STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

UNITED FACULTY OF FLORIDA, Charging Party, v. UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, Respondent.	Case No. CA-2009-015 FINAL ORDER Order Number: 10U-076 Date Issued: March 8, 2010

Mark F. Kelly, Tampa, attorney for charging party.

John F. Dickinson and Lori K. Mans, Jacksonville, attorneys for respondent.

On February 13, 2009, the United Faculty of Florida (UFF) filed an unfair labor practice charge alleging that the University of South Florida Board of Trustees (University) violated Section 447.501(1)(a), (c), and (f), Florida Statutes (2009). The charge relates to the University's alleged refusal to allow a grievance to proceed to arbitration and its alleged failure to comply with a settlement agreement (Agreement) between the UFF and the University that required the latter to provide certain correspondence to Associate Professor and UFF member Paul Terry. The Commission's General Counsel determined that the charge was sufficient to proceed to hearing, and an evidentiary hearing was held before the Commission-appointed hearing officer on October 21.

On December 8, the hearing officer issued a recommended order. He found that the University failed to comply with one of the provisions of the Agreement by failing to provide Terry with an October 9, 2008, e-mail from the University's Department of

Educational Leadership and Policy Studies (DELPS) Chair Leonard Burrello. However, he found that the University's one-time failure to comply with a provision of the Agreement does not demonstrate that it repudiated the entire Agreement. Therefore, he concluded that the University did not commit an unfair labor practice. He also concluded that neither party is entitled to an award of attorney's fees and costs pursuant to Section 447.503(6)(c), Florida Statutes (2009).

Following an extension of time, the UFF filed three exceptions to the recommended order. The University filed a response to the UFF's exceptions. A transcript of the evidentiary hearing was filed with the Commission.

The hearing officer's findings of fact, in pertinent part, show that in 2006 Terry filed a grievance alleging that the University violated various provisions of the parties' collective bargaining agreement. Prior to an arbitration hearing on the merits of Terry's grievance, he entered into an Agreement with the University which resolved the grievance and several other issues relating to Terry's employment.

The Agreement contained provisions requiring the University to include Terry in all DELPS faculty correspondence (e-mail & written) regarding the Department of Educational Leadership & Policy Studies Program. The Agreement also required the DELPS Chair to insure that Terry was informed of DELPS curriculum and programmatic issues rather than tenure and promotion issues.

Thereafter, Terry suspected that he was not being provided with all the required communications. On March 19, 2008, Terry filed another grievance alleging that the University had failed to provide him with required communications.

University Associate Provost Kofi Glover heard the grievance at step one and determined that the manner in which Terry was receiving communications required by the Agreement was not consistent. On April 23, 2008, he issued a directive that Terry be included in direct correspondence and not through intermediaries on curriculum and programmatic issues, as determined by the DELPS Chair. In making this decision, Glover did not review the communications Terry attached to the grievance to determine whether he should have received them.

In October 2008, Terry continued to believe that he was not receiving all of the communications that he was entitled to receive. Therefore, he petitioned UFF Executive Director Ed Mitchell to take action to enforce the Agreement. Mitchell requested that Glover have the University set aside the Agreement and process Terry's May 19, 2006, grievance to arbitration.

Glover denied the request and on February 13, 2009, the UFF filed the unfair labor practice charge in this case. On March 26, 2009, Glover wrote a memorandum to College of Education Dean Colleen Kennedy stating that Burrello was not complying with the Agreement's requirement that Terry be provided with communications regarding DELPS curriculum and programmatic issues.

As stated above, the hearing officer concluded that the University's one-time failure to comply with a provision in the Agreement does not demonstrate that it repudiated the entire Agreement.

We now address the UFF's exceptions to the recommended order. In exception one, the UFF takes issue with finding of fact ten which states that the October 9, 2008,

e-mail is the only communication Terry did not receive between July 28, 2008, and the filing of the unfair labor practice charge. The UFF contends that the disputed finding disregards ample evidence to the contrary including: (a) Glover's memorandum dated March 26, 2009, which constitutes an admission that the University failed to comply with the Agreement following the April 23, 2008, grievance settlement; (b) evidence of a similar admission by a University agent; (c) evidence that the University included Terry on the departmental e-mail server list and delivered a CD-ROM to him containing departmental correspondence from January 2007 to April 2009 after the unfair labor practice charge was filed in a effort to achieve belated compliance with the Agreement; (d) the absence of any allegation in the pleadings or evidence that the University complied with the April 23, 2008, Agreement before the charge was filed; and (e) documents in the record that are relevant to the University's alleged continued failure or refusal to abide by the Agreement.

In considering the disputed finding, we note that when making findings of fact, the hearing officer must consider all of the evidence presented, resolve conflicts, judge credibility, weigh evidence, and draw permissible inferences from the evidence. Often the evidence, especially the testimony of witnesses, conflicts or is not entirely consistent. However, it is the hearing officer who must decide which version of the events to credit, and the Commission lacks the authority to reverse that decision if the record contains support for the version of events credited by the hearing officer. Strickland v. Florida A & M University, 799 So. 2d 276 (Fla. 1st DCA 2001); Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985). In reviewing the hearing

officer's recommended order, the Commission is without authority to reject the hearing officer's findings and credibility determinations if they are supported by any competent substantial evidence. See § 120.57(1)(l), Fla. Stat. (2009); see also Boyd v. Department of Revenue, 682 So. 2d 1117 (Fla. 4th DCA 1996); Holmes v. Turlington, 480 So. 2d 150 (Fla. 1st DCA 1985); Leapley v. Board of Regents, Florida State University System, 423 So. 2d 431, 432 (Fla. 1st DCA 1983).

Here, although we agree with the UFF's contention that Glover's statements in the March 26, 2009, memorandum are admissible as evidence, we do not agree with its contention that this evidence is also sufficient to carry its burden of proof in the underlying unfair labor practice charge in this case. The hearing officer considered Glover's testimony and his statement in the March 26, 2009, memorandum that the University was failing to comply with the requirement in the Agreement that Terry be provided with communications regarding DELPS curriculum and programmatic issues. The hearing officer noted that Glover had previously made an identical determination that the manner in which Terry was receiving communications required by the Agreement was not consistent. However, in making that determination, Glover failed to examine the communications submitted by Terry to determine whether Terry was actually entitled to receive the communications.

The hearing officer chose not to accept Glover's statement in the March 26, 2009, memorandum as competent evidence in the absence of references to specific communications the University did not provide to Terry. The hearing officer also recognized the UFF's difficulty in ascertaining what communications Terry failed to

receive given that he allegedly did not receive them. However, he noted that the UFF could have sought to obtain the relevant documents through public records or discovery requests, but failed to do so. Therefore, in determining whether the University failed to comply with the Agreement, the hearing officer only considered the relevant communication entered into evidence to support the UFF's charge. The hearing officer did not assign the same probative weight to Glover's memorandum and testimony which the UFF now asks the Commission to assign. We conclude that the hearing officer's finding that the October 9, 2008, e-mail is the only communication that Terry did not receive after July 28, 2008, and prior to the filing of the unfair labor practice charge in this case, is supported by the record. (Charging Party Exhibit 7; T 15, 34-35, 53-54, 105-106, 111-113)[1]

The UFF also contends that the hearing officer overlooked evidence in the record showing a similar admission by a University agent, and evidence showing that the University included Terry on the departmental e-mail server list and delivered a CD-ROM to him containing departmental correspondence from January 2007 to April 2009. The UFF similarly contends that the hearing officer also failed to consider the absence of any allegation in the pleadings or evidence that the University complied with the April 23, 2008, Agreement before the charge was filed; and documents showing the University's continued failure or refusal to abide by the Agreement. However, none of this evidence

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[1]The transcript of the hearing will be referred to by "T" followed by the appropriate page number(s).

provides sufficient proof of the specific communications Terry allegedly did not receive. Accordingly, exception one is denied.

In exception two, the UFF excepts to the hearing officer's conclusion that it failed to prove that the University repudiated the Agreement. It contends that the hearing officer applied the wrong criteria in evaluating the evidence by his use of the term "repudiate" in determining whether the University engaged in unlawful conduct.

A charge asserting that an employer has abrogated the terms upon which it has resolved a grievance asserts a contractual right derived from the provisions of the collective bargaining agreement which the Commission has found analogous to a unilateral change in the terms of the underlying contract. Contravention of a contractual right by an employer in this fashion establishes an unlawful refusal to bargain in violation of Section 447.501(1)(a) and (c). See Sharp v. City of Melbourne, 18 FPER ¶ 23092 (1992); Central Florida Police Benevolent Association, Inc. v. Orange County Board of County Commissioners, 19 FPER ¶ 24214 (1993); Federation of Public Employees, A Division of the National Federation of Public and Private Employees v. School Board of Broward County, Florida, 22 FPER ¶ 27002 (G.C. Summary Dismissal 1995). The certified bargaining agent, and not the employee, may pursue an unfair labor practice based upon an alleged violation of a contract from which the employee's grievance is derived. See Kelly v. Metro Dade County, Parks and Recreation Department, 19 FPER ¶ 24257 (1993) (ruling that the employee lacks standing to allege that the city unlawfully failed to comply with the grievance settlement); City of Melbourne, 18 FPER ¶ 23092 at 165 (1992).

Here, the hearing officer concluded that the University's one-time failure to comply with a provision of the Agreement does not demonstrate an unlawful repudiation of the entire Agreement. We find that the hearing officer's reliance on Manatee Education Association, FEA, AFT, Local 3821, AFL-CIO v. School District of Manatee County, Florida, 33 FPER ¶ 135 (2007), to support this conclusion is misplaced. In that case, the Commission considered whether the school district committed an unfair labor practice by unilaterally assigning an additional duty hour to middle school teachers every seven days. In addressing the school district's contention that, if a charge alleging a contract violation is not required to be deferred to arbitration, any dispute over the contract could be elevated to the status of an unfair labor practice charge, the Commission noted that a one-time failure to comply with a contract provision is not sufficient to establish a unilateral change; rather, there must be a repudiation of the contract provision. See also Florida State Lodge, Fraternal Order of Police, Local 129 v. City of Ocala, 24 FPER ¶ 29335 (1998) (holding that a public employer violated Section 447.501(1)(a) and (c), Florida Statutes, by unilaterally changing the pay period, deducting of dues, and costs of cleaning clothing from a weekly to biweekly period and by unilaterally changing the accrual of sick and vacation leave from monthly to biweekly).

Here, however, the UFF's allegation that the University failed to comply with the Agreement's provision is distinguishable from the alleged unlawful unilateral changes to contract provisions addressed by the Commission in the School District of Manatee County and City of Ocala cases. The issue here is not whether an employer's failure to abide by a negotiated contract provision is tantamount to a unilateral change of the

provision at issue. Rather, at issue here is a public employer's obligation to comply with an agreement it reached in resolving a grievance filed under the applicable collective bargaining agreement.

The hearing officer found that the UFF failed to comply with a provision of the Agreement but, in essence, he concludes that the University's action was lawful because there is no proof that it repudiated the entire Agreement. In our view, proof of repudiation of the entire Agreement is not required.

Preliminarily, we note that Section 447.201, Florida Statues (2009), provides that it is the public policy of our state to "promote harmonious and cooperative relationships between government and its employees...." Commission precedent indicates its encouragement and approval of settlements in unfair labor practice cases whenever they adequately effectuate the purposes of Chapter 447, Part II. See, e.g., Coral Gables Fraternal Order of Police, Lodge No. 7 v. City of Coral Gables, 5 FPER ¶ 10235 (1979). This furthers the fundamental policy of labor law of permitting and encouraging parties to solve their own problems in a mutually agreeable manner.

However, if public employers are permitted to ignore provisions of settlement agreements reached with employees and labor organizations, there is no impetus for employees or labor organizations to enter into such agreements as means of amicably resolving grievances. Moreover, this contravenes the fundamental policy of labor law of encouraging parties to solve their own problems in a mutually agreeable manner.

The Agreement reached by the parties in the instant case illustrates the point. The hearing officer found that the University violated a portion of paragraph five inasmuch as it failed to provide an October 9, 2008, e-mail to Terry. Although not the subject of this dispute, there were several other provisions in the Agreement requiring the University to take specific action. For example, the University was required to remove and destroy, when permissible under Florida Statutes, an April 28, 2006, Letter of Counsel given to Terry. The Agreement also provided that Terry would continue to serve on University Committees and he would be assigned full time to the University's Lakeland campus as a tenured Associate Professor. (Charging Party Exhibit 2) Under the hearing officer's rationale, the University could ignore the above-referenced agreed-to provisions and remain in compliance with the Agreement. In effect, the University's failure to comply with the above-referenced provisions of the Agreement would not constitute an unfair labor practice as long as the University complied with the remaining portions of the Agreement and did not repudiate the entire Agreement. Commission sanction of such a practice contravenes the stated policy of promoting harmonious and cooperative relationships between governments and its public employees. Thus, we find that the University failed to bargain in good faith by failing to comply with the Agreement it executed with Terry. Accordingly exception two is granted.

In exception three, the UFF excepts to the hearing officer's conclusion that it is not entitled to an award of attorney's fees and costs of litigation. Our standard for awarding attorney's fees and costs to a successful charging party is based upon a showing that

the employer knew or should have known that its conduct was unlawful. See DeMarois v. Military Park Fire Control Tax District No. 4, 7 FPER ¶ 12065 (1981), aff'd, 411 So. 2d 944 (Fla. 4th DCA 1982). Inasmuch as we have resolved this case by recognizing the distinction between this case and analogous cases alleging unilateral changes, we conclude that the UFF is not entitled to an award of attorney's fees and costs. Consequently, exception three is denied.

Upon review of the complete record, including the transcript, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding which satisfied the essential requirements of law. § 120.57(1)(l), Fla. Stat. (2009). However, we conclude that the University violated Section 447.501(1)(a) and (c), Florida Statutes (2009), by breaching the Agreement it entered into with Terry.

Accordingly, the University is ORDERED to:

1. Cease and desist from:

   a. Failing to comply with paragraph five of the Agreement between Paul Terry and the University; and

   b. In any like or related manner, interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them by Chapter 447, Part II, Florida Statutes.

2. Take the following affirmative action:

   a. If requested, provide Terry with the October 9, 2008, e-mail from DELPS Chair Leonard Burrello regarding conditional State approval for educational leadership program;

b. Post in conspicuous locations where notices to the UFF's bargaining unit employees are customarily posted, copies of the attached notice to employees. The University shall ensure these notices remain posted for sixty (60) consecutive days and the notices are not altered, defaced, or covered by other material. Copies of the notice shall be signed by the University's authorized representative prior to posting; and

c. Notify the Public Employees Relations Commission in writing, within twenty (20) calendar days from the issuance of this order, of the steps that the University has taken to comply with its contents.

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within **thirty** days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in Sections 120.68 and 447.504, Florida Statutes (2009), and the Florida Rules of Appellate Procedure.

It is so ordered.
RAY, Chair, VARN and DELGADO, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on March 8, 2010.

BY: _____
Clerk

/bjk

NOTICE TO EMPLOYEES

POSTED PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION

AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE, THE PUBLIC EMPLOYEES RELATIONS COMMISSION HAS DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO ABIDE BY THE FOLLOWING:

WE WILL NOT fail to comply with paragraph five of the Agreement between Paul Terry and the University.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce public employees in the exercise of any rights guaranteed them by Chapter 447, Part II, Florida Statutes.

WE WILL, if requested, provide Terry with the October 9, 2008, e-mail from DELPS Chair Leonard Burrello regarding conditional State approval for educational leadership program.

University of South Florida Board of Trustees

DATE BY TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for **60** consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

(ULP)