

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL PHILLIP)
)
Petitioner,)
)
vs.) CASE NO. 96-2366
)
UNIVERSITY OF FLORIDA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 21, 1996, by video conference technology, in Gainesville, Florida, before the Division of Administrative Hearings, by its designated Hearing Officer, Don W. Davis.

APPEARANCES

For Petitioner: Paul A. Donnelly, Esquire
Post Office Box 1308
Gainesville, Florida 32602

For Respondent: Barbara C. Wingo, Esquire
University of Florida
Post Office Box 113125
Gainesville, Florida 32611-3125

STATEMENT OF THE ISSUE

Whether Petitioner's untimely filing of a Petition For Formal Administrative Hearing should be excused.

PRELIMINARY STATEMENT

By letter dated June 30, 1995, Respondent's representative informed Petitioner that Petitioner's appointment as a faculty member would not be renewed.

By order dated August 23, 1995, Respondent denied Petitioner's request for formal administrative proceedings as untimely.

Petitioner's motion for reconsideration, alleging that Respondent was estopped from denial of such proceedings because of actions of Respondent's employee, was denied by Respondent on September 15, 1995.

On April 23, 1996, the First District Court of Appeal found that Petitioner "has alleged facts, supported by affidavit, that would excuse the untimely filing of his petition." The matter was remanded for formal proceedings on whether Petitioner's untimely filing for formal proceedings should be excused.

By correspondence and attachments filed May 17, 1996, Respondent referred the matter to the Division of Administrative Hearings.

At the final hearing, the parties jointly sponsored and introduced exhibits A through J, which were admitted into evidence. Petitioner presented testimony of one witness. Respondent presented testimony of three witnesses.

A transcript of the August 21, 1996 final hearing was filed with the Division of Administrative Hearings on September 5, 1996. Proposed findings of fact submitted by the parties are addressed in the appendix to this recommended order.

FINDINGS OF FACT

1. Petitioner gave Respondent's June 30, 1995 correspondence, informing Petitioner that his employment contract would not be renewed, to Petitioner's attorney. That correspondence informed Petitioner that he could appeal Respondent's decision through "the appropriate administrative structure" or the formal grievance procedures contained in Respondent's Rule 6C1-7.041, Florida Administrative Code.

2. A copy of Rule 6C1-7.041, Florida Administrative Code, was attached to the June 30, 1995 letter. Pertinent to this proceeding is the language of a portion of the rule contained in paragraph 6C1-7.041(4)(a), Florida Administrative Code, which reads as follows:

Initiation of a proceeding under Section 120.57, F.S. shall be made by submitting a petition to the Clerk of the University of Florida, as provided in Rule 6C1-1.005, F.A.C. A copy of the petition should also be sent to the President of the University. The petition should be printed, typewritten, or otherwise duplicated in legible form on white paper. Unless printed, the impression should be on one side of the paper only, and lines shall be double-spaced and indented.

3. The June 30, 1995 letter did not state the location or personal identity of the Clerk of the University. Rule 6C1-1.005, Florida Administrative Code, referenced in Rule 6C1-7.041(4)(a), Florida Administrative Code was not included in Respondent's correspondence. Rule 6C1-1.005(1), Florida Administrative Code, provides:

The Clerk of the University is the administrative assistant in the Office of the General Counsel at 207 Tigert Hall, University of Florida, Gainesville, Florida 32611. In the absence of the individual holding this position, the administrative assistant to the Vice-President for Administrative Affairs shall act as the Clerk of the University of Florida.

4. Petitioner did not obtain and was not provided by Respondent with a copy of Rule 6C1-1.005(1), Florida Administrative Code. Petitioner's counsel

did not know who was the Clerk of the University or where that office was located.

5. Petitioner's counsel telephoned the University's information services on August 8, 1995, and asked for a telephone listing for the Clerk of the University of Florida at Tigert Hall. Information services was unable to provide such a telephone listing and referred counsel to the University's President.

6. On August 8, 1995, Petitioner's counsel telephoned the office of the University's President and spoke with Lois Ivanko. A senior secretary in the President's office for eight years, Ivanko greets guests, opens and directs mail, and receives grievances. When informed by Petitioner's counsel of the need to file an administrative petition with the Clerk of the University of Florida on that very day, Ivanko said she would be happy to help counsel with the filing process and that he should send his law clerk, Joseph Marlar, to her, that she would take the petition and that she would file it.

7. Marlar went to Ivanko's office on August 8, 1995, and spoke with Ivanko. Marlar explained that his mission was to file Petitioner's Petition For Formal Administrative Hearing. Marlar specifically told Ivanko that the document had to be filed with the Clerk of the University of Florida that day. Ivanko, ignorant of the existence of a Clerk for the University, assured Marlar that he was at the right place and that leaving the documents with her would constitute appropriate filing. Marlar left Petitioner's Petition For Formal Administrative Hearing with Ivanko who date and time stamped the document. Ivanko later brought the original to the office of the University's Vice-President of Academic Affairs.

8. Ivanko placed a date and time stamp on a copy of the documents provided by Marlar so that Marlar would have proof of the filing of the document. All three documents, one original and two copies, were clearly entitled "Petition For Formal Administrative Hearing (CH.120)."

9. Karen Grabel is the Clerk of the University of Florida. She has held that position since May 1993. Grabel works in the General Counsel's office, located at 207 Tigert Hall. Ivanko works in the Office of the President at 226 Tigert Hall on the same floor of the building as Grabel.

10. Petitioner's Petition For Formal Administrative Hearing was not filed in Grabel's office by the required deadline of close of business on August 8, 1995. By order of the University's President dated August 23, 1995, the Petition was denied on the basis that it was not filed with the Clerk.

CONCLUSIONS OF LAW

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

12. Petitioner has the burden of proving entitlement to the relief sought in this proceeding. Fla. DOT v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA, 1981).

13. Central to resolution of the issue in this proceeding is the question of equitable estoppel. See Tri-State Systems v. Department of Transportation, 500 So. 2d 212 (Fla. 1st DCA 1986), rev. denied, 506 So. 2d 1041 (1987). See

also Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1989), review denied, 562 So. 2d 345 (Fla. 1990). Estoppel must be considered in view of the apparent and reasonable reality that Petitioner's counsel and counsel's clerk were misled by Ivanko, regarding the location and propriety of document filing.

14. Ivanko acted on behalf of Respondent when she accepted Petitioner's Petition For Formal Administrative Hearing and gave her assurances to Marlar of the propriety of the filing of those documents with Ivanko. Petitioner's representatives placed reasonable reliance upon the representations of Ivanko. To conclude that the Petition For Formal Administrative Hearing was not timely filed is detrimental to the interests of Petitioner and his representatives who relied and acted upon Ivanko's representations. Harris v. State, Department of Administration, 577 So. 2d 1363 (Fla. 1st DCA 1991).

15. Respondent's argument that Petitioner was fairly informed by reference in an enclosure with the June 30, 1995 letter to yet another, and not enclosed, rule containing details governing proper filing requirements is not persuasive in view of the actions of Ivanko. The proof establishes that filing delay of the Petition For Formal Administrative Hearing, occasioned by filing the documents with Ivanko in room 226 instead of room 207 of Tigert Hall, should be excused and that Respondent should be estopped from denying Petitioner formal proceedings on that basis.

RECOMMENDATION

Based upon the findings of fact and the conclusions of law, it is,

RECOMMENDED:

That a final order be entered finding Petitioner's Petition For Formal Administrative Hearing to have been timely filed.

DONE and ENTERED this 19th day of September, 1996, in Tallahassee, Leon County, Florida.

DON W. DAVIS, 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 19th day of September, 1996.

APPENDIX

In accordance with provisions of Section 120.59, Florida Statutes, the following rulings are made on the proposed findings of fact submitted on behalf of the parties.

Petitioner's Proposed Findings

1.-33. Accepted and incorporated in HO findings, although not verbatim.

Respondent's Proposed Findings

- 1.-3. Accepted, not verbatim.
- 4.-5. Rejected, relevance.
- 6. Incorporated by reference.
- 7.-8. Accepted.
- 9. Rejected, subordinate to HO findings.
- 10.-12. Accepted.
- 13. Rejected, cumulative.
- 14. Rejected, relevance to this proceeding.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.