

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CYNTHIA ORNDOFF, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-0740RU  
 )  
 FLORIDA GULF COAST UNIVERSITY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on March 16, 2011, by video teleconference in Tallahassee, Florida, and Fort Myers, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Cynthia Orndoff, pro se  
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## STATEMENT OF THE ISSUES

Whether the Division of Administrative Hearings has jurisdiction to hear a petition, brought pursuant to section 120.56(4), Florida Statutes (2010),<sup>1/</sup> claiming that a state university's documents concerning the process and criteria for faculty performance evaluation; documents from the university's College of Business setting out a Framework and Standards for Contract Renewal and Promotion for faculty; and documents showing the university's organization structure and delegations of authority are "agency statements" that require rule-making under the Administrative Procedure Act.

## PRELIMINARY STATEMENT

On February 14, 2011, the Petitioner, Cynthia Orndoff (Petitioner), filed a Petition for Administrative Determination of Invalidity of Agency Statements (Petition) pursuant to section 120.56(4). The Petitioner alleged that she had been an associate professor at the Respondent, Florida Gulf Coast University (hereafter referred to by proper name or University). The Petitioner alleged that she had been terminated "based on several unadopted rules involving published documents from FGCU President, to the Provost, to the College." The Petition's Prayer for Relief specifically identified the following as "agency statements," which are "unadopted rules:" (1) The Faculty Performance Evaluation Documents for 2003 and 2008;

(2) College of Business Framework and Standards for Contract Renewal and Promotion adopted on April 14, 2006, and revised on February 5, 2010 ("Framework"); (3) Delegation of Authority Memorandum accessed on October 7, 2010, from the University's web-site; and (4) Florida Gulf Coast University's organizational chart.

On February 16, 2011, the case was assigned to Administrative Law Judge Susan B. Harrell (Judge Harrell). On February 21, 2011, Judge Harrell issued an Order of Pre-hearing Instructions and set the case for final hearing on March 16, 2011. On March 10, 2011, the case was transferred to Administrative Law Judge Thomas P. Crapps (Judge Crapps).

On March 14, 2011, the University filed a Motion to Dismiss and/or Motion for Summary Dismissal of Petition. The University argued that the Petition should be summarily dismissed for the following reasons: (1) the University derives its powers to regulate the evaluation and employment of academic personnel from article IX, section 7, Florida Constitution, and, thus, is not subject to the Administrative Procedure Act; (2) the Petitioner waived her rights to challenge her termination through chapter 120 "when she filed a grievance pursuant to the applicable collective bargaining agreement"; (3) the Petitioner lacked standing to bring the rule challenge; and (4) the

Petition is untimely because the Petitioner filed her challenge more than one year from the date that she was terminated.

On March 16, 2011, Judge Crapps conducted the final hearing on the Petition and reserved ruling on the University's Motion to Dismiss and/or Motion for Summary Dismissal of Petition.

At the March 16, 2011, hearing the Petitioner testified in her own behalf and offered Exhibits 1, 2, 6 through 15, 17 through 19, 23 through 31, and 36 through 37, which were admitted into evidence. The University presented the testimony of Dr. Hudson Rogers and offered Exhibits 1 through 10 and 16 through 21, which were admitted into evidence. The undersigned also took judicial notice of Florida Statutes (2010), article IX of the Florida Constitution, and Florida Board of Governors Regulation 1.001.

On March 28, 2011, a one-volume Transcript of the proceedings was filed with the Division of Administrative Hearings. The parties filed proposed final orders on April 7, 2011.

On April 7, 2011, the Petitioner filed additional exhibits numbered 38 through 75 for consideration with her proposed final order. On April 20, 2011, the University filed a Motion to Strike the additional exhibits filed by the Petitioner. On

April 21, 2011, the Petitioner filed a response to the Motion to Strike. The University's Motion to Strike is granted.

FINDINGS OF FACT

1. The Petitioner is a former associate professor with Florida Gulf Coast University.

2. Florida Gulf Coast University is a member of the Florida state university system. Since November 2002, with the voter's adoption of article IX, section 7, Florida Constitution, the state university system has been overseen by a Board of Governors. Further, article IX, section 7, Florida Constitution, designated that each university, including Florida Gulf Coast University, would be managed by a local board of trustees. Thus, the Board of Governors and boards of trustees for universities derive power from the Florida Constitution, not legislative enactment.

3. The Board of Governors enacted Regulation 1.001 that established power and duties for university boards of trustees. Among the Board of Governors' powers and duties delegated to the universities' board of trustees is the authority to manage university personnel and faculty.

4. Dr. Hudson Rogers (Dr. Rogers), an associate provost with the University, testified that the University faculty are organized and represented by the United Faculty of Florida (UFF).

The University and UFF are parties to a Collective Bargaining Agreement.<sup>2/</sup>

5. The Collective Bargaining Agreement between the Florida Gulf Coast University Board of Trustees and UFF addresses the evaluation of faculty members. Under Article 10 of the Collective Bargaining Agreement, each college within the University is empowered to develop its faculty evaluation procedures and forms consistent with the criteria agreed upon in the Collective Bargaining Agreement. The colleges' promulgation and implementation of their respective evaluation frameworks are not subject to any special process other than that outlined in the Collective Bargaining Agreement.

6. The University's College of Business developed its own evaluation framework for faculty evaluation, which was consistent with the Collective Bargaining Agreement. Further, Dr. Rogers credibly explained that the University faculty voted on and approved the Faculty Performance and Evaluation Document in 2003 that is used to evaluate faculty.

7. In September 2008, the Petitioner signed a Professional Development Plan that included a performance improvement plan. The performance improvement plan identified objectives that the University expected the Petitioner to meet regarding her job duties.

8. In August 2009, after completing a probationary period of the 2008-2009 academic year, the Petitioner was evaluated by her department chair. The department chair rated the Petitioner as not meeting expectations by failing to publish at least one journal article by the end of the 2008-2009 academic year to meet the College of Business scholarship standards.

9. Based on the Petitioner's failure to publish, the department chair recommended that the Petitioner not be reappointed after the 2009-2010 academic year. A peer review committee for the University's College of Business also determined the Petitioner had failed to meet the minimum requirements. The peer review committee informed the Petitioner of its decision on September 12, 2009.

10. On October 21, 2009, the Petitioner filed a grievance pursuant to the Collective Bargaining Agreement. A review of the Petitioner's grievance shows that it alleged numerous violations of the Collective Bargaining Agreement concerning her faculty evaluation and decision not to re-appoint her as an associate professor.

11. On October 22, 2009, the dean for the College of Business informed the Petitioner that "[a]fter reviewing your request and all documents provided me by you and the Peer Review Committee, my decision is that your contract will not be renewed."

12. On November 20, 2009, the University representative, who reviewed the grievance, found that a majority of the claims were time barred or did not constitute a violation. The University representative found "a partial violation of [Collective Bargaining Agreement] Article 10.3A(1)" for failing to timely finalize the Petitioner's annual evaluation for the 2008-2009 academic year. The University representative noted that the Collective Bargaining Agreement did not "indicate any action to be taken in response to this violation."

13. On December 10, 2009, the Petitioner filed a Request for Arbitration under the Collective Bargaining Agreement. On February 23, 2010, the University received the Petitioner's Notice of Intent to Arbitrate. On April 12, 2010, an arbitration hearing was held on the Petitioner's grievance. The arbitrator held that the Petitioner's Notice of Intent to Arbitrate was not timely under the Collective Bargaining Agreement; thus, it was considered withdrawn.

14. On September 22, 2010, the Petitioner's supervisor, Dr. Robert O'Neill (Dr. O'Neill), wrote the Petitioner, confirming that her last date of employment at the University was December 17, 2010.



15. The Petitioner's last day of employment with the University was December 17, 2010.

16. On February 14, 2011, the Petitioner filed the Petition. The Petitioner alleged that the University is an "agency" within the definition of chapter 120 and is subject to the Administrative Procedure Act. Further, the Petitioner alleged that the University has made the following agency statements that are unadopted rules: (1) the Faculty Performance Evaluation Document for 2003 and 2008; (2) College of Business Framework and Standards for Contract Renewal and Promotion adopted on April 14, 2006, and revised on February 5, 2010 ("Framework"); (3) Delegation of Authority Memorandum accessed on October 7, 2010, from the University's web-site; and (4) Florida Gulf Coast University's organizational chart.

17. The Petitioner also alleged that her substantial interests are affected "because her employment has been terminated based on several unadopted rules involving published documents from the [Florida Gulf Coast University] President, to the Provost, to the College." Further, a reading of the Petitioner's challenge here shows that she alleged that the University failed to follow the "unadopted rules" when it evaluated her and decided not to re-appoint her to a teaching position. For example, the Petitioner claimed that the Florida Gulf Coast University Faculty Performance and Evaluation document

is an agency statement that was not adopted as a rule under chapter 120. Next, the Petitioner alleged that Dr. O'Neill, who was her supervisor, failed to follow this Faculty Performance and Evaluation document when he evaluated her.

#### CONCLUSIONS OF LAW

18. The University's Motion to Dismiss and/or Motion for Summary Dismissal of Petition raises the dispositive issue that the Division of Administrative Hearings does not have subject matter jurisdiction in this case. The Petitioner filed the Petition, seeking to invoke jurisdiction pursuant to section 120.56(4)(a). The Division of Administrative Hearings, however, does not have jurisdiction to hear the Petition challenging statements concerning faculty evaluation, retention, and university organization, because Florida Gulf Coast University is not an "agency" as defined by the Administrative Procedure Act. This determination is based on a reading of chapter 120; article IX, section 7, Florida Constitution; and the holding in NAACP, Inc. v. Florida Board of Regents and State Board of Education, 876 So. 2d 636 (Fla. 1st DCA), review dismissed, 822 So. 2d 386 (Fla. 2004).

19. An examination of chapter 120 shows that the University's challenged documents here are not "agency statements." Section 120.56(4)(a) provides "any person substantially affected by an agency statement may seek an

administrative determination that the statement violates section 120.54(1)(a)." Further, section 120.54(1)(a) provides that "[e]ach agency statement defined as a rule by section 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable." A "rule" is defined, in pertinent part, in section 120.52(16) as:

(16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .

20. The statutory definition of a "rule" shows that it is an "agency statement." Consequently, the question is whether the University is an "agency" under the Administrative Procedure Act. The term "agency" is defined, in pertinent part, in section 120.52 as:

(1) "Agency" means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:

(a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only when a majority of its governing board

is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.

21. The term "educational unit" referenced in section 120.52(1)(a) is further defined as:

(6) "Educational unit" means a local school district, a community college district, the Florida School for the Deaf and the Blind, or a state university when the university is acting pursuant to statutory authority derived from the Legislature.

22. Based on the definitions, it is clear that a state university is subject to the Administrative Procedure Act only when it is acting pursuant to a statutory authority derived from the Legislature. When a state university is acting pursuant to powers derived from the constitution, the university is not subject to the Administrative Procedure Act.

23. In November 2002, the voters adopted article IX, section 7, Florida Constitution. Article IX, section 7, Florida Constitution, establishes a system of governance for the state university system which provides:

§ 7. State University System

(a) Purposes.--In order to achieve excellence through teaching students, advancing research and providing public service for the benefit of Florida's citizens, their communities and economies, the people hereby establish a system of governance for the state university system of Florida.

(b) State university system.--There shall be a single state university system comprised of all public universities. A board of trustees shall administer each public university and a board of governors shall govern the state university system.

(c) Local boards of trustees.--Each local constituent university shall be administered by a board of trustees consisting of thirteen members dedicated to the purposes of the state university system. The board of governors shall establish the powers and duties of the boards of trustees. Each board of trustees shall consist of six citizen members appointed by the governor and five citizen members appointed by the board of governors. The appointed members shall be confirmed by the senate and serve staggered terms of five years as provided by law. The chair of the faculty senate, or the equivalent, and the president of the student body of the university shall also be members.

(d) Statewide board of governors.--The board of governors shall be a body corporate consisting of seventeen members. The board shall operate, regulate, control, and be fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs. The board's management shall be subject to the powers of the legislature to appropriate for the expenditure of funds, and the board shall account for such expenditures as provided by law. The governor shall appoint to the board fourteen citizens dedicated to the purposes of the state university system. The appointed members shall be confirmed by

the senate and serve staggered terms of seven years as provided by law. The commissioner of education, the chair of the advisory council of faculty senates, or the equivalent, and the president of the Florida student association, or the equivalent, shall also be members of the board.

24. On January 7, 2003, the Board of Governors established regulations pursuant to article IX, section 7, Florida Constitution, that delegated authority to the local board of trustees for each university. In pertinent part, Florida Board of Governors Regulation 1.001 provides:

(3) University Administration and Oversight.

(a) Each board of trustees shall be responsible for the administration of its university in a manner that is dedicated to, and consistent with the university's mission which shall be otherwise consistent with the mission and purposes of the State University System as defined by the Board of Governors;

\* \* \*

(5) Personnel

(a) Each board of trustees shall provide for the establishment of the personnel program for all employees of the university, including the president, which may include but is not limited to: compensation and other conditions of employment, recruitment and selection, nonreappointment, standards for performance and conduct, evaluation . . . appeals and grievance procedures, and separation and termination from employment.

25. Article IX, section 7, Florida Constitution, gives the Board of Governors broad powers over the governance of the state

university system and creates a university board of trustees to administer each university. Further, Florida Board of Governors Regulation 1.001 shows that the Board of Governors has delegated power and authority to the boards of trustees for administering the universities, including the management of personnel.

26. The controlling case of NAACP, Inc. v. Florida Board of Regents and State Board of Education, supra, held that article IX, section 7, Florida Constitution, is self-executing and that the Board of Governors, which oversees the state university system, derives its power directly from the constitution. 876 So. 2d at 639-640. The NAACP court reasoned that because the Board of Governors derives its authority from the constitution, its regulations are not subject to the Florida Administrative Procedure Act. 876 So. 2d at 640. Therefore, the court dismissed a challenge to the Board of Governors' regulations concerning university admissions as moot.

27. Further, the Legislature has recognized the Board of Governors' duties as constitutional through its enactment of section 1001.705, Florida Statutes. Section 1001.705(2) sets out the Board of Governors' constitutional duties while subsection (3) of the statute recognizes the Legislature's constitutional responsibilities concerning the state university system. A reading of the statute shows that the Legislature recognized that the Board of Governor's constitutional duties

included "[e]stablishing a personnel system for all state university employees. . . ." In contrast, the portion of the statute framing the Legislature's duties and responsibilities does not reference university personnel. Therefore, it is clear that the University's decisions concerning its personnel, including faculty evaluations, re-appointment, promotion, delegation of powers and organizational structure are derived from the constitution.

28. Applying the rules of law to the Petition, it is clear that a summary dismissal with prejudice is appropriate here. Although the University's motion raises several issues, the issue concerning subject matter jurisdiction is dispositive. The Petition here seeks to challenge as "unadopted rules" the following Florida Gulf Coast University statements or documents: (1) the Faculty Performance Evaluation Document for 2003 and 2008; (2) College of Business Framework and Standards for Contract Renewal and Promotion adopted on April 14, 2006, and revisal on February 5, 2010 ("Framework"); (3) Delegation of Authority Memorandum accessed on October 7, 2010, from the University's web-site; and (4) Florida Gulf Coast University's organizational chart.

29. As discussed earlier, the Board of Governors' power and authority over the University is derived from article IX, section 7, Florida Constitution. Further, the Board of



Governors has delegated this constitutional authority to the University's Board of Trustees to administer the University, including faculty evaluations, standards of performance, decisions on reappointment, and organizational structure. All of the challenged statements identified by the Petitioner are within the powers derived from the constitution and not subject to chapter 120, the Administrative Procedure Act. None of the challenged statements show that Florida Gulf Coast University is acting as an "agency" as defined under section 120.52. Thus, it is clear that jurisdiction does not exist, and the Petition is to be dismissed with prejudice.

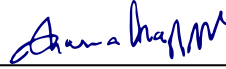
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

A. The Petition for Administrative Determination of Invalidity of Agency Statements is dismissed for lack of jurisdiction;

B. The parties' requests for award of reasonable attorney's fees and costs are denied.

DONE AND ORDERED this 3rd day of May, 2011, in Tallahassee,  
Leon County, Florida.



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THOMAS P. CRAPPS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of May, 2011.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

<sup>2/</sup> The Collective Bargaining Agreement in this case initially covered years 2007-2010, but its terms have been extended for 2011 by an agreement between UFF and the Florida Gulf Coast University Board of Trustees.

COPIES FURNISHED:

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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.