7-2-01

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AP

01 OCT -2 PM 2:03
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY ANN WINTERS,

Petitioner,

vs.

BOARD OF REGENTS AND UNIVERSITY OF SOUTH FLORIDA,

Respondents.

DOAH Case No: 01-0786
98-21964

WFQ-CLS

FINAL AGENCY ORDER

APPEARANCES:

For Petitioner: Robert F. McKee, Esq.
Kelly & McKee
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

For Respondents: John W. Campbell, Esq.
Constangy, Brooks & Smith, LLC
Post Office Box 1840
Tampa, Florida 33601-1840

And

R.B. Friedlander, Esq.
University of South Florida
Office of the General Counsel
4202 East Fowler Avenue, ADM 250
Tampa, Florida 33620

PROCEDURAL HISTORY

On April 23-25, 2001, a formal administrative hearing ("Hearing") in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH"). On July 2, 2001, the ALJ entered his Recommended Order ("Rec. Order"). On July 17, 2001, Respondents, Florida Board of Regents and the University of South Florida (collectively "Respondents") filed their Exceptions to the Rec. Order ("Exceptions"). On July 20, 2001, Petitioner, Jerry Ann Winters ("Petitioner") filed her Memorandum in Opposition to Respondent's Exceptions ("Opposition").

In the Rec. Order, the ALJ recommended that USF issue a final order reinstating Petitioner's Employment Contract and providing back pay from the date of termination to the date of reinstatement. Respondents timely filed eighteen (18) exceptions to the Rec. Order, in which Respondents disputed the ALJ's Preliminary Statement, twenty (20) of the ALJ's fifty-one (51) Findings of Fact, and seventeen (17) of the ALJ's nineteen (19) Conclusions of Law. Petitioner filed no exceptions to the ALJ's Rec. Order.

Respondents, in their Exceptions, argue that the issues, as framed by the ALJ in the Rec. Order, misstated the actual issue in question. Respondents further argue that many of the ALJ's Findings of Fact were not based on substantial competent evidence, and that, based in large part on the faulty Findings of Fact, the ALJ made erroneous Conclusions of Law. Respondents urged that this Agency reject the Rec. Order, and enter a final order denying Petitioner's request for reinstatement of her employment contract.

In her Opposition, Petitioner argues that the ALJ framed the issues properly, and that both the

ALJ's Findings of Fact and Conclusions of Law were based upon substantial competent evidence.[1] Petitioner urges this Agency adopt, in its entirety, the ALJ's Rec. Order.

DISCUSSION

Under Florida law, an agency reviewing the recommended order of an administrative law judge is required to give significant weight to that judge's Findings of Fact. This Agency may only reject the administrative law judge's findings of fact if, after a full and complete review of the record, this Agency finds that those facts are not supported by competent substantial evidence. See Bush v. Brogan, 725 So.2d 1237, 1239 (Fla. 2nd DCA 1999); see also Schrimsher v. School Board of Palm Beach County, 694 So.2d 856 (Fla. 4th DCA 1997), §120.57(1)(j), Fla. Stat. (Supp. 2000).

In contrast, the agency is not required to defer to the administrative law judge on issues of law. See State Contracting and Engineering Corporation v. Florida Dept. of Transportation, 709 So.2d 607, 609-10 (Fla. 1st DCA 1998). Section 120.57(j) Florida Statutes states in material part that "the agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction." See id., see also Florida Public Employees Council 79 v. Daniels, 646 So.2d 813 (Fla. 1st DCA 1994). Furthermore, this Agency may reject the findings of the hearing officer when the issues are infused with overriding policy considerations for which the Agency is the most qualified entity upon which to decide. See Brogan, 725 So.2d at 1239, citing to Baptist Hosp., Inc. v. State of Florida, 500 So.2d 620 (Fla. 1st DCA

---

[1] Petitioner's Opposition does not address Respondent's exceptions on a point-by-point basis. Instead, Petitioner groups her responses into four groups: (1) exceptions that she opposes, but chooses not to directly respond to [exceptions 2, 3, 4, 6, and 7]; (2) the exception Petitioner classifies as dealing with the audio tape-recordings entered at the Hearing as Exhibit 23 [exception 5]; (3) exceptions that Petitioner classifies as dealing with Petitioner's alleged "lies" [exceptions 11 and 13]; and (4) the exception Petitioner classifies as dealing with a meeting that occurred in April 2000 [exception 8]. Petitioner offers no opinion whatsoever on exceptions 1, 9, or 10. However, as Respondent presented its exceptions to the ALJ's factual findings on a point-by-point basis, that is how this Agency will address them, as well.

1986). In fact, the meaning assigned to agency rules by the officials charged with their administration are "entitled to great weight and should not be overturned unless clearly erroneous." See State Contracting and Engineering Corp. v. Dept. of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998), citing to Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983).

In exception one, Respondents argue that the ALJ's Rec. Order misstated the issue presented by USF at the hearing, thereby placing a burden of proof on Respondents that was both erroneous and unwarranted. According to the Rec. Order, the issue became a question of fact as to whether Petitioner (a) retaliated against a member of the women's basketball team and/or (b) lied to a University investigator. If one or both of those allegations were true, then (and only then) did the requisite cause exist for Respondents to terminate Petitioner's employment contract.

Respondents argue, however, that the true issue before the ALJ was a much more simple one: breach of contract. Respondents point to the filed Pre-Hearing Stipulation as an indication that both sides agreed to the narrow question of whether USF had sufficient cause, as that term is defined by Petitioner's employment contract, for terminating Petitioner's employment. Upon review of the record, particularly the Statement of the Issue in its Amended Notice of Hearing and the parties' Pre-Hearing Stipulation, this Agency agrees with Respondents. The ALJ's alteration of the issue in question was in error. Therefore, exception one is granted.[2]

[2] It is disturbing to this Agency that the ALJ would choose his Recommended Order as the place and time in which to alter the very issue that he had set forth prior to the hearing in his final Amended Notice of Hearing. The effect of doing so was two-fold: First, Respondents argued a case at the Hearing with issues different from those that the ALJ ultimately chose to consider, through no fault of their own. Second, it has potentially rendered all findings of fact (and the legal conclusions that arose from them) suspect due to the fact that the ALJ concentrated his focus on elements of proof, rather than on the actual question at issue. However, this Agency believes that the record is sufficient for this Agency to make a decision on the original question presented.

In exception two, Respondents dispute the ALJ's statement in Paragraph 7 of the Rec. Order that it was unknown why Petitioner chose to record her meetings with the various members of the women's basketball team in April, 1999. Respondents argue that the record evidence does not support this finding, and that Petitioner did in fact testify as to at least one reason for her having made those tape recordings. Upon review of the transcript, this Agency agrees, and removes the qualifying phrase "for some reason" from the ALJ's finding. (See Hearing Transcript ("Transcript") at 32). To the extent that the factual finding suggests that Petitioner's reasoning behind making the recordings is unknown, that finding is not based upon substantial competent evidence. Exception two is therefore granted.

In exception three, Respondents dispute the characterization by the ALJ in Paragraph 8 of the Rec. Order that the tape-recorded conversation between Petitioner and basketball team member Dionne Smith took "several hours." Respondents assert that the testimony at the Hearing, as well as the tapes themselves, establish that the length of the recorded interview between Ms. Smith and Petitioner lasted four and one-half (4 1/2) hours, and the finding of fact should reflect such. Upon review of the transcript, this Agency agrees, and modifies the ALJ's finding accordingly. (See Transcript at 150; see also Hearing Exhibit 23). Therefore, exception three is granted.

In exception four, Respondents dispute Paragraph 13 of the Rec. Order to the extent of the ALJ's characterization that evidence presented by Respondents at the Hearing "suggests" that Petitioner's lengthier meetings with African-American players during the April 1999 taped interviews was racially motivated. Respondents argue that the evidence presented at the hearing did no more than establish an undisputed fact that the players who complained of racial discrimination (who just happened to be African-American) had longer interviews than those that had not complained.

Upon full review of the record, this Agency agrees. (See Transcript, pp. 150-151, 164, 219-228). The testimony of Camille Blake clearly states her belief that Petitioner acted in the manner that she did in retaliation for the charges of discrimination filed against her by the team members, and not out of some independent racial animosity on her part towards the complainants. (See Transcript at 164). This Agency therefore amends the Rec. Order's finding of fact in Paragraph 13 to read: "The University suggests that because meetings with some African-American players were longer than meetings with other players, players were being retaliated against for having filed complaints of race discrimination against Winters." Exception four is therefore granted.

In exception five, Respondents dispute the findings of fact in Paragraphs 16 through 19 of the Rec. Order. Specifically, Respondents take issue with Paragraph 16's finding that the tape-recorded meeting between Ms. Smith and Petitioner was "a frank discussion between the coach and the player about the problems perceived by each," in that it appears to lead to an ultimate finding of fact in Paragraph 19 that there was "no credible evidence presented during the hearing" to show Petitioner's statements to Ms. Smith during the taped interview were unreasonable.

Petitioner responds by asserting that Respondents are seeking to simply have this Agency substitute its judgment for that of the ALJ in regards to the tape-recording. This Agency, Petitioner argues, is not entitled to act in such a way. Petitioner maintains that any findings relating to the tape itself are supported by substantial competent evidence, and cannot be rejected or modified.

As it is the ALJ's task to weigh the evidence before him, this Agency finds that the disputed finding of fact in regards to Paragraph 16 is based upon the ALJ's interpretation of the evidence presented to him, and is therefore supported by competent substantial evidence. (See Hearing Ex. 23). Therefore, to the extent that the fifth exception seeks amendment to Paragraph 16 of the Rec. Order, the exception is denied. Upon full review of the record, however, including a review of all the

tape recordings made by Petitioner and entered into evidence as Hearing Exhibit 23, it is clear that no competent substantial evidence exists to support the disputed finding of fact in Paragraph 19.

If the only evidence presented at the hearing was the single tape-recorded interview between Petitioner and Ms. Smith, then the ALJ's evaluation of the statements made on that tape would not have been subject to dispute, as it is the ALJ's duty to weigh the evidence before him. See Boyd v. Department of Revenue, 10 FCSR ¶201 (1995), aff'd 682 So.2d 1117 (Fla. 4th DCA 1996). However, a full review of the record, as well as a review of the entire set of tape-recorded interviews, shows evidence that Petitioner's actions towards Ms. Smith were unreasonable - not so much for just *what* was said as for *how* Petitioner said it, and for how long. (See Transcript, pp. 150-151, 219-228; see also Ex. 23).

This Agency finds that the tremendous disparity between the length of Ms. Smith's interview and the interviews of non-complaining players is evidence of the interview's unreasonable nature. Therefore, this Agency amends Paragraph 19 in its entirety to read: "Winters' statements to Smith during the April 1999 meeting, taken in isolation, were arguably not unreasonable. However, given the difference in length between Smith's interview and the interviews Winters had with the other team members, there is evidence to support a finding that Winters acted unreasonably in regards to Smith. As Smith was one of only two team member to accuse Winters of racial discrimination, evidence exists to find that the unreasonable treatment was motivated by a desire to retaliate against Smith." Respondents' fifth exception is therefore granted in part and denied in part.

In exception six, Respondents assert that in Paragraph 24 of the Rec. Order the ALJ attributed to Petitioner a motive that is not supported by any facts in evidence. Respondents argue that the record shows no evidence of any kind supporting the ALJ's statement that Petitioner was "apparently concerned about appearing to be insensitive." Upon full review of the record, this Agency agrees,

and amends Paragraph 24's finding of fact to remove the disputed phrase, as this Agency finds the ALJ's description of Petitioner's motive to be unsupported by any substantial competent facts. Exception six is therefore granted.

In exception seven, Respondents assert that Paragraph 25 of the Rec. Order is phrased in such a way as to suggest that Petitioner disputes having made the statement attributed to her in that Paragraph. Respondents assert that Petitioner admitted to making the statement, but that the date and circumstances were in dispute. Upon review of the record, this Agency agrees that the finding of fact in Paragraph 25 requires clarification. (See Transcript, pp. 626-627). Therefore, the last sentence of Paragraph 25 is amended and will now read: "Based on the evidence presented during the hearing, it is not surprising that Winters would have believed that the team would have been "better" without Smith, and even admits to having said as much; there is no credible evidence, however, that prior to April 2000 Winters had any plan to discipline the player." Exception seven is therefore granted.

In exception eight, Respondent challenges the factual findings in Paragraphs 33 through 35 of the Rec. Order. Respondent argues that there was no substantial competent evidence to support the ALJ's findings in those Paragraphs. Petitioner opposes this exception, and maintains that the ALJ had sufficient evidence before him upon which to base a decision, and that it is not our place to reinterpret the facts. Upon full review of the record, this Agency agrees with Petitioner. (See Transcript, pp. 77-82). The specific factual findings are supported by the undisputed testimony of Petitioner. Therefore, exception eight is denied.

In exception nine, Respondents argue that in Paragraph 40 of the Rec. Order the ALJ improperly blended a factual finding with a conclusion of law. Specifically, Respondents claim that the determination by the ALJ that Petitioner did not dismiss Ms. Smith from the team in retaliation for

the filing of a race discrimination complaint against her fails to address numerous legal issues that are a necessary prerequisite for such a finding. Upon review of the record and the Rec. Order, this Agency agrees. The ALJ has presented Paragraph 40 as a finding of ultimate fact, but failed to properly analyze that finding through application of relevant legal principles. Without that analysis, Paragraph 40 is not supported by competent substantial evidence, and this Agency hereby rejects it.[3] Therefore, while exception nine is rejected insofar as it seeks a finding of fact that retaliation occurred, this Agency disregards Paragraph 40 as unsupported by competent substantial evidence.

In exception ten, Respondents claim that factual findings in Paragraphs 41 and 42 of the Rec. Order misstated evidence that is undisputed. Respondents also claim that Paragraphs 41 and 42, similar to Paragraph 40, states a legally unsupported ultimate factual finding, and that the ALJ ignored significant evidence when making that finding. As to the issue of the misstated evidence, upon full review of the record, this Agency agrees. (See Hearing Ex. 15). As Petitioner's own statement contradicts the ALJ's finding as to the cause of Ms. Smith's dismissal from the team, the disputed finding in Paragraph 41 is not based on substantial competent evidence.

Furthermore, in making his finding in Paragraph 41, the ALJ completely disregards the evidence offered by Respondents that Petitioner dismissed Smith from the team in part out of retaliation for her having filed a racial complaint the prior year. Before the ALJ can disregard evidence, he must first at least address that such evidence exists. This the ALJ failed to do in making his finding in Paragraph 41. Therefore, taking the whole of the record into account, this Agency amends the second sentence of Paragraph 41 as follows: "There was no credible evidence presented that Smith's removal from the team was not warranted by her behavior during the April 2000 meeting

[3] Although, as stated above on page 5, supra, the ALJ misstated what the ultimate issue in this case actually is. Therefore, even if the ALJ had properly supported this "ultimate factual finding," it would still be in error under the true matter at issue.

with Winters; however, there is evidence that the severity of the discipline would have been less had Smith not filed a charge of race discrimination against Winters the previous year." This Agency further finds that Paragraph 42, reflecting as it does the ALJ's interpretation of the April 2000 meeting only, is supported by competent substantial evidence. Therefore, exception 10 is granted in part, and denied in part.

In exception eleven, Respondents assert that certain factual findings in Paragraphs 48 through 50 of the Rec. Order equivocates in the wording as to whether evidence has been proven without dispute, or rather merely just inferred. Respondents further dispute the language of Paragraph 50, arguing that it blended a finding of fact with a conclusion of law, namely the motive of Petitioner in falsifying the document she provided to the University as part of the ongoing investigation. Petitioner claims that the findings are indeed factual findings, and well within the ALJ's authority to make based upon the evidence before him.

Upon review of the recommended order, this Agency agrees with Petitioner that the disputed statement from Paragraph 48, "It is reasonable to infer that Winters suspected that Smith participated in the investigation," is based on substantial competent evidence. While this Agency may agree with Respondents that the vocabulary used is not necessarily the most forceful available, the ALJ is entitled to weigh the evidence as he sees fit. Nevertheless, the factual finding as written by the ALJ does agree in kind with Respondents' position, even if not to the desired degree. Therefore, exception eleven, as it pertains to Paragraph 48 of the Rec. Order, is denied.

Upon full review of the record regarding Respondents' assertion as to Paragraph 50, however, this Agency finds that the ALJ made a significant "finding of fact" based not on the evidence before him, but rather on what he considered to be "illogical." (See Rec. Order ¶ 50). There is no evidence in the record, one way or the other, from which the ALJ might find that "it is illogical to assume that

Winters' written response, prepared as directed by legal counsel, was an attempt to conceal information from or otherwise deceive USF officials." The ALJ had before him evidence that Petitioner had submitted written answers to an official University investigation questionnaire in a manner inconsistent with verbal answers she gave to a University investigator at a later date. (See Transcript, pp. 40, 94-96). The conclusion drawn from those facts by the ALJ was therefore one of law, rather than of fact. As a result, this Agency finds that the second sentence of Paragraph 50 is in fact a conclusion of law by the ALJ, and as such it can and will be disregarded. To the extent that exception eleven concerns the stricken second sentence of Paragraph 50, that exception is granted.

In exception twelve, Respondents repeat their argument regarding Paragraph 50, which this Agency has already addressed. Therefore, to the extent that the issues in exception twelve have already been addressed, this exception is denied as duplicative.

In exception thirteen, Respondent claims that Paragraph 51 of the Rec. Order contains not a finding of fact, but rather a conclusion of law. In Paragraph 51, the ALJ makes the determination that the written response by Petitioner in the University EEO investigation was not sufficient grounds upon which to base Petitioner's termination. Petitioner maintains that this finding is based upon the substantial competent evidence placed before the ALJ at the Hearing, and must be upheld.

Upon full review of the record, this Agency finds that Petitioner's written response to University investigator Camille Blake (Hearing Ex. 15, last page) was flatly inconsistent with other statements made by Petitioner in the tape-recorded interviews (Hearing Ex. 23) and in EEO investigative interviews is well established in the record. (See Transcript at 94-96). The record further shows that the inconsistency was due to intentional acts by Petitioner, not through some form of negligence or mistake. (See id.). Whether such action is sufficient to base a decision to terminate Petitioner's employment contract for cause is both a conclusion of law and a question of policy, and

as such is within the sole discretion of this Agency, not the ALJ. See Brogan, 725 So.2d at 1239. Therefore, after full and careful review of the entire record, this Agency re-classifies the finding of fact in Paragraph 51 as a conclusion of law and statement of policy. Therefore, exception thirteen is granted.

Upon review of the entire record, this Agency concludes that the ALJ's findings of fact in the Rec. Order, as modified above, are supported by competent substantial evidence and that the proceedings upon which the findings are based comply with the essential requirements of law. Consequently, we adopt the ALJ's findings of fact, as modified.

LEGAL CONCLUSIONS AND CONSIDERATION OF POLICY

Respondents have filed exceptions to sixteen of the ALJ's nineteen Conclusions of Law. (See Exceptions, ¶¶ 14-20). Petitioner, not surprisingly, supports the ALJ's Conclusions, and asks this Agency to adopt them in their entirety. (See Opposition, pp. 5-7). The ALJ's Conclusions appear to be based, in large part, upon his initial (and erroneous) restatement of the question at issue. Therefore, this Agency hereby REJECTS, in its entirety, the portion of the ALJ's Rec. Order entitled "Conclusions of Law," and will instead substitute its own Conclusions, as it is entitled to under Florida Law. See Fla. Stat. §120.57(j) (2000); see also State Contracting and Engineering Corporation v. Florida Department of Transportation, 709 So.2d 607, 609-10 (Fla. 2nd DCA 1999); Florida Public Employees Council 79 v. Daniels, 646 So.2d 813 (Fla. 1st DCA 1994).

The exact issue that was to be addressed at the Hearing was "whether 'cause' existed to terminate Petitioner's employment at the University of South Florida." (See ALJ's Amended Notice of Hearing from April 18, 2001). Under the terms of the employment contract between Petitioner and USF, USF could terminate Petitioner at any time for "cause," as that term was defined in the

contract.[4] The proper burden for Respondent, then, was to show that USF, based on all the information before it when making the decision to terminate Petitioner's Contract, had reason to believe that Petitioner had committed acts sufficient to breach her contract with the University.

In an employment relationship, such as the one between the University and Petitioner, USF has the right to independently "determine the weight of any particular performance standard" to which Petitioner is required to adhere. See Department of Commerce v. Public Employees Relations Commission, 662 So.2d 1365, 1368 (1st DCA 1995). To that end, "an agency may establish a standard whose relative importance is so great that failure to achieve that standard alone, can result in an employee's overall failure to meet performance standards." See id. Therefore, when considering the actions taken by Petitioner during the period in question (as determined by the Findings of Fact), it is this Agency - not the ALJ - that is in the best position to determine whether Petitioner's actions violated USF's employment policies and thereby created the "cause" necessary to terminate her employment contract. See Brogan, 725 So.2d at 1239.

---

4 The employment contract defined "cause" for termination by USF in ¶8(c), sub-paragraphs 1-8. The sub-paragraphs relevant to this case define cause as follows:

> (1) [The] failure or refusal by Coach [Petitioner] to perform any of the duties required by this Agreement, neglect by Coach of any of the duties required by this Agreement, an unwillingness to perform such required duties to the best of Coach's ability, or other breach of this Agreement; or...
>
> (5) Any fraud or dishonesty of Coach while performing the duties required by this Agreement, including, but not limited to, falsifying, altering or otherwise fraudulently preparing any document(s) or record(s) of, or required by, the University, the NCAA, or the Conference pertaining to recruits or student athletes, transcripts, eligibility forms, compliance reports, or expense reports, or any other document; or...
>
> (8) any conduct of the Coach which violates any Law or University Rules, or...any other conduct of the Coach which in the sole judgment of the University reflects adversely on the University or its educational mission...

See Hearing Exhibit 19, pp. 3, 4, 8, and 9.

Respondents have maintained that sufficient cause existed under Petitioner's employment contract to terminate that contract, based on Petitioner's actions during the investigation into Smith's claims of racial discrimination. The investigation, conducted by USF Equal Opportunity Affairs ("EOA") investigator Camille Blake, followed the standard procedure used by USF to investigate such claims. (See Transcript, pp. 113-130). Petitioner's behavior during the investigation, including her untruthfulness in responding to written questions submitted to her by Blake, led Blake to question Petitioner's credibility. (See id. at 145-147). Ultimately, based upon the information from interviews and written statements gathered by Blake, a final investigative report was produced. (See Hearing Exhibit 9). The report found that, based on all the evidence available, Petitioner had retaliated against Smith. (See id.). This determination was affirmed upon review by both the Director of Equal Opportunity Affairs, (see Hearing Exhibit 13), and by the Vice-President in charge of Human Resources, (see Hearing Exhibit 16). Once the findings were deemed final, Petitioner's employment contract was terminated for breach of the terms within that contract. (See Hearing Exhibit 17).

In the Rec. Order, the ALJ disregarded the findings of Blake, the Director of EOA, and the Vice-President of Human Resources, instead conducting a "de novo proceeding designed to find facts based on evidence presented during the hearing..." (See Rec. Order, ¶56). The ALJ then proceeded to treat the hearing as a trial on the merits as to whether Petitioner actually committed retaliation. (See id. at ¶57). The ALJ then found that the testimony of Blake was insufficient by itself to establish retaliation, and that none of the statements in her report were valid evidence because the statements were not sworn to by those interviewed, and therefore hearsay. (See id. at ¶¶ 58-63).

Whether Petitioner in fact committed impermissible retaliation in violation of Smith's rights is, ultimately, completely irrelevant for purposes of determining whether Petitioner's contract was terminated for cause. The question that needed to be answered at the Hearing was whether USF had

grounds to *believe* that Petitioner had committed retaliation, and thereby breached her employment contract. To address this issue, the ALJ was required to look at the evidence before the investigative officer (as well as those who reviewed her findings). The evidence, including the statements taken by Blake during her investigation, led Blake to the conclusion that Petitioner had committed retaliation. (See Transcript, pp. 149-151; see also Finding of Fact 41, as modified).

In making employment decisions, USF is neither required nor expected to conduct investigations within the strict confines of the legal evidence code that is required in a state or federal court. Similarly, USF does not have the resources to treat every investigation with the same depth and focus as a lawsuit would. The fact that the witnesses statements made to Blake were not sworn may make them inadmissible in a court of law, but they are still a valid basis upon which USF may make an employment decision. Federal courts, where the vast majority of employment disputes end up, have long held that it is the employer, not the courts, which is responsible for making employment decisions. See Nix v. WLCY Radio/Rahall Comm., 738 F.2d 1181, 1187 (11th Cir. 1984); see also Alphin v. Sears Roebuck & Co., 940 F.2d 1497, 1501 (11th Cir. 1991) (holding that a court should not sit as a super-personnel department that re-examines business decisions).

It is clear, from a full review of the record, that the EOA final investigative report was based on an investigation that involved both numerous witness interviews (including Petitioner's) and a thorough review of the available evidence (including the many hours of tape recordings from Hearing Exhibit 23). The final report took into account both the investigative report and Petitioner's lengthy response. (See Hearing Exhibits 9 and 15). The result of the full review by USF EOA officials was the decision that Petitioner engaged in retaliation. Petitioner offered no evidence to suggest that the investigation was improperly handled; in fact, even the ALJ acknowledged USF followed its policy and procedures in reaching this decision. (See Rec. Order ¶60).

Retaliation against an individual for having engaged in protected activity under USF's EOA rules is specifically prohibited by the EOA policy. (See Hearing Exhibit 3). This Agency, as a matter of policy, considers any such action to violate university rules, and to reflect adversely on the University and its educational mission. Upon full review of the entire record, this Agency finds that USF had valid cause to believe that Petitioner had engaged in retaliation against Dionne Smith. Therefore, as Petitioner's action violates the policy of USF as interpreted by this Agency, Petitioner breached a condition of her employment contract, and was subject to termination for cause under the terms of that contract. Cause therefore did exist for USF to terminate Petitioner's employment contract.

At the Hearing, Respondents also put forth evidence to establish that Petitioner had breached her employment contract (thus giving USF cause to terminate that contract) by intentionally falsifying information in written documents submitted to USF during the EOA investigation. Specifically, statements made by Petitioner in her written responses to Blake's Final Investigative Report (see Hearing Exhibit 15) were flatly inconsistent with other statements made by Petitioner, both directly to Blake and as tape-recorded during the April 1999 meetings, (see Hearing Exhibit 23).

There is no real dispute that Petitioner knowingly provided statements in her written responses to the Final Investigative Report that were contradicted by other, earlier statements. (See Findings of Fact (as modified) ¶¶ 44-48; see also Transcript, pp.94-96). The only question is whether such actions, i.e. intentionally providing false information to EOA officials during an ongoing investigation, is an action that is in violation of Petitioner's employment contract, and therefore cause for her dismissal. The ALJ did not believe so; however, the question of what types of offences are grounds for termination is a policy decision, and one best suited for this Agency to address. See State

Contracting and Engineering Corp. v. Department of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998).

Integrity and honesty are important qualities for any employee. For an employee of a public university - particularly one who speaks for the university in her role as head coach of an NCAA monitored sporting team - integrity and honesty are essential. The University reasonably had a right to expect a trust relationship with Petitioner in her role as head coach of the women's basketball team. Therefore, any action that would lead to a breach of that trust - such as showing a propensity to falsify documents submitted during an investigation into alleged racial discrimination - must be dealt with swiftly and surely.

So important is this issue of honesty, USF has written into its employment contracts a provision making any fraud or dishonesty cause for termination. (See, e.g., Petitioner's employment contract, Hearing Exhibit 19, ¶8(c)(5)). Petitioner falsified answers submitted to USF in the course of an ongoing investigation. (See Findings of Fact (as modified) ¶¶ 44-48; see also Transcript, pp.94-96). Petitioner's motives or reasons for having done so are irrelevant in light of the greater policy considerations this Agency must address. Therefore, as a matter of policy, based upon the public trust obligations of public employees, this Agency holds that Petitioner's actions in falsifying those answers are grounds for her termination. As a result, cause, as defined by Petitioner's employment contract, existed for USF to terminate that contract.

FINAL AGENCY DECISION

Upon full review of the record, and review of both the Florida Administrative Code and relevant case law, and for the reasons herein discussed, this Agency hereby finds that cause did exist for USF to terminate the employment contract of women's basketball coach, Jerry Ann Winters. Therefore, the recommendation of the ALJ in his Rec. Order is hereby **REJECTED**. Petitioner's employment contract will not be reinstated, nor will Petitioner receive any additional compensation from Respondents.

IT IS SO ORDERED.

A. C. Hartley by RLS
Albert C. Hartley
Vice President – Administrative Services

9-28-01
Date