STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHEILA KIESS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-2287
	)	
FLORIDA INTERNATIONAL UNIVERSITY,	)	
	)	
	)	
Respondent.	)	
	)	

ORDER DECLINING REMAND

On February 16, 2004, Respondent Florida International University ("FIU") entered an order "remanding" this case to the undersigned for further proceedings. Specifically, FIU wants, first, a determination as to whether FIU is an "employer" within the meaning of that term as defined in Section 112.19(1)(a), Florida Statutes; and, second, clarification of a statement in the Recommended Order regarding the relevant statute-years.

Because the remand order appeared to be facially insufficient to justify acceptance of the remand, the undersigned afforded the parties an opportunity to show cause in writing why further proceedings should be had before DOAH. In response to the Order to Show Cause, which was issued on February 24, 2004, the following papers have been filed: Petitioner's Response to Administrative Law Judge's Order to

Show Cause (02/25/04); Respondent's Response to Order to Show Cause (03/15/04); Respondent's Filing of Supplemental Authorities in Support of Respondent's Response to Order to Show Cause (03/16/04); and Petitioner's Reply to Respondent's Response and Filing of Supplemental Authority (03/17/04). This matter is ripe for adjudication.

Authority for Remand

As a threshold matter, the undersigned is mindful that FIU is an agency, not an appellate court; as such, its authority to articulate binding pronouncements of law (subject to judicial review) is limited to the party whose substantial interests are being determined at the moment.[1] Therefore, where the Administrative Law Judge ("ALJ") has fully discharged all of his duties under the Administrative Procedure Act ("APA") and there are no exceptional circumstances, FIU lacks the power to issue a mandate directing the Division of Administrative Hearings ("DOAH") to conduct further proceedings. DOAH's independence—— and hence the fairness of formal administrative proceedings—— would be compromised if agencies (which are litigants when under DOAH's jurisdiction[2]) were entitled to dictate to the impartial ALJ, much as an appellate court authoritatively decides the law or a trial judge instructs a jury.

While the foregoing might seem self-evident, it is nevertheless true that the Second District Court of Appeal, by

issuing writs of mandamus to reluctant hearing officers, on two occasions many years ago enforced a robust, implied agency power to remand. See Collier Development Corp. v. State Dept. of Environmental Reg., 592 So. 2d 1107, 1109 (Fla. 2d DCA 1991); Manasota 88, Inc. v. Tremor, 545 So. 2d 439, 441-42 (Fla. 2d DCA 1989). Fortunately, other courts have been more circumspect, and the Second DCA's treatment of DOAH as the agencies' handmaiden has not held sway.

For example, instead of compelling DOAH's submission to the litigating agency via extraordinary writ (and avoiding an immediate decision as to whether the agency or the ALJ is correct on the law) as the second district did, the First and Fourth District Courts of Appeal generally have elected to settle disputed legal issues on the merits. See Agency for Health Care Admin. v. Mount Sinai Medical Center of Greater Miami, 690 So. 2d 689, 692 (Fla. 1st DCA 1997)(treating petition for mandamus as one for interlocutory review of ALJ’s refusal to conduct evidentiary hearing on attempted remand); State Dept. of Environmental Protection v. Dept. of Management Services, Div. of Admin. Hearings, 667 So. 2d 369, 370-71 (Fla. 1st DCA 1995)(granting petition for review of non-final order declining remand, concluding that hearing officer had erred in various respects, and remanding for further proceedings at DOAH); Department of Prof. Reg. v. Wise, 575 So. 2d 713, 716-16 (Fla.

1st DCA), rev. denied, 584 So. 2d 997 (Fla. 1991)(sidestepping question whether agency has power to remand, even as concurring judge would recognize implicit power to remand for clarification of recommended findings); Florida Dept. of Law Enforcement, Criminal Justice Standards and Training Com'n v. Dukes, 484 So. 2d 645, 647 (Fla. 4th DCA 1986)(in agreeing to review non-final recommended order because agency otherwise would be effectively unable to appeal hearing officer's evidentiary rulings, court noted that the APA did not authorize agency to remand case to hearing officer with instructions to admit the evidence in question).

The general rule is that because agencies have at best implied authority to remand cases to DOAH prior to the entry of a final order, there being no statutory authority to do so, such action is justified only under "exceptional circumstances," and the ALJ has the power to refuse the remand. See Henderson Signs v. Florida Dept. of Transp., 397 So. 2d 769, 772 (Fla. 1st DCA 1981)(hearing officer acted within authority in denying remand where case presented no exceptional circumstances); see also Berry v. State Dept. of Environmental Reg., 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988)(assuming without deciding that agency had authority to remand, hearing officer did not err in refusing the remand, where hearing officer had complied with essential requirements of law); Florida Dept. of Transp. v. J.W.C. Co.,

Inc., 396 So. 2d 778, 785-86 (Fla. 1st DCA 1981)(concluding that reviewing court can remand for further fact finding; declining to hold that agency has inherent authority to remand, while leaving open possibility that agency might have such authority in exceptional circumstances).

Examples of exceptional circumstances under which an agency's implied power to remand would be acknowledged can be found in the reported decisions. In Miller v. State Dept. of Environmental Reg., 504 So. 2d 1325, 1325-26 (Fla. 1st DCA 1987), it was held that remand was appropriate where the agency, after receiving a recommended order, changed its mind about the validity of a permit condition with which the applicant had complied, and which the hearing officer, consistent with the agency's litigating position, had upheld.[3] As a consequence of the agency's changing its regulatory position, additional findings of fact were required regarding the environmental impact, if any, expected to result from the revision of the affected permit condition. Id. at 1327.[4] In Board of Medicine v. Mata, 561 So. 2d 364, 367-68 (Fla. 1st DCA 1990), the court held that in a licensing proceeding, where the statutes governing applications for licensure required the licensing board to consider all material information coming to light prior to the grant or denial of the license, it was appropriate for the agency to remand the case to DOAH for further proceedings to

resolve disputed issues of fact involving alleged misconduct discovered after the issuance of the recommended order. Clearly, neither Miller nor Mata involved circumstances similar to those presently facing the undersigned.

The undersigned concludes that FIU's limited implied authority to remand a case to DOAH properly may be exercised only in "exceptional circumstances." FIU's implied authority respecting remand is held in check initially by the ALJ, who possesses the authority, subject to judicial review, to refuse the remand if, in his view, the circumstances are not exceptional. See Henderson, 397 So. 2d at 772. Further, because the question whether exceptional circumstances exist is a question of law[5] over which FIU does not have substantive jurisdiction, FIU cannot modify or reject the ALJ's resolution of the issue. See § 120.57(1)(l), Fla. Stat.[6] It is appropriate, therefore, for the undersigned to determine independently whether remand is warranted.

Necessity of Remand

A.

In its remand order, FIU characterized as "jurisdictional" the question whether FIU is an "employer" under the applicable statutory definition. In its response to the show cause order, however, FIU failed to defend or support this questionable claim. For the reasons that follow, it is concluded that

neither DOAH's nor FIU's jurisdiction in this cause depends on whether FIU is an "employer" within the meaning of that term as defined in Section 112.19(1)(a).

FIU is clearly an "agency" for purposes of the APA. See § 120.52(1)(b)7., Fla. Stat. (defining "agency" as including "educational units") and § 120.52(6), Fla. Stat. (defining "educational unit" to include state universities). When FIU, an agency, denied Petitioner Sheila Kiess's request for lifetime health insurance benefits, as it did pursuant to a letter dated May 19, 2003, FIU made a decision that affected Ms. Kiess's substantial interests, thereby initiating a proceeding in which Section 120.569, Florida Statutes, applies.

FIU's decision was based on its factual determination that "the accident of September 14, 1994 is the root cause and/or the major contributing cause of [Ms. Kiess's] current disability." Ms. Kiess disputed this factual determination, thereby implicating Section 120.57(1), Florida Statutes, which applies whenever a Section 120.569 proceeding involves disputed issues of material fact. See § 120.569(1), Fla. Stat. Hence, Ms. Kiess was entitled to request that a formal administrative hearing be held at DOAH before a neutral administrative law judge, which she did. On June 12, 2003, FIU's President entered an order granting Ms. Kiess's request for a formal hearing and referring the matter to DOAH.

Given the above history, the conclusion is inescapable that FIU and DOAH have jurisdiction in this cause pursuant to the APA. The question whether FIU is an "employer" goes, not to the agency's jurisdiction, but to the question whether FIU should be liable to Ms. Kiess on the merits of her claim under the Alu-O'Hara Public Safety Act ("Act"). In other words, FIU has jurisdiction to hear and decide a claim for benefits under the Act, even if the claimant should lose because FIU is not an "employer" as the Act defines that term.

Because the issue of FIU's status as an "employer" is not jurisdictional, it was waivable. Significantly, at no stage of the proceedings before DOAH did FIU ever question its status as an "employer" under the Act. The issue simply was not in dispute. Indeed, FIU stipulated to its status as a potentially liable party (i.e. an "employer") and asserted at every turn that the only dispute involved which accident (9/16/94 vs. 1/24/95) resulted in Ms. Kiess's permanent impairment. Reduced to its essence, FIU's current position is little more than a request that the undersigned reopen the record so that FIU can offer evidence on an issue that FIU belatedly perceives to be potentially exculpatory. Receiving additional evidence after the evidentiary record has been closed, much less after the Recommended Order has been issued and the case returned to the agency, is highly disfavored and should be avoided, because "to

allow a party to produce additional evidence after the conclusion of an administrative hearing . . . would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures [sic] Act." See Collier Medical Center, Inc. v. State Dept. of Health and Rehabilitative Services, 462 So. 2d 83, 86 (Fla. 1st DCA 1985). It is concluded that FIU waived the issue of its "employer" status.

Additionally, there is yet another, separate and independent problem with the attempted remand on the "employer" issue, namely, the absence of any identified disputes of fact. Ignoring a specific request in the Order to Show Cause, FIU has not identified a single fact that is both disputed and material to the question whether FIU is an "employer" under the definition of Section 112.19(1)(a). The undersigned cannot accept a remand that is not predicated on a genuine dispute of material fact.

B.

Regarding the matter of the statute-years, the undersigned invited FIU, via the Order to Show Cause, to explain whether (and why) it believes the wrong law was applied in deciding this case. FIU did not avail itself of the opportunity to explicate its position. FIU's silence convinces the undersigned that FIU

has no reasonable basis for disagreeing with the undersigned's choice of statute-years——a matter about which, as the undersigned recalls, the parties were in agreement at the final hearing.

The undersigned concludes that no grounds have been stated which warrant even clarification of the statute-years issue, much less a remand to revisit it. Nevertheless, it will be noted for FIU's benefit that the Act was first regularly codified in the 1997 Florida Statutes and that the provisions of Chapter 440 incorporated by reference in the Act, as they existed in 1996 when the legislature adopted the Act, are found in the 1995 Florida Statutes.

C.

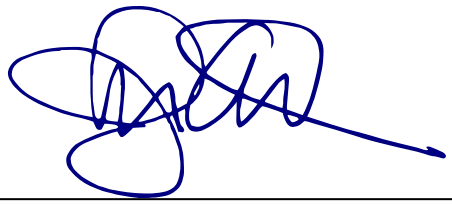
In responding to the show cause order, FIU has raised a brand new issue, contending for the first time that FIU should not be liable to Ms. Kiess because, at all material times, the Board of Regents, not FIU, was the "public employer" for purposes of collective bargaining. See § 447.203(2), Fla. Stat. (2001). Even today, FIU implies, the proper party respondent, if any, would be FIU's Board of Trustees, a "public body corporate" (and state "agency" for APA purposes), see Section 1001.72, Florida Statutes (2003),[7] that now serves as the "public employer," see Section 447.203(2), Florida Statutes (2003).

This argument, besides being untimely, is a red herring. As defined in Section 447.203(2), the term "public employer" (or "employer") is a term of art whose special meaning has application only in Part II of Chapter 447, which governs collective bargaining relationships between public employees and their designated "public employers." This case has absolutely nothing to do with collective bargaining. Thus, it is completely irrelevant to the question whether FIU was Ms. Kiess's "employer" as the term is defined in, and for purposes of, Section 112.19(1), Florida Statutes, that FIU was not her "public employer" as defined in, and for purposes of, Chapter 447, Part II, Florida Statutes. The former definition is an apple to the latter's orange.

Disposition

The undersigned, having concluded, for the foregoing reasons, that no exceptional circumstances exist, hereby declines to accept FIU's attempted remand of this case.

DONE AND ORDERED this 22nd day of March, 2004, in Tallahassee, Leon County, Florida.



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this 22nd day of March, 2004.

ENDNOTES

[1]/ When the agency and the Administrative Law Judge reach conflicting conclusions regarding the law, it is properly for the appellate court, not the agency, to authoritatively resolve such disagreements (unless of course an appeal is not taken, in which case the agency's legal conclusions become binding on the affected party). If the appellate court rules that additional fact-finding is required, then the court can remand the case for further proceedings before the Division of Administrative Hearings. See Cohn v. Department of Prof. Reg., 477 So. 2d 1039, 1047 (Fla. 3d DCA 1985)(holding that where the court of appeal determines that the hearing officer erred in deciding a point of law, the court must remand to the hearing officer for another hearing if disputed issues of material fact subsist).

[2]/ See § 120.569(2)(a), Fla. Stat. ("The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1)."); see also endnote 4, infra.

[3]/ The hearing officer, it should be added, accepted the remand, ultimately issuing a second recommended order. Id. at 1325. Thus, the hearing officer's authority to refuse the remand was not addressed in Miller.

[4]/ Commenting on the APA's requirement that referring agencies take no action except as a parties litigant while DOAH has jurisdiction over formal administrative proceedings, which requirement is currently codified in Section 120.569(2)(a), Florida Statutes, see endnote 2, supra, the Miller court stated in a dictum that the subject statutory "prohibition is clearly confined to action while the hearing officer retains jurisdiction, and is simply irrelevant to agency action in performance of quasi-adjudicative functions after the submission of a recommended order." Id. at 1327. While this statement is correct as far as it goes, it cannot reasonably be taken to mean that the referring agency is authorized, not only to urge, but to compel the ALJ to make findings of fact in accordance with the agency's legal conclusions, provided the agency orders the ALJ to follow its conclusions while jurisdiction is vested in the agency. If this larger proposition were true, then the agency, before referring the case to DOAH, could enter an order directing the ALJ to make findings of fact consistent with the agency's stated legal conclusions, which order would be tantamount to jury instructions. This is because, were it to be accepted that the agency has the power to make its legal conclusions binding on the ALJ after the hearing (when jurisdiction returns to the agency), then there would be no principled basis upon which to deny the agency such power before the hearing (when jurisdiction is first in the agency), the only thing separating the two being time, a distinction that does not affect the outcome. Going a step further, if the agency has the power to make its legal conclusions binding on the ALJ, then it should do so at the very beginning, well before the final hearing, rather than after the issuance of a recommended order, for that would be more efficient——and, in its transparency, more honest. Because the undersigned finds nothing in the APA contemplating a power of referring agencies to authoritatively instruct ALJs on the law before DOAH acquires jurisdiction, he concludes that agencies likewise do not possess such power after DOAH relinquishes jurisdiction——not, at least, where the circumstances are unexceptional.

[5]/ There is no suggestion in the cases that an evidentiary hearing should be held regarding the existence in fact of

exceptional circumstances. If this were a fact question, however, then it would be for the ALJ to decide, not the agency.

[6]/ This latter point is one the Second DCA could not have considered in Collier and Tremor. Those cases were decided in the years 1991 and 1989, respectively, when agencies had broad power to reject or modify hearing officers' conclusions of law. Indeed, the fact that agencies enjoyed such freedom to reject hearing officers' legal conclusions is what persuaded the Second DCA that obedience to an agency's order of remand must be a nondiscretionary or ministerial act on the hearing officer's part——a conclusion that was essential to the grant of mandamus. See Tremor, 545 So. 2d at 441-42.

Circumstances changed in 1996, when the legislature substantially amended the APA. One revision enacted that year, which remains in force, see § 120.57(1)(l), forbids litigating agencies from rejecting or modifying administrative law judges' conclusions of law on matters outside their substantive jurisdiction. See Ch.96-159, Laws of Florida § 19. (The subject provision was originally codified in paragraph j of § 120.57(1). See § 120.57(1)(j), Fla. Stat. (1997)). The undersigned concludes that to the extent Collier and Tremor can be read to suggest that ALJs have no choice but to do as the agency says on remand, those decisions are not good law in the wake of the 1996 APA amendments.

[7]/ To repeat for emphasis, FIU too is a state "agency" for APA purposes, as explained in the text supra. Moreover, FIU, like its Board of Trustees, is itself a public body corporate. See § 1004.21, Fla. Stat. (2003).

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