

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA AGRICULTURAL & )  
MECHANICAL UNIVERSITY, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-0627  
 )  
DANA BARNES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this cause in Tallahassee, Florida, on April 21, 2006, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Antoneia Roe, Esquire  
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For Respondent: Ben R. Patterson, Esquire  
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STATEMENT OF THE ISSUE

Whether Respondent was properly terminated by Petitioner for just cause or is entitled to reinstatement with back pay and benefits.

PRELIMINARY STATEMENT

This cause arises from a referral of the case by Florida Agricultural and Mechanical University (FAMU) to the Division of Administrative Hearings on or about February 17, 2006.

By this referral and the absence of any pre-trial motions in opposition to the initiating "Petition Against Termination of Employment, Demand for Evidentiary Hearing," FAMU has submitted to the jurisdiction of the Division of Administrative Hearings, pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

A disputed-fact hearing was held April 21, 2006.

At the commencement of hearing, Mr. Barnes' Motion in Limine and FAMU's Motion in Limine were each argued. Both Motions were denied without prejudice.

Because by this case, FAMU seeks to terminate Mr. Barnes and such termination would change the status quo, it was orally ruled, over objection, that FAMU had the duty to go forward and prove its entitlement to terminate Mr. Barnes. The parties stipulated that the burden of proof herein was "by a preponderance of the evidence." See Florida Department of

Transportation v. J. W. C., Inc., 396 So. 2d 778 (Fla. 1<sup>st</sup> DCA 1981)

Eight Joint Exhibits were admitted in evidence.<sup>1/</sup>

Petitioner FAMU presented the oral testimony of John Cotton, Dr. Kenneth Perry, and Dr. Janie Greenleaf,<sup>2/</sup> and had two exhibits admitted in evidence.

Respondent testified on his own behalf and had three exhibits admitted in evidence.

A Transcript was filed on May 12, 2006. By agreement, the parties each filed Proposed Recommended Orders on May 16, 2006. On May 30, 2006, Respondent filed an Amended Proposed Recommended Order, amended only to include Transcript citations. No motion to strike same was filed by Petitioner, and so Respondent's Amended Proposed Recommended Order has been considered in lieu of the original.

#### FINDINGS OF FACT

1. Respondent is a 48-year-old man who was employed between 1997 and August 15, 2005 (eight years), by Petitioner FAMU. During that period, he had attained permanent status in the classifications of Computer Programmer and Senior Computer Programmer in Petitioner FAMU's Information Technology (IT) Services Unit.

2. Respondent is a member of an AFSCME union bargaining unit.

3. Petitioner reorganized its IT unit in 2004-2005. As a result, several employees of that unit, including Respondent, were targeted for layoff. FAMU's standard procedure for advising employees for the first time that they were being laid off was to call them to the personnel office.

4. After returning to work from sick leave on August 15, 2005, Respondent was informed that he was to report to the personnel office that afternoon.

5. Four or five people already had been laid off, and Respondent anticipated that he would be laid off.

6. Indeed, Respondent's position as a Senior Computer Programmer Analyst had been eliminated as a result of the reorganization, but he did not know this in advance of the August 15, 2005, meeting.

7. With apprehension, Respondent unsuccessfully attempted to secure a union representative to accompany him to the afternoon meeting. He subsequently secured a tape recorder from his home, with the intent of recording the meeting.

8. The meeting turned out to be scheduled in the office of FAMU's Human Resources Administrator. When Respondent arrived at the meeting location, there were two campus police officers, John Cotton and Audrey Alexander, present. Also in attendance were Dr. Janie Greenleaf, FAMU Human Resources Administrator; Dr. Kenneth Perry, at that time Associate Vice-President and

Chief Technology Officer; and Howard Murphy, the IT consultant hired as special assistant to the university president.

Mr. Murphy had done the assessment leading to the layoffs, and it was he who had recommended which employees to lay off.

9. The meeting was intended by the administrators as an initial layoff meeting, wherein Respondent would be presented with a letter advising him that he was being laid off as of that date and of his rights under the rules governing layoffs (the Notice of Layoff); he would sign another letter acknowledging that he had received the Notice of Layoff; and any questions he had would be answered by those present.

10. Upon entering Dr. Greenleaf's office, Respondent was instructed to take a seat, and he did so. Dr. Greenleaf laid a Notice of Layoff (Exhibit P-2), dated August 15, 2005, on a table in front of him.

11. Respondent then removed his tape recorder from an attaché case. This movement appears to have put the other attendees on edge, because terminations, for whatever reason, can turn violent.

12. Respondent then placed the recorder on the table, and announced that he intended to record the meeting. He stated that anyone who did not want to be recorded could leave.

13. Respondent testified that he had assumed that his behavior would cause the administrators to end the meeting and do what they intended to do without any input from him. (TR-74)

14. Instead, Dr. Greenleaf told Respondent that he could not record the meeting because she did not want to be recorded. She told him to turn off his tape recorder. Apparently, Dr. Greenleaf was the only attendee who objected out loud to being taped. Respondent would not turn off his recorder.

15. Respondent believed that he had a right to tape the meeting because of his status as a University Support Personnel Services (USPS) employee. He testified that during his employment with FAMU, he had attended workshops where he had been allowed to record the meeting for accuracy and make his written report to his superiors from the taped record. He also testified that he had recorded "in the open" a conversation with a superior about a promotion. He further testified that he had been in meetings and hearings with an AFSCME union representative when administrative personnel asked them to turn off the recorder and told them when they could turn on the recorder. In these instances, there were apparently "on the record" and "off the record" conversations. (TR 73-74) There is the suggestion in Respondent's testimony that he believed that, in the absence of a union representative, he was entitled to tape any meeting.

16. More than once in the August 15, 2005, meeting, Respondent stated to the assemblage that he had a right "as USPS" to record the meeting.

17. After reviewing either a statute book or labor union book, Dr. Greenleaf advised everyone present that the meeting could not be recorded without all attendees' consent.

18. Dr. Greenleaf advised Respondent that he could take notes; have someone present to transcribe the meeting; or have an AFSCME union representative present; but that she did not wish to be recorded.

19. From the evidence as a whole, it appears that Respondent believed that since he could not get a union representative there at that time, his only option was to tape the meeting, but there is no evidence that he requested to reschedule the meeting for a time when he could be accompanied by a union representative.

20. Dr. Greenleaf repeatedly advised Respondent that he could not record the meeting and/or ordered him to turn off his tape recorder.

21. Respondent repeatedly refused to cease taping and repeatedly advised the assemblage that anyone who did not wish to be recorded could leave.

22. At least once, Dr. Greenleaf advised Respondent that his refusal could be construed as insubordination.

23. Apparently, the volume of both Dr. Greenleaf's and Respondent's voices became elevated.

24. Respondent's affect was described by all the witnesses who testified as "defiant," "agitated," "adamant," "persistent," and/or "insistent."

25. Dr. Greenleaf then interrupted the meeting and asked Respondent to wait outside. Dr. Greenleaf and Dr. Perry consulted and decided that Respondent was being insubordinate. A revised letter dismissing Respondent for insubordination (the Notice of Dismissal, Jt. Ex. 1) was drafted and signed by Dr. Perry.

26. When he was permitted to return to Dr. Greenleaf's office, Respondent turned on his tape recorder again. Dr. Greenleaf had removed the original layoff letter from the table and delivered to Respondent the Notice of Dismissal for insubordination, also dated August 15, 2005.<sup>3/</sup>

27. Respondent requested a copy of the original Notice of Layoff, and was informed by Dr. Greenleaf that he was now terminated for insubordination and the Notice of Layoff was withdrawn. Respondent was not provided with a copy of the Notice of Layoff.

28. Respondent was ultimately conducted off campus by Officers Cotton and Alexander without further incident.



29. Although Respondent was dismissed from FAMU, effective August 15, 2005, he remained on the University's payroll through August 29, 2005, approximately two weeks following his dismissal. The Notice of Dismissal retained the two week pay provision that had been part of the Notice of Layoff.

30. Subsequent to his termination by FAMU, Respondent has sought other employment, but has been unsuccessful.

#### CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this proceeding, pursuant to Sections 120.569 and 120.57 (1), Florida Statutes.

32. The parties have stipulated that the burden of proof herein is "by a preponderance of the evidence" to show that just cause existed to terminate Respondent.<sup>4/</sup>

33. FAMU's Proposed Recommended Order acknowledges that FAMU is a public agency, subject to Section 286.011, "Florida's Government in the Sunshine Law."

34. The undersigned also notes that neither layoff materials or disciplinary actions against a permanent FAMU employee are specifically excluded from Chapter 119, Florida Statutes, "The Public Records Act."

35. FAMU's Proposed Recommended Order cites the following rules: "Florida Board of Governors' Regulation 6C-5.955 (1) (c)"<sup>5/</sup> and "Florida A & M University Regulations 10.337 (1), (1),(b), and (2)(c)."<sup>6/</sup>

36. Those rules and others which may be applicable to this case include:

6C-5.955 (1)(c) - Separations From  
Employment and Layoff-

(1) Separations from employment shall be administered consistent with the following provisions.

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(c) The Chief Administrative Officer may dismiss an employee for just cause in accordance with University rules, policies or procedures. (Joint Ex 7)

6C3-10.337-Disciplinary and Separation from Employment Actions for University Support Personnel System Employees.

(1) Scope and Purpose - The purpose of this rule is to establish minimum standards for supervisors and administrators to use in administering discipline for various types of offenses committed by a University Support Personnel System (USPS) employee.

(a) The provisions of this rule are supplemented by Rules 6C-5.950 and 6C-5.955 F.A.C. and the respective collective bargaining agreement for the employees who are represented by a collective bargaining agent.

(b) The following guidelines and standards for performance shall govern the manner and extent to which disciplinary action is taken, except that greater or lesser penalties may be imposed, dependent upon the seriousness of the offense and any aggravating or mitigating circumstances.

The Director of University Personnel Relations provides guidance to University department heads and supervisors in the administration of discipline within these standards.

(c) Delegation of Authority—  
The authority to discipline employees resides in the President or President's designee. The President has further delegated the authority to department heads and immediate supervisors to administer written reprimands. All other forms of discipline are administered in writing by the President or the President's designee.

(2) Types of Disciplinary Action

(a) Written Reprimand—For more serious or repeated cases of rules infractions, the supervisor, warns the employee in writing of the specific conduct or performance standard that was violated and places the employee on notice of the next level of discipline if the offense is repeated or the performance fails to improve.

(b) Suspension—This is a severe form of discipline which may be administered as a step in progressive discipline following a written reprimand or may be administered as the first discipline for the commission of a serious offense. Suspension is defined as an action taken by the University to temporarily relieve the employee of duties and place the employee on leave without pay. In an extraordinary situation, such as when the retention of a permanent status USPS employee is likely to result in damage to property or is likely to result in injury to the employee, a fellow employee, or some other person, the employee may be suspended immediately.

(c) Dismissal—This is the final and most severe form of discipline that may be imposed upon an employee. Dismissal is defined as the action taken by the University to separate an employee from the USPS when continued employment would be counter-productive to the operations and welfare of the University. Dismissal may be

appropriate for the first discipline for a serious offense or as the final step in progressive discipline.

(3) Offenses-Standards of Disciplinary Action. The most common occurrences are listed below, but the list is not all-inclusive. The disciplinary action for the listed offenses have been established to help assure that employees who commit offenses receive similar treatment in like circumstances.

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(r) Insubordination-A deliberate and inexcusable refusal to obey a reasonable order which relates to an employee's job function. This includes an unwillingness to submit to authority, failure to follow oral or written instructions from a superior or an expressed refusal to obey a proper order, as well as a deliberate failure to carry out an order.

1. First occurrence-Written Reprimand
2. Second occurrence-Five (5) days suspension or dismissal
3. Third occurrence-Dismissal (Joint Exhibit 6; Emphasis supplied for ease of reference)

37. This case, of necessity, also requires consideration of Section 934.03, Florida Statutes, which provides, in pertinent part, as follows:

934.93 Interception and disclosure of wire, oral, or electronic communications prohibited.-

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, . . . any wire, oral, or electronic communication;

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shall be punished as provided in subsection (4).

38. Respondent submits that because FAMU's activities are subject to "government in the sunshine," and the other attendees at the August 15, 2005, meeting had no reasonable expectation of privacy, Respondent's termination for insubordination because he persisted in tape recording the layoff meeting was without just cause. Respondent further asserts that Dr. Greenleaf's order to turn off his tape recorder was unrelated to the duties of his job function, and therefore, Respondent's refusal to turn off his tape recorder, in defiance of Dr. Greenleaf's direct order, could not constitute "insubordination" as defined by rule. Finally, Respondent asserts that even if his actions constituted insubordination as defined by rule, his behavior on August 15, 2005, constituted his first and only act of insubordination, and therefore, termination was a grossly excessive discipline. He seeks reinstatement, back pay, and benefits. In support of these positions, Respondent submits the case of Dept. of Agriculture v. Edwards, 654 So. 2d 628 (Fla. 1st DCA 1995).

39. In Edwards, a law enforcement officer employed by the Florida Department of Agriculture and Consumer Services, was upset about being transferred. He decided to tape record his supervisor. The supervisor learned what was afoot and assigned several officers to investigate. These officers engaged the

aggrieved employee in conversation in one of their offices. A bulge in the employee's pocket turned out to be a voice-activated tape recorder, which had recorded the disciplinary investigation by the other officers. The employee was criminally prosecuted by the State Attorney for violating Section 934.03, Florida Statutes (intercepting or endeavoring to intercept an oral communication), and the employing agency terminated him for violating agency rules, regulations, policies or procedures, and for exceeding his law enforcement authority. The Public Employee Relations Commission (PERC) ordered the employee reinstated. In the following terms, the First District Court of Appeal upheld PERC's final order which had adopted its hearing officer's order:

. . . We conclude that the hearing officer was justified in finding that any subjective expectation of privacy held by Edwards's supervisors was not reasonable under the circumstances of this case. We reach this conclusion based not on the officers' suspicion that Edwards would record their statements, but because of the number of persons present when the statements were made, the place chosen for the interview, and the very nature of that interview. We affirm the Commission's final order directing Edwards's reinstatement, and awarding back pay, attorney's fees, and costs. We do so, because we conclude the record contains competent, substantial evidence to support the Commission's determination that the Department did not have cause to discipline Edwards for a violation of Section 934.03(1), Florida Statutes, or for exceeding his law

enforcement authority. It appears the protections afforded by Section 934.03 are inapplicable in the circumstances of this case. For an oral communication to fit within the purview of chapter 934, it must be "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." . . . The Commission was entitled to find that supervising law enforcement officers engaged in the investigation and interrogation of a subordinate officer had no subjective expectation of privacy in their statements. Since the protections of Section 934.03 do not apply to the oral communications here at issue, the Department has failed to show cause for terminating Edwards's employment, either for a rule violation or for exceeding his law enforcement authority.

40. FAMU contends that three elements are necessary to bring the instant case within the parameters of the holding in Edwards which concluded that: no expectation of privacy existed for Edwards because of the number of people present; the place chosen; and the nature of the interview. FAMU submits that because there is no evidence herein that the Respondent was, or thought he was, involved in a disciplinary matter, the third element described as the "nature of the interview" is missing and Respondent is subject to termination. This distinction is one of form, not of substance, as explored hereafter.

41. FAMU further embraces the dissent in Edwards to the effect that the expectation of privacy is separate and distinct from the right to be free from electronic interception, and

submits that Dr. Greenleaf had a separate right not to be recorded. That may be a societally better construction of an employer's rights, but it has not yet been engrafted onto our jurisprudence.

42. The foregoing Findings of Fact establish that Respondent herein was called to the August 15, 2005, meeting for the employer's purpose of laying him off. If he were going to be laid off, he knew he was entitled to a number of rights, simply by virtue of being a permanent employee, and that he was entitled to other rights as a result of being a member of a collective bargaining unit. He wanted to protect those rights.<sup>7/</sup>

43. Herein, not only due to the number of persons in the room and the location of the meeting, but also for other reasons, no one in the meeting could have reasonably expected privacy. Indeed, the meeting's director, Dr. Greenleaf, advised Respondent he could have yet another person come in and take down what was said. She even advised him he could have a union representative present. All the documents involved were public records, and the meeting was for the public purpose of managing personnel within the agency's limited financial range. Any right of confidentiality in the documents prepared to go into his personnel file was Respondent's to assert, and the other university personnel present had no such right in them. See Chapter 119, Florida Statutes. Section 934.04, Florida Statutes



does not apply to the oral communications herein. Furthermore, unlike Mr. Edwards' situation, there is no evidence that Respondent has been collaterally charged or prosecuted under Section 934.04, or that he was fired by FAMU for exceeding his authority with regard to that statute or for violating his agency's rules, regulations, policies or procedures related to that statute.

44. Respondent herein was terminated for refusing to stop recording a meeting in which none of the participants had any reasonable expectation of privacy.<sup>8/</sup> At law, silence usually is presumed to signify consent, not resistance, and neither the two police officers nor the other two administrators besides Dr. Greenleaf, including Respondent's direct superior in the line of IT command, voiced any opposition to Respondent's recording what went on in their meeting. Granted, Dr. Greenleaf appears to have been the university president's designee to accomplish the ministerial act of a layoff, and granted, Dr. Perry "signed off on" the Notice of Dismissal letter Dr. Greenleaf, which cited Respondent for insubordination, but the real issue here is: "If a superior, not in the employee's regular chain of command gives an oral order, without any basis in law and unrelated to the employee's normal job functions, is it insubordination if the employee refuses to obey that order?"

45. A point may be made that proper decorum was part of Respondent's job description and that a function of his job was participation in the bureaucratic process by which management accomplished a layoff, but that does not render Dr. Greenleaf's oral order to stop recording or to turn off the recorder reasonable under the circumstances. See Rule 6C3-10.337(3)(r). Since Dr. Greenleaf's order was not reasonable under the circumstances, Respondent was not guilty of insubordination, and he should not have been terminated for insubordination.

46. Respondent was never formally laid off and is entitled to be reinstated as of the date of the improper dismissal, August 15, 2005. Since he was paid for two additional weeks, he is not entitled to recover wages for that period of time, but he is entitled to receive all other benefits to which he was entitled from August 15 to August 29, 2005. It also appears that he has been unable to secure commensurate employment since August 29, 2005, at least in part because he was "discharged for cause" instead of merely "laid off." That being the case, it is appropriate for FAMU to correct its personnel records and provide him salary and benefits from August 29, 2005, until the date of the final order herein and to institute appropriate layoff procedures, if still appropriate, simultaneously with entry the final order.

47. Respondent has not requested attorney's fees and costs in his Proposed Recommended Order, and the undersigned is unaware of any provision for an award of same under the posture of this case.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Agricultural and Mechanical University enter a final order which:

(1) Reinstates Respondent in his previous position as of August 15, 2005, and corrects all personnel records to reflect that he was not discharged for insubordination;

(2) Provides him with back pay dating from August 29, 2005, to the date of the final order;

(3) Provides him with all commensurate employee benefits dating from August 15, 2005, to the date of the final order; and

(4) As of the date of the final order, provides him with all layoff rights and entitlements appropriate to his job position and bargaining unit under the layoff procedures applicable at that date.

DONE AND ENTERED this 2nd day of August, 2006, in  
Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of August, 2006.

ENDNOTES

<sup>1/</sup> Although the testimony of Dr. Greenleaf suggests an inconsistency due to legislative changes in administrative structure (TR-52-54; 62-64), the parties stipulated that Joint Exhibit Six constituted the rules of the University Support Personnel System defining disciplinary standards at all times material, including defining "insubordination" (TR 24); that Joint Exhibit Seven, constituted applicable rules distinguished from standard disciplinary action (the SUS Employment Rules) and also were in effect at all times material (TR-25); and that Joint Exhibit Eight constituted the lay-off rule (Florida Administrative Code Rule 6C3-10.113) in effect at all times material (TR-25-26).

<sup>2/</sup> The exhibits reveal this as the correct spelling of Dr. Greenleaf's first name, which was apparently mis-heard by the court reporter, and which erroneously appears in the Transcript as "Jamie Greenleaf".

<sup>3/</sup> The transcription of Respondent's tape recording (Barnes Exhibit 1) is accurate as to the contents of the actual tape (Barnes Exhibit 2), but it is clear that neither the tape nor

the transcript contains the entire meeting. At most, they may contain what was said upon Respondent's return from the outer office. Respondent concedes that he turned his recorder on and off at various times during the meeting, trying only to record when something was actually happening.

<sup>4/</sup> Regardless thereof, the evidence herein has met the "clear and convincing" burden.

<sup>5/</sup> This rule is shown on Joint Exhibit Seven, "Department of Education Board of Regents, Chapter 6C-5", the SUS Rules. See also n. 1, and Florida Administrative Code Rule 6C-5.955(1)(c).

<sup>6/</sup> None of the exhibits show this citation. The undersigned has assumed that FAMU intended to cite from Joint Exhibit Six, Florida Administrative Code Rule 6C3-10.337. See also n. 1.

<sup>7/</sup> Respondent's Proposed Recommended Order suggests that when Dr. Greenleaf refused to give Respondent the original layoff letter, she violated Chapter 119, Florida Statutes, and further speculates that Dr. Greenleaf refused to be tape recorded because she was not in compliance with, or was planning to not comply with, Rule 6C-5.955, regarding layoff lists, unit designations, retention points, etc. The evidence herein is insufficient to establish either theory, and resolution of those issues is not necessary to resolution of the material issue presented in this case. Those conjectures will not be addressed herein.

<sup>8/</sup> The undersigned acknowledges that the Edwards court reversed that portion of PERC's hearing officer's order wherein he stated that a disciplinary investigation for alleged illicit tape recording constituted an "extension of a public meeting." However, based on the different sequence of events, the different situation, purposes, and applicable personnel rules herein, and the director's offer to bring in someone to transcribe the hearing, one might accurately describe the instant situation as a "public meeting."

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.