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IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

R. TIMOTHY CARTER, O.D.,

Petitioner/Appellant,

v.

CASE NO. 81,249

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTOMETRY,

Respondent/Appellee.
_____/

PETITIONER'S INITIAL BRIEF

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

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PRELIMINARY STATEMENT

In this brief, petitioner/appellant R. Timothy Carter, O.D., will be referred to as Dr. Carter or as appellant. Appellee Department of Professional Regulation will be referred to as "the Department." The Board of Optometry will be referred to as "the Board." The Probable Cause Panel of the Board of Optometry will be referred to herein as "the Panel." The complainant in this matter, Keith Roberson, will be referred to as Roberson.

Citations to the original record on appeal will be made by the letter "R" and the appropriate page number. References to the appendix will be by the letter "A" and the appropriate page number and, if appropriate, by the duplicate cite to the record.

The Appendix attached hereto consists of the opinion of the District Court of Appeal in R. Timothy Carter, O.D. v. Department of Professional Regulation, Board of Optometry, 18 FLW D409 (Fla. 1st DCA January 26, 1993) at Appendix 1-8; the Final Order of the Board of Optometry in Department of Professional Regulation, Board of Optometry v. R. Timothy Carter, O.D., (filed October 20, 1989) at Appendix 9-12; and the Recommended Order of the hearing officer in Department of Professional Regulation, Board of Optometry v. R. Timothy Carter, O.D., (filed March 8, 1989) at Appendix 13-29.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision rendered by the First District Court of Appeal affirming a final order entered by the Department of Professional Regulation, Board of Optometry, with the exception of the administrative fine, which the Court of Appeal reversed. The case was remanded for reconsideration of the fine. In addition, the Court of Appeal 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?

This action arose after Keith Roberson filed a consumer complaint with the Department against R. Timothy Carter, O.D. (R 804). Roberson, who suffered from extreme near sightedness (myopia) and constant movement of the eyes from side to side (nystagmus), first came to Dr. Carter for treatment in 1979 (R 595-60). On September 7, 1982, Roberson visited Dr. Carter's office after having been struck in the left eye four days earlier (R 963). Roberson described the symptoms of a detached retina and Dr. Carter conducted an examination. However, because of Roberson's myopia and nystagmus, Dr. Carter was unable to determine conclusively whether Roberson's retina was detached (R 963-64). Dr. Carter advised Roberson to remain still, to have his mother drive him home, and to visit his ophthalmologist the first thing the following morning (R 671-74). Roberson failed to follow that advice, and instead went to work the next day. The next evening

Roberson lost vision in his left eye (964). He subsequently underwent three major operation on his left eye but ultimately lost the sight in that eye (R 964).

Roberson filed a consumer complaint against Dr. Carter on May 13, 1986, almost four years after the complained of events (R 804). The Department notified Roberson that an investigation of the complaint had been initiated and should be completed within 45 days (R 767). Ten months later, on March 19, 1987, the Department completed its initial investigation and referred the matter to the Probable Cause Panel of the Board of Optometry (R 490-91). The Panel first considered the matter three months later, on June 13, 1987, at which time the Panel determined that it required additional information (R 492). On July 15, 1987, the Department retained another expert to conduct a further investigation and two months later, on September 21, 1987, the expert relayed this additional information (R 492). On November 6, 1987, the Panel reconsidered Dr. Carter's file and found probable cause to file formal charges against Dr. Carter (R 492-93). The Panel referred its finding to the Department, and finally, on February 16, 1988, 21 months after Roberson filed his complaint (and five and one-half years after the September 1982, incident), the Department filed an administrative complaint against Dr. Carter (R 1-3).

The administrative complaint contained five counts. Counts I and II challenged Dr. Carter's initial treatment program of orthokeratology in 1979 and the fee charged therefor (R 1-2). Count III alleged that Dr. Carter was negligent, incompetent or

engaged in misconduct in the practice of optometry regarding the September 1982, incident (R 2-3). Count IV alleged a records violations, and Count V alleged that Dr. Carter's treatment and examination of Roberson constituted gross and repeated malpractice in the practice of optometry (R 3).

Dr. Carter timely requested a formal hearing and, at the same time, filed a motion to dismiss the administrative complaint based on the Department's failure to comply with the time requirements of section 455.225, Fla. Stat. (1986) (R 10-17). The Department referred the matter to the Division of Administrative Hearings on April 26, 1988 (R 957). The hearing officer denied Dr. Carter's motion to dismiss on August 9, 1988 (R 90-92), and the final hearing was held on September 26 and 27, 1988 (R 956). At that time the Department made various amendments to its complaint, none of which are significant to this appeal (R 957-58, 140).

On March 8, 1989, the hearing officer issued his recommended order finding: 1) the Department failed to establish its case with respect to Counts I and II, and recommending dismissal of those counts (R 962, 963, 969-970; and A 19, 20, and 26-27); 2) the Department had withdrawn Count IV, and recommending dismissal of that count (R 958, 967, 970; and A 15, 24 and 27); and 3) Dr. Carter guilty of Counts III and V (R 968-970; and A 25-27). The hearing officer recommended a one year suspension of Dr. Carter's license, followed by one year of probation, and a minimum fine of $5,000 (R 969; A 26).

After rejecting Dr. Carter's exceptions to the recommended order, the Board accepted the hearing officer's findings of fact and conclusions of law and issued its final order On October 11, 1989 (R 979-981; A 9-12). The Board found Dr. Carter guilty of Counts III and V, but reduced the hearing officer's recommended suspension to six months, followed by a two-year probationary period (R 981-983; and A 10-11). The Board also reduced the fine to $2,000. Id.

Dr. Carter timely appealed the Board's final order. On January 23, 1993, the First District Court of Appeal filed its opinion. See Carter v. Department of Professional Regulation, Board of Optometry, 18 Fla. L. Weekly D409 (Fla. 1st DCA Jan. 23, 1993) (A 1-8). The Court of Appeal rejected the Department's proposition that the time limits set forth in section 455.225 existed only to ensure adequate reporting between the Department, the Board, and the Panel. The majority did accept, however, this Court's rationale in Department of Business Regulation v. Hyman, 417 So. 2d 671 (Fla. 1982), and held that violations of section 455.225 were subject to the harmless error rule. Because the majority determined that Dr. Carter failed to establish that the delays in the disciplinary process against him impaired the fairness of the proceedings or the correctness of the action taken, it affirmed the Board's final order, with the exception of the administrative fine imposed. The Court of Appeal reversed the fine and remanded for reconsideration of the same, limiting the maximum fine on remand to $1,000.

Judge Zehmer filed a lengthy dissenting opinion. He disagreed that the Hyman test should apply to violations of section 455.225. Judge Zehmer wrote that a fair reading of 455.225(3) reveals that after expiration of the established time limits, the Panel loses its power to act, unless the Department's Secretary has granted reasonable time extensions. According to Judge Zehmer, failure to adhere to this section placed the burden on the Department and the Board to justify their unauthorized deviation from the statutory requirements, if such deviations are, in fact, capable of being excused. Judge Zehmer concluded that the correctness of the proceedings were impaired, as a matter of law, by the appellees' failure to comply with, or obtain extensions of, the time limits set forth in section 455.225, Fla. Stat..

The Court of Appeal certified to this Court the question of whether Hyman should be applied in this case. Dr. Carter timely invoked the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Appellant urges the court to adopt the position of Judge Zehmer in his dissenting opinion that the harmless error rule does not apply to violations of the time requirements of section 455.225 since they define the time frames within which the Department, the Board, and the Panel must exercise their respective powers.

Department of Business Regulation v. Hyman, 417 So. 2d 671 (Fla. 1982), under which a violation of the time requirement found in section 120.59(1), Fla. Stat., subjects the agency decision to the harmless error rule, should not apply when a licensee moves to dismiss an administrative complaint based on violations of the time limitations contained in section 455.225, Fla. Stat. (1986). Unlike the 90-day time period for issuing final orders in 120.59(1), the time limitations contained in section 455.225 are jurisdictional. Section 455.225 describes the different time periods within which one of three separate bodies -- the Department of Professional Regulation, a probable cause panel, or a regulatory board -- is authorized to take disciplinary action against a licensee.

Section 120.59(1) is part of Florida's Administrative Procedure Act ("APA"). The APA contains procedural guidelines for agency rule-making and adjudication. Each agency's scope of authority, however, derives from the agency's own organic statutes. Chapter 455, Florida Statutes, defines the boundaries within which the legislature authorizes the Department to act. It also sets some limits on the power of regulatory boards and probable cause

panels. Neither the Department, nor any of the regulatory boards, may act beyond the legislative authority delegated to that particular body.

Section 455.225 is also distinguishable from section 120.59 because the latter statute makes no provision for the consequence of failure to act within the prescribed time period. Ssection 455.225, on the other hand, removes the power to act once the time periods expire. Because the Hyman court relied heavily upon the fact that section 120.59 provides no sanctions or other consequences for the failure to act within the given time period, this distinction renders Hyman inapplicable to the instant case.

In addition, section 455.225 provides that extensions of the time periods contained therein may be granted only by the Secretary of the Department. Compare, §120.59(1), Fla. Stat. (the 90 day period may be waived or extended with the consent of the parties.).

The application of the harmless error rule also defeats important public policy goals. The timely processing of complaints protects the public by facilitating prompt identification of practitioners who may endanger the public health, safety, or welfare. In addition, the time requirements of section 455.225 protect the due process interests of licensees under Departmental scrutiny. Furthermore, to permit agencies to ignore these statutory limitations with impunity invites disrespect and erodes public confidence in the legal process. If state agencies find statutory time restrictions inadequate, they make seek revision or

removal of such limitations. They may not, however, simply ignore legislative mandates.

Assuming the Court requires a finding of prejudice in order to dismiss an administrative complaint due to violations of section 455.225's time limits, the violating party must justify its delay and seek an extension. In addition, the agency must bear the burden of proving that the delay was not prejudicial to the licensee.

CERTIFIED QUESTION

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?

ARGUMENT

I. THE DISTRICT COURT ERRED IN APPLYING THE HARMLESS ERROR RULE SET FORTH IN HYMAN TO A LICENSEE WHO MOVES TO DISMISS AN ADMINISTRATIVE COMPLAINT BASED ON THE FAILURE OF THE DEPARTMENT OR THE BOARD TO COMPLY WITH THE TIME LIMITATIONS OF SECTION 455.225.

The Court in Hyman ruled that failure to adhere to the 90-day time period for issuing final orders, required by section 120.59(1), Fla. Stat., subjects the administrative proceedings to the application of the harmless error rule found in section 120.68(8), Fla. Stat.. The Hyman court placed upon the party challenging the agency decision the burden of proving that the delay prejudiced that party because "either the fairness of the proceedings or the correctness of the action may have been impaired by material error in procedure or a failure to follow prescribed procedure". See, § 120.68(8), Fla. Stat..

A. THE HARMLESS ERROR RULE DOES NOT APPLY TO VIOLATIONS OF THE TIME REQUIREMENTS OF SECTION 455.225 SINCE THIS SECTION ESTABLISHES THE TIME FRAMES WITHIN WHICH THE DEPARTMENT, THE BOARD, OR THE PANEL MUST EXERCISE THEIR RESPECTIVE POWERS.

The harmless error rule set forth in Hyman should not apply to violations of the time limitations set forth in section 455.225, Fla. Stat. (1986), since, unlike the 90-day period for issuing

final orders found in section 120.59(1), the time requirements contained in section 455.225 are jurisdictional.

Chapter 120, Florida Statutes, Florida's APA, grants persons adversely affected by agency action certain mechanisms for redressing their grievances. The APA describes the manner in which state agencies shall conduct their rulemaking and adjudicatory activities. The provisions of Chapter 120 do not define the scope of authority delegated by the legislature to each individual agency and board. Such authority derives from each agency or board's own organic statutes.

The Department's organic statutes are found in Chapter 455, Fla. Stat.. The provisions within this chapter define the boundaries within which the Department is legislatively authorized to act. Although most, if not all, regulatory boards are creatures of their own organic statutes, (e.g., Chapter 463 defines the powers delegated to the Board of Optometry) Chapter 455 limits the scope of these boards' authority with regard to certain activities, including the extent to which boards may act in disciplinary actions instituted against licensees.

Subsections (2) and (3) of section 455.225, Fla. Stat. (1986), provide in pertinent part:

> (2) The department shall expeditiously investigate complaints. When its investigation is complete, the department shall prepare and submit to the probable cause panel of the appropriate regulatory board the investigative report of the department. The report shall contain the investigative findings and the recommendations of the department concerning the existence of probable cause.
> (3) The determination as to whether probable cause exists shall be made by majority vote of a probable cause panel

> of the board, or by the department, as appropriate. Each regulatory board shall provide, by rule, that the determination of probable cause shall be made by a panel of its members or by the department. ... In aid of its duty to determine the existence of probable cause, the probable cause panel may make a reasonable request, and upon such request the department shall provide such additional investigative information as is necessary to the determination of probable cause. A request for additional investigative information shall be made within 15 days from the date of receipt by the probable cause panel of the investigative report of the department. The probable cause panel or the department, as may be appropriate, shall make its determination of probable cause within 30 days after receipt of the final investigative report of the department. The secretary may grant extensions of the 15-day and 30-day time limits. If the probable cause panel does not find probable cause within the 30-day time limit, as may be extended, or if the probable cause panel finds no probable cause, the department may determine, within 10 days after the panel fails to determine probable cause or 10 days after the time limit has elapsed, that probable cause exists. If the probable cause panel finds that probable cause exists, it shall direct the department to send the licensee a letter of guidance or to file a formal complaint against the licensee. The department shall follow the directions of the probable cause panel regarding the filing of a formal complaint; and, if directed to do so, the department shall file a formal complaint against the regulated professional or subject of the investigation and prosecute that complaint pursuant to chapter 120. However, the department may decide not to prosecute the complaint if it finds that probable cause was improvidently found by the panel. In such cases, the department shall refer the matter to the board. The board may then file a formal complaint and prosecute the complaint pursuant to chapter 120. The department shall also refer to the board any investigation or disciplinary proceeding not before the Division of Administrative Hearings pursuant to chapter 120 or otherwise completed by the department within 1 year of the filing of the complaint. ....

Beckum v. Department of Professional Regulation, Board of Optometry, 427 So. 2d 276 (Fla. 1st DCA 1983) is frequently cited for the proposition that the requirements of section 455.225 are not jurisdictional. However, Beckum did not deal with the

statute's time requirements. In Beckum, the probable cause panel failed to properly record its proceedings. In lieu of such recording, the hearing officer accepted a record of reconstituted proceedings which the panel created through depositions of board members. The Beckum court held that this particular "irregularity" failed to deprive the panel of its jurisdiction. Id. at 277. The court noted, however, that if the asserted errors of the probable cause panel could be considered jurisdictional, implicating the panel's power to act at all, Beckum might have had a meritorious argument that the hearing officer's ruling on the matter was subject to immediate judicial review under section 120.68(1). Id. at 277.

In Carrow v. Department of Professional Regulation, 453 So. 2d 842 (Fla. 1st DCA 1984), Carrow claimed that the Department violated section 455.225 by failing to inform him of the nature of the complaint against him, and he urged the court to dismiss the complaint on that ground. The Carrow court, citing Beckum, held that "this error cannot be considered jurisdictional in any sense". The court stated that if Carrow could subsequently show that the investigation was procedurally irregular and that any irregularities were material and impaired the fairness of the proceedings, the court could, upon final review, vacate a final order against Carrow and remand for new proceedings. Id. at 843. The Carrow court stated further that "[i]n the meantime, should this investigation lead to a finding of probable cause by the probable cause panel ..., and an administrative hearing be

requested, Carrow may urge the appointed hearing officer that the administrative complaint should be dismissed for failure to comply with Section 455.225(1).". Id. at 843.

The instant case differs significantly from both Beckum and Carrow since the violations complained of in the instant case are violations of section 455.225's time requirements. When constructing section 455.225, the legislature carefully delineated which body -- the Department, the Panel, or the Board -- has jurisdiction, or authority to act, at any given time over the course of the disciplinary process. Administrative bodies may not ignore these explicit legislative directives.

In the instant case, the Department took ten months (from May 13, 1986, the date Roberson filed his complaint until March 19, 1987), to complete its initial investigation, despite the fact that section 455.225(2) requires the Department to "expeditiously" investigate complaints.[1]

On March 19, 1987, the Department referred the matter to the Panel. Although section 455.225(3) allows the Panel only 15 days within which to request further investigation, the Panel failed to make such request until three months later, on June 13, 1987. The Panel received the additional information requested on September 21, 1987, and despite the statutory requirement that the Panel make its probable cause finding within 30 of receipt of the Department's

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[1]The Department has construed "expeditiously" to mean 45 days. See R 767 and 496-497.

final investigative report, such finding was not made until November 6, 1987.

By the time the Department filed its administrative complaint against Dr. Carter, 21 months had passed since Roberson had filed his consumer complaint. This time period exceeds the one year period within which the Department may act under the provisions of section 455.225(3). Section 455.225(3) required the Department to refer Roberson's complaint to the Board on or before May 13, 1988, which is one year from the date the consumer complaint was initially filed.

Based on the foregoing, the Panel acted beyond the boundaries of section 455.225 when it requested further investigation more than 15 days after receiving the Department's initial investigative report. The Panel also violated section 455.225 by making a probable cause determination more than 30 days after receiving the Department's final investigative report. The Department, on the other hand, should have not have filed a formal complaint against Dr. Carter based on the Panel's determination of probable cause because the Panel's authority to make such a finding had already lapsed by the time the determination was made. In addition, by filing the complaint against Dr. Carter 21 months after Roberson filed his consumer complaint, the Department acted beyond the one year limitation on Departmental action contained in section 455.225(3). Only the Board had the power to act after May 13, 1988. The Department, therefore, lost jurisdiction to act and was without legal authority to issue the subject complaint.

B. AGENCY ACTION TAKEN OUTSIDE THE TIME LIMITS ESTABLISHED IN SECTION 455.225 CONSTITUTES AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY.

It is well settled that state agencies may not exercise jurisdiction where none has been granted by the legislature. Radio Telephone Comm., Inc. v. Southeastern Telephone Co., 170 So. 2d 577 (Fla. 1964). If there is a reasonable doubt as to the lawful exercise of a particular power that is being exercised, the further exercise of the power should be arrested. Id. at 582.

In Edgerton v. International Co., 89 So. 2d 488 (Fla. 1956), this Court held that although the Hotel and Restaurant Commission was authorized by statute to commence disciplinary proceedings within 60 days after the cause for such disciplinary action arose, the Commission lacked jurisdiction where the license holder did not receive the complaint until 62 days after the conduct at issue occurred. In so ruling, the Edgerton court stated:

> Administrative authorities are creatures of statute and have only such powers as the statute confers on them. Their powers must be exercised in accordance with the statute bestowing such powers, and they can act only in the mode prescribed by statute. If a power or duty is imposed upon him jointly or as a body, it may not be exercised by them acting individually and separately. They cannot rightfully dispense with any of the essential forms of the proceedings which the legislature has prescribed for the purpose of investing them with power to act. A commission may not assert the general powers given it and at the same time disregard the essential conditions imposed upon its exercise. Id. at 489-90.

In Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988)("Machules II"), this Court considered the effect of a time requirement imposed by agency rule, as opposed to a statutory time limit. This Court agreed with Judge Zehmer's dissent 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. Id. at 1133, citing Machules v. Dept. of Administration ("Machules I"), 502 So. 2d 437, 444 (Fla. 1st DCA 1986)(Zehmer, J., dissenting). In Machules I, Judge Zehmer explained that the rule at issue was not jurisdictional because there is no explicit statutory authority for the Department to impose the 20-day limit. Machules I, 502 So. 2d at 444 (Zehmer, J., dissenting) (emphasis added). Judge Zehmer stated that he could find no statute within Chapter 110 "empowering the agency to set jurisdictional time limitations on the right to administrative review". Id. at n.4 (emphasis in original).

In contrast to his interpretation of the agency rule at issue in Machules I, Judge Zehmer stated in the Carter case below that a fair reading of the plain language of 455.225(3) can lead to only one meaning - that "the 15-day and 30-day time limits are binding and terminate the probable cause panel's power to act further in the case unless reasonable time extensions have been sought and obtained from the Secretary.". Carter, 18 Fla. Law Weekly at D414 (Zehmer, J., dissenting) (A 6).

The time requirements of section 455.225 are jurisdictional because they limit the scope of authority of the Department, the Panel, and Board with respect to disciplinary actions against licensees. Carter, 18 Fla. Law Weekly at D414 (Zehmer, J., dissenting) (A 6). See also, Kirk v. Publix Super Markets, 185

So.2d 161, 164 (Fla. 1966)(when the legislature provides that an administrative power shall be exercised in a certain way, such prescription precludes the doing of it in another way). Because these time frames are jurisdictional, any action taken beyond these boundaries is invalid as exceeding delegated legislative authority. Edgerton, 89 So. 2d at 489-490.

II. PUBLIC POLICY CONSIDERATIONS PREVENT THE APPLICATION OF THE HARMLESS ERROR RULE TO VIOLATIONS OF SECTION 455.225.

Public policy considerations warrant rejection of the harmless error rule in this case, where the Department, the Board, and the Panel ignored legislative mandates, failed to request extensions of time, and failed to even explain or excuse their non-compliance.

The expeditious handling of complaints protects the public from potential harm or injury caused by violations of the law and of standards governing the professional practice. Carter, 18 Fla. L. Weekly at D414 (Zehmer, J., dissenting) (A 6). In addition, the time limits set forth in section 455.225 provide the licensee against whom a complaint is directed the right to a speedy determination of the matters giving rise to the complaint. Id. As Judge Zehmer stated below:

> These statutory provisions unambiguously manifest legislative intent to place a high priority on compliance with the stated time limits by permitting extensions thereof only at the discretion of the Secretary as the highest official in the Department, no doubt because the Secretary is directly responsible to the Governor for strict performance by the Department and its boards of the duties and obligations imposed upon them by law. Id.

In Kibler v. Department of Professional Regulation, 418 So. 2d 1081 (Fla. 4th DCA 1982), the court reviewed violations of section

455.225, including a probable cause panel comprised of one board member and no lay person, and the panel's "rubber stamp" acceptance of the charges against Kibler without adequate consideration. Although the court reversed the case based on the Board's failure to justify its rejection of the hearing officer's findings of fact, the Kibler court noted that the order would "still require reversal based on the improper constitution and action of the probable cause panel". Id. at 1083. The court held that the Department failed to justify its position by claiming "this is the way we do things", notwithstanding the existence of statutes and rules to the contrary. The Kibler court stated:

> The adherence to rules and statutes by the very agency charged with their enforcement is especially necessary if the public and parties regulated are to maintain respect and confidence in the decision rendered by the agency. It is one thing to seek the revision or removal of unnecessary or burdensome rules and regulations. But to ignore such rules while they remain in force is to invite disrespect and will ultimately result in a breakdown of the system. Id. at 1084.

The court in Morning v. State, 416 So. 2d 844 (Fla. 4th DCA 1982), also discussed the necessity of adherence to basic procedural rules. The Morning court stated:

> The argument is frequently encountered that requiring adherence to any procedural rule "elevates form over substance." Form (the procedural rules) is the skeleton which holds the body of substantive law together as a cohesive whole. Without the former the latter might well become unavailable and unenforceable. The lack of procedural rules on the one hand or the selective enforcement of those rules on the other hand will inevitably result in chaos, necessarily accompanied by diminished public esteem for the judicial process. In truth, then, it is not accurate to always equate the enforcement of a procedural rule with giving it preeminence over substantive rights. ... In proper perspective the requirement of an orderly system

ultimately assure rather than constricts the availability of substantive rights. Id. at 846.

A violation of section 120.59(1), at issue in Hyman, results in the late issuance of a final order. A tardy order is not analogous to effects of the failure to investigate and bring a formal complaint against a licensee in a timely manner. Especially where the action may result in the revocation or suspension of a professional license, agencies should be held to the highest standards. Compare, Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987)(in cases where the proceedings implicate the loss of livelihood, an elevated burden of proof is necessary to protect the rights and interests of the accused).

Because violations of the time frames set forth in section 455.225 may result in public endangerment, denial of due process, and an erosion of public confidence in our legal and administrative systems, this Court must not apply the harmless error rule to violations of these provisions. The requirement that a petitioner prove actual prejudice, in order to challenge the validity of an administrative complaint issued in violation of the time requirements of section 455.225, allows agencies to disregard these provisions with little fear of repercussions. Permitting such violations thwarts the public policy goals that agencies follow the law as mandated by the legislature.

The courts' invalidation of agency action which exceeds statutory time periods may sometimes hinder, or prevent altogether, an agency's ability to take disciplinary action against a licensee. However, the agency must appeal to the legislature, not the courts,

to remedy this problem. In Edgerton, this Court barred the Hotel and Restaurant Commissioner from pursuing a disciplinary action against the holder of a hotel license where the Department failed to serve notice upon the licensee within 60 days from the date the cause of action arose, as required by statute. Edgerton, 89 So. 2d at 490. As the Edgerton Court reasoned, "[i]t may be that [the Commissioner] in some instances may find himself unable to effect service within sixty days after the cause for suspension or revocation arises, because of our conclusion that there must be a delivery of the notice, but this is a matter for the legislature". Id. at 490.

III. IN THE ALTERNATIVE, AN AGENCY THAT VIOLATES THE TIME LIMITATIONS OF SECTION 455.225 SHOULD BEAR THE BURDEN OF JUSTIFYING ITS DELAY AND PROVING THAT THE LICENSEE WAS NOT PREJUDICED THEREBY.

Application of the harmless error rule to violations of the time limits in section 455.225 would unjustly shift the consequences of an agency's failure to act in a timely manner to the licensee. It would impose upon the licensee a burden which, because of the agency's delay, would be very difficult for him to meet.

In most cases, a violation of the 90-day time period for issuing final orders, found section 120.59(1), will not result in undue prejudice to a petitioner, and, consequently, the courts grant agencies a rebuttable presumption that no material error results from a violation of this provision. By contrast, the failure to follow the time requirements of 455.255 is likely to lead to grave injustice, where, e.g., a licensee is forced to

defend himself against stale claims. As noted by Judge Zehmer, obvious prejudice flows to licensees as the result of unreasonable delays in the disciplinary process, including loss of documents, unavailability of witnesses and fading memories. Carter, 18 Fla. L. Weekly at D414 (A 6). In the instant case, Roberson admitted that he was unable to recall certain crucial events because his memory was unclear due to the lapse of time[2] (R 125). In addition, Dr. Carter no longer had his original patient records, records of who was working with him at relevant times, his old appointment book, office records, day sheets or employee records dating back to the time of his alleged wrongdoing (R 676-677 and 687).

Judge Zehmer aptly described the futility of applying the harmless error rule in these circumstances:

> The Department's argument that repeated violations of the statutory time limits remain unremedied unless Appellant carries the burden of showing actual prejudice, does nothing to motivate the Department or the Board ... to comply with the statutory time limits. Indeed, under their argument, the time limits can be violated with virtual impunity in most cases because of the difficulty a licensee will encounter in demonstrating the substantial prejudice that has been required of the Appellant in this case. Their argument completely ignores the statutory provisions for reasonable extensions of the time limits upon appropriate request to the Secretary. In short, their argument makes mockery of the statutory scheme for insuring that these matters move forward in a timely fashion. Id. at 414-15; and A 6-7 (emphasis added).

An agency's failure to act within the time limits set by Section 455.255 should result in a presumption of material error.

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[2] For example, Roberson was unable to remember receiving treatment and advice from other professionals, including an ophthalmologist, for similar symptoms (R 195-198).

Consequently, the agency must be required to justify its delay and to prove no prejudice to the licensee. Placing the burden on the agency would encourage compliance and deter future violations.

At the very least, this Court should remand the case for explicit findings by the hearing officer on the factual issue of prejudice to Dr. Carter. This is true because neither the hearing officer's recommended order nor the final order contains findings of fact on disputed issues regarding prejudice. Carter, 18 Fla. L. Weekly at D415 (A 7) (Zehmer, J., dissenting). Section 120.59(1) requires that every final order contain specific findings of fact and conclusions of law. Section 120.59(1), Fla. Stat.. See also, Gentry v. Department of Professional Occupation Regulation, 283 So. 2d 386 (Fla. 1st DCA 1973). Thus, if prejudice is an essential element to the harmless error rule as to be applied to this case, the matter must be remanded for factual findings on the disputed issue.

CONCLUSION

For the reasons stated above, this Court should reject the application on the harmless error rule to this case and reverse the decision of the First District Court of Appeal. The case should be remanded to the District Court of Appeal with instructions to remand to the Department of Professional Regulation, Board of Optometry, with instructions to dismiss the administrative complaint against Dr. Carter. Alternatively, if this Court determines that the Department and Board have the burden of establishing prejudice to Dr. Carter, then the decision of the First District Court of Appeal should be reversed with instructions to remand to the Division of Administrative Hearings for legally sufficient findings of fact on whether the Board carried its burden of proving no prejudice to Dr. Carter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 9th day of March, 1993, to the following:

Lisa S. Nelson, Esquire
Kathy Kasprzak, Esquire
Department of Professional Regulation
Northwood Centre
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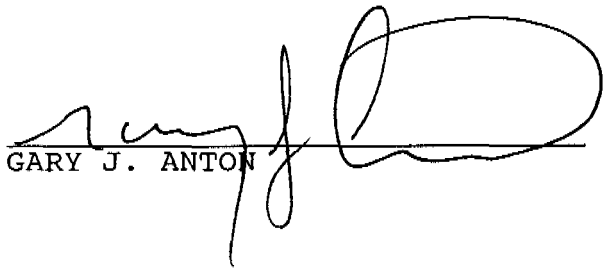

GARY J. ANTON

APPENDIX

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Appendix A

(1987-88).

(WOLF, J., specially concurring.) I concur only because I believe that the holdings and the legal reasoning as stated in *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), as specifically interpreted by *University of Miami v. Bogorff*, 583 So. 2d 1000, 1003-1004 (Fla. 1991), and *Kush v. Lloyd*, 17 Fla. L. Weekly S730 (Fla. Dec. 3, 1992), require such a result. Notwithstanding the overwhelming public policy identified in *Carr* and *Kush, supra*, it is difficult for me to understand how a statute which extinguishes a common law right of action prior to the accrual of such action cannot be repugnant to the right of access to courts guaranteed by article I, section 21 of the Constitution of the State of Florida.

* * *

Administrative law—Department of Professional Regulation—Board of Optometry—Discipline—Statutory time limits governing disciplinary proceedings were not intended merely to facilitate communication and reporting between the department and its boards—Optometrist's timely filed motion to dismiss department's administrative complaint against him was appropriate method to challenge violations of statutory time limits—Licensee filing motion to dismiss has burden to establish that board or department has violated time limits and that consequent delays may have impaired fairness of proceedings or correctness of the action and may have prejudiced licensee—No error in denying optometrist's motion to dismiss where findings of guilt were based upon his own admission that he failed to refer patient with emergency problem to ophthalmologist—Question certified whether decision in *Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982), should be applied when licensee moves to dismiss administrative complaint because department or board has failed to comply with time limitations of section 455.225, Florida Statutes—Administrative fine of $2000 to be reduced so as not to exceed $1000

R. TIMOTHY CARTER, O.D., Appellant, v. DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTOMETRY, Appellee. 1st District. Case No. 89-2860. Opinion filed January 26, 1993. An appeal from an order of the Department of Professional Regulation, Board of Optometry. Gary J. Anton of Stowell, Anton & Kraemer, Tallahassee, for Appellant. Lisa S. Nelson, Appellate Attorney, Department of Professional Regulation, Tallahassee, for Appellee.

(ALLEN, J.) R. Timothy Carter (Carter), an optometrist, appeals a final order of the Board of Optometry (the board), which found him guilty of negligence in the administration of professional services, suspended his license for a period of six months, and assessed a $2,000 administrative fine. Carter's arguments include contentions (1) that the fine imposed is erroneous as a matter of law, and (2) that the hearing officer and the board erred in denying his motion to dismiss on grounds that the Department of Professional Regulation (the department) and the board had disregarded the time limits in section 455.225, Florida Statutes (Supp. 1986). Based upon the department's concession that the provisions of the relevant statute require the reduction of the fine to an amount not exceeding $1,000, we reverse the fine and remand for reconsideration. We conclude that Carter's motion to dismiss was properly denied because he failed to show that violations of the section 455.225 time limitations may have impaired the fairness of the proceedings or the correctness of the action and that he may have been prejudiced thereby. Carter's remaining arguments are without merit and do not require discussion. The discussion which follows relates to Carter's contention that his motion to dismiss should have been granted.

This administrative proceeding commenced when a former patient filed a complaint against Carter. One of the allegations concerned Carter's failure to make a direct referral of the patient to an ophthalmologist practicing retinal specialty on September 7, 1982, when Carter examined the patient and concluded that he was probably suffering from a torn or detached retina as a result of an accidental injury to the patient's left eye four days earlier. After considerable delay by both the department and the board, the department filed an administrative complaint which alleged, among other things, that Carter was negligent, incompetent, or engaged in misconduct in the practice of optometry in violation of section 463.016(1)(g), Florida Statutes, by reason of his negligence in failing to refer the patient to a qualified ophthalmologist for emergency treatment.

Carter requested a formal hearing pursuant to section 120.57, Florida Statutes, and also filed a motion to dismiss the complaint on grounds that the department and the board had violated the time limits contained in section 455.225, Florida Statutes (Supp. 1986), in several respects. Following a hearing on Carter's motion, the hearing officer denied the motion, ruling that the time limits set out in 455.225(2) and (3) were designed to assure adequate reporting between the department, the board, and the board's probable cause panel, and that any failure to comply with the time limitations was "not jurisdictional," absent a showing of prejudice. The ruling granted Carter leave to present evidence at the final hearing that he had been prejudiced by the delays. Following the final hearing, the hearing officer entered a recommended order finding Carter guilty of two counts of the administrative complaint relating to his failure to refer the patient to an ophthalmologist.

In reaching his conclusion, the hearing officer found, *largely based upon the testimony of Carter himself*, that Carter did not refer the patient to an ophthalmologist on the evening of September 7, 1982; rather, *as Carter testified*, he simply told the patient to see an ophthalmologist the next morning. The hearing officer found that the standard of care applicable under the circumstances required Carter "to call the ophthalmologist himself that evening and, if the ophthalmologist was not in the office, it would have been appropriate td leave a message explaining the emergency nature of the circumstances." Regarding Carter's motion to dismiss the complaint based on the section 455.225 time limits violations, the order recited that, "Although the record reveals that [the department] has not always timely complied with time limits set out in Section 455.225(2) and (3), *Florida Statutes*, there has been no showing by [Carter] that he was prejudiced by the delays."

The board entered its final order approving and adopting the findings of fact and conclusions of law in the hearing officer's recommended order, but reducing the recommended penalty from a two-year suspension to a six-month suspension and reducing the recommended fine from $5,000 to $2,000. Carter has appealed this final order.

Carter argues that the section 455.225 time limits were violated in at least four respects and that the violations have resulted in the deprivation of his right to constitutional due process because he was hampered in defending against a stale claim. He argues that the hearing officer's recommended finding that he failed to establish any prejudice from the delays is not supported by competent, substantial evidence because the evidence in the record establishes that he was hampered in his defense of the charges. He points out that he no longer has his original records to use in the defense of the charges because they were subpoenaed from him during civil litigation, and he does not have other records which would aid him in identifying potential witnesses to the events of September 7, 1982. He also asserts that the prolonged delay in filing and prosecuting the charged violations affected the complaining patient's ability to recall various events. As a result, Carter argues, the delay in hearing the charges deprived him of a fair hearing.

Responding to these arguments, the department contends that Carter misunderstands the purpose and intent of section 455.225. Subsections 455.225(2) and (3), the department argues, were only intended to provide for adequate reporting between the department, the board, and the probable cause panel. The department also argues that, in any event, Carter could not have been

prejudiced because he did not dispute the central finding of fact: that he did not immediately refer the patient to an opthalmologist the night that he saw him. The department also points out that C[redacted] did not claim any inability to recall the details of the inci[redacted]

We agree with Carter that the time limits set forth in section 455.225, Florida Statutes (Supp. 1986), have far more significance in according rights to a licensee such as Carter than has been attributed by the hearing officer, the department, and the board. The direction in subsection 455.225(2) that the department "expeditiously investigate complaints" is not an idle recitation, but a directive to act promptly for the protection of the public as well as to assure timely due process to the licensee. And we must assume that the legislature used the words "time limit" in subsection 455.225(3) advisedly to communicate clear legislative intent that complaints against licensed professionals regulated by the department and its boards should be expeditiously processed without unjustifiable delay. This expeditious handling of complaints serves to protect the public from potential harm or injury caused by violations of the law and standards governing the professional's practice. Of course, these time limits also accord to the licensee complained against the right to a speedy determination of the matters giving rise to the complaint and provide protection against the potential prejudice that flows from unreasonable delays, such as loss of documents, unavailability of witnesses, and fading memories.

Thus, we decline to treat violations of the time limits in subsections 455.225(2) and (3) as mere technicalities having no significance on the affected licensee. We reject the argument that the time constraints in those subsections are intended merely to facilitate communication and reporting between the department and its boards. Accordingly, we disapprove the interpretation of the purpose and intent of those statutory time limits made by the h[redacted]g officer.

[redacted]e time limits specified in subsections 455.255(2) and (3) may be enforced by writ of mandamus to the offending board or the department. *Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982); *Lomelo v. Mayo*, 204 So. 2d 550 (Fla. 1st DCA 1967). However, mandamus is not the exclusive remedy for such violations, and failure to seek mandamus does not necessarily constitute a conclusive waiver of violations of these time limits. An aggrieved licensee may resort to other appropriate means in challenging the violation of the time limits in section 455.225 by the department or a board. *Cf. Hyman*; *G & B of Jacksonville, Inc. v. State, Department of Business Regulation*, 362 So. 2d 951 (Fla. 1st DCA 1978), *appeal dismissed*, 372 So. 2d 468 (Fla. 1979). Carter's timely filed motion to dismiss in response to the department's administrative complaint was an appropriate method to challenge violations of the section 455.225 time limits in this case.

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 a[redacted]y 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." As a condition precedent to relief because of an agency's failure to follow prescribed procedure, Section 120.68(8) requires a finding that such failure may have impaired "either the fairness of the proceedings or the correctness of the action."

Carter established that the department and the board violated the section 455.225 time limitations. 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 opthalmologist 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.

Because we consider the question we decide to be of great public importance, we certify the following question to the supreme court:

> 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 a board has failed to comply with the time limitations of section 455.225, Florida Statutes?

The $2,000 administrative fine is reversed and this cause is remanded for reconsideration of the fine. If a new fine is imposed, it shall not exceed $1,000. In all other respects, the order under review is affirmed. (MINER, J., CONCURS; ZEHMER, J., DISSENTS WITH OPINION.)

(ZEHMER, J., dissenting.) I do not agree that the appealed order should be affirmed. I conclude that the inordinate delays and multiple statutory time limit violations by the Department of Professional Regulation and the Board of Optometry require reversal and remand with directions to dismiss the charges. I do not agree with the majority opinion that Appellant was required to show actual prejudice under the test enunciated by the supreme court in *Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982), and that such test should be applied to the facts of this case. I do agree, in view of the majority's decision to affirm Appellant's conviction, that the fine must be reduced to $1,000 as stated in the majority opinion.

I.

This administrative proceeding commenced on May 13, 1986, when a former patient filed a complaint against Appellant with the Department. The matters complained of were essentially twofold. The first related to Appellant's treatment of the patient through the use of a program of orthokeratology[1] from 1979 to September 1982. The second involved Appellant's failure to make arrangements for direct referral of the patient to an ophthalmologist practicing retinal specialty on September 7, 1982, when Appellant examined the patient and concluded that he was probably suffering from a torn or detached retina as a result of an accidental injury to his left eye four days previously.

When the patient's complaint was filed,[2] the Department promptly notified Appellant that the investigation thereof would be completed within 45 days. However, the investigation was not completed within that time period. Not until March 19, 1987, some 10 months later, was the initial investigation completed by the Department's investigator and the file sent to the Department in Tallahassee for a probable cause determination. The Department then referred the file to the Probable Cause Panel of the Board of Optometry, but the panel did not take up the matter until June 13, 1987. The panel determined that it needed further information, so the Department, on July 15, 1987, retained another expert to provide additional investigation and information to the Probable Cause Panel. On September 21, 1987, this expert sent additional information to the panel. On November 6, 1987, the panel considered the matter for a second time and found probable

cause for the Department to file a complaint against Appellant. This finding was referred back to the Department, and on February 16, 1988, some 21 months after the patient had lodged his complaint, the Department filed an administrative complaint alleging violations in five counts. The counts charged, respectively: (1) Appellant's treatment of the patient with orthokeratology was inappropriate because of the patient's high degree of myopia and, further, that Appellant's follow-up care of orthokeratology was inadequate; (2) Appellant prescribed orthokeratology for the patient to facilitate charging a higher fee than Appellant could have charged for other more appropriate treatment; (3) Appellant was negligent, incompetent, or engaged in misconduct in the practice of optometry in violation of section 463.016(1)(g), Florida Statutes, by reason of his negligence in treating the patient for an injury to the eye which evidenced symptoms of a torn or detached retina and failing to refer the patient to a qualified ophthalmologist for emergency treatment; (4) Appellant's records were altered or made after the fact and Appellant engaged in fraud, deceit, and misconduct thereby; and (5) Appellant's treatment and examination of the patient amounted to gross and repeated malpractice in violation of section 463.016(1)(n), Florida Statutes.

Appellant timely requested a section 120.57(1) formal hearing, and also filed a motion to dismiss the complaint on grounds that the Department and the Board had violated the time limits contained in section 455.225, Florida Statutes (Supp. 1986), in several material respects. The case was referred to the Division of Administrative Hearings (DOAH) on April 26, 1988, over two months after the administrative complaint was filed. Appellant's motion to dismiss was heard by a DOAH hearing officer on July 19, 1988. The hearing officer accepted the Department's argument and denied the motion by an order dated August 9, 1988, ruling that

> any time limits set out in Section 455.225(2) and (3), *Florida Statutes*, were designed to assure adequate reporting between the Department of Professional Regulation, the Board of Medical Examiners [sic] and the Probable Cause Panel of the Board, and the failure to time [sic] comply with these time frames, if such was the case, was not jurisdictional since there had been no showing by the Respondent that he was in any way prejudiced by the alleged delays. This ruling was without prejudice to the Respondent coming forward at the final hearing to show that he was in fact prejudiced.

The final hearing was held September 26 and 27, 1988, and the hearing officer's recommended order was forwarded to the Board on March 8, 1989. The hearing officer found Appellant guilty of the charges in counts 3 and 5 regarding the failure to refer the patient to an ophthalmologist, and exonerated him of the other three charges.

To briefly summarize, the hearing officer's recommended order found that Appellant told the patient on September 7, 1982, to see an ophthalmologist the next morning, but that the standard of care applicable under those circumstances required Appellant to call an ophthalmologist that evening and make a referral, and if Appellant could not reach the ophthalmologist, he should leave a message explaining the emergency nature of the circumstances. The hearing officer also found that this conduct amounted to gross or repeated malpractice in view of a prior disciplinary order entered against Appellant in 1981. Finally, regarding Appellant's motion to dismiss the complaint based on the numerous section 455.225 time limits violations, the order only recited in paragraph 41 that, "Although the record reveals that Petitioner [Department] has not always timely complied with time limits set out in Section 455.225(2) and (3), *Florida Statutes*, there has been no showing by the Respondent that he was prejudiced by the delays."

On October 11, 1989, the Board entered its final order approving and adopting the findings of fact and conclusions of law in the hearing officer's recommended order. However, the Board reduced the recommended penalty from a two-year suspension to a six-month suspension of Appellant's license, and reduced the recommended administrative fine from $5,000 to $2,000. Appellant has appealed this final order.

II.

It is necessary to set forth the parties' arguments in greater detail than usual to accurately appreciate their widely divergent views of the facts and law relating to this particular issue.

A.

Appellant argues that the time limits in section 455.225 were flagrantly violated in at least four respects, and that these violations have resulted in the deprivation of his right to constitutional due process because he was hampered in defending against a stale claim. Appellant states that the time limits in section 455.225 govern the investigation of consumer complaints and the disposition thereof by the Department and the Board, and that neither the Department nor the Board has justified its failure to comply with the time limits, nor did they seek and obtain any extensions of time from the Secretary of the Department as provided in the statute. Appellant quotes *Kibler v. Department of Professional Regulation*, 418 So. 2d 1081 (Fla. 4th DCA 1982), regarding the Department's failure to follow procedural guidelines:

> The adherence to rules and statutes by the very agency charged with their enforcement is especially necessary if the public and the parties regulated are to maintain respect and confidence in the decisions rendered by the agency. It is one thing to seek revision or removal of unnecessary or burdensome rules and regulations. But to ignore such rules while they remain in force is to invite disrespect and will ultimately result in a breakdown of the system.

418 So. 2d at 1084. *Accord Turner v. Department of Professional Regulation*, 460 So. 2d 395 (Fla. 5th DCA 1984). Appellant points out that in respect to violations of the time constraints set forth in chapter 120, the Administrative Procedure Act, for which the legislature has not provided a specific sanction, relief to an aggrieved party is appropriate if it is shown that the agency's failure to comply with mandatory time requirements constitutes a material error in procedure that impairs the fairness of the proceeding or the correctness of the action, citing *Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982); *G & B of Jacksonville, Inc. v. State of Florida, Department of Business Regulation*, 362 So. 2d 951 (Fla. 1st DCA 1978), *appeal dismissed*, 372 So. 2d 468 (Fla. 1979); *City of Panama City v. Florida Public Employees Relations Commission*, 364 So. 2d 109 (Fla. 1st DCA 1978). Based on these principles, Appellant argues that it was error not to dismiss the Department's complaint based on the four specific violations of the subsections 455.225(2) and (3) time limits.

Section 455.225(2) provides that, "The department shall expeditiously investigate complaints." Appellant argues that investigating a patient's complaint for some 21 months, from May 13, 1986, when it was filed, until February 16, 1988, when the Department filed its formal administrative complaint, was anything but expeditious, and far in excess of the 45 days stated in the Department's letter sent to him when the patient's complaint was filed. He points to evidence at the final hearing establishing that the Department's operating manual provides that such investigations should be concluded within 45 days, which Appellant construes to be the Department's interpretation of the statutory meaning of "expeditiously" used in section 455.225(2). Appellant then describes the process of the investigation, pointing out that investigation materials were given to Dr. McAuliffe on September 5, 1986, but his report was not forthcoming until 52 days later, on October 27, 1986; and that materials were given to Dr. James Lanier on November 3, 1986, but his report was not received until four months later in March 1987. The record establishes that the Department did not consider the investigation complete until March 19, 1987, when the file was

sent to Tallahassee by the investigator ten months after the investigation was commenced.

Appellant contends that specific time limits in subsection 455.225(3) were violated in at least three respects. First, Appellant argues, the Department and the panel failed to comply with the requirement that additional investigative information must be requested by the Probable Cause Panel within 15 days after receipt of the investigative report. The Department's investigation was completed on March 19, 1987, some ten months after the initial complaint had been filed. The matter was referred to and first considered by the Probable Cause Panel on June 13, 1987. On July 15, 1987, the Department retained another expert to provide additional information to the panel, but the information was not supplied until September 21, 1987. Thus, Appellant argues, the Probable Cause Panel did not convene to consider the matter until June 13, some 95 days after the investigative report was filed in Tallahassee. The panel did not make its request for additional information until July 15, or 32 days after the panel had met. No request for any extension of the 15-day time limit was made of the Secretary, and no explanation for this delay and failure to meet this time limit has ever been offered by the Department or the Board's Probable Cause Panel. Thus, Appellant argues, the statutory 15-day requirement was flagrantly violated.

Second, Appellant points out that the final investigative information was supplied to the Department and the Probable Cause Panel on September 21, 1987, and thus the panel was required by subsection 455.225(3) to make its determination within 30 days thereof. Yet, the panel did not even meet to consider the additional information until November 6, 1987, 46 days thereafter. Neither the panel nor the Department acted within the 30-day time limit required by the statute, Appellant argues, nor did they request any extension from the Secretary and have offered no justification for their failure to do so.

Third, Appellant contends that the Department was required by subsection 455.225(3) to complete this matter or refer it to the Board within one year of the filing of the patient's complaint on May 13, 1986. However, the Department's administrative complaint was not filed until February 16, 1988, a period of 21 months, and the matter was not referred to the Division of Administrative Hearings until April 26, 1988, nearly two years after the patient's complaint against Appellant had been filed. Neither the Board nor the Department has provided any explanation or justification for this failure to comply with this statutory requirement.

Appellant further argues that the hearing officer and the Board erred in concluding that he had the burden of proving prejudice as a result of the agency's time limit violations. He contends that the legal test is whether the fairness of the proceedings was impaired as a consequence thereof, referring to the cases cited previously. The fairness of the proceedings, Appellant argues, was impaired in several respects that resulted in the denial of his constitutional right to due process. Appellant contends that the Fifth and Fourteenth Amendment guarantees of procedural due process apply to these administrative proceedings, and that any denial of due process as a result of unreasonable delay in conducting the hearing may be raised on appeal from the final order at the conclusion of the administrative proceeding, citing *Gordon v. Savage*, 383 So. 2d 646, 649 (Fla. 5th DCA), *pet. for rev. denied*, 389 So. 2d 1110 (Fla. 1980). Acknowledging there is a "paucity of Florida case law on this issue," Appellant cites to a decision of the New Hampshire Supreme Court, *The Appeal of Plantier*, 126 N.H. 500, 494 A.2d 270 (N.H. 1985), for the propositions that a licensee's procedural due process right could be violated upon a showing that the licensee has been harmed by delay in bringing the complaint, that the delay affected the licensee's ability to defend the charges, and that the Department, having knowledge of the alleged misconduct, slept on its rights.

Appellant further argues that the hearing officer's recommendation that he failed to establish any prejudice from the delays is not supported by competent, substantial evidence because the only evidence in the record establishes that he was in fact hampered by such delays in his defense of all five charges brought by the Department's complaint. For example, Appellant points out that he no longer has his original records to use in the defense of these charges because they were subpoenaed from him in the civil litigation, and he does not have records to determine who was working for him at relevant times to assist in identifying witnesses. He asserts that he no longer has his September 1982 appointment book that would assist him in refuting allegations by his former patient regarding the nature of the advice given to him by Appellant on September 7, 1982, although that was a key issue in the case. Appellant complains that he no longer has his office records, day sheets, and employee records dating back to September 1982 to assist in his defense, parenthetically noting that the Board requires its licensees to retain their patient records for only two years pursuant to rule 21Q-3.03 [now 21Q-3.003], Florida Administrative Code. Appellant asserts that the prolonged delay in filing and prosecuting the charged violations affected the complaining patient's ability to recall crucial events at the final hearing, and that the patient acknowledged that his memory was unclear because of the lapse of time. As examples, Appellant states that the patient could not remember having appointments with other professionals concerning similar symptoms, and that although the patient had seen an ophthalmologist in St. Augustine for very similar symptoms, he could not recall at the final hearing that he had done so. Appellant argues that the hearing officer and the Department ignored the repeated inability of the complaining patient to recall significant and crucial events, such as being treated for such symptoms by others and receiving from them advice similar to that given to him by Appellant. Appellant characterizes the patient's failed memory as selective, in that he testified for the Department on direct examination with surprising clarity and recall, while on cross-examination he was unable to remember other important events. As a result, Appellant argues, the delay in hearing the charges deprived him of a fair hearing. Appellant further argues that there is no evidence that he contributed to the delay in completing the investigation or the filing of the complaint, and that the inordinate delay was due solely to the Department's and the Board's flagrant violation of the section 455.225 time limits in violation of his due process right to a fair hearing.

B.

Responding to these arguments, the Department contends that there is no statutory requirement to complete an investigation within 45 days; that the Department conducted its investigation expeditiously with due regard to Appellant's procedural and substantive rights; and that Appellant misreads the purpose and intent of section 455.225. Section 455.225(3), the Department argues, was only intended to give the Board a remedy against the Department to insure that cases over a year old that had neither been referred to DOAH nor investigated completely would be handled by a special Board prosecutor. Thus, section 455.225(3) does not authorize dismissal as a remedy for failure to investigate within a year, but envisions that some investigations may take over a year to complete.

In this case, the Department contends, "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." (Ans. Br. p. 7.) The Department argues that "any irregularities related to probable cause were not in any sense jurisdictional, especially in light of the panel's attempt to reconstitute its finding and cure any alleged error," citing *Beckum v. State, Department of Professional Regulation*, 427 So. 2d 276 (Fla. 1st DCA 1983). Relying on *School Board of Leon County v. Weaver*, 556 So. 2d 443 (Fla. 1st DCA 1990), the Department urges that, just as the failure by the Florida Commission on Human Relations to file a final order

for some ten months after issuance of the recommended order did not merit reversal because no impediment to the fairness of the procedure nor correctness of the action taken was demonstrated, so also in this case "the hearing officer held that any time limits set out in section 455.225(2) and (3) were designed to assure adequate reporting between the Department, the Board, and the Probable Cause Panel and that failure to comply with these time guidelines, if such was the case, was not jurisdictional inasmuch as the Appellant made no showing of prejudice." (Ans. Br. p. 8.) Continuing, the Department argues:

> In his recommended order the hearing officer found as a matter of fact that no such prejudice had occurred. This finding is clearly supported by the record in this case. There is no dispute that the allegations for which Appellant was found guilty were the subject of civil litigation in which Appellant was an active participant. The civil litigation had concluded when the patient complained to the Department. In fact, part of the investigative file consisted of testimony from the civil litigation. Appellant was given an opportunity to submit materials for consideration by the probable cause panel. Most important, the finding of fact which is central to the violation found in this case is one that Respondent did not dispute: that he did not immediately refer [the patient] to an ophthalmologist the night that he saw him and did not follow up the next day. He did not claim any inability to remember the details about the incident and still had the patient records related to treatment.

(Ans. Br. p. 9.)

The Department characterizes Appellant's argument on this point as essentially a plea of laches, which is not available in an administrative proceeding, citing *Farzad v. Department of Professional Regulation*, 443 So. 2d 373 (Fla. 1st DCA 1983); *Landes v. Department of Professional Regulation*, 441 So. 2d 686 (Fla. 2d DCA 1983), *pet. for rev. denied*, 451 So. 2d 849 (Fla. 1984); and *Donaldson v. State, Department of Health and Rehabilitative Services*, 425 So. 2d 145 (Fla. 1st DCA 1983). The Department argues that there was no prejudice because Appellant "never claimed an inability to remember the facts of this case; in fact his memory of the details was no doubt heightened by the civil litigation," and that Appellant testified in detail regarding "the evening of October 7, 1982 [sic], had patient records regarding the treatment rendered and produced a witness who was in the office and to some extent was able to corroborate his story. No additional records or testimony by other employees would change what Appellant essentially admitted: he did not refer the patient to an ophthalmologist that night and did not follow up the next day." (Ans. Br. p. 9-10.)

C.

In reply, Appellant argues that he "consistently requested the Department to expedite its investigation and resolution of this matter," and this is a crucial fact that distinguishes this case from the decision in *School Board of Leon County v. Weaver*, 556 So. 2d 443. (Reply Br. p. 3.) Appellant focuses attention on the fact that at no time did the Department or the Board obtain extensions of time from the Secretary, as required by the statute. He observes that the Department's reliance on the complainant's absence from the area and the voluminous nature of the documents and use of multiple consultants "cannot withstand scrutiny" because the complaining patient was seen one time by a departmental investigator at which time he turned over copies of various records, and the "only contact [with him] thereafter was by counsel for the Department shortly prior to the final hearing." Moreover, Appellant argues, the Department "never denies that it failed to give the consultants deadlines within which to complete their task," and its investigator "candidly admitted that the Department has 'to be patient with' its consultants given the consultant's demands in private practice." (Reply Br. p. 2.) Finally, Appellant contends that the Department misses the point in characterizing his argument as based on laches, and that the record shows without dispute that he was substantially hampered in presenting a defense to the charges due to the inordinate delay, in violation of his right to constitutional due process.

III.

I agree with the majority opinion that the time limits set forth in section 455.225, Florida Statutes (Supp. 1986), have far more significance in according rights to a licensee such as Appellant than has been attributed to that section by the hearing officer, the Department, and the Board. I disagree with the majority that when violation of the time limits is shown, the only remedy is for the licensee to show substantial prejudice due to the delay.

A.

The requirement in subsection 455.225(2) that the Department "expeditiously investigate complaints" is not an idle recitation, but a mandatory directive to act promptly for the protection of the public as well as to assure timely due process to the licensee. The 45-day period set forth in the Department's manual is in accord with this intent. Concisely stated, subsection 455.225(2) requires the Department to expedite its own investigation, promptly make a determination of probable cause, and submit its report to the Probable Cause Panel of the Board within the time limits set forth in subsection 455.225(3). Subsection 455.225(3) provides in part:

> In aid of its duty to determine the existence of probable cause, the probable cause panel may make a reasonable request, and upon such request the department shall provide such additional investigative information as is necessary to the determination of probable cause. *A request for additional investigative information shall be made within 15 days from the date of receipt by the probable cause panel of the investigative report of the department. The probable cause panel or the department, as may be appropriate, shall make its determination of probable cause within 30 days after receipt by it of the final investigative report of the department. The secretary may grant extensions of the 15-day and the 30-day time limits. If the probable cause panel does not find probable cause within the 30-day time limit, as may be extended, or if the probable cause panel finds no probable cause, the department may determine, within 10 days after the panel fails to determine probable cause or 10 days after the time limit has elapsed, that probable cause exists.* If the probable cause panel finds that probable cause exists, it shall direct the department to send the licensee a letter of guidance or to file a formal complaint against the licensee. The department shall follow the directions of the probable cause panel regarding the filing of a formal complaint; and, if directed to do so, the department shall file a formal complaint against the regulated professional or subject of the investigation and prosecute that complaint pursuant to the provisions of chapter 120. However, the department may decide not to prosecute the complaint if it finds that probable cause had been improvidently found by the panel. In such cases, the department shall refer the matter to the board. The board may then file a formal complaint and prosecute the complaint pursuant to the provisions of chapter 120. *The department shall also refer to the board any investigation or disciplinary proceeding not before the Division of Administrative Hearings pursuant to chapter 120 or otherwise completed by the department within 1 year of the filing of a complaint.*

(Emphasis added.)

Subsection 455.225(3) contemplates that the Probable Cause Panel may need more information than that supplied in the Department's investigative report to reach a decision, and explicitly authorizes the panel to request the Department to furnish it "such additional investigative information"; but the subsection also provides that the panel's request shall be made within 15 days from its receipt of the investigation report of the Department. This subsection further contemplates that the panel or the Department shall determine the presence or absence of probable cause within 30 days after receipt of the Department's final investigative report, which means within 30 days after the Department has furnished the additional investigative information requested. Recognizing that not all investigative proceedings to determine

probable cause can be accomplished within the stipulated 15-day and 30-day time limits, section 455.225(3) further authorizes the Secretary of the Department to grant reasonable extensions of the time limits.

A fair reading of the plain language of the subsection can lead to only one meaning—the 15-day and 30-day time limits are binding and terminate the probable cause panel's power to act further in the case unless reasonable time extensions have been sought and obtained from the Secretary. This is made clear by the provision in subsection 455.225(3) that requires, when the Probable Cause Panel does not make its determination within the stated 30-day time limit or within the time limit as extended by the Secretary, the Department has "10 days after the time limit has elapsed" to make its own determination as to whether probable cause exists. This provision insures that the Board's panel will promptly make its determination within the set time periods, and that upon the panel's failure to do so, the matter will, by operation of law, be removed from the panel's jurisdiction and passed to the Department for its expeditious handling and decision. Significantly, there is no provision in the statute for the Secretary or anyone else to further extend this 10-day time limit on the Department's action after the panel has failed to act.

Finally, subsection 455.225(3) imposes a time limit of one year between the filing of a consumer (patient) complaint and the Department's referral to the appropriate board of "any investigation or disciplinary proceeding not before the Division of Administrative Hearings pursuant to chapter 120 or otherwise completed by the department." This unambiguous provision reinforces the legislative intent that disciplinary matters under consideration by the Department must either be completed or referred to DOAH or the appropriate board expeditiously, that is, within one year of the filing of the consumer complaint. No exceptions or authority to grant extensions of this one-year time limit is provided in the statute.

I assume that the legislature used the words "time limit" in subsection 455.225(3) advisedly to communicate clear legislative intent that complaints against licensed professionals regulated by the Department and its boards are to be expeditiously processed without unjustifiable delay. This expeditious handling of complaints serves to protect the public from potential harm or injury caused by violations of the law and standards governing the professional's practice. Of course, these time limits also accord to the licensee complained against the right to a speedy determination of the matters giving rise to the complaint; they also provide protection against the obvious prejudice that flows from unreasonable delays, such as loss of documents, unavailability of witnesses, and "fading memories." These statutory provisions unambiguously manifest legislative intent to place a high priority on compliance with the stated time limits by permitting extensions thereof only at the discretion of the Secretary as the highest official in the Department, no doubt because the Secretary is directly responsible to the Governor for strict performance by the Department and its boards of the duties and obligations imposed upon them by law. Of course, a request for extension made by a panel, board, or departmental representative to the Secretary would have to justify the requested extension of the time limits on reasonable and valid grounds; otherwise, the granting of an extension would amount to nothing more than an arbitrary decision and directly thwart the basic purpose and intent underlying the legislatively imposed time limits.

Again, I would emphasize that these statutory time limits are not to be ignored and disregarded by the Department and its boards; they are to be honored and obeyed unless extensions have been approved by the Secretary. Failure to adhere to the stipulated time limits and reasonable extensions granted by the Secretary places the burden on the Department and its boards to establish legally sufficient justification for their unauthorized deviation from the requirements of the statute, if in fact such deviations can be excused.[3]

Thus, I decline to treat violations of the time limits in subsections 455.225(2) and (3) as mere technicalities having no significance to Appellant unless he is able to prove substantial prejudice. I reject the argument that the time constraints in those subsections are intended merely to provide a remedy for the Board against the Department, and to facilitate communication and reporting between the Department and its boards. Section 455.225 governs the procedure for handling all disciplinary proceedings by the Department and boards falling under the Department. It contains procedural requirements that insure that the complained-against licensee will receive due process of law in the handling of such complaints. The Department's argument that these time limits should not be construed for the benefit of the licensee is simply not tenable in view of the manifest purpose of that section. I disapprove the interpretation of the purpose and intent of those statutory time limits made by the hearing officer.

B.

The next step in this analysis is to address the remedies available to an aggrieved party when the statutory time limits are violated. Section 455.225 does not specify any particular sanctions to be imposed when the Department violates these statutory time limits. I cannot assume that the legislature intended these time limits to be unenforceable by appropriate remedies; to reach that conclusion would treat the statutory time limits as a meaningless enactment. Accepted rules of statutory construction preclude this construction unless no other choice exists. *See Sharer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962) ("It should never be presumed that the legislature intended to enact purposeless and therefore useless legislation."); *Smith v. Cox*, 166 So. 2d 497 (Fla. 2d DCA 1964) (in construing a statute, a court cannot attribute to the legislature an intent beyond that expressed).

Of course, these statutory time limits may be enforced by writ of mandamus to the offending board or the Department. *See Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982); *Lomelo v. Mayo*, 204 So. 2d 550 (Fla. 1st DCA 1967). However, as the majority opinion recognizes, mandamus is not the exclusive remedy for time limit violations, and failure to seek mandamus does not necessarily constitute a conclusive waiver of such violations. An aggrieved licensee may resort to other appropriate means of enforcing the time limits in section 455.225 upon a showing that the delay attributable to such violations has impaired the fairness of the administrative proceeding. *Cf. Hyman*; *G & B of Jacksonville, Inc. v. State, Department of Business Regulation*, 362 So. 2d 951 (Fla. 1st DCA 1978), *appeal dismissed*, 372 So. 2d 468 (Fla. 1979).

Appellant argues that dismissal of the complaint against him is the only meaningful sanction available, considering the harmful effects of the delay in prosecuting the matter despite his repeated requests to the Department to expedite the proceeding. The Department counters with the argument that section 455.225 makes no provision for sanctions in the event of the violation of the time limits set forth therein and its provisions are not jurisdictional in the sense that a violation is grounds for dismissing the complaint or voiding the resulting order; thus, Appellant bears the burden of showing that he has been prejudiced by the delays before he is entitled to any relief.

The Department's argument, that repeated violations of the statutory time limits must remain unremedied unless Appellant carries the burden of showing actual prejudice, does nothing to motivate the Department or the Board of Optometry to comply with the statutory time limits. Indeed, under their argument, the time limits can be violated with virtual impunity in most cases because of the difficulty a licensee will encounter in demonstrating the substantial prejudice that has been required of Appellant in this case. Their argument completely ignores the statutory provisions for reasonable extensions of the time limits upon appropriate request to the Secretary. In short, their argument makes a mockery of the statutory scheme for insuring that these

matters move forward in a timely fashion.

Therefore, I would hold that Appellant's motion to dismiss, timely filed in response to the Department's filing of the administrative complaint, alleging four violations of the section 455.225 time standards without any attempt by Department personnel or the Board to obtain reasonable extensions from the Secretary, was an appropriate procedure to obtain relief for such violations without the movant having to demonstrate, in addition, substantial actual prejudice by reason of such violations. Appellant, as the moving party, should have to establish only a prima facie case for dismissal by showing that the Board or Department violated the section 455.225 statutory time limits without having first sought and obtained extensions from the Secretary. Appellant should not be required, in addition, to carry the burden of showing actual prejudice created by such violations because the very existence of the statutory time limits establishes an inference, if not a presumption, that delay in violation thereof is prejudicial to the charged licensee. So long as Appellant has demonstrated that violations of the statutory time limits actually occurred, the Department and the Board should then have the burden of showing that such violations ought to be excused for good cause or other lawfully sufficient reasons, and further that notwithstanding their violations of the time limits, Appellant has not suffered any substantial prejudice as a result thereof. Requiring the Department and the Board to overcome Appellant's prima facie showing of prejudice, inferred from the fact of the violations, places primary responsibility for compliance with the statutory time limits on the Department and the Board, and serves the desirable function of encouraging strict compliance with these statutory limits. Only by placing the burden of excusing such violations on the agency itself can the legislative purpose underlying the statutory time limits be effectively and fully implemented and enforced.

I do not agree that the rationale of the supreme court's decision in *Department of Business Regulation v. Hyman*, 417 So. 2d 671 (Fla. 1982), in respect to the effect of violations of the 90-day time requirement in section 120.59(1), Florida Statutes, should be applied in this case, as the majority opinion has done.

In *Hyman* the supreme court held that reversal of an appealed agency order denying relief is required only if the agency's violation of the subsection 120.59(1) time constraints has resulted in the impairment of the fairness of the proceeding or the correctness of the action. The court explained that the time requirement in section 120.59(1) must be read in conjunction with section 120.68(8), which it has characterized as "the harmless error rule for agency action." *Id.* at 673. The supreme court cautioned, however, that it was not suggesting "that state agencies should be excused from following the mandates of the legislature, for there may very well be instances in which a violation of the 90-day requirement will justify reversal of agency action," citing *Pinellas County v. Florida Public Employees Relations Commission*, 379 So. 2d 985 (Fla. 2d DCA 1980), and *City of Panama City v. Florida Public Employees Relations Commission*, 364 So. 2d 109 (Fla. 1st DCA 1978). *Id.* at 673. Each of these cited cases held that the Commission's violation of the 90-day requirement in section 120.59(1) amounted to a flagrant disregard of the City's rights in respect to collective bargaining, and peremptorily directed the commission to grant the relief requested by the City.

The time provision in section 120.59(1) contains no reference to sanctions for its violation, nor does it contain any provision for obtaining an extension thereof. While section 455.225 does not specify a specific sanction for violation of the several time limits, it does contain provisions for the Department or Board to obtain extensions of those limits when reasonably necessary. Thus, this section differs significantly from section 120.59(1) in providing authority for obtaining an extension of the time limits from a highly responsible official. This difference between the statutes calls for different treatment when an agency violates the time limits without even attempting to obtain a reasonable extension. When an agency does not even undertake to avail itself of a statutorily-authorized remedy when the need for an extension of time arises, such indifference to the statutory requirements and the consequent violations of the statutory time limits amounts to a callous, if not intentional, disregard of the agency's statutory duties, and must be treated differently than the isolated violation in *Hyman*, where no means for extending the time limits was statutorily authorized. I conclude that the agencies' violation of the statutory time limits in this case, without even a pretext of attempting to obtain extensions of time as authorized by the statute, amounts to a flagrant disregard of Appellant's rights under section 455.225 for which he is entitled to obtain relief by way of his motion to dismiss.

C.

I am fully aware that the standard of appellate review prescribed in section 120.68(8) is whether "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." Therefore, Appellant has the burden of demonstrating *on this appeal* that such has occurred in the proceedings and action leading to the final order under review. I believe Appellant has carried that burden for the following reasons.

First, Appellant's motion to dismiss the administrative complaint was an appropriate procedure for raising the issue of the Department's and the Board's violations of the section 455.225 time limits.

Second, the hearing officer correctly concluded, after the preliminary denial of Appellant's motion to dismiss, that the matter of these violations must be heard and determined at the evidentiary hearing requested by Appellant pursuant to section 120.57.

Third, it is apparent from the arguments and my review of the record that Appellant established a prima facie case for relief based on his motion to dismiss in that he established at least four definitive violations of the time limits in section 445.225. In addition, the evidence would support inferences that Appellant was prejudiced by the delay constituting those four violations in the several respects argued, although I agree that the hearing officer could have found otherwise on the evidence.

Fourth, and most significantly, it is evident from the arguments of the parties and my review of the record that many of the evidentiary facts relied on by Appellant were disputed by the Department and the Board, and that the hearing officer was thus required to resolve these disputes with findings of fact in the recommended order. Determining whether the evidentiary facts and inferences to be drawn therefrom should have been found in accordance with the Department's contention or Appellant's contention required specific findings of fact in both the recommended order and the final order. *See generally Gentry v. Department of Professional Regulation*, 283 So. 2d 386 (Fla. 1st DCA 1973); *Ford v. Bay County School Board*, 246 So. 2d 119 (Fla. 1st DCA 1970); § 120.59, Fla. Stat. (1989). This was not done.

To summarize, the fairness of the proceedings and the correctness of the agency action was impaired by a material error in procedure because: (1) Appellant's motion to dismiss was facially sufficient to require dismissal of the administrative complaint upon the undisputed showing of the Department's and the Board's violations of the section 445.225 time limits without any attempt to obtain an extension thereof, as prejudice should have been inferred from such violations; (2) the hearing officer and the final order relieved the Department and the Board of their respective burdens of proof to show that good cause or other lawfully sufficient grounds existed to excuse their violations of the section 445.225 time limits in view of their failure to seek and obtain extensions of time from the Secretary; (3) the hearing officer and the final order erroneously placed on Appellant the burden of showing actual prejudice before being entitled to any relief for the Department's and the Board's violations; and (4) even assum-

ing such prejudice had to be shown, neither the hearing officer's recommended order or the final order contained the required findings of fact on obviously disputed evidence regarding the presence or absence of such prejudice. The absence of required findings of fact based on disputed evidence relevant to the issue of prejudice is, standing alone, an error of sufficient magnitude to require reversal and remand to the hearing officer to make such findings of fact, as it fails to comply with section 120.59(1).

IV.

For the recited reasons, I would reverse the appealed order and remand with directions that Appellant's motion to dismiss the administrative charge be granted and the charge be dismissed. Alternatively, I would reverse and remand for legally sufficient findings of fact on the issue of prejudice, regardless of which party bears the burden of proving the presence or absence of such prejudice. In view of these dispositions, I would not reach the issue of the sufficiency of the evidence to prove the charged violations of professional standards of conduct.

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[1]The hearing officer's recommended order defined that term as follows:

(5) Orthokeratology has been defined as the programmed application of contact lenses to reduce or eliminate refractive anomalies and to sphericalize the cornea in order to reduce myopia, contain myopia, and to bring back a more functional vision. Orthokeratology has also been used for the reduction of astigmatism.

[2]The record reflects that the patient brought a civil action against Appellant that was terminated by the payment of substantial damages by Appellant and his insurer prior to the patient's filing of a complaint with the Department.

[3]I do not consider what circumstances might constitute good cause for excusing such violations as neither the Department nor the Board has urged any basis for excusing the asserted violations in this case.

* * *

Criminal law—Prisoners—Parole—Parole Commission may suspend prisoner's presumptive parole release date on the basis of information previously considered or available for consideration at time of setting PPRD—Error to suspend PPRD based on psychological reports where reports were absent from record, making adequate review of Parole Commission's decision impossible

JIMMY McCORVEY, Appellant, v. FLORIDA PAROLE COMMISSION, Appellee. 1st District. Case No. 91-1020. Opinion filed January 26, 1993. An appeal from the circuit court for Leon County, John E. Crusoe, Judge. Jimmy McCorvey, pro se, for Appellant. James S. Byrd, Assistant General Counsel, Florida Parole Commission, Tallahassee, for Appellee.

(PER CURIAM.) Jimmy McCorvey appeals an order denying his petition for writ of habeas corpus or mandamus filed after the Florida Parole Commission suspended his presumptive parole release date (PPRD). The Commission expressly based the suspension of appellant's PPRD on information it considered when it initially set the PPRD and on psychological reports that the Commission describes as indicating "underlying hostility and a potential for aggressive behavior."

We reject McCorvey's contention that the Commission abused its discretion in suspending his PPRD on the basis of previously-considered information. The law is well settled that, pursuant to section 947.18, Florida Statutes, the Commission may decline to authorize an inmate's release on the basis of information that was previously considered, or available for consideration, when it set the inmate's PPRD. *Florida Parole and Probation Commission v. Paige*, 462 So. 2d 817 (Fla. 1985); *Parole and Probation Commission v. Bruce*, 471 So. 2d 7 (Fla. 1985).

However, we are unable to determine whether McCorvey's second contention, that the psychological reports on which the Commission based the suspension do not support the suspension, is meritorious as the court record does not contain those reports. Adequate review of the Commission's decision to suspend appellant's PPRD cannot be performed in the absence of the complete record relied on by the Commission to support its recited reasons. *Williams v. Florida Parole Commission*, No. 91-112 (Fla. 1st DCA Dec. 28, 1992) [18 F.L.W. D160]. Thus, we reverse and remand to the circuit court for further proceedings consistent with the law stated in *Williams*.

REVERSED AND REMANDED. (ZEHMER, BARFIELD, and ALLEN, JJ., CONCUR.)

* * *

Criminal law—Question certified whether trial judge has discretion to stack minimum mandatory sentences in cases involving capital felonies together with non-capital felonies committed with use of a firearm where the predicate offenses all occurred during the course of the same criminal episode

ANTONIO LEBARON MELTON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-3944. Opinion filed January 26, 1993. An Appeal from the Circuit Court for Escambia County, Nicholas Geeker, Judge. Spiro T. Kypreos, Pensacola, for Appellant. Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) Appellant's convictions and sentences for first degree murder and armed robbery are AFFIRMED. We certify the same question certified in *Downs v. State*, 592 So. 2d 762 (Fla. 1st DCA 1992). (SMITH, ALLEN AND WOLF, JJ., CONCUR.)

* * *

Workers' compensation—Compensable accidents—Record lacked competent substantial evidence that compensable accident occurred

GAYFERS & LIBERTY MUTUAL INSURANCE CO., Appellants, v. MICHAEL JONES, Appellee. 1st District. Case No. 91-3749. Opinion filed February 1, 1993. An appeal from an order of the Judge of Compensation Claims. A. S. Fontaine, Judge. Jaime D. Liang, of Granger, Santry, Mitchell & Heath, P.A., Tallahassee, for appellants. Lorin J. Lee, of The Morton Law Center, P.A., Tallahassee, for appellee.

(WIGGINTON, J.) Appellants, employer/carrier, appeal the judge of compensation claim's order finding appellee's injury compensable and awarding benefits accordingly. Having carefully reviewed the record in this case, we find that appellee failed to meet his burden of proving by competent substantial evidence that a compensable accident occurred. A finding of compensability on the basis of the instant record fails to accord with logic and reason. *See Paul H. Cowart/Building Specialty v. Cowart*, 481 So.2d 83 (Fla. 1st DCA 1986). Therefore, we reverse. (KAHN and MICKLE, JJ., CONCUR.)

* * *

Civil procedure—Dismissal—No error to dismiss complaint for lack of record activity even though plaintiffs' attorney had devoted time and effort to advancing the cause by reviewing and organizing documents in his file, obtaining documents from defendants and third parties, taking and summarizing depositions, and calling defendants' attorney near end of one-year period in attempt to schedule depositions—Good cause for lack of record activity must include contact with opposing party and some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines

MARY R. EDGECUMBE, MILLIE GEORGE (formerly Stokes), THOMAS GRICE, MALCOLM DAVIDSON, and EARLINE STARKIE, Appellants, v. AMERICAN GENERAL CORPORATION, AMERICAN GENERAL GROUP SERVICES CORPORATION, AMERICAN GENERAL GROUP INSURANCE COMPANY, AMERICAN GENERAL GROUP INSURANCE COMPANY OF FLORIDA, GULF LIFE INSURANCE COMPANY, and GULF GROUP SERVICES CORPORATION, Appellees. 1st District. Case No. 92-816. Opinion filed February 1, 1993. An appeal from the circuit court for Escambia County. Edward P. Nickinson, III, Judge. John Barry Kelly II of Ray, Kievit & Kelly, Pensacola, for Appellants. Joseph O. Stroud, Jr., of Rogers, Towers, Bailey, Jones & Gay, Jacksonville, for Appellees.

(ZEHMER, J.) Appellants, Plaintiffs below, appeal an order dismissing their action against Appellees, Defendants below, pursuant to rule 1.420(e), Florida Rules of Civil Procedure, for lack of record activity for more than one year from October 10, 1990, to October 23, 1991, when Defendants' motion to dismiss

Appendix B

FILED
Department of Professional Regulation
AGENCY CLERK

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF OPTOMETRY

CLERK Gail Cope

DATE October 20, 1989

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTOMETRY,

Petitioner,

vs.

CASE NO. 88-2032

R. TIMOTHY CARTER, O.D.,

Respondent.
_____/

FINAL ORDER

This matter came before the Board of Optometry for final action pursuant to Subsection 120.57(1)(b)9, Florida Statutes, at a public meeting held on July 26, 1989, in Orlando, Florida, for consideration of the Recommended Order of the Hearing Officer and the Exceptions thereto filed in DPR vs. Carter, Case No. 88-2032. Both parties appeared through legal counsel. A transcript of the proceeding is available from Rita Mott Reporting, 1901 Hinckley Road, Orlando, Florida 32812.

FINDINGS OF FACT

Both parties filed Exceptions to the Hearing Officer's Recommended Findings of Fact. The Board reviewed and considered individually each exception filed by Respondent. Having reviewed the complete record; having heard arguments by counsel; and having been otherwise fully advised, the Board voted individually on each of Respondent's Exceptions to the facts and by majority vote denied each exception on the basis that the Hearing

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Officer's Recommended Findings of Fact are supported by competent substantial evidence in the record. Petitioner withdrew its Exceptions to the Hearing Officer's Recommended Findings of Fact.

The Board further determined that each of the Recommended Findings of Fact filed by the Hearing Officer are supported by competent substantial evidence in the record.

Therefore, the Board hereby approves and adopts by reference the Findings of Fact set forth by the Hearing Officer in the Recommended Order attached and incorporated as Exhibit A.

CONCLUSIONS OF LAW

Both parties filed Exceptions to the Hearing Officer's Recommended Conclusions of Law. The Board reviewed and considered individually each exception filed by Respondent. Having reviewed the complete record; having heard arguments by counsel; and having been otherwise fully advised, the Board voted individually on each of Respondent's Exceptions to the conclusions and by majority vote denied each exception. Petitioner withdrew its Exceptions to the Hearing Officer's Recommended Conclusions of Law.

The Board, of its own volition, determined that Section 463.016(2), Florida Statutes (1979) must be applied to acts committed in 1979 and therefore the Board is permitted to assess an administrative fine not to exceed $1,000.00 for each count or separate offense.

The Board further determined that each of the Conclusions of Law filed by the Hearing Officer are appropriate in light of the foregoing Findings of Fact.

Therefore, the Board hereby approves and adopts by reference the Conclusions of Law set forth by the Hearing Officer in the Recommended Order incorporated above as amended herein.

PENALTY

Based upon the foregoing Findings of Fact and Conclusions of Law the Board hereby finds that the Respondent is guilty of Count III and Count V, in regard to Count III of the Amended Administrative Complaint. In consideration of the extensive length of time since Respondent's commission of these acts the Board amends the penalty recommended by the Hearing Officer and hereby suspends the optometry license of Respondent for a period of six (6) months. Said suspension shall be followed by a period of probation to last two (2) years. The terms of probation shall require Respondent to provide quarterly reports to the Board, which reports shall include copies of four (4) patient records, to be reviewed by the Board in order to determine that Respondent is meeting minimum examination requirements. Furthermore, during the period of probation, Respondent shall submit to periodic unannounced inspections by the Department of Professional Regulation for the purpose of examining Respondent's patient records and examination procedures. There shall also be imposed upon Respondent an administrative fine in the amount of $2,000.00 to be paid to the Board of Optometry within 60 days. The Board hereby determines that the reduction in the penalty recommended by the Hearing Officer is justified by the mitigating factors set forth in the record and stated above.

This Final Order shall become effective upon filing with the Clerk of the Department of Professional Regulation.

DONE AND ORDERED this 11 day of October, 1989.

BOARD OF OPTOMETRY

JON S. JACOBS, O.D.
CHAIRMAN

NOTICE

Pursuant to section 120.59, Florida Statutes, the parties are hereby notified that they may appeal this Final Order by filing one copy of a Notice of Appeal with the clerk of the agency and by filing one copy of a Notice of Appeal with the District Court of Appeals within thirty (30) days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished to R. Timothy Carter, O.D., c/o Gary J. Anton, Esquire, Post Office Box 11059, Tallahassee, Florida 32302, by U.S. Mail this 20 day of October, 1989.

Patricia Guilford
FHB

Appendix C

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF OPTOMETRY, Petitioner, vs. R. TIMOTHY CARTER, O.D., Respondent.	)	CASE NO. 88-2032

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William R. Cave, held a public hearing in the above-styled case on September 26 and 27, 1988, in Jacksonville, Florida. The issue for determination is whether Respondent's license to practice optometry in the state of Florida should be revoked, suspended or otherwise disciplined under the facts and circumstances of this case.

APPEARANCES

For Petitioner: Robert D. Newell, Jr., Esquire
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Tallahassee, Florida 32303-6313

For Respondent: Gary J. Anton, Esquire
Stowell, Anton & Kraemer
Post Office Box 11059
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V, 956

BACKGROUND

An Administrative Complaint dated February 16, 1988, was filed with the Division of Administrative Hearings on April 26, 1988 and amended at the beginning of the final hearing in this case on September 26, 1988, without objection, to correct certain citations as to the Florida Administrative Code in all five counts and to correct the amount charged by the Respondent for treatment of the patient with orthokerathology from $1,800.00 to $1,000.00. The Amended Administrative Complaint seeks to revoke, suspend or otherwise discipline the license of Respondent to practice optometry in the state of Florida. As grounds therefor, it is alleged that: (a) Respondent's treatment of patient, Keith Roberson, with orthokeratology was inappropriate because of the patient's high degree of myopia; (b) Respondent's follow-up care for orthokeratology was inadequate in that Respondent saw the patient only four times in the year following the initial contact lens fitting; (c) Respondent prescribed orthokeratology for the patient to facilitate charging the patient a higher fee than that which Respondent could have charged the patient for a more appropriate treatment; (d) Respondent failed to properly treat patient Roberson and to follow-up the patient's care concerning a visit by the patient in regard to being struck in the left eye and experiencing vision problems which was later diagnosed as a detached retina and; (e) Respondent had altered, or made after the fact, patient's records. This alleged misconduct purportedly violates Section

463.016(1)(g), (m) and (n), Florida Statutes, and Rule 21Q-3.010 (previously numbered 21Q-1.380 and 21Q-3.101, Florida Administrative Code.

At the beginning of the hearing, Petitioner agreed that it would not present any evidence in regard to Count IV of the Amended Administrative Complaint. Count IV is therefore deemed to have been withdrawn.

In support of its charges, Petitioner presented the testimony of Alan Keith Roberson, Walter Hathaway, O.D., James C. Lanier, Jr., O.D., Kevin M. McAuliffi, M.D., Diane Rabideau-Wise and Timothy Carter, O.D. Petitioner's exhibits 1 through 10, 15 and 17 were received into evidence.

Respondent testified on his own behalf and presented the testimony of Anthony V. Potts, O.D. and Mark A. Braddock. Respondent's exhibits 1, 2, 5, 6, 7, 11 through 18 and 20 were received into evidence.

The parties submitted posthearing Proposed Findings of Fact and Conclusions of Law. However, by agreement of the parties, time for filing was extended by order on two occasions and, they were not filed until December 23, 1988. A ruling on each proposed finding has been made as reflected in the Appendix to this Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant facts are found:

(1) Respondent is, and was at all times material to these proceedings, a licensed optometrist in the state of Florida, having been issued license number OP 000773.

(2) Respondent has been a practicing optometrist in the state of Florida for 24 years having graduated from the Southern College of Optometry in Memphis, Tennessee in 1964. Respondent has maintained his practice in Orange Park, Florida, since 1964. Respondent has been treating patients with orthokeratology for approximately 20 years.

Count I: Treatment of Keith Roberson with Orthokeratology and Follow-Up Care Therefor.

(3) On or about October 23, 1979, Alan Keith Roberson and his mother visited Respondent for the first time concerning a program of orthokeratology. During that visit, Respondent gave Roberson literature regarding orthokeratology. Roberson expressed a strong desire to obtain a driver's license. Roberson was 21 years of age at the time.

(4) Respondent told Roberson that orthokeratology would possibly enhance his vision and possibly enable him to achieve those things that he desired, more specifically, a driver's license.

(5) Orthokeratology has been defined as the programmed application of contact lenses to reduce or eliminate refractive anomalies and to sphericalize the cornea in order to reduce myopia, contain myopia, and to bring back a more functional vision. Orthokeratology has also been used for the reduction of astigmatism.

(6) The American Academy of Optometry does not recognize diplomacy for orthokeratology. Neither the American Optometric Association nor the Florida Optometric Association recognizes orthokeratology as a separate section. No special license or certification is required to practice orthokeratology in Florida.

(7) The initial refraction of Roberson by Respondent showed that the patient's eyes were a minus 21 diopter. Roberson was extremely myopic, which means he was extremely nearsighted. Roberson also had a high degree of nystagmus (constant movement of the eyes from side to side) and very large eyes.

(8) Respondent treated Roberson with a modified orthokeratology program in an attempt to improve Roberson's vision so that Roberson could obtain a driver's license.

(9) Through this modified orthokeratology program, Respondent hoped to reduce and contain Roberson's myopia, to reduce Roberson's nystagmus, and to improve Roberson's vision.

(10) Roberson's aided vision improved from the initial visit of 20/200 in each eye to that of 20/70 in the right eye and 20/100 in the left eye. Although Petitioner contends that Roberson's improved vision was not attributable to the orthokeratology treatment, there is insufficient evidence to show otherwise.

(11) From 1979 through September 1982, Roberson's vision did not slip and his myopia did not get any worse, and indeed, his vision had improved. During that period, Roberson

was seen approximately eight times by Respondent, of which six visits were for orthokeratology and contact lens treatment.

(12) On March 17, 1981, Roberson was issued an operator's license with corrective lens restrictions by the State of Florida, Department of Highway Safety and Motor Vehicles. Prior to the issuance of this driver's license, Roberson had obtained a form entitled "Report of Eye Examination with a Certification of Eye Specialist" which was completed and apparently used to obtain Roberson's driver's license. There is insufficient evidence to show that Respondent completed and signed that portion of the form entitled "Certification of Eye Specialist". Although Roberson testified that his driver's license was issued the day after this form was dated on October 4, 1980, it is clear from the record that Roberson's driver's license was not issued until March 17, 1981.

(13) Respondent did not make any promises to Roberson that treatment with modified orthokeratology would improve his vision, unaided by glasses or contact lenses, so that Roberson could pass the vision requirement of the Florida Driver's Test unaided by glasses or contact lens, notwithstanding that the ultimate goal of orthokeratology may be to allow the patient to go for periods of time without refractive devices and function normally.

(14) Although Roberson's condition at the time of his first visit may have contraindicated a "strict" orthokeratology treatment, there were indications that the "modified"

orthokeratology treatment suggested and used by the Respondent, after full explanation to Roberson, would produce the results that Roberson was seeking. In fact, it did improve Roberson's vision aided by refractive device sufficiently to allow Roberson to obtain a driver's license.

(15) Respondent did not promise Roberson that the "modified" orthokeratology treatment would enhance his vision, unaided by refractive devices, to the point of allowing Roberson to pass the driver's license test or that Roberson would be able to function normally for any period of time without refractive devices to aid his vision.

(16) There is insufficient evidence to show that Respondent could have obtained the same results using a less expensive treatment such as gas permeable contact lens.

(17) There was insufficient evidence that Respondent's follow-up care of Roberson was inadequate, particularly considering the use of "modified" orthokeratology treatment.

(18) There was insufficient evidence to show that Respondent's treatment of Roberson with "modified" orthokeratology fell below the standard of care in the community or that such treatment was inappropriate under the facts and circumstances of this case.

Count II: Whether Respondent charged Patient Roberson an Excessive Fee for Orthokeratology.

(19) Because Roberson was the highest myopic (-21 diopter) patient ever seen by Respondent and initially unsure

whether orthokeratology would work on this patient, Respondent quoted a fee of $1,000.00 with the understanding that if treatment was not successful then the fee would only be $500.00.

(20) The parties stipulated that Respondent ultimately received $1,000.00 in payment from Roberson for orthokeratology.

(21) Dr. Carter's normal fee in 1979 for orthokeratology was $2,000.00.

(22) There is insufficient evidence to show that Respondent prescribed orthokeratology treatment for Roberson to facilitate charging him a higher fee.

Count III: Whether Respondent Failed to Properly Treat Patient Roberson and Follow Patient Roberson's Condition.

(23) At approximately 7:30 p.m., on September 7, 1982, Roberson visited Respondent's office after accidentally being "poked" in the left eye four days earlier causing a bright blue flash of light resulting in a curtain over Roberson's eye and poor sight vision in the nasal field.

(24) Roberson complained about fluctuating vision, seeing light flashes, a veil-like curtain coming over his left eye, watering of the left eye and slipping of contact lens.

(25) Respondent spent approximately 20-25 minutes examining Roberson. After examining Roberson's visual acuities, Respondent examined Roberson with a slitlamp or biomicroscope and attempted an optomoscopy in an attempt to view Roberson's retina. Because of Roberson's high degree of myopia and nystagmus and because Respondent did not dilate eyes during this time period,

Respondent was unable to determine for certain that Roberson had a detached retina. However, Respondent was aware of the high possibility that Roberson had a detached retina.

(26) Although Respondent may have advised Roberson to visit his previous ophthamologist the next day, Respondent did not call an ophthamologist on the evening of September 7, 1982 to facilitate referral, nor did Respondent follow-up by calling a ophthamologist at any other time.

(27) After Roberson left Respondent's office he went home. The next day Roberson went to work and while at work he continued to experience the veil like curtain over his eye and a dark spot. Roberson then went home and played drums for about 3 1/2 to 4 hours. When he finished playing the drums he took a shower. While shaking his hair dry he lost the vision in his left eye.

(28) Roberson, on the advice of his mother, then went to the University Hospital where he was immobilized and diagnosed as having a probable retinal detachment, and thereafter transported to Shands Hospital, where he was diagnosed as having a giant retinal tear. While at Shands Hospital, Roberson underwent three major operations on his eye and 45 minutes of laser surgery. He was informed that he would probably always be blind in his left eye.

(29) Because of Roberson's high degree of myopia, statistically he was at a very high risk of experiencing a

detached retina with or without injury. Respondent was aware that patient's eyes were sensitive to a retinal detachment as early as 1979. In 1979, Respondent went to great lengths to inform Respondent that if he ever had the symptoms of a detached retina he should go directly to an ophthamologist.

(30) The classic symptoms of a detached retina are flashes of light with what appears to be a veil or curtain floating over the eye. Roberson experienced the classic symptoms of a retinal detachment and communicated them to Respondent on the evening of September 7, 1982.

(31) A detached retina usually occurs secondarily to a retinal tear.

(32) A detached retina becomes an ocular emergency once detected or when it should have been detected. The circumstances presented in this case, inter alia, the history of the patient's eyes; a high degree of myopia; difficulty Respondent had with viewing patient's eyes and the symptoms complained of made the situation an ocular emergency.

(33) It was of paramount importance to get the patient to an ophthalmic specialist. The failure to promptly refer a patient who has a possible detached retina to the appropriate specialist is a grave departure from the prevailing standard of care for reasonable and prudent optometrists in Respondent's community under similar circumstances. The longer the blood supply is cut off from the retina the less chance there is that the retina will continue to function. The fact that 4 days had

elapsed between the time Roberson had been struck in the eye on September 3, 1982, and the time he visited Respondent on September 7, 1982, makes referral that much more important.

(34) Merely telling Roberson to see an ophthamologist the next day is not enough. Respondent should have called the retinal specialist and made the referral.

(35) The appropriate referral protocol and standard of care under the circumstances presented in this case would have been for Respondent to call the ophthalmologist himself that evening and, if the ophthalmologist was not in the office, it would have been appropriate to leave a message with the doctor's service explaining the emergency nature of the circumstances.

Count IV: Whether Patient Roberson's Records were Altered or Made After the Fact by Respondent.

(36) When Roberson first visited Respondent's office in 1979, Respondent recorded Roberson's case history on a 5 x 8 card which was kept with Roberson's patient jacket.

(37) The results of Respondent's examination and testing of patients were records on a letter size document. In 1984, after receiving and responding to numerous inquiries regarding Roberson, Respondent transferred information from the 5 x 8 card onto the larger patient record so that all of the information would be contained on one form.

(38) The 5 x 8 card was then returned to the patient jacket. Respondent no longer has the patient jacket as all of his original records were subpoenaed from him during the civil litigation.

(39) While Dr. Carter candidly admits to transferring part of the patient record from one document onto another document, there was no testimony or evidence presented that Dr. Carter altered or changed any of the patient records or added any information thereto.

Count V: Whether Respondent has Engaged in Gross or Repeated Malpractice in the Practice of Optometry Regarding his Treatment and Examination of Keith Roberson.

(40) The Respondent was disciplined by the Board of Optometry in its Final Order dated July 17, 1981 in Department of Professional Regulation v. R.T. Carter, O.D., Case No. 81-403, wherein Respondent was assessed an administrative fine of $5,000.00, ordered to make restitution in the total amount of $1,471.00, placed on probation for 18 months and had restrictions placed on his advertising.

In General

(41) Although the record reveals that Petitioner has not always timely complied with time limits set out in Section 455.225(2) and (3), Florida Statutes, there has been no showing by the Respondent that he was prejudiced by the delays.

CONCLUSIONS OF LAW

(1) The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

(2) Section 463.016(1), Florida Statutes, empowers the Board of Optometry (Board) to revoke, suspend or otherwise

discipline the license of optometrists to practice optometry in the state of Florida found guilty of any one of the acts enumerated in Section 463.016(1)(a - t), Florida Statutes.

(3) Respondent is charged with the violation of Section 463.016(1)(g), (m) and (n), Florida Statutes, which provide as follows:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (g) Fraud or deceit, negligence or incompetency, or misconduct in the practice of optometry.
>
> * * *
>
> (m) Exercising influence on the patient in such a manner as to exploit the patient for financial gain of the licensee or of a third party.
>
> (n) Gross or repeated malpractice.

(4) In disciplinary proceedings, the burden is upon the regulatory agency to establish facts upon which its allegations of misconduct are based. Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (1 DCA Fla.). Petitioner has clearly shown that Respondent failed to properly refer Roberson, a patient with an ocular emergency, to the appropriate specialist, thereby failing to practice optometry with that level of care recognized by reasonably prudent optometrists under similar circumstances, in violation of Section

Section 463.016(1)(g) and (n), Florida Statutes. Ferris v. Turlington, 510 So.2d 392 (Fla. 1987). However, Petitioner has failed to clearly show that Respondent's treatment of Roberson with orthokeratology was a violation of Section 463.016(1)(g), (m) and (n), Florida Statutes. Additionally, Petitioner has failed to show that Respondent's records were altered or made after the fact in violation of Section 463.016(1)(g), Florida Statutes.

(5) Prior to the hearing, Respondent moved to dismiss the Administrative Complaint based on Petitioner's failure to timely comply with time limits set out in Section 455.225(2) and (3), Florida Statutes. The motion was denied since no prejudice to Respondent had been shown but allowed Respondent to present evidence at the hearing to establish prejudice, if any. To the extent that the motion was renewed by Respondent, it is denied. The burden was upon Respondent to establish facts showing prejudice due to the delays. In that regard, Respondent has failed to sustain its burden.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, it is, therefore,

RECOMMENDED that the Board enter a Final Order finding Respondent guilty of Count III and Count V, in regard to Count III of the Amended Administrative Complaint, and suspending his license to practice optometry in the state of Florida for a period of one year followed by one (1) year of supervised probation with conditions the Board may consider appropriate, and imposing an administrative fine of $5,000.00. It is further

RECOMMENDED that Count I, Count II, Count IV and Count V as it relates to Counts I, II and IV be dismissed.

RESPECTFULLY SUBMITTED and ENTERED this 8th day of March, 1989, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 1989.

Copies furnished:

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APPENDIX TO RECOMMENDED ORDER IN CASE NO. 88-2032

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in this case.

Specific Rulings in Proposed Findings of Fact Submitted by Petitioner

1. Adopted in Finding of Fact 1.
2. Adopted in Finding of Fact 3, except date which was October 23, 1979.
3. Adopted in Findings of Fact 4.
4. Adopted in substance in Finding of Fact 5, except last sentence which is rejected as not being supported by the substantial competent evidence in the record.

5.-6. Adopted in Findings of Fact 6 and 7, respectively.

7. Subordinate to facts actually found in this Recommended Order.
8. The first sentence adopted in Findings of Fact 10. The balance of this findings of rejected as not being supported by substantial competent evidence in the record.

9.-12. Subordinate to facts actually found in the Recommended Order.

13. Adopted in Finding of Fact 20.
14. Rejected as not being supported by substantial competent evidence in the record.

15.-22. Adopted in Findings of Fact 23,24,25,27,28,29,30 and 31, respectively.

23. The first sentence is only a restatement of Respondent's testimony rather than a finding of fact. The balance of this finding is subordinate to facts actually found in this Recommended Order.
24. Adopted in Findings of Fact 26 and 35.

25.-28. Adopted in Findings of Fact 32, 33, 34 and 40.

Specific Rulings on Proposed Findings of Fact Submitted by Respondent

1.-13. Adopted in Findings of Fact 1, 2, 3, 7, 3, 2, 5, 8, 9, 10, 11, 12 and 16, respectively.
14. Adopted in Findings of Fact 14, 15 and 16.
15. Adopted in Findings of Fact 17 and 18.

16.-20. Are not findings of fact, but statements as to the weight given certain evidence.

21. Adopted in Findings of Fact 17 and 18.
22. Covered in Background.
23.-26. Adopted in Findings of Fact 19, 19, 20 and 21, respectively.
27.-28. Not a finding of fact, but rather a restatement of testimony.
29.-35. Adopted in Findings of Fact 23, 23, 24, 25, 25, 25 and 25, respectively.
36. Adopted in Findings of Fact 25 and 26, but modified.
37. The first sentence is subordinate to facts actually found in this Recommended Order. The balance is adopted in Finding of Fact 27.
39.-41. Adopted in Finding of Fact 28.
42. Subordinate to facts actually found in this Recommended Order.
43. Adopted in Finding of Fact 28.
44. Is a restatement of testimony rather than a finding of fact but, if stated as a finding of fact would reject as subordinate to facts actually found in this Recommended Order.
45. Rejected as being argument rather than a finding of fact.
46. Covered in Background.
47. Rejected as not being material or relevant.
48.-51. Adopted in Findings of Fact 36, 37, 38 and 39.
52. Rejected as argument not a finding of fact.
53. The first, third and fifth sentences are rejected as not being supported by substantial competent evidence in the record. The balance of this finding is subordinate to facts actually found in this Recommended Order.
54.-67. Rejected as not being material or relevant since Respondent produced insufficient evidence to show that he was prejudiced by these acts.
68. Rejected as not supported by substantial competent evidence in the record.
69.-70. Rejected as not being material or relevant.
71. Rejected as not being supported by substantial competent evidence in the record.