context of this case may run athwart of the holding of this Court in Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982). Nothing in Hadley would suggest that this Court is opposed to the fairness and flexibility associated with the concept of due process and embodied in the Doctrine of Equitable Tolling. Indeed this Court stated of procedural due process, "We must ... consider the facts of the particular case to determine whether the parties have been accorded that which state and federal constitutions demand." Id., at 187.

The Appellant respectfully requests this Court to consider the facts of this particular and peculiar case and after looking at those facts, approve the use of the Doctrine of Equitable Tolling to permit the Appellant's petition against abandonment to be considered timely filed so that he can at last receive a hearing on the substance of his claim which is all he ever sought.

CONCLUSION

The Appellant respectfully submits that the Doctrine of Equitable Tolling should be invoked in this case so as to permit his petition to DOA against abandonment to be considered timely filed. The facts require that his petition of April 1, 1985, against abandonment and to DOA be considered timely filed.

Subsequent to notice which he received on January 30, 1985, informing him that he was being separated from the employment of the Departmernt of Insurance because of "abandonment", he went to his Union and asked their assistance. The Union filed a grievance under the discharge section of its contract with the State. This grievance was not summarily rejected by the employing agency. Rather it was considered, heard, and over a month after it had been received, it was rejected as a matter to be heard by DOA under Rule 22A-7.10(2), F.A.C.

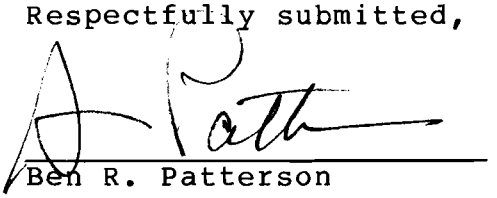
While the employing agency was considering the grievance, its representative described the notice of January 30, 1985, as "a prEliminary determination".

The Union and the Appellant pursued the grievance to DOA and its Office of Labor Relations after the grievance was rejected by the employing agency. DOA rejected the Union grievance on April 1, 1985, and Mr. Machules immediately filed his Rule 22A-7.10(2) petition. He contends here that the time he spent on the Union grievance, a facially appropriate one, should toll the time for filing a Rule 22A-7.10(2) petition for he could not engage in dual filing under the terms of the labor agreement and, at any

rate, the short delay involved here would not prejudice DOA or the employing agency.

Nothing in Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982), is contrary to the invocation of the Doctrine of Equitable Tolling. The Doctrine should be invoked here and the Appellant's petition should be considered timely filed. He should be given a hearing on the substance of his claim that he did not abandon his position of employment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the aforegoing was sent to Richard L. Kopel, Esq., Deputy General Counsel, Department of Administration, 435 Carlton Building, Tallahassee, Florida 32301, this 28th Day of April, 1987.