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IN THE SUPREME COURT OF FLORIDA

R. TIMOTHY CARTER, O.D.,

Petitioner,

v. Case No. 81, 249

DEPARTMENT OF PROFESSIONAL REGULATION,

Respondent.

_____/

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL,
FIRST DISTRICT,
STATE OF FLORIDA

CASE NO. 89-2860

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PRELIMINARY STATEMENT

This case comes before the Court on a petition for discretionary review of a decision of the First District Court of Appeal, in which that Court certified the following question as being of great public importance:

> Whether the decision in Department of Business Regulation v. Hyman, 417 So.2d 671 (Fla. 1982), should be applied when a licensee moves to dismiss an administrative complaint because the department or the board has failed to comply with the time limitations of section 455.225, Florida Statutes?

In that decision, the First District Court affirmed a final order of the Board of Optometry ("Board"). Only that portion of the final order dealing with the imposition of the administrative fine was reversed and remanded for reconsideration.

The petitioner, R. Timothy Carter, O.D. ("Carter" or "Petitioner") was the Appellant in the appeal below and the respondent in the disciplinary proceedings before the Board of Optometry. The respondent, Department of Professional Regulation ("Department") was the Appellee in the appeal before the First District Court and the Petitioner in the underlying disciplinary case. The Board of Optometry is the administrative agency charged with final agency action for the licensing and regulation of optometrists in Florida pursuant to section 20.30, 455.225, and Chapter 463, Florida Statutes. The Department of Professional Regulation is the administrative agency with responsibility for investigating and prosecuting violations of Chapter 463 by optometrists.

All references to the original record on appeal shall be designated (R-). References to the Appendix shall be designated (A-). All emphasis is supplied by the Department

unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Department accepts the Statement of the Case and Facts of the Petitioner.

JURISDICTION

Carter seeks to invoke the discretionary jurisdiction of this Court in light of the question certified by the First District Court of Appeal as being of great public importance. Article V, section 3(b)(4), Florida Constitution. As this Court has already spoken on this issue, this case is not one in which invoking the Court's discretionary jurisdiction is appropriate.

It is axiomatic that under Article V of the Florida Constitution, the jurisdiction of this court is limited and, with specifically delineated exceptions, the decisions of the district courts are to be considered final. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Seaboard Air Line Railroad v. Branham, 104 So. 2d 356, 358 (Fla. 1958)("To grant a review of the decision of the District Court of Appeal under these circumstance would amount, in effect, to allowing the petitioners two separate successive appeals at two separate and distinct levels; and this the constitution does not authorize.")

In this case, the First District clearly stated:

> We decline, however, to treat violations of section 455.225 time limits as requiring dismissal of the complaint or voiding of the order as a matter of law. Rather, we hold that the licensee, as the moving party, has the burden to establish a basis for dismissal by showing (1) that the board or department has violated the time limits in section 455.225, and (2) that the consequent delays may have impaired the fairness of the proceedings or the correctness of the action and may have prejudiced the licensee. In so holding, we follow the analysis used by the supreme court in Department of Business Regulation v. Hyman in respect to violations of the 90-day requirement in section 120.59(1). The policy reasons for the holding in Hyman apply with equal force in the case at bar. There, as here, the legislature had specified no sanction for agency noncompliance

> with a statutory time limitation. The supreme court explained in Hyman that, under such circumstances, the statutory time requirement must be read in conjunction with section 120.68(8), which the supreme court characterized as "the harmless error rule for agency action."

Carter v. Department of Professional Regulation, 18 Fla. L. Weekly D409, D410 (Fla. 1st DCA Jan. 23, 1993). Although certifying the question, the First District Court applied the most recent caselaw and statement by this Court on this very issue. The holding in Hyman is especially appropriate where, as here, the delineated time deadlines can be extended by the Secretary of the Department. Thus, any additional time and expense the Court would expend in taking jurisdiction in this case would not be a wise use of its resources. The question certified to this Court in the decision below, therefore, is not a question deserving of this Court's discretionary jurisdiction. The decision of the First District Court is clear and based on precedent by this Court. There is no need for this Court to re-examine the issue.

SUMMARY OF THE ARGUMENT

Petitioner Carter raises three issues for this Court's review. First, he claims that the First District Court of Appeal erred below in applying the "harmless error" rule as articulated in Department of Business Regulation v. Hyman, 417 So. 2d 671 (Fla. 1982) to the Department's failure to adhere to the time limits set forth in section 455.225, Florida Statutes. The Department asserts that the court correctly applied the harmless error standard because, as with section 120.59(1), Florida Statutes in Hyman, the time limits articulated in section 455.225 are not jurisdictional. Had the Legislature intended that untimely requests for further investigation or for untimely probable cause determinations to result in dismissal, such a sanction would have been expressly stated in the statute.

The time limits in section 455.225, Florida Statutes, not being jurisdictional, no divestment of jurisdiction occurred such that action by the Department, the Board or the panel constituted an invalid exercise of delegated authority.

Secondly, contrary to Carter's assertions, public policy considerations dictate the application of the harmless error standard to violations of section 455.225, Florida Statues. The harsh result of dismissal of the complaint in no way protects the health, safety and welfare of the public, in accordance with the Department's mandate under section 455.201, Florida Statutes. Dismissal only benefits the licensee against whom the complaint is filed, who in cases such as Carter's, will then continue to practice below the standard of care without penalty, restriction or rehabilitation. Such a result was not intended by the Legislature in drafting section 455.225, Florida Statutes.

Carter asserts that the strict adherence to basic procedural rules protects both the public and the licensee's rights. Where, as here, he argues that strict adherence dictates dismissal as the appropriate sanction for noncompliance, the Department instead supports the balancing of these competing interests. The First District Court's application of the harmless error rule, rather than the draconian measure of dismissal of the complaint against the licensee, strikes the proper balance between harm to the public and harm to the licensee.

Finally, Carter argues that if this Court upholds the First District Court's application of the harmless error standard articulated in Hyman to the time limits in section 455.225, Florida Statutes, the burden of showing prejudice should rest on the Department, and not on the licensee as that court required. The Department contends that the licensee is the party who can best know and demonstrate any harm accruing to him from actions by the Department, the Board or the panel. Furthermore, such a position is supported by case law in a criminal setting in which there was a significant delay in both the arrest and subsequent indictment of the defendant. In this case, Carter could show no prejudice to him caused by the asserted time limit violations; the hearing officer, the Board and the First District Court found none. The decision by the First District Court properly placed the burden on Carter to demonstrate prejudice resulting from asserted violations of section 455.225, Florida Statutes.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEAL DID NOT ERR IN APPLYING THE "HARMLESS ERROR" STANDARD IN DECIDING THE CASE BELOW.

A. The time limits articulated in section 455.225, Florida Statutes, are not jurisdictional.

Carter's first issue on appeal asserts that the First District Court of Appeal erred in applying the harmless error standard as articulated in this Court's opinion in Department of Business Regulation v. Hyman, 417 So. 2d 671 (Fla. 1982), to the time limits set forth in section 455.225, Florida Statutes. His contention is that these time limits delineate the window of time within which the Department, the Board and the probable cause panel must exercise their respective powers. This argument must fail for several reasons.

Carter asserts that the First District Court's decision below relying on this Court's decision in Hyman is incorrect. Section 455.225, at issue herein, is distinguishable from section 120.59 which the Court analyzed in Hyman, because the latter statute does not make express the consequences of failure to act within the prescribed time period. Carter makes the unsupported statement that "[s]ection 455.225, on the other hand, removes the power to act once the time periods expire." No such express removal exists in the statute, and the First District Court so found when it stated:

> We decline, however, to treat violations of section 455.225 time limits as requiring dismissal of the complaint or voiding of the order as a matter of law.... In so holding, we follow the analysis used by the supreme court in Department of Business Regulation v. Hyman, in respect to violations of the 90-day requirement in section 120.59(1). The policy reasons for the holding in Hyman apply with equal force in the case at bar.

> There, as here, the legislature had specified no sanction for agency noncompliance with a statutory time limitation.

Carter, 18 Fla. L. Weekly at 410. If the Legislature had intended that untimely requests for further investigation, or for untimely probable cause determinations in proceedings in which the agency is the protagonist would always result in dismissal, the Department believes that it would have included the necessary language in section 455.225 to impose such a sanction, as it has done elsewhere in statutes outlining administrative procedure. Hyman, 417 So. 2d at 673.

Furthermore, the 15-day and 30-day time periods outlined in section 455.225, Florida Statutes, speak only to the probable cause panel's decision that further investigation is required before it can make a probable cause determination and to the panel's making the determination once the investigation is final. Once the time limit is reached, the Department may still make a probable cause determination thereafter. Nothing in the language of the statute suggests that divestment of jurisdiction for the complaint itself is a consequence of failing to meet these deadlines. Indeed, such a drastic result for merely failing to request further investigation within 15 days seems draconian in the extreme.

The statute expressly provides for the extension of those time limits by the Secretary of the Department. Section 455.225(3), Florida Statutes. It is axiomatic that jurisdictional time limits can neither be extended nor waived. Even assent by both of the parties is not sufficient to revest jurisdiction where jurisdictional time limits have run. Furthermore, the statute provides for no dismissal of the complaint as a matter of law in the event of a failure by the panel to meet the statutory time limits.

Also, the Department is directed by the statute to "expeditiously" investigate complaints. No specific time limit for investigation of a complaint is set by statute. The Department asserts that the Legislature did not set a time limit in recognition of the different set of facts and circumstances that each new complaint presents for the Department to investigate. Indeed, section 455.225(3), Florida Statutes, bears this statement out. The Legislature implicitly acknowledges that some cases may even take a year, or more, to investigate when it provided the Board a remedy against the Department to insure that cases over a year old which had neither been referred to the Division of Administrative Hearing nor had not been completely investigated would be handled by a special Board prosecutor. Thus, not only does section 455.225 not provide dismissal as a remedy for failure to investigate within a year, but the provision expressly envisions that some investigations may take over a year to complete. In this case, the completion of the investigation was complicated by the fact that the complainant had moved away from the area where the events giving rise to the complaint took place, the documents were lengthy and the investigation required the use of multiple consultants. (R-219, 364, 486, 487-488).

Carter anticipates the Department's argument and distinguishes both Beckum v. Department of Professional Regulation, 427 So. 2d 276 (Fla. 1st DCA 1983) and Carrow v. Department of Professional Regulation, 453 So. 2d 842 (Fla. 1st DCA 1984). While neither case is directly on point, both cases dealt with irregularities by the Department or probable cause panel in compliance with the requirements of section 455.225, Florida Statutes.

The First District Court in Beckum held that the asserted irregularities regarding the imperfect recording of the probable cause panel meeting were not in any sense jurisdictional, especially in light of the panel's attempts to reconstitute its findings and cure any alleged error. The court explained that errors or omissions claimed to be jurisdictional could be addressed by immediate section 120.68(1) judicial review of the ruling below. Absent any jurisdictional errors, the "disciplinary proceedings to follow will be vitiated only upon a finding that 'the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure,' section 120.68(8)...". 427 So. 2d at 277. While the Department asserts that the errors in this case are in no way jurisdictional, if Carter had thought so at the time, the appropriate remedy was for him to immediately appeal the hearing officer's denial of his motion to dismiss. It should be noted that the hearing officer denied the motion to dismiss without prejudice for Carter to demonstrate that he was in fact prejudiced. (R-89-90) Carter neither filed the immediate appeal nor did he show attempt to show prejudice necessary to carry his motion to dismiss.

Similarly, the court in Carrow found that any failure by the Department to inform him of the nature of the complaint against him, in violation of section 455.225(1) was not jurisdictional, nor would it result in a termination of the investigation against Carrow. The court found no demonstrated need for immediate non-final review, and stated:

> Should it subsequently be shown that this investigation was procedurally irregular, and that any irregularities were material and impaired the fairness of the proceedings, this court upon final review could vitiate the agency action and remand for new

proceedings. Section 120.68(8), Florida Statute (1983).

453 So. 2d at 843. Carter has made no showing that the time it took to investigate the complaint against him and to get it before the probable cause panel was a material error that impaired the fairness of the proceedings below. Carter, 18 Fla. L. Weekly at D410.

Because the time limits set forth for the probable cause panel to request additional information or to make its determination after receiving the final investigatory report are extendable by the Secretary of the Department, they can in no way be considered jurisdictional. Furthermore, had the Legislature intended for dismissal of the complaint to be the result if such time limits were not strictly observed, it would have expressly provided such a remedy. As it did not in section 120.59(1), so it did not in section 455.225, Florida Statutes.

B. Agency action in this case did not constitute an invalid exercise of delegated authority.

It is well-settled that state agencies may not exercise jurisdiction where none has been granted by the Legislature. Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So. 2d 577 (Fla. 1965). Herein, however, there was no invalid exercise of the authority delegated to the Department and the Board by the Legislature.

The Department is the administrative agency charged with the responsibility for investigation and prosecution of consumer complaints against licensees, pursuant to section 20.30 and Chapter 455, Florida Statutes. The Board is the administrative agency having final agency action authority for the licensing and regulation of optometrists in Florida, as stated in section 20.30, section 455.225, and chapter 463, Florida Statutes. Department of

Professional Regulation v. Hall, 398 So. 2d 978, 979 fn.2 (Fla. 1st DCA 1981).

Carter states that the time limits set in section 455.225, Florida Statutes, are jurisdictional and limit the scope of authority of the Department, the panel, and the Board with respect to disciplinary actions against licensees. Such an statement goes beyond the plain language of the statute and ignores the realities of the ongoing investigative and prosecutorial responsibilities of the Department. Investigation of a complaint, although deemed complete and placed before the probable cause panel for determination, continues if the investigator receives further information. He pursues that information and reduces it to writing for presentation as a supplement to the completed investigative report, even though such report is pending before the panel. Similarly, the Department's role as prosecutor continues from the intake of the consumer complaint through to the appellate process after final agency action. There is no divestiture of this authority even when the probable cause panel considers the consumer complaint and the investigative report because it is the Department's attorney who presents the cases for the probable cause determination and then initiates whatever action is appropriate upon the panel's decision. Carter suggests that at each step of the way jurisdiction is acquired and then lost by each of the agencies responsible in the process. If such a reading was taken to its logical conclusion, the process would be even more lengthy. The Department could make no further investigation on a case pending before the panel, even though its investigators may receive additional material information. Such investigation would have to wait until the probable cause panel had decided, without the additional information, and "relinquished jurisdiction" to the Department. The same

strictures would apply to the Department prosecutor while the case is before the panel.

The Department asserts that the process must, of necessity, be more flexible that Carter's rigid reading of the statute suggests. Neither the Department nor the Board and panel have invalidly exercised authority herein, because, unlike in Edgerton v. International Co., 89 So. 2d 488 (Fla. 1956), the time limits in section 455.225, Florida Statutes, are not jurisdictional. Carter, 18 Fla. L. Weekly. at D410. The statutory time limit in Edgerton was that within which the Hotel and Restaurant Commission was authorized to commence disciplinary proceedings. As with other statutory time limits for the initiation of an action, such as the 30-day time period within which to file a notice of appeal, once that period has run no jurisdiction can be invoked. That is not this case. Indeed, there is no current statute of limitations for initiating an action against a licensee by the Department; had the Legislature intended for such limitations to exist, it would have enacted them.

Carter also cites to Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988)("Machules II")and Machules v. Department of Administration, 502 So. 2d 437 (Fla. 1st DCA 1986). In Machules II, this Court held that an agency rule requiring the Department to review certain action within 20 calendar days after receipt of written notification is not jurisdictional in the sense that failure to comply is an absolute bar to appeal. 523 So. 2d at 1133. Again, the facts in Machules are inapposite to those before this Court. Contrasting an agency rule setting an operational time deadline with those time limits set forth in section 455.225, Florida Statutes, brings no clarity to the issue before this Court.

As the time limits in section 455.225, Florida Statutes, are not jurisdictional, action

taken in the case before this Court by the Department, the panel and the Board was within the authority delegated by the Legislature.

II. PUBLIC POLICY CONSIDERATIONS DICTATE THE APPLICATION OF THE HARMLESS ERROR RULE TO VIOLATIONS OF SECTION 455.225, FLORIDA STATUTES.

Appellant charges, in his second issue on appeal, that the Department, Board and panel ignored Legislative mandates, and in failing to comply with the provisions of section 455.225, did not "even explain or excuse their non-compliance." There is no question that the Department failed to meet the time deadlines specified in section 455.225, and the reasons for this failure are not readily apparent in the record before this Court. For reasons of public policy, however, this failure on the part of the Department should not be a basis for dismissal of the complaint against Dr. Carter or any licensee who does not demonstrate prejudice.

The Department's most important and fundamental legislative mandate is to protect the health, safety and welfare of the public. Section 455.201, Florida Statutes. Carter recites as one of the most compelling reasons for forcing the harsh result of dismissal for time limit violations of section 455.225 on the Department "protect[ing] the public from potential harm or injury caused by violations of the law and of standards governing the professional practice." (Petitioner's Initial Brief at 18). Yet he fails to show how dismissing a complaint against a licensee will protect the public. Indeed, the only benefit of such a drastic remedy will accrue to the licensee, not to the public. The draconian penalty of dismissal where time periods set forth in section 455.225 are violated will allow licensees

who may be guilty of violating the law or of practicing below minimum standards to continue to do so with impunity until the next violation occurs and is reported for investigation. The public is not served by such a scenario.

Appellant sets forth a lengthy explication of the route that the consumer complaint in this case took before the administrative complaint issued. (Petitioner's Initial Brief at 14-15.) The Department asserts that this complicated and involved route is at the heart of the reasons why the Legislature purposely did not impose express jurisdictional time limits on the investigation and prosecution of complaints, and why to do so judicially would cause tremendous barriers to the ability of the Department to protect the health, safety and welfare of the public, while at the same time observing the rights of licensees.

The Department, as with all State executive agencies, is charged each year with regulating more professions and licensees with fewer resources. Overwhelming case loads for both investigators and prosecutors is the rule rather than the exception. The Department relies heavily on volunteer consultants to save money, but those volunteers have their own professional responsibilities. Even the Department experts who are under contract to provide paid services are also practitioners with professional demands other than those of the Department. The time they can devote to their services to the Department often must take a secondary priority, yet the Department relies heavily on their expertise to determine whether a licensee has violated a practice act. In addition, when the opinion of a consultant suggests that further expert review is necessary, correspondingly, further delay in the completion of the investigation occurs.

The mandate of the Department to protect the health, safety and welfare of the public is also complicated and often delayed by other statutory requirements. Legal skirmishes over the release of patient records by either defense counsel or by counsel for the patient can slow or completely halt a medical malpractice investigation. Additionally, the probable cause panel of the Board and the Board itself are collegial bodies composed of working people. Not infrequently, the panel or the Board may find itself without a quorum when members are unable to attend a meeting due to other more pressing responsibilities. Meetings must then be rescheduled and re-noticed, further delaying consideration of the cases on that day's agenda. Finally, the Department must rely on the active participation and availability of complainants and other witnesses, who also are working people with other responsibilities. In this case, the investigation was made more difficult by the complainant's relocation away from the area where the events giving rise to the complaint took place. The complainant's relocation, and the corresponding difficulties, however, did not divest the Department of its responsibility to pursue the complaint. It was simply made more difficult and time-consuming.

In light of the foregoing realities in the operation of the Department, the Board, and the panels, the harsh result of dismissal of a consumer complaint for a failure to meet the stated time limits in section 455.225, Florida Statutes, would severely hamper the Department's statutory mandate of protecting the health, safety and welfare of the public. This is particularly so where the legislature has not dictated such a result, and where the licensee has not demonstrated any prejudice resulting from such a failure. Dismissal would

require that the Department allow individuals guilty of malpractice and who even admit that fact, such as Dr. Carter, to continue to practice below the standard of care and without restraint. Surely such a result was not envisioned by the Legislature in crafting Chapter 455, Florida Statutes.

Carter cites to Morning v. State, 416 So. 2d 844 (Fla. 4th DCA 1982) for that court's discussion of the necessity to adhere to basic procedural rules. Yet by his ellipsis, he subtracts the most important point of the quoted passage, emphasized below:

> In truth, then, it is not accurate to always equate the enforcement of a procedural rule with giving it preeminence over substantive rights. There is a delicate balance which must be struck between the two. In proper perspective the requirement of an orderly system ultimately assures rather than constricts the availability of substantive rights. We do no more than maintain that perspective here.

Id. at 846. See also, State v. Sobel, 363 So. 2d 324 (Fla. 1978)(citing cases which hold that dismissal is not an automatic sanction where nonpreservation of evidence is attributable to negligence of the state and in which no public policy would be served by dismissing an indictment where the risk of prejudice is slight.).

The Department believes that the First District Court properly balanced the competing interests herein when it chose to follow this Court's lead by adhering to the "harmless error" standard articulated in Hyman. In so doing, the Court acknowledged the continuing duty of executive agencies to observe the constitutional and statutory rights of licensees while not imposing barriers to the agencies' ability to protect the public. If the court finds that there is harm in the failure by the Department or the panel to comply with the requirements of

section 455.225, the harmless error standard will allow for the fashioning of a remedy for the licensee. No other resolution could so balance the interests herein.

III. THE FIRST DISTRICT COURT APPROPRIATELY PLACED THE BURDEN OF SHOWING PREJUDICE ON THE LICENSEE.

For his final point on appeal, Carter argues that if this Court should uphold the First District Court's application of the harmless error rule to violations of the time limits in section 455.225, Florida Statutes, the Department should bear the burden of showing that the licensee was not prejudiced by the delay. Such an argument results in the absurd requirement that the Department prove a negative. Who but Dr. Carter himself can better identify the harm accruing to him by any delay in the investigation and prosecution of the consumer complaint against him.

The Department's position finds support in an opinion of the First District Court in which it addressed the prejudice to a criminal defendant because of delay in both his arrest and subsequent indictment. In Howell v. State, 418 So. 2d 1164 (Fla. 1st DCA 1982), that court stated:

> The Due Process Clause protects against an oppressive delay. United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752, reh. denied, 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (1977). However, the purpose of the clause is not to afford wide-ranging protections based on shallow claims of prejudicial delay. The intended application of due process notions is a narrow one, although prevention of oppressive actual prejudice to the defense caused by the passage of time is the central concern of due process in a delayed arrest or indictment setting. Proof of actual prejudice does not make valid a due process assault on delayed arrest or indictment. Rather, it merely makes such a claim ripe for adjudication.

418 So.2d at 1167-1168. (Citations omitted). The court expands at great length on those federal cases which deal with the issue of due process violations due to pre-indictment delay, and concludes:

> Accordingly, it would appear to be the responsibility of the defendant to demonstrate actual prejudice resulting from any delay in arrest or indictments. Once the defendant has met his burden of proof, the burden shifts to the government to show why the delay was necessary. It follows that if the defendant cannot meet his initial burden of proof, the inquiry need not proceed any further.

418 So.2d at 1170. (Citation omitted). The court noted that defendant Howell's claims of prejudice centered on the fading memories of both himself and his friends. Howell failed to make clear to the court that such fading memories were due to the pre-information period or the more lengthy post-information time period. Nor could the court ascertain what material effect the fading memories had that caused Howell actual prejudice. The court concluded that there was no due process deprivation due to delay in time. 418 So.2d at 1170-1171.

The Department contends that the reasoning of the court in Howell, although in a criminal setting, is sound when applied to any claimed prejudice by the licensee in an administrative setting where investigation and probable cause determinations are lengthy and time-consuming. The Department does not claim, however, that such a rationale excuses its adherence to the time limits of the statute. Howell is cited only for support as to which party should carry the burden of showing prejudice.

Herein, Carter has not and cannot make any showing of prejudice to him. Indeed,

if his assertion were to echo that of Howell in the case described above, he would be refuted by the record below. Carter was able to locate office staff who remembered the patient in question, and the patient records were intact. (R-582, 679, 713). Moreover, he never claimed an inability to remember the facts of this patient's case; in fact, the allegations for which Carter was found guilty were the subject of civil litigation in which he was an active participant. The civil litigation had concluded when the patient complained to the Department (R-151, 680). His memory of the details was no doubt heightened by the civil litigation involving these same facts. Moreover, Carter admitted that he made no immediate referral which was the basis of the charge against him. (R-670-672); Carter, 18 Fla. L. Weekly at D409.

For these reasons, the Department believes that the First District Court was correct in its requirement that Carter, as the moving party, had the burden of showing prejudice to him from any asserted delay. That he did not and could not was noted by the court, who stated:

> But, because he failed to demonstrate that the delays may have impaired the fairness of the proceedings or the correctness of the action and may have prejudiced him, Carter was not entitled to dismissal of the administrative complaint. In his testimony, Carter acknowledged that he recalled the events of September 7, 1982, and he acknowledged that he did not refer the patient to an ophthalmologist on that evening. In light of the fact that the findings of guilt were based upon this omission, which Carter fully admitted, the hearing officer could only have concluded that Carter was not prejudiced by the delays. Accordingly, we conclude that the hearing officer and the board were correct in denying Carter's motion to dismiss.

Carter, 18 Fla. L. Weekly at D410. The First District Court properly held that the burden

of showing prejudice caused by any delay was with Carter.

CONCLUSION

Based on the foregoing, the Department respectfully requests that Carter's petition for discretionary review be denied. If the Court elects to take jurisdiction, the Department respectfully requests that the question certified by the First District Court of Appeal be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to Gary J. Anton, Esquire, Attorney for Petitioner, Stowell, Anton & Kraemer, 201 South Monroe Street, Suite 200, Post Office Box 11059, Tallahassee, Florida 32302, this 31st day of March, 1993.

Kathryn L. Kasprzak