

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PHILIP CARTER,

Petitioner,

vs.

Case No. 15-2019RU

FLORIDA INTERNATIONAL  
UNIVERSITY,

\*AMENDED AS TO APPEARANCES  
AND COPIES FURNISHED ONLY

Respondent.

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\*AMENDED FINAL ORDER

Administrative Law Judge John G. Van Laningham conducted the final hearing in this rule challenge, which was brought pursuant to section 120.56(4), Florida Statutes, by video teleconference on June 12, 2015, at sites in Tallahassee and Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether a statement of Respondent's, which informed Petitioner of his right to seek judicial review of an administrative decision Respondent deemed outside the purview of the Administrative Procedure Act, constitutes an agency statement of general applicability that implements, interprets, or prescribes law or policy in violation of section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

On April 13, 2015, Petitioner filed with the Division of Administrative Hearings a petition seeking an administrative determination, pursuant to section 120.56(4), Florida Statutes, that Respondent's statement regarding Petitioner's right to judicial review of an administrative decision affecting his substantial interests constitutes an unlawful unadopted rule.

The final hearing was held on June 12, 2015, with both parties present. At the outset of the hearing, the undersigned entertained argument on the question of whether Respondent is an "agency" for purposes of sections 120.54 and 120.56, which had been raised previously in a motion to dismiss but not decided. During the argument, the undersigned took official recognition of all Florida Board of Governors Regulations, including its Regulation Development Procedure, as well as the regulations of Respondent's Board of Trustees, including FIU-102.

After hearing from the parties, the undersigned announced his decision that, with regard to the statement at issue, Respondent is not an "agency" for purposes of sections 120.54 and 120.56. As explained at hearing, this legal conclusion compels a decision in Respondent's favor. The undersigned's complete ruling is set forth below.

The final hearing was recorded but not transcribed. Florida International University filed a Proposed Final Order on June 26, 2015.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2014.

#### FINDINGS OF FACT

1. Petitioner Philip Carter was, at all relevant times, a student at Florida International University ("FIU").

2. Located in Miami, Respondent FIU is a public university within the state university system of Florida. The Florida Board of Governors oversees the state university system, and each public university, including FIU, is administered by a board of trustees whose powers and duties the Board of Governors establishes.

3. Carter claims that FIU has caused him injury by, among other things, improperly using or disclosing personal or confidential information gleaned from his educational records.

He believes, as well, that certain documents in his student file should be amended to correct alleged inaccuracies. FIU denies Carter's allegations, and, each time Carter has pursued an administrative remedy, FIU has declined to grant him relief.

4. On one such occasion, by letter dated March 23, 2015, FIU denied Carter's request for a hearing concerning various matters relating to his student records. This letter concluded with the following notice of right to judicial review:

Please be advised that this decision constitutes final agency action of the University, and that no further action will be taken by the University on these matters. You may seek judicial review of this final University decision pursuant to Florida Rule of Appellate Procedure 9.190(b)(3), applicable to review of quasi-judicial decisions of an administrative body not subject to the Administrative Procedure Act, by filing a petition for certiorari review with the appropriate circuit court within thirty (30) days of this final University decision. If you seek review with the court, you must also provide a copy of the petition to [the] Clerk of the University . . . .

(Emphasis added.) Carter alleges that the underlined sentence above is an unadopted rule.<sup>1/</sup>

#### CONCLUSIONS OF LAW

5. Section 120.56(4)(a), Florida Statutes, authorizes any person who is substantially affected by an agency statement to seek an administrative determination that the statement is actually a rule whose existence violates section 120.54(1)(a)

because the agency has not formally adopted the statement. Section 120.54(1)(a) declares that "[r]ulemaking is not a matter of agency discretion" and directs that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

6. The statutory term for an informal rule-by-definition is "unadopted rule," which is defined in section 120.52(20) to mean "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

7. Section 120.52(16) defines the term "rule" to mean 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.

The statutory definition excludes several types of agency statement from its operation, but none of these exclusions is applicable here.

8. To be a rule, the statement at issue must be that of an agency. Further, only an agency may adopt a rule pursuant to the rulemaking procedure set forth in section 120.54. It necessarily follows, then, that only an agency can violate

section 120.54(1) (a) by failing timely to adopt an agency statement defined as a rule; and that, therefore, only an agency can be prohibited from relying on a statement defined as a rule through a proceeding brought under section 120.56(4).

9. The term *agency*, as used in the Administrative Procedure Act ("APA"), refers to specifically identified "officers or governmental entities"—including "educational units"—but only when and if they are "acting pursuant to powers other than those derived from the constitution."

§ 120.52(1) (a), Fla. Stat. (emphasis added).

10. The term "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." § 120.52(6), Fla. Stat. (emphasis added).

11. Thus, FIU is an agency for purposes of the APA when it acts pursuant to authority delegated by the Florida Legislature, but it is not an agency when it acts pursuant to authority derived from the Florida Constitution.

12. Administrative rulemaking, which is a quasi-legislative function,<sup>2/</sup> ordinarily takes place pursuant to a statutory delegation of Legislative authority. Under article IX, section 7(c), of the Florida Constitution, however, it is

the Board of Governors—not the Legislature—that "shall establish the powers and duties of the boards of trustees" which administer the several public universities.

13. Pursuant to article IX, section 7(d), moreover, the Board of Governors is invested with broad constitutional authority to "operate, regulate, control, and be fully responsible for the management of the whole university system." This constitutional grant of authority—and not a statutory delegation—empowers the Board of Governors to adopt rules which cannot be challenged under the APA. See NAACP, Inc. v. Fla. Bd. of Regents, 876 So. 2d 636, 640 (Fla. 1st DCA 2004).

14. Exercising its constitutional rulemaking authority, the Board of Governors promulgates the rules, denominated "regulations," which govern the state university system. The Board of Governors adopts regulations pursuant to its Regulation Development Procedure, which is available online at <http://www.flbog.edu/about/regulations/docs/RegulationDevelopmentProcedure.pdf> (last visited June 23, 2015). Board of Governors regulations are published online at <http://www.flbog.edu/about/regulations/regulations.php> (last visited June 23, 2015).

15. Board of Governors Regulation 1.1001 "delegate[s] powers and duties to the university boards of trustees so that the university boards have all of the powers and duties

necessary and appropriate for the direction, operation, management, and accountability of each state university." BOG 1.001(1). Among other things, this regulation authorizes each board of trustees "to promulgate university regulations in accordance with the Regulation Development Procedure adopted by the Board of Governors." BOG 1.001(3)(j). By regulation, therefore, the Board of Governors has delegated to each of the boards of trustees its constitutional authority to make rules.

16. The FIU Board of Trustees, exercising this delegated constitutional authority, has promulgated many regulations,<sup>3/</sup> including FIU-102, which provides as follows:

The Florida International University regulations replace any and all Florida International University rules previously promulgated by Florida International University which were indexed under Chapter 6C8 of the Florida Administrative Code, and the previously promulgated rules have no force and effect. FIU regulations have been, and will continue to be, adopted pursuant to the Florida Board of Governors' Regulation Development Procedure.

17. The undersigned concludes that when FIU promulgates a rule, or implements an unadopted rule, it acts pursuant to delegated constitutional authority, not in the exercise of delegated legislative authority—at least where, as here, there is no statutory grant of rulemaking authority for the rule under review. Accordingly, for purposes of sections 120.54 and 120.56 vis-à-vis the statement at issue in this case, FIU is not an



"educational unit" as defined in section 120.52(6), and thus it is not an "agency" as defined in section 120.52(1)(a).<sup>4/</sup>

18. Because FIU is not an agency when it exercises rulemaking authority derived from the constitution, the statement which Carter has alleged violates section 120.54(1)(a) is not a "rule" as that term is defined in section 120.52(16); it cannot be adopted pursuant to section 120.54; and consequently it is not an "unadopted rule" as defined in section 120.52(20).

19. This does not leave Carter bereft of an administrative remedy if he believes that he is substantially affected by a university statement that has not been adopted pursuant to the Regulation Development Procedure. As stated at the website of the FIU Board of Trustees, "[i]n order to challenge an FIU Regulation or unpromulgated regulation, a petition must be filed with the FIU Board of Trustees. The process is provided in the Florida Board of Governors Regulations Development Procedure." See Regulations Procedure, available online at <https://regulations.fiu.edu/> (last visited June 24, 2015). Section H, paragraph 2, of the Regulation Development Procedure sets forth the process for challenging an unpromulgated regulation.

20. FIU seeks an award of reasonable costs and attorney's fees pursuant to section 120.595(4)(d), which provides as follows:

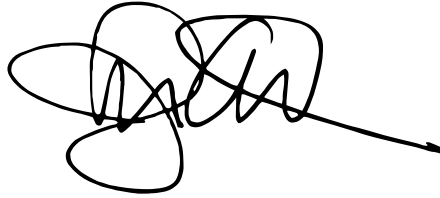
If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and attorney's fees against a party if the appellate court or administrative law judge determines that the party participated in the proceedings for an improper purpose . . . or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported by the application of then-existing law to those material facts.

(Emphasis added.) FIU is not a prevailing "agency" for purposes of section 120.595(4)(d), however, because, for reasons explained above, FIU is not an "agency" in this proceeding. Therefore, section 120.595(4)(d) does not authorize an award against Carter.

#### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the notice of right to judicial review provided to Philip Carter in correspondence dated March 23, 2015, is not an unlawful unadopted rule.

DONE AND ORDERED this 29th day of June, 2015, in  
Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of June, 2015.

ENDNOTES

<sup>1/</sup> The notice appears to be a correct statement of the law. As a state university, FIU is not subject to the requirements of sections 120.569 and 120.57 when determining the substantial interests of a student. See § 120.81(1)(g), Fla. Stat. In such instances, therefore, FIU's decisions are not final agency actions reviewable under section 120.68. See § 120.68(1), Fla. Stat. (establishing right to judicial review of "final agency action"); § 120.52(2) (defining "agency action"); § 120.52(7) (defining "final order"). A party seeking to challenge such a decision is entitled to certiorari review in the circuit court. See Couchman v. Univ. of Cent. Fla., 84 So. 3d 445, 446-47 (Fla. 5th DCA 2012).

<sup>2/</sup> See Adam Smith Enters. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1269-70 (Fla. 1st DCA 1989).

<sup>3/</sup> FIU regulations are published online at <https://regulations.fiu.edu/regulation> (last visited June 24, 2015).

<sup>4/</sup> The conclusion that, under the facts of this case, FIU is not an agency for purposes of sections 120.54 and 120.56 might mean that DOAH is without jurisdiction to consider Carter's claim on the merits. See Dep't of Ins. v. Fla. Ass'n of Ins. Agents, 813 So. 2d 981, 984 (Fla. 1st DCA 2002) (DOAH did not have jurisdiction over action brought under section 120.56(4) to challenge policies of an association held not to be an agency). Unlike the association whose policies were at issue in Florida Association of Insurance Agents, however, which the court determined was *never* an agency for purposes of the APA, FIU is an agency for purposes of the APA *sometimes*, i.e., when it acts pursuant to legislative authority. It is unnecessary for the undersigned to conclude that FIU could *never* be an agency for purposes of sections 120.54 and 120.56, which logically would be true only if the Legislature were powerless to grant rulemaking authority to the boards of trustees, an issue the undersigned need not decide. At any rate, having decided that FIU is not an agency in this instance, it matters not whether the disposition is based on lack of jurisdiction or the merits, for as explained in the main text, the conclusion that FIU is not an agency in connection with the statement at issue necessarily determines the merits.

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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 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.