

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BABU JAIN,)
)
Petitioner,)
)
vs.) Case No. 03-3838
)
FLORIDA AGRICULTURAL AND)
MECHANICAL UNIVERSITY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on January 14 and 15, 2004, in Tallahassee, Florida, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Arthur Lewis Stern, III, Esquire
1904 West Indianhead Drive
Tallahassee, Florida 32301

For Respondent: Linda Barge-Miles, Esquire
Avery D. McKnight, Acting General Counsel
Office of the General Counsel
Florida A & M University
300 Lee Hall
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STATEMENT OF THE ISSUE

Whether Petitioner's employment with Respondent terminated on May 31, 2003, or whether Petitioner continued to be employed by Respondent during the next calendar month.

PRELIMINARY STATEMENT

By letter dated May 27, 2003, Respondent notified Petitioner that it was not in agreement with Petitioner's decision to void his participation in the Deferred Retirement Option Program (DROP). By letter dated May 30, 2003, Respondent advised Petitioner, Dr. Babu Jain, that two summer employment contracts for the periods May 12, 2003 through June 30, 2003 and July 1, 2003 through August 1, 2003, were issued in error "due to the fact that your DROP retirement date is May 31, 2003." The letter further advised that the Respondent considers Dr. Jain to have retired as of May 31, 2003.

Petitioner Jain disputed Respondent's decision and requested an administrative hearing. The request for hearing was forwarded to the Division of Administrative Hearings on or about September 29, 2003. A formal hearing was scheduled for January 14 and 15, 2004.

At hearing, Petitioner testified on his own behalf and presented the testimony of Mogus Mochena, Gladys Lang, William Tucker, Larry Robinson, Nellie Woodruff, and Larry Rivers. Joint Exhibits numbered 1 through 30 and 32 through 34 were admitted into evidence. Respondent presented the testimony of Larry Rivers and Larry Robinson. Respondent's Exhibits numbered 1 and 2, which included the deposition testimony of Valencia Matthews, were admitted into evidence.

Official Recognition was requested of Chapter 121, Florida Statutes (1997), and Florida Administrative Code Chapter 6C3-10. The request was granted.

A Transcript consisting of four volumes was filed on February 6, 2004. On February 27, 2004, the parties filed a Joint Motion for Extension of Time to File Proposed Recommended Orders, which was granted. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner Babu Jain was hired by Florida Agricultural and Mechanical University (FAMU) as a physics professor in September, 1967. He became an associate professor with tenure in 1979 and a full professor in 1996. The exact date of his last day of employment is a central issue in this case.

2. In 1998, Dr. Jain learned of the DROP program. After reviewing written materials regarding DROP for nearly a year, Dr. Jain decided to join DROP in 1999. He executed Forms DP-11 and DP-ELE, indicating his election to participate in DROP.

3. Form DP-ELE is entitled, "Notice of Election to Participate in the Deferred Retirement Option Program (DROP) and Resignation of Employment." Form DP-ELE includes the following: "RESIGNATION FROM EMPLOYMENT TO PARTICIPATE IN THE DROP - I elect to participate in the DROP in accordance with Subsection

121.091(13), Florida Statutes . . . and resign my employment on the date I terminate from the DROP." The form contains Dr. Jain's notarized signature below the following: "I understand that I must terminate all employment with FRS employers to receive a monthly retirement benefit and my DROP benefit under Chapter 121, F.S." Dr. Jain signed the form on October 12, 1999.

4. The bottom portion of Form DP-ELE is to be completed by the agency head or designated representative. Within that portion of the form, the signature of Nellie Woodruff, Director of Personnel Relations at FAMU, appears following an acknowledgement: "I acknowledge that DROP participation for Babu L. Jain will begin on 06/01/1999, and I accept his resignation effective 05/30/2003 (the date the employee's DROP participation will terminate)." This portion of the form indicates that it was signed by Ms. Woodruff on November 10, 1999.

5. Sometime in the early part of 2003, Dr. Jain, for personal and financial reasons, decided that he wanted to relinquish his participation in DROP. He was aware that if he did so, he would forfeit all accumulated DROP moneys.

6. Dr. Jain first relayed his desire to FAMU by verbally informing Dr. Henry Williams, the Assistant Dean of the College of Arts and Sciences, who was in charge of science departments.

This conversation took place in approximately mid-February, 2003.

7. On March 18, 2003, Dr. Jain sent a letter to Dr. Larry Rivers, Dean of the College of Arts and Sciences, which read in pertinent part as follows:

This letter is in connection with my 1999 DROP application. I would like to inform you that I am finding my circumstances very unfavorable to accept the DROP at this time and, hence, I will not be taking the retirement in May 2003.

8. Dr. Jain sent a copy to, among others, Dr. Gladys Lang, who was the Acting Provost and Vice President of Academic Affairs at that time. She did not take any action regarding Dr. Jain's letter because it was her understanding and belief that no action was necessary. It was her understanding and belief that that Dr. Jain notified the University of his decision to withdraw from DROP and that no action was necessary on her part, "because I believed that the participants in DROP could make that decision that they wanted to continue to work and did not want to continue in the DROP program. I did nothing." She considered her decision not to take any action on Dr. Jain's letter to be an acceptance of his decision. However, Dr. Lang acknowledged that had the letter been addressed to her, rather than her receiving a copy of it, she would have responded.

9. Dr. Jain did not receive any response to his March 18, 2003, letter to Dr. Rivers. Because of this, Dr. Jain wrote again to Dr. Rivers on April 18, 2003, in which he reiterated that he did not want to retire in May 2003.

10. Dr. Jain received a Termination Notification Form, Form DP-TERM, from the Division of Retirement in February 2003. Form DP-TERM specifies that it must be completed by both the DROP participant and the employer. It reads in pertinent part as follows:

According to our records, your DROP termination date is 05/31/03. This form must be completed by both you and your employer and returned to the Division of Retirement in order to receive your DROP benefits and your monthly retirement benefits. In order to collect DROP, you must agree to the following statements.

I understand that I cannot accept work for any Florida Retirement System (FRS) covered employer during the calendar month following my DROP termination date or my DROP participation will be null and void. If I fail to meet this requirement, I will forfeit my accumulated DROP benefit including interest. I also understand that I may not be reemployed by any FRS employer in any capacity . . . during the calendar month immediately following my DROP termination date. If I fail to meet this requirement, I will forfeit my accumulated DROP benefit, including interest retroactive to my enrollment date in DROP.

I understand that if I forfeit my DROP benefit, my employer will be responsible for making retroactive retirement contributions and I will instead be awarded service credit

for the time period during which I was in DROP. I will be eligible for a service retirement benefit based on my new termination date. I will be responsible for submitting an Application for Service Retirement. My retirement benefit will be based on my creditable service and salary, including such service and salary earned while in DROP.

11. Dr. Jain did not sign Form DP-TERM. It is not clear from the record whether FAMU was even aware that Dr. Jain received this form. In any event, the portion of the form which is to be completed by the employer certifying that the employee has or will terminate employment is not signed by anyone from FAMU.

12. Dr. Bill Tucker is a faculty member of the physics department and is president of the FAMU chapter of the United Faculty of Florida. On or about April 19, 2003, Dr. Tucker met with Dr. Rivers regarding Dr. Jain's intention not to retire. Dr. Tucker left that meeting with the impression that Dr. Rivers had accepted Dr. Jain's decision to remain a faculty member at FAMU and not retire in May 2003.

13. Following that meeting, Dr. Jain wrote a letter dated April 21, 2003, to Dr. Rivers thanking him for his support and understanding that he, Dr. Jain, had decided not to retire. The letter also reminded Dr. Rivers that Dr. Mochena had not yet given him his 2003-2004 assignment of responsibilities, and

requested that Dr. Rivers ask Dr. Mochena to do so at his earliest opportunity.

14. Dr. Rivers did then call Dr. Mochena regarding preparing a schedule for fall semester for Dr. Jain. Dr. Mochena described the call as a "very quick call." As a result of that call, Dr. Mochena issued an Assignment of Responsibility Form on April 23, 2003, for Dr. Jain for the fall 2003 semester. While Dr. Rivers insisted at hearing that his intention was that Dr. Jain be assigned teaching duties on an adjunct basis, he acknowledged, and Dr. Mochena confirmed, that the assignment of responsibilities for Dr. Jain for fall of 2003 was not of a type that would have been given to an adjunct professor.

15. Sometime after April 23, 2003, Dr. Jain asked Dr. Mochena to assign him teaching responsibilities for the summer of 2003. Dr. Mochena had already made his summer teaching assignments. He assumed, however, that since Dr. Jain was being assigned fall classes, that it was it would be appropriate to assign summer classes to Dr. Jain as well. On May 2, 2003, Dr. Mochena issued an Assignment of Responsibility Form for Summer Term "C" 2003, which was for 12 weeks. This was signed by Dr. Jain and Dr. Mochena on May 2, 2003. While Dr. Mochena's assignment of summer teaching responsibilities to Dr. Jain was as a result of Dr. Jain's request and not at the

request of the Dean's office, Dr. Henry Williams, Assistant Dean for the College of Arts and Sciences, and Dr. Larry Rivers signed the Assignment of Responsibility Form for Summer Term "C" for Dr. Jain on May 5 and 6, 2003, respectively.

16. Dr. Williams and Dr. Rivers also signed two forms on May 5 and 6, 2003, respectively, regarding Dr. Jain entitled "Recommendation for Faculty Employment." One was for the period of employment designated May 12, 2003 to June 30, 2003. The second was for the period July 1, 2003 to August 1, 2003. These recommendations went to the new Provost, Dr. Robinson.

17. Dr. Larry Robinson became Provost and Vice President of Academic Affairs of the University on May 5, 2003.

18. On May 20, 2003, Dr. Robinson signed two employment contracts regarding Dr. Jain for Summer Term "C." The first contract period was May 12, 2003 to June 30, 2003. The period of the second contract was July 1, 2003 until August 1, 2003. There were two contracts covering the summer term because the "C" summer term during which the physics courses were taught, extended into the next fiscal year. There is a section on the two summer contracts entitled "Tenure Status." There is an "X" beside the designation "Tenured."

19. On May 21, 2003, Nellie Woodruff sent a memo addressed to Dr. Robinson which stated as follows:

SUBJECT: DROP Termination Date for Babu L. Jain

We are requesting your intervention in bringing closure to the subject employee's request to withdraw from the DROP and continue his employment with the University subsequent to May 31, 2003. Enclosed are copies of the documents which were received in this Office from both Dr. Jain and the Division of Retirement.

Please advise this office by May 30, 2003, regarding the appropriate action to take relative to Dr. Jain's request for withdrawal from the DROP and remaining an employee of the University.

20. According to Dr. Robinson, Ms. Woodruff's May 21, 2003, memorandum to him was the first time he "officially" became aware of the issue regarding Dr. Jain. That is, he was generally aware of the fact that several employees were approaching their retirement date and entering DROP. Dr. Jain's designated retirement date was a month earlier than the other FAMU DROP participants who had a June 30, 2003, DROP termination date. Whether Dr. Robinson had unofficial knowledge of Dr. Jain's retirement date or of his desire to withdraw from DROP at the time he signed the two summer contracts is unclear based upon his testimony.

21. As a result of learning of Dr. Jain's situation, Dr. Robinson sent a certified letter to Dr. Jain dated May 27, 2003, which read as follows:

This comes in response to your request to void your participation in the Deferred Retirement Option (DROP) program. It appears from your correspondence of April 18, 2003, addressed to Dr. Larry Rivers, Dean of the College of Arts and Sciences, that you believe the decision to void your participation is a unilateral one.

On the contrary, the decision to void your participation in DROP is a mutual one, requiring the University's assent. The University is not in agreement with your decision to void your participation in DROP.

I call your attention to two documents, Form DP-ELE and Form DP-11, which are on file with your signature. Specifically, Form DP-ELE reads in relevant part as follows: "I elect to participate in the DROP in accordance with Subsection 121.091(13), Florida Statutes (F.S.), as indicated above and resign my employment on the date I terminate from the DROP." Additionally, Form DP-11 reads in relevant part as follows: "I have resigned my employment on the date stated above and elect to participate in the DROP in accordance with Subsection 121.091(13), Florida Statutes (F.S.)."

Regrettably, the University must inform you that it will follow the guidelines for DROP as outlined in the aforementioned Florida Statutes and cannot support your request to void your application in DROP. I also call your attention to Florida A&M University Rule 6C-10.211(2)(c), Florida Administrative Code which is enclosed with the aforementioned forms. Thank you for your many years of service to the University.

22. The Division of Retirement issued a letter, dated May 5, 2003, to Dr. Jain with Form DP-VOID enclosed. Dr. Jain insists he did not receive it in the mail and, therefore, went

to the Division of Retirement on May 29, 2003, to pick it up. In any event, he signed the DROP-VOID form on May 29, 2003, and took it to FAMU in an attempt to get it executed by Dr. Rivers or Dr. Robinson. The DROP-VOID form contains a section entitled "Employer Certification" which reads as follows:

This is to certify that the _____ (agency name) has rescinded the resignation of the above named member, and the member will continue working in a regularly established position with FRS coverage. We understand the member's DROP participation will be null and void, the membership in the FRS Pension Plan will be reestablished to the date the member joined the DROP and we will begin immediately reporting the correct retirement plan and contributions to the Division of Retirement. FRS will adjust previous payrolls reported under DROP based upon the member not having joined the DROP. In addition, we understand that contributions, plus interest, may be required. Future payrolls should reflect the retirement plan of active membership.

23. Despite Dr. Jain's efforts on May 29 and 30, 2003, to get this form signed, the DROP-VOID form was not signed by anyone at FAMU.

24. On either May 29 or 30, 2003, Dr. Mochena received a call from Dr. Henry Williams, Assistant Dean for the College of Arts and Sciences, who instructed Dr. Mochena to end Dr. Jain's summer employment and to reassign Dr. Jain's classes to another instructor. Dr. Mochena assigned Mr. Jay Jackson to teach Dr. Jain's classes beginning Monday, June 2, 2003.

25. Dr. Robinson wrote a second letter to Dr. Jain on May 30, 2003, which read in pertinent part as follows:

Dear Dr. Jain:

This letter is to inform you that the two Summer Semester Employment Contracts, May 12, 2003 to June 30, 2003, and July 1, 2003 to August 1, 2003, were issued in error to you due to the fact that your DROP retirement date is May 31, 2003. As a result, you will be paid through May 30, 2003 for your services to the University and the University will consider you to have retired as of May 31, 2003.

26. On Monday, June 2, 2003, Dr. Jain arrived at his classroom where Mr. Jackson was teaching. Dr. Jain left the classroom and went to see Dr. Mochena. Dr. Jain learned from Dr. Mochena that he had been instructed by the Dean prior to Saturday, May 31, 2003, to replace Dr. Jain with another instructor.

27. Dr. Jain continued to go to his office for several days after June 2, 2003, "doing things I usually do. Do some research, study, read." He did not teach any classes in June 2003.

28. Each department submits a payroll certification indicating the number of hours that an employee worked during a pay period. The payroll certification signed by Dr. Mochena on June 4, 2003, for the pay-period May 23 through June 5, 2003, initially indicated that Dr. Jain worked 79.3 hours. However,

the 79.3 was crossed out and replaced with 47.58. The 47.58 was in handwriting, not typed as the rest of the numbers on the certification sheet which included the entry of 79.3 hours.

29. The record is not clear as to who made the correction or when it was made. According to Ms. Woodruff, however, it is not the practice of the payroll section to change any certifications after the fact. Additionally, once an employee in a salaried position is added to the payroll, he/she is automatically issued a paycheck based upon the contract, unless some action occurs. In any event, the payroll section did not make an adjustment in Dr. Jain's pay for the pay-period May 23 through June 5, 2003.

30. Dr. Jain's received an Earnings Statement reflecting a "pay date" of June 13, 2003, and a pay-period of 05/23/2003-06/05/2003 reflecting regular wages of \$3,266.11. Subsequently, the payroll office at FAMU completed a Refund for Overpayment of Salary form and submitted it to the Office of the Comptroller, Bureau of State Payrolls. In the section entitled, Reason for Adjustment, the payroll office wrote, "DROP end date 5/30/03."

31. A salary refund in the amount of \$898.33 was deducted from Dr. Jain's sick leave payout on June 20, 2003.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

33. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is established otherwise by statute. Young v. State, Department of Community Affairs, 567 So. 2d 2 (Fla. 3rd DCA 1990); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner, Dr. Jain, has the burden of proof in this proceeding.

34. Two competing statutory provisions come into play in this analysis. The first, Section 121.091(13), Florida Statutes, reads in pertinent part as follows:

(13) DEFERRED RETIREMENT OF OPTION PROGRAM.--In general, and subject to the provisions of this section, the Deferred Retirement Option Program, hereinafter referred to as the DROP, is a program under which an eligible member of the Florida Retirement System may elect to participate, deferring receipt of retirement benefits while continuing employment with his or her Florida Retirement System employer. The deferred monthly benefits shall accrue in the System Trust Fund on behalf of the participant, plus interest compounded monthly, for the specified period of the DROP participation, as provided in paragraph (c). Upon termination of employment, the participant shall receive the total DROP benefits and begin to receive the previously determined normal retirement benefits. Participation in the DROP does not guarantee employment for the specified period of DROP. Participation in the DROP by an eligible member beyond the initial 60-month period as authorized in this subsection shall be on an

annual contractual basis for all participants.

(b) Participation in the DROP.--

1. An eligible member may elect to participate in the DROP for a period not to exceed a maximum of 60 calendar months . . .

2. Upon deciding to participate in the DROP, the member shall submit, on forms required by the division:

a. A written election to participate in the DROP;

b. Selection of the DROP participation and termination dates, which satisfy the limitations stated in paragraph (a) and subparagraph 1. Such termination dates shall be in the a binding letter of resignation with the employer, establishing a deferred termination date. The member may change the termination date within the limitations of subparagraph 1., but only with the written approval of his or her employer;

c. A properly completed DROP application for service retirement as provided in this section; and

d. Any other information required by the division.

3. . . . However, participation in the DROP does not alter the participant's employment status and such employee shall not be deemed retired from employment until his or her deferred resignation is effective and termination occurs as provided in s. 121.021(39). (emphasis added)

35. Section 121.021(39)(b), Florida Statutes, reads in pertinent part as follows:

"Termination" for a member electing to participate under the Deferred Retirement Option Program occurs when the Deferred Retirement Option Program participant ceases all employment relationships with employers under this system in accordance with s. 121.091(13), but in the event the Deferred Retirement Option Program participant should be employed by any such employer within the next calendar month, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence shall constitute a continuation of the employment relationship. (emphasis added)

36. Florida Administrative Code Rule 60S-11.004 reads in pertinent part:

(9) Termination of Employment for Participants Not in the Elected Officers' Class -- A DROP participant not in the Elected Officers, Class must terminate employment on or before the preselected resignation date specified on Form DP-ELE. If a participant fails to terminate on or before the DROP termination and resignation date:

(a) Retirement and DROP participation are voided.

(b) The DROP accumulation and any monthly retirement benefits are forfeited.

(c) Membership in the member's retirement plan will be retroactively reestablished to the date the member initiated DROP participation. (emphasis added)

37. The preponderance of the evidence shows that "all employment relationships" with Dr. Jain did not terminate,

within the meaning of Section 121.021(39)(b), Florida Statutes, on May 30, 2003.

38. While Dr. Mochena's actions of assigning summer classes to Dr. Jain were a result of Dr. Jain's requesting that he do so, and not at the direction of his administrative superiors, those actions were ratified at each administrative level of the University. Most significantly, Dr. Robinson signed contracts with Dr. Jain, a tenured professor, for Summer Term "C", entitling him to employment "within the next calendar month" following his DROP termination date. Moreover, while the FAMU administration did not sign the DROP-VOID form, the contracts issued to Dr. Jain constitute written approval of Dr. Jain's employer regarding modification of his termination date.

39. The summer contracts entered into between FAMU and Dr. Jain are clear and unambiguous. Parties are bound by unambiguous terms of a contract. 2004 WL 840228, 29 Fla.L.Weekly 1002, __So. 2d__ (Fla 1DCA 2004); FAMU's actions of writing letters to him after the contracts had been signed by the parties and in completing the Refund for Overpayment of Salary form, which resulted in \$898.76 being withheld from Dr. Jain's sick leave payout, were unilateral acts by one party to a contract attempting to, in effect, rescind the contract.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That Respondent enter a final order rescinding its letters of May 27 and 30, 2003, and reinstating Petitioner to employment effective June 1, 2003, including all salary and benefits for that period of time.^{1/}

DONE AND ENTERED this 17th day of May, 2004, in Tallahassee, Leon County, Florida.

S

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2004.

ENDNOTE

^{1/} Petitioner in his Proposed Recommended Order requested to be reimbursed for attorney's fees. Petitioner does not cite to the authority under which he makes his request.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.