STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BABU JAIN, Petitioner, vs. FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY, Respondent.	)	Case No. 05-3990F

FINAL ORDER

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to an award of attorney's fees pursuant to Section 57.105(5), Florida Statutes, and, if so, what amount?

PRELIMINARY STATEMENT

Pursuant to notice, the undersigned conducted a hearing on January 14 and 15, 2004, in the underlying case of Babu Jain v. Florida Agricultural and Mechanical University, DOAH Case No. 03-3838. A Recommended Order was entered on May 17, 2004, in favor of Petitioner, Dr. Babu Jain. Petitioner in his Proposed Recommended Order requested to be reimbursed for attorney's fees but did not cite to the authority under which he made his request.

On June 1, 2004, Petitioner filed Exceptions to Recommended Order and Motion to Administrative Law Judge for Award of Attorney's Fees Pursuant to Section 57.105(5),Florida Statutes.[1/] Respondent also filed Exceptions to Hearing Officer's Proposed Recommended Order on the same date. Petitioner filed a Reply to Respondent's Exceptions to Recommended Order and Petitioner's Reply to Respondent's Opposition to Awarding of Attorneys' Fees to Petitioner.

On August 19, 2004, the Florida Agricultural and Mechanical University (hereinafter FAMU) issued a Final Order which included rulings on the exceptions filed by each party and which did not award attorney's fees.

An appeal ensued before the First District Court of Appeal in Case No. 1D04-4167, which resulted in an Opinion issued on October 20, 2005, remanding the case to the undersigned for a determination of Dr. Jain's entitlement to attorney's fees under Section 57.105(5), Florida Statutes.

Accordingly, the instant case was opened at the Division of Administrative Hearings. The undersigned issued a Notice of Hearing scheduling the final hearing for December 13, 2005. Petitioner filed a letter with the Division on December 2, 2005, requesting clarification with respect to the Notice of Hearing. A telephone conference call was held on December 7, 2005, which resulted in a continuance of the hearing date and a briefing

schedule being established. The hearing was rescheduled for January 6, 2006.

Petitioner filed a Petition of Dr. Babu Jain for a Determination as to His Entitlement to Attorney's Fees and Costs Pursuant to Section 57.105, Florida Statutes, with accompanying affidavits and a Memorandum of Law and Facts in Support of the motion. FAMU filed a Response to Petition of Dr. Babu Jain for a Determination as to his Entitlement to Attorney's Fees and Costs Pursuant to Section 57.105, Florida Statutes, with an accompanying affidavit.

Another telephone conference call took place on January 5, 2006, during which it was decided that the case would proceed on the pleadings and that there would be no live hearing. The parties were permitted to file reply memoranda on or before January 23, 2006. Petitioner filed a Reply of Petitioner to FAMU's Responsive Memorandum. FAMU did not file a reply.

The parties requested that Official Recognition be taken of all pleadings filed in DOAH Case No. 03-3838, including the Recommended Order and Final Order and of the following pleadings and Orders from the appeal in First District Court of Appeal Case No. 1D04-4167: the October 20, 2005, Opinion of the First District Court of Appeal remanding the case to the undersigned and Mandate issued on December 16, 2005; the Index to Record on Appeal; Dr. Jain's Initial and Reply Briefs; and Dr. Jain's

Motion for Rehearing and Clarification and the November 30, 2005, Order denying same. The parties' request for Official Recognition of the enumerated documents is granted. References to the Florida Statutes is to Florida Statutes, 2005 unless otherwise indicated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. § 57.105(5), Fla. Stat.; and Order and Mandate in Case No. 1D04-4167, First District Court of Appeal.

2. Section 57.105(5), Florida Statutes, reads as follows:

> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

3. Subsection (5) of Section 57.105, Florida Statutes, directs the undersigned to the preceding subsections which set forth standards to be applied in the analysis of entitlement to

attorney's fees. Subsection (1) provides that reasonable attorney's fees shall be awarded to the prevailing party to be paid by the losing party where the losing party or the losing party's attorney knew or should have known that a claim or defense, when initially presented to the administrative tribunal or at any time before the administrative hearing, "[w]as not supported by the material facts necessary to establish the claim or defense or [w]ould not be supported by the application of then-existing law to those material facts."

4. The standards set forth in Subsection (1) and incorporated by reference in Subsection (5) were the result of an amendment to Section 57.105, Florida Statutes, in 1999. s. 4, Ch. 99-225, Laws of Florida. Prior to that amendment, the statute provided for the award of attorney's fees when "there was a complete absence of justiciable issue of either law or fact raised by the complaint or defense of the losing party." These new standards became applicable to administrative hearings in 2003 by s. 9, Ch. 2003-94, Laws of Florida, with an effective date of June 4, 2003. Petitioner filed his Petition for Administrative Hearing in September 2003. Accordingly, the newer standards of Section 57.105, Florida Statutes, apply to this case.

5. In the case of Wendy's v. Vandergriff, 865 So. 2d 520, (Fla. 1st DCA 2003), the court discussed the legislative changes to Section 57.105:

> [T]his statute was amended in 1999 as part of the 1999 Tort Reform Act in an effort to reduce frivolous litigation and thereby to decrease the cost imposed on the civil justice system by broadening the remedies that were previously available. See Ch. 99-225, s. 4, Laws of Florida. Unlike its predecessor, the 1999 version of the statute no longer requires a party to show a complete absence of a justiciable issue of fact or law, but instead allows recovery of fees for any claims or defenses that are unsupported. (Citations omitted) However, this Court cautioned that section 57.105 must be applied carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings. (Citations omitted)
>
> In determining whether a party is entitled to statutory attorney's fees under section 57.105, Florida Statutes, frivolousness is determined when the claim or defense was initially filed; if the claim or defense is not initially frivolous, the court must then determine whether the claim or defense became frivolous after the suit was filed. (Citation omitted) In so doing, the court determines if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of existing law.(Citation omitted) An award of fees is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action. (Citation omitted)

Wendy's v. Vandergriff, 865 So. 2d 520, 523.

6. The court in Wendy's recognized that the new standard is difficult to define and must be applied on a case-by-case basis:

> While the revised statute incorporates the 'not supported by the material facts or would not be supported by application of then-existing law to those material facts' standard instead of the 'frivolous' standard of the earlier statute, an all encompassing definition of the new standard defies us. It is clear that the bar for imposition of sanctions has been lowered, but just how far it has been lowered is an open question requiring a case by case analysis.

Wendy's v. Vandergriff, 865 So. 2d 520, 524 citing Mullins v. Kennelly, 847 So. 2d at 1155, n.4. (Fla. 5th DCA 2003).

7. More recently, the First District Court of Appeal further described the legislative change:

> The 1999 version lowered the bar a party must overcome before becoming entitled to attorney's fees pursuant to section 57.105, Florida Statutes . . . Significantly, the 1999 version of 57.105 'applies to any claim or defense, and does not require that the entire action be frivolous.'

Albritton v. Ferrera, 913 So. 2d 5, 6 (Fla. 1st DCA 2005), quoting Mullins v. Kennelly, supra.

8. The Florida Supreme Court has noted that the 1999 amendments to Section 57.105, Florida Statutes, "greatly expand the statute's potential use." Boca Burger, Inc. v. Richard Forum, 912 So. 2d 561, 570, (Fla. 2005).

9. The phrase "supported by the material facts" found in Section 57.105(1)(a), Florida Statutes, was defined by the court in Albritton to mean that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." Albritton, 913 So. 2d 5, at 7, n.1.

10. Therefore, the first question is whether FAMU or its attorneys knew or should have known that its defense of Dr. Jain's claim was not supported by the material facts necessary to establish the defense when the case was initially filed or at any time before trial. That is, did FAMU possess admissible evidence sufficient to establish its defense.

11. The parties filed a Pretrial Stipulation the day before the hearing. The Pretrial Stipulation characterized FAMU's position as follows:

> It is the position of the University that Dr. Babu Jain retired at the close of business on May 30, 2003, pursuant to the provision of the DROP retirement program. Dr. Jain did not have the right, nor the authority, to unilaterally rescind his resignation and retirement date.
>
> In a letter dated May 5, 2003, the Division of Retirement informed Dr. Jain that it was providing him with the "DROP VOID" form that had to be signed by himself and the University, for his participation in DROP to be rescinded. No University official signed that form nor agreed to rescind his retirement. On May 30, 2003, Dr. Babu Jain knew that his retirement through DROP had not been voided and that he had in-fact retired.

> The University included the position that Dr. Jain occupied in its vacancy announcement in the 'Chronicle of Higher Education.' The University, through Dr. Larry Robinson notified Dr. Jain that his retirement rescission was not accepted. Dr. Jain did not work past May 30, 2003.
>
> Finally, there was never a 'meeting of the minds', nor any other agreement between the University and Dr. Jain to void his retirement commitment. It [is] the University's position that Dr. Babu Jain retired from Florida Agricultural and Mechanical University effective at the close of business on May 30, 2003.

Pretrial Stipulation at 14-15. (emphasis in original)

12. The material facts known by FAMU necessary to establish its defense against Petitioner's claim at the time the case was filed included: Petitioner's initial Notice of Election to Participate in DROP and Resignation of Employment in which Dr. Jain resigned effective the date he terminated from DROP (designated as May 30, 2003); Dr. Robinson's letter dated May 27, 2003, which asserted that the University was not in agreement with Dr. Jain's decision and that the decision to terminate from DROP is a mutual one; Dr. Robinson's letter of May 30, 2003, which informed Dr. Jain that the two summer semester employment contracts were issued to him in error and informing Dr. Jain that he would be paid through May 30, 2003, his designated DROP date; the refusal of anyone from FAMU to sign the DROP-VOID form provided to Dr. Jain by the Division of

Retirement; the reassignment of another instructor to take over Dr. Jain's classes the first Monday following the designated DROP termination date; and the Refund of Overpayment of Salary Form and resulting salary deduction from Dr. Jain's sick leave payout.

13. It is difficult to determine what, if any, additional facts FAMU learned through discovery. That is, whether deposition testimony of FAMU officials enlightened FAMU or its attorneys as to material facts not known at the time the case was filed by Dr. Jain, is not readily apparent.

14. However, a review of the pre-trial depositions reveals material facts which supported FAMU's defense that the summer contracts were issued in error and that there was no meeting of the minds between the parties regarding voiding Dr. Jain's DROP participation. In particular, Dr. Robinson, Provost and Vice-President for Academic Affairs, testified in deposition that when he signed Dr. Jain's summer employment contracts on May 20, 2003, he had no knowledge of Dr. Jain's participation in the DROP program; that he first became aware that Dr. Jain was in DROP with a DROP termination date of May 30, 2003, upon receiving a May 21, 2003, memorandum from Nellie Woodruff, Director of the FAMU Personnel Office; and that Dean Larry Rivers did not have the authority to issue work assignments for any of his faculty beyond their DROP dates.

15. Additionally, Dr. Henry Williams, Assistant Dean for Science and Technology, testified in deposition that when he signed the Recommendation for Summer Employment on May 5, 2003, which recommended Dr. Jain for teaching summer courses beginning May 12, 2003, he was unaware that there was a 30-day window during which a DROP participant could not be employed.

16. Obviously, when the undersigned weighed all of the evidence, including evidence presented at hearing which is not part of this analysis, it was determined that the preponderance of the evidence was in favor of Dr. Jain's position. However, that is not the standard to be applied here. The undersigned concludes that at the time the case was filed and prior to the commencement of the hearing, FAMU possessed admissible evidence sufficient to establish the fact that it did not give written agreement to his decision to abandon DROP and resume employment if accepted by the finder of fact. While the finder of fact ultimately did not agree with FAMU, FAMU possessed the material facts necessary to establish the defense, i.e., admissible evidence sufficient to establish the fact if accepted by the trier of fact, when the case was filed and prior to the final hearing.

17. The second question is whether FAMU's defense would not be supported by the application of then existing law to

those material facts, when the case was initially filed or at any time before the final hearing.

18. In the Pretrial Stipulation, the parties referenced Sections 121.091(13) and 121.021(39), Florida Statutes, as provisions of law relevant to the determination of the issues in the case.[2/] These statutory provisions were also referenced by the undersigned in the Recommended Order as "two competing statutory provisions." Recommended Order at 15.

19. Subsection 121.091(13), Florida Statutes, establishing the DROP program, was created by s. 8, Ch. 97-180, Laws of Florida, with an effective date of January 1, 1999.[3/]

20. Section 121.091(13), Florida Statutes (2003), read as follows:

> DEFERRED RETIREMENT 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.

21. Section 121.021(39)(b), Florida Statutes (2003), read 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.

22. Unlike the situation in Albritton, supra, the DROP program was relatively new and the statutes creating the same were not well established provisions of law. Dr. Jain was in the first “class” of DROP for FAMU. FAMU and its lawyers did not have the benefit of established case law that discussed DROP and its provisions when this case was filed or at any time before the hearing. While general contract law also came into play, it had to be considered in the context of the DROP program, which had no precedent of case law.

23. FAMU argues in its Response to the Motion for Attorney's Fees that it interpreted the provision in Section 121.091(13), Florida Statutes, that requires written approval of the employer to be either the DROP VOID form provided by the Division of Retirement or a written document, executed by the designated University official, specifically approving Petitioner's decision. "The University did not believe the employment contracts that were issued to Petitioner in error, would constitute written approval." FAMU's Response at 5. This argument is consistent with the position FAMU took in the Pretrial Statement quoted above, that there was never a meeting of the minds "or any other agreement" that Dr. Jain's retirement rescission was accepted.

24. A critical conclusion in the Recommended Order is found in paragraph 38: "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."

25. FAMU also took the position in the Pretrial Stipulation that Dr. Jain did not work past May 30, 2003, based upon the material facts recited above. Under that reading of the facts, Dr. Jain did not work during the next calendar month after DROP, and, therefore terminated employment consistent with

the definition of "termination" in Section 121.021(39)(b), Florida Statutes.

26. Again, while the undersigned did not agree with FAMU's application of the material facts to the then-existing law, FAMU's interpretation was not completely without merit. See Mullins v. Kennerly, 847 So. 2d 1151, 1155. (Case completely without merit in law and cannot be supported by reasonable argument for extension, modification or reversal of existing law is a guideline for determining if an action is frivolous.)

27. Accordingly, the undersigned concludes that at the time the case was filed and prior to the commencement of the hearing, FAMU did not know and could not be expected to know that its defense would not be supported by the application of then-existing law to the material facts necessary to establish the defense.

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

ORDERED:

Petitioner’s Motion for Attorney’s Fees is denied.

DONE AND ORDERED this 1st day of March, 2006, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 2006.

ENDNOTES

1/ Petitioner stated in his Initial Brief filed with the First District Court of Appeal, Case. No. 1D04-4167, "presumably, the ALJ did not act upon Appellant's Exceptions and Motion because she did not consider that she continued to have jurisdiction to do so." (Initial Brief at 19) Petitioner's presumption is correct. FAMU, as the agency issuing the final order, ruled on the exceptions pursuant to Section 120.57(1)(k), Florida Statutes. The Motion for Attorney's Fees was filed after the Recommended Order was entered and before the Final Order was issued. Accordingly, the undersigned could not have ruled on the motion because no final order had been issued at the time the motion was filed, and, therefore, there was no prevailing party. No motion for fees was filed after the Final Order was issued until the case was remanded to the Division. Because the court's discussion of whether the motion was untimely is dispositive of that issue (Order, p. 3), the undersigned will not address further the issue of timeliness and will proceed to the determination of entitlement to attorney's fees.

2/ The parties also referenced Florida Administrative Code Chapter 6C3-10 pertaining to tenure and other personnel matters concerning FAMU.

3/ The effective date of Subsection 121.091(13) was contingent, upon the Division of Retirement's receiving favorable letters from the Internal Revenue Service. s. 10, Ch. 97-180, Laws of Florida.

COPIES FURNISHED:

Elizabeth McBride, General Counsel
Office of the General Counsel
Florida A & M University
300 Lee Hall
Tallahassee, Florida 32307-3100

Antoneia L. Roe, Esquire
Office of the General Counsel
Florida A & M University
300 Lee Hall
Tallahassee, Florida 32307-3100

Arthur Lewis Stern, III, Esquire
1904 Indianhead Drive
Tallahassee, Florida 32301

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.