

FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY
BOARD OF TRUSTEES
TALLAHASSEE, FLORIDA

KEITH JACKSON, Ph.D.,
Petitioner,

v.

FAMU Case Nos. 09-002 and 09-003
DOAH Case Nos. 09-0030 and 09-1352

FLORIDA A&M UNIVERSITY BOARD
OF TRUSTEES,
Respondent.

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

FINAL ORDER

This matter is now before Florida Agricultural and Mechanical University Board of Trustees ("FAMU," "Respondent," or the "University") for final agency action.

STATEMENT OF THE ISSUE

Whether Keith Jackson, Ph.D. ("Petitioner") should be required to pay FAMU's claimed overpayment of salary as calculated in the amount of \$29,141.57, for the pay periods between July 11, 2008 and December 12, 2008.

PRELIMINARY STATEMENT

On or about December 11, 2008, Petitioner was notified by FAMU that pursuant to FAMU BOT Policy 2005-15, his salary, retroactive to July 11, 2008, had been modified to the median salary of employees within his same professorial rank and discipline as a Physics Professor and that effective December 12, 2008 his pay warrant would reflect the salary adjustment. Pursuant to Section 120.57(1), Florida Statutes, Petitioner requested a disputed-fact hearing to "dispute how Petitioner's salary is to be determined" and the cause was referred to the Division of Administrative Hearings (DOAH) on or about January 5, 2009. Petitioner's request for hearing was assigned

DOAH case number 09-0030. By Order entered January 29, 2009, DOAH denied Petitioner's request for hearing because "it [was] unclear from the request what relief [was] being sought."¹

On or about January 5, 2009, Petitioner was notified by FAMU that he had been overpaid by a gross amount of \$29,141.57 and that pursuant to FAMU BOT Policy 2005-19, the University was seeking from Petitioner repayment of the overpayment amount. On or about February 20, 2009, Petitioner filed an Amended Request for Hearing "to dispute that he owed \$29,141.57 as a salary overpayment." The request for a disputed-fact hearing was referred by FAMU to DOAH and the matter was assigned DOAH case number 09-1352. By Order entered March 26, 2009, DOAH, *sua sponte*, consolidated case numbers 09-0030 and 09-1352.

On March 18, 2010, Petitioner filed with DOAH a Motion to Abate or in the Alternative Continue Hearing in case number 09-1352. On March 19, 2010, an Order was entered granting Petitioner's motion and the matter was placed in abeyance by DOAH until September 20, 2010. Also on March 19, 2010, and after entry of the abatement order, Petitioner filed a Notice of Voluntary Dismissal Without Prejudice in case number 09-1352. Upon receipt of Petitioner's Notice of Voluntary Dismissal, an Order was entered by DOAH on March 19, 2010, closing case number 09-1352. An Amended Order closing the file and relinquishing jurisdiction was subsequently entered by DOAH in case number 09-1352 on March 24, 2010.

On March 18, 2010, Petitioner also filed a Notice of Voluntary Dismissal without prejudice in DOAH case number 09-0030. On March 19, 2010, an Order closing file

¹ On January 30, 2009, FAMU, without knowledge of the Order of dismissal entered by DOAH on January 29, 2009, also issued an Order Denying Petitioner's Request for Administrative Hearing.

number 09-0030 was entered. It is not clear why Petitioner filed the Notice of Voluntary Dismissal in case number 09-0030 when Petitioner's request for hearing in this case was denied by Order entered January 29, 2009, and this case was consolidated with case number 09-1352 by Order entered March 26, 2009.

RULING ON OBJECTIONS

On April 5, 2010, FAMU received "Petitioner's Response to Respondent's Notice of Intent to Take Final Agency Action in Matters Not Involving Disputed Issues of Material Fact (hereinafter "Response")." Petitioner's objections to Respondent's intended final agency action are hereby overruled for the reasons set forth below. The numbered paragraphs and language below correspond with Petitioner's numbered paragraphs as set forth in the Response.

1. **Petitioner's Objection:** DOAH Case Nos. 09-1352 and 09-0030 have been dismissed and The Honorable Diane Cleavinger entered [an] Order closing both files. Due to the dismissals and subsequent Orders, DOAH has no further jurisdiction in this matter. FAMU has not filed a Petition for Hearing on this issue nor have they [sic] filed a Counter-Petition in DOAH Case Nos. 09-1352 and 09-0030.

Objection Overruled: By Order entered March 24, 2010, The Florida Division of Administrative Hearings closed its file and relinquished jurisdiction to FAMU. Petitioner asserts that FAMU should have filed a Petition for Hearing or Counter-Petition in the instant matter. Respondent is not aware of, nor has Petitioner cited, any legal authority that requires FAMU, as the agency proposing to take action in this matter, to file a Petition or Counter-Petition with DOAH.

2. **Petitioner's Objection:** In the event DOAH determines they have [sic] retained some form of jurisdiction, FAMU states there are no disputed issues of material fact. This statement is not accurate. Petitioner, Keith Jackson specifically alleges there are numerous factual disputes.

Objection Overruled: The statement set forth in numbered paragraph two (2) is merely conclusory, and fails to set forth specific grounds as to why FAMU should not take final agency action in this matter.

3. **Petitioner's Objection:** In Respondents [sic] paragraph #1, Petitioner objects to Respondent's portrayal of the contract signed between Petitioner and Respondent. The contract shall speak for itself as to its terms and conditions. Respondent has not incorporated the contract with its Motion. Therefore this paragraph is materially disputed.

Objection Overruled: Section 120.57(1)(i), Florida Statutes, provides in material part that "[i]f [an] administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, **but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge.**" (Emphasis added) Petitioner initially sought relief pursuant to Section 120.57(1), Florida Statutes, on the ground that that a dispute exists as to material facts. Subsequently, Petitioner waived his claim of the existence of disputed material facts when he voluntarily dismissed his petition for a disputed-fact hearing pursuant to Section 120.57(1), Florida Statutes. Therefore, consistent with Section 120.57(1)(i), Florida Statutes, Petitioner is now estopped from asserting the existence of issues of disputed material fact regarding the execution of the

contract because the issue clearly involves facts that could have been raised by Petitioner while the instant matter was pending before the administrative law judge.

4. **Petitioner's Objection:** Petitioner admits that paragraph #2 is not in dispute.

5. **Petitioner's Objection:** In Respondents [sic] paragraph #3, Respondent [sic] is without knowledge as to if and when the resignation was accepted by Respondent. Therefore paragraph #3 is in dispute.

Objection Overruled: Section 120.57(1)(i), Florida Statutes, provides in material part that "[i]f [an] administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, **but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge.**" (Emphasis added) Petitioner initially sought relief pursuant to Section 120.57(1), Florida Statutes, on the ground that that a dispute exists as to material facts in the instant matter. Subsequently, Petitioner waived his claim of the existence of disputed material fact when he voluntarily dismissed his petition for a disputed-fact hearing pursuant to Section 120.57(1), Florida Statutes. Therefore, consistent with Section 120.57(1)(i), Florida Statutes, Petitioner is now estopped from asserting the existence of issues of disputed material fact regarding when Petitioner's letter of resignation was accepted by FAMU because this issue clearly involves facts that could have been raised by Petitioner while the instant matter was pending before the administrative law judge.

6. **Petitioner's Objection:** Petitioner admits that paragraph #4 is not in dispute.

7. **Petitioner's Objection:** Petitioner admits that paragraph #5 is not in dispute.

8. **Petitioner's Objection:** In Respondents [sic] paragraph #6, Petitioner admits that FAMU BOT's policy 2005-15 is as stated. However, Petitioner denies the policy as written applies to him or that the policy as written is vague as to how it applies to him and this paragraph is subject to ongoing litigation in Leon County Circuit Court Case Number 2010-CA-000845. Therefore, there is a factual material dispute as to the policy and its application.

Objection Overruled: Section 120.57(1)(i), Florida Statutes, provides in material part that "[i]f [an] administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, **but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge.**" (Emphasis added) Petitioner initially sought relief pursuant to Section 120.57(1), Florida Statutes, on the ground that that a dispute exists as to material facts in the instant matter. Subsequently, Petitioner waived his claim of the existence of disputed material facts when he voluntarily dismissed his petition for a disputed-fact hearing pursuant to Section 120.57(1), Florida Statutes. Therefore, consistent with Section 120.57(1)(i), Florida Statutes, Petitioner is now estopped from asserting the existence of issues of disputed material fact regarding the application of FAMU BOT policy 2005-15 because this issue clearly involves facts that could have been raised by Petitioner while the instant matter was pending before the administrative law judge. Additionally, when an administrative error results in a salary overpayment, the proper avenue for the employee to pursue a review of the

employer's actions attempting to collect the overpayment is by way of a Section 120.57, Florida Statutes, proceeding as a substantially affected person. New v. Dept. of Banking and Finance, 544 So.2d 1203 (Fla. 1st DCA 1989) (citing, Dept. of Corrections v. Career Service Commission, 429, So.2d 1244, 1246, Fla. 1st DCA 1983)). Furthermore, it is well established that a party who seeks relief through the administrative process "should not seek to have the administrative process subverted by filing a civil action in circuit court." State of Florida, Dept. of Transportation v. Clark Construction Co., 621 So.2d 511, 513 (Fla. 1st DCA 1993). This is consistent with the "primary jurisdiction doctrine" which generally provides that when the courts and an agency have concurrent jurisdiction over a subject matter, the courts should defer to the agency for initial determination of the matter. See Hill Top Developers v. Holiday Pines Service Corp., 478 So.2d 368 (Fla. 2d DCA 1985).

9. **Petitioner's Objection:** Petitioner admits that paragraph #7 is not in dispute.

10. **Petitioner's Objection:** In Respondents [sic] paragraph #8, Petitioner denies that according to FAMU BOT Policy 2005-15, his salary was \$72,662.00. Petitioner has alleged FAMU BOT Policy 2005-15 does not apply to him or is vague as to how it applies to him and is currently subject to ongoing litigation in Leon County Circuit Court Case Number 2010-CA-000845. Therefore, there is a factual material dispute as to the policy and its application.

Objection Overruled: This objection is overruled on the same grounds as set forth in paragraph 8, above.

11. **Petitioner's Objection:** In Respondents [sic] paragraph #9, Petitioner denies there was any oversight and according to the signed employment contract, he was entitled to \$166,400.00 until there was a mutually acceptable contractual modification. The allegations in paragraph #9 are currently subject to ongoing litigation in Leon County Circuit Court Case Number 2010-CA-000845. Therefore, there is a factual material dispute as to the allegations alleged in paragraph #9.

Objection Overruled: Section 120.57(1)(i), Florida Statutes, provides in material part that "[i]f [an] administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, **but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge.**" (Emphasis added) Petitioner initially sought relief pursuant to Section 120.57(1), Florida Statutes, on the ground that that a dispute exists as to material facts in the instant matter. Subsequently, Petitioner waived his claim of the existence of disputed material facts when he voluntarily dismissed his petition for a disputed-fact hearing pursuant to Section 120.57(1), Florida Statutes. Therefore, consistent with Section 120.57(1)(i), Florida Statutes, Petitioner is now estopped from asserting the existence of issues of disputed material fact regarding his claim of entitlement to a salary of \$166,400.00 because this issue clearly involves facts that could have been raised by Petitioner while the instant matter was pending before the administrative law judge. Additionally, when an administrative error results in a salary overpayment, the proper avenue for the employee to pursue a review of the employer's actions attempting to collect the overpayment is by way of a Section 120.57, Florida Statutes, proceeding as a substantially affected person. New v. Dept. of

Banking and Finance, 544 So.2d 1203 (Fla. 1st DCA 1989) (citing, Dept. of Corrections v. Career Service Commission, 429, So.2d 1244, 1246, Fla. 1st DCA 1983)). Furthermore, it is well established that a party who seeks relief through the administrative process “should not seek to have the administrative process subverted by filing a civil action in circuit court.” State of Florida, Dept. of Transportation v. Clark Construction Co., 621 So.2d 511, 513 (Fla. 1st DCA 1993). This is consistent with the “primary jurisdiction doctrine” which generally provides that when the courts and an agency have concurrent jurisdiction over a subject matter, the courts should defer to the agency to initially decide the matter. See Hill Top Developers v. Holiday Pines Service Corp., 478 So.2d 368 (Fla. 2d DCA 1985).

12. **Petitioner’s Objection:** In Respondents [sic] paragraph #10, pursuant to Petitioner’s response to paragraph’s [sic] 1, 6, 8 and 9, Petitioner denies his salary should have been adjusted to \$72,662.00. The allegation in Respondent’s paragraph #10 is factually disputed and is currently subject to ongoing litigation in Leon County Circuit Court Case Number 2010-CA-000845.

Objection Overruled: This objection is overruled on the same grounds as set forth in paragraph 11, above.

13. **Petitioner’s Objection:** In Respondents [sic] paragraph #11, pursuant to Petitioner’s response to Respondent’s paragraph’s [sic] 1, 6, 8, 9 and 10, Petitioner denies he was erroneously paid from July 11, 2008 through December 12, 2008. The allegation in Respondent’s paragraph #11 is factually disputed and is currently subject to ongoing litigation in Leon County Circuit Court Case Number 2010-CA-000845.

Objection Overruled: Section 120.57(1)(i), Florida Statutes, provides in material part that “[i]f [an] administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, **but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge.**” (Emphasis added) Petitioner initially sought relief pursuant to Section 120.57(1), Florida Statutes, on the ground that that a dispute exists as to material facts in the instant matter. Subsequently, Petitioner waived his claim of the existence of disputed material facts when he voluntarily dismissed his petition for a disputed-fact hearing pursuant to Section 120.57(1), Florida Statutes. Therefore, consistent with Section 120.57(1)(i), Florida Statutes, Petitioner is now estopped from asserting the existence of issues of disputed material fact regarding his pay from July 11, 2008 through December 12, 2008, because this issue clearly involves facts that could have been raised by Petitioner while the instant matter was pending before the administrative law judge. Additionally, when an administrative error results in a salary overpayment, the proper avenue for the employee to pursue a review of the employer’s actions attempting to collect the overpayment is by way of a Section 120.57, Florida Statutes, proceeding as a substantially affected person. New v. Dept. of Banking and Finance, 544 So.2d 1203 (Fla. 1st DCA 1989) (citing, Dept. of Corrections v. Career Service Commission, 429, So.2d 1244, 1246, Fla. 1st DCA 1983)). Furthermore, it is well established that a party who seeks relief through the administrative process “should not seek to have the administrative process subverted by filing a civil action in circuit court.” State of Florida, Dept. of Transportation v. Clark Construction Co., 621 So.2d 511, 513 (Fla. 1st DCA 1993). This is consistent with the

“primary jurisdiction doctrine” which generally provides that when the courts and an agency have concurrent jurisdiction over a subject matter, the courts should defer to the agency to initially decide the matter. See Hill Top Developers v. Holiday Pines Service Corp., 478 So.2d 368 (Fla. 2d DCA 1985).

14. **Petitioner’s Objection:** In Respondents [sic] paragraph #12, Petitioner was advised by Respondent [that] he could elect to file for an administrative hearing. Petitioner did file two Petitions: DOAH Case Nos. 09-1352 and 09-0030. However, DOAH does not have exclusive jurisdiction over contract disputes and Petitioner elected to file a Complaint in Leon County Circuit Court, Case Number 2010-CA-000845 alleging Breach of Contract and Intentional Infliction of Emotional Distress. Petitioner does not dispute Respondent has the right to seek overpayments, if any. The allegations in Respondent’s paragraph #12 are currently subject to ongoing litigation in Leon County Circuit Court Case Number 2010-CA-000845.

Objection Overruled: This objection is overruled on the same grounds as set forth in paragraph 11, above.

15. **Petitioner’s Objection:** In Respondents [sic] paragraph #13, See [sic] response to paragraph #12.

Objection Overruled: This objection is overruled on the same grounds as set forth in paragraph 11, above.

16. **Petitioner’s Objection:** In Respondents [sic] paragraph #14, Petitioner admits to Respondent’s paragraph #14.

17. **Petitioner’s Objection:** In Respondents [sic] paragraph #15, Petitioner did dismiss DOAH Case Nos. 09-1352 and 09-0030 due to all of the issues being

brought before DOAH was subject to the Complaint filed in Leon County Circuit Court, Case Number 2010-CA-000845. Prior to dismissal, Petitioner advised the Hearing Officer, Diane Cleavinger, as to the Circuit Court Complaint and requested an abatement pending resolution of the Circuit Court Case. Respondent objected to the abatement. Hearing Officer, Diane Cleavinger, agreed the matter should be abated pending resolution in Circuit Court.

Objection Overruled: Petitioner does not dispute that he dismissed his pending requests for hearing in the instant matter. The grounds set forth by Petitioner as to paragraph 15 fail, however, to provide a legal basis as to why Respondent should not take final agency action in this matter. The objection is therefore overruled.

FINDINGS OF FACT

1. On or about July 1, 2005, Petitioner executed an employment contract with FAMU to serve as Vice President for Research. The contract executed by Petitioner provides that Petitioner "is subject to the Constitution and Laws of the State of Florida and the United States and the rules, policies, guidelines and procedures of the Board of Governors and the University as now existing or hereafter promulgated."

2. On July 11, 2008, Petitioner submitted to the University a letter advising that he was resigning from his administrative position with the University as the Vice President for Research.

3. Petitioner's letter of resignation was accepted by the University effective July 11, 2008.

4. Tenure as a faculty member was granted to Petitioner by the University on May 25, 2007.