STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

UNITED FACULTY OF FLORIDA,

Charging Party,

Case No. CA-2019-031

v.

Order Number: 21U-026
Date Issued: February 5, 2021

UNIVERSITY OF CENTRAL FLORIDA
BOARD OF TRUSTEES,

Respondent.
_________________________________/

FINAL ORDER

On July 19, 2019, United Faculty of Florida (Union) filed an unfair labor practice charge against the University of Central Florida Board of Trustees (University), alleging that the University violated sections 447.501(1)(a) and (1)(b), Florida Statutes (2020).[1] Specifically, the Union alleged that the University: (1) retaliated against bargaining unit member Dr. Abby Milon for engaging in protected concerted activity; and (2) applied the conflict of interest provision set forth in section 112.313(7)(a), Florida Statutes (2020), in an overbroad manner that has a chilling effect on the right of bargaining unit members to engage in protected concerted activity. The Commission's General Counsel found the charge to be sufficient, and a hearing officer was appointed. The University disputed the charges, and both parties requested attorney's fees and costs.

The hearing officer conducted an evidentiary hearing on the matter on January 28 and August 27, 2020. On November 10, the hearing officer issued her recommended order, concluding that the University violated section 447.501(1)(a), Florida Statutes,

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[1]All statutory references are to the 2020 edition of the Florida Statutes.

because it applied section 112.313(7)(a), Florida Statutes, "in an overbroad manner that has the effect of chilling the right of bargaining unit members to engage in the protected concerted activity of assisting other bargaining unit members in disciplinary or grievance matters." However, the hearing officer did not find that the University violated section 447.501(1)(a) and (1)(b), Florida Statutes, by retaliating against Milon for engaging in protected concerted activity. The hearing officer did not recommend awarding attorney's fees and costs to either party. Both parties filed exceptions to the recommended order.

FACTUAL BACKGROUND

The hearing officer found the following relevant facts. The University and Union negotiated a collective bargaining agreement (CBA) in which the Union has the exclusive right to represent any employee in a grievance. So long as there is no conflict of interest, employees may participate in "outside activities," which is defined as "any private practice, private consulting, additional teaching or research, or other personal commitment, e.g., service on a board of directors, participation in a civic or charitable organization, political activity, etc., whether compensated or uncompensated, that is not part of the employee's assigned duties and for which the University provides no compensation." Resp. Ex. 1 at 78, 81. Article 19.2(b) defines a conflict of interest as:

> (1) any conflict between the private interests of the employee and the public interests of the University, the Board of Governors, or the State of Florida, including conflicts of interest specified under Florida Statutes; or
>
> (2) any activity that interferes with the full performance of the employee's professional or institutional responsibilities or obligations.

CP Ex. 12; Resp. Ex 1 at 81. Before employees can engage in outside activities, they must first report the details of that activity on a form titled "Potential Outside Activity,

Employment, and Conflict of Interest and Commitment Disclosure Form" (COI Form). The COI Form is then routed to the employee's supervisor for review, who can make comments and approve the conflict. Next, the department chair will review the form, and then the University's Compliance, Ethics, and Risk Office (Compliance Office) conducts a final review and determines whether the conflict or activity violates state ethics law.

Dr. Abby Milon is a Florida licensed attorney who is employed at the University as a full-time instructor for the Legal Studies Department (Department). She also is a member of the Union. All of the instructors in the Department have law degrees, but not all are licensed attorneys in the State of Florida. Some instructors have outside law practices, which are reported using the COI Form and do not constitute a conflict of interest. Milon did not have an outside law practice but did occasionally offer legal advice to other faculty members and colleagues, including Robert Wood, an associate professor in the Department and close friend, who was also a member of the Union.

In 2016, Dr. Alisa Smith became the Department Chair. Numerous colleagues in the Department had disciplinary issues while under Smith. Milon received two letters of counseling. Wood was suspended after he took bereavement leave and had missed days of work due to acute bronchitis in January of 2018. After an investigation, the University informed Wood that it intended to suspend him without pay. The University subsequently ordered Wood to clean out his office, put him under a trespass warning, and ultimately dismissed him in September 2018. Wood filed grievances pertaining to the discipline he received, and the Union represented him during the grievance process and hearing. After he was dismissed, attorney Toby Lev represented Wood during the arbitration proceeding.

During this time, Wood discussed the disciplinary and grievance matter with Milon and emailed her copies of the notices. Milon offered her informal opinion to Wood on the matter, including whether the University treated other professors more leniently, the validity of the trespass notice, and what she thought the University was planning. They also discussed the provisions of the CBA, including whether the provision pertaining to job abandonment was applicable to his situation, whether his suspension was a constructive dismissal, and whether annual evaluations were needed. Wood knew Milon was an attorney, but he never paid her for her informal opinions or advice, and they never executed a retainer agreement. Milon expected their conversations would be kept confidential because she believed they were protected concerted activity. However, while she was a fellow union member and Wood's friend, Milon also recognized that she wore multiple hats because she was also a licensed Florida attorney. She understood that she was required to abide by professional rules of conduct if another person may consider her communications on legal topics to be confidential.

Milon did not represent Wood against the University as his attorney or a union representative during the grievance or arbitration proceeding, nor did she file any lawsuits on his behalf. Milon did not report to the University that she talked to Wood and gave her opinion concerning Wood's employment and disciplinary issues because she did not believe this activity rose to the level of a reportable outside activity. She thought the conversations with Wood constituted protected concerted activity.

Wood's grievance culminated in an arbitration hearing that was held at the beginning of 2019. Smith was present during the entire arbitration hearing, during which Milon testified under subpoena on Wood's behalf. When she testified, Milon was critical

of how Smith performed her duties as Department Chair. During cross-examination by the University's counsel, Milon testified that Wood provided his Step 2 grievance decision to her. When counsel inquired as to why, Milon invoked the attorney-client privilege and stated that this privilege attached sometime during Spring 2018. She later explained that the reason she invoked the privilege was because she was concerned that Wood may have discussed things in confidence with her because he knew she was a licensed Florida attorney, and she wanted to err on the side of caution. She understood that under The Florida Bar's Rules of Professional Responsibility, the attorney-client privilege is based on the perspective of the person providing the information—not from the attorney's perspective. Milon believed the arbitrator would conduct an in-camera meeting with her to determine the scope of the privilege; this did not happen.

On April 7, 2019, the arbitrator issued a decision directing that Wood be reinstated to his former position and awarded back pay, among other relief. However, the arbitrator did not consider Milon's testimony, agreeing with the University's argument that Wood improperly attempted to utilize the attorney-client privilege as both a sword and a shield. Wood and the University reached a settlement in the case, and Wood submitted his resignation to the University, effective May 6, 2019.

Smith, who was present at the arbitration and had read the arbitrator's decision, sent a letter to Milon stating that even though Milon had raised an attorney-client privilege on behalf of Wood, she had not submitted any COI Forms for the academic years of 2017-18 or 2018-19. Smith requested that Milon submit the appropriate conflict form so that the University could assess the conflict. Milon did not know how to fill out the form since she did not maintain an outside law practice, so she spoke with Georgiana DeBoer,

who worked in the Compliance Office. DeBoer advised Milon that she should indicate that she was her own agency. Although Milon did not believe she had a conflict, she submitted the COI Form as directed, stating on the form that "[a]s a licensed attorney and mediator in the State of Florida, I occasionally am approached on an unsolicited basis for legal advice from individuals. I do not advertise my services nor collect remuneration." She asserted that she engaged in such activities for about an hour per month. After reviewing the form, Smith requested more information about the parameters of Milon's "representation" of Wood, to address the time period from Spring 2018 to Spring 2019, and to explain why a COI Form was not filed within thirty days of that activity. Milon was required to submit this information by May 7.

On April 30, Milon's attorney, Toby Lev, sent a letter to Smith objecting to the request and asserting that Milon and Wood were engaged in protected concerted activity. Lev requested that the conflict be interpreted narrowly because requiring a bargaining unit member to report that they are assisting another bargaining unit member could unlawfully chill protected concerted activity. Smith requested guidance from Christina Serra, the Director of Compliance and Ethics. On May 3, Serra sent an email to Smith discussing the language of section 112.313(7), Florida Statutes, and University Regulation UCF 3.018. Smith forwarded this email to Charlie Piper, the Associate Director of Contract Compliance and Administrator Support. On May 6, Smith reminded Milon to submit the updated COI Form by May 7.

Milon resubmitted the amended COI Form and stated that any additional information was protected per the legal opinion that Lev set forth in his April 30 letter. Smith reviewed the revised COI Form and indicated that Milon's activity was an

unapproved conflict. DeBoer marked the COI Form as an unapproved conflict, citing section 112.313(7), Florida Statutes, University Regulation UCF 3.018, and the UCF Employee Code of Conduct pertaining to avoiding conflicts.

Serra issued a memo, notifying Milon that the University determined the reported activity was an unapproved conflict and required Milon to confirm that she would not engage in the reported activities in the future. DeBoer explained that she considered Milon to have been representing a University employee in a suit against the University, which was a conflict of interest. Milon requested the University to reconsider its decision, stating that she did not receive compensation, did not charge Wood for her time, did not have a written retainer agreement, and did not enter an appearance on his behalf or serve as his representative. She further explained that she had less than a dozen communications with him pertaining to the University's disciplinary actions and his grievance under the CBA. DeBoer responded that the activity would remain unapproved.

The University did not discipline Milon for the unapproved conflict, and her contract with the University was renewed in May 2020. In 2020, Milon was promoted to a Senior Lecturer and received a pay increase. Nevertheless, Milon is concerned that she may be disciplined for the unapproved conflict in the future and believes the conflict of interest determination had an adverse impact on her career and reputation.

The hearing officer concluded that the University violated section 447.501(1)(a), Florida Statutes, because it applied section 112.313(7)(a), Florida Statutes, in an overbroad manner that has a chilling effect on the right of bargaining unit members to engage in protected concerted activity. In reaching this result, the hearing officer concluded that Milon was engaged in concerted, protected activity when she advised

Wood regarding his grievance and testified on his behalf at the arbitration hearing. She further found that consulting with Wood as a fellow bargaining unit employee regarding his disciplinary proceeding, including providing him sporadic, informal advice and testifying at an arbitration hearing, was not prohibited by law.

The hearing officer determined that Milon did not have an employment or contractual relationship with Wood, and thus, did not act contrary to section 112.313(7)(a), Florida Statutes. Likewise, she found that Milon's conduct in informally assisting a fellow employee in his disciplinary and grievance proceedings did not involve the type of "private interests" contemplated by the statute. In reaching this result, the hearing officer pointed out that to conclude Milon's conduct created a conflict of interest would mean that employees who are attorneys would be treated differently in determining whether their conduct was protected. On the other hand, the hearing officer determined that the University did not violate section 447.501(1)(a) and (1)(b), Florida Statutes, because it did not retaliate against Milon for engaging in protected concerted activity. The hearing officer did not award attorney's fees and costs to either party.

ANALYSIS

The University raises five exceptions to the recommended order, challenging both the hearing officer's findings of fact and her legal analysis. The Union contests the hearing officer's conclusion that the University's actions did not amount to an adverse employment action, in violation of sections 447.501(1)(a) and (1)(b), Florida Statutes, and her recommendation that the Commission not award the Union its attorney's fees upon finding that the University violated section 447.501(1)(a), Florida Statutes, by applying

section 112.313(7)(a), Florida Statutes, in an overbroad manner. We address the University's exceptions first.

In reviewing challenges to findings of fact, we are cognizant that it is the hearing officer's function "to consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact." *Boyd v. Department of Revenue*, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996). If competent substantial evidence in the record supports the findings of fact, the Commission may not reject them, substitute its findings, or make new findings. *Id.*, § 120.57, Fla. Stat. Further, it is not our function to determine whether the evidence supports a different version of the events; nor can we reweigh conflicting evidence even if we were inclined to do so. *Id.*; *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Consistent with the aforementioned standard, we limit our review of the hearing officer's findings of fact to a determination of whether there is any competent substantial evidence in the record to support the challenged findings. *Tamiami Trail Tours, Inc. v. King*, 143 So. 2d 313 (Fla. 1962).

In considering challenges to a hearing officer's legal analysis, we review whether the hearing officer applied the correct law and whether we agree with the application of the law to the case, including relevant policy considerations. If we reject or modify a hearing officer's conclusions of law, we must "state with particularity [our] reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." § 120.57(1)(*l*), Fla. Stat.

University's Exceptions One and Two

In its first exception, the University alleges that the hearing officer erred in finding that Milon's invocation of the attorney-client privilege on Wood's behalf during the arbitration was not determinative on the issue of whether she provided him with legal representation. Further, according to the University, the hearing officer erred when she determined that Milon did not provide Wood with legal representation. The University relies significantly on Commission on Ethics Advisory Opinion 16-12 to support its premise that Milon's conduct in providing informal legal advice to Wood in an adversarial action against the University is prohibited by law. Further, the University contends that based on Florida Bar Ethics Opinion 78-4 and various rules of professional conduct, Milon engaged in an attorney-client relationship with Wood, which she did not report.

In its second, related exception, the University asserts that the hearing officer erred in determining that the University violated section 447.501(1)(a), Florida Statutes, by applying section 112.313(7)(a), Florida Statutes, in an overbroad manner. The University alleges that we should follow a newly established standard by the National Labor Relations Board, which determines whether a facially neutral work rule or policy, when reasonably interpreted, would unlawfully interfere with or restrain employees in the exercise of their rights under the NLRA. *See The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). In support, the University relies on *G&E Real Estate Management Services, Inc.*, 369 NLRB No. 121 (July 16, 2020), where the NLRB held the employer's moonlighting policy was lawful because it was aimed at preventing potential conflicts of interest presented by outside work activities.

In contrast, the Union alleges that Milon only provided information and her opinion to a colleague in her bargaining unit who was involved in a grievance and arbitration. The Union emphasizes that none of the University's cases apply to the situation presented here, i.e., a long-time friend and colleague, who is also an attorney, sharing her opinions with a fellow bargaining member regarding problems with the same supervisor.

Section 447.501(1)(a), Florida Statutes, prohibits employers or their agents or representatives from "[i]nterfering with, restraining, or coercing public employees in the exercise of <u>any rights</u> guaranteed them under this part." (Emphasis added.) Promulgating or adopting an unlawful restriction that clearly interferes with and restrains employees in the exercise of rights guaranteed under Chapter 447, Part II, can be an unfair labor practice where the restriction has a "chilling effect" upon employees' protected rights. *See, e.g., Sarasota County Teachers Association v. School Board of Sarasota County*, 6 FPER ¶ 11048 (1980); *Clay County Education Association v. School Board of Clay County, Florida*, 8 FPER ¶ 13365 (1982).

"To be protected under section 447.301(3), Florida Statutes, employee activity must be concerted in nature, not prohibited by law, and pursued for the purpose of either collective bargaining or other mutual aid or protection." *Boswell v. City of Lakeland*, 46 FPER ¶ 86 (2019); *see also Helms v. City of Crestview*, 10 FPER ¶ 15281 (1984); *Clay County Education Association*, 8 FPER ¶ 13365; *Cuozzo v. City of Hollywood*, 4 FPER ¶ 4131 (1978). If an employee acts on behalf of other employees, his or her activity is concerted. *Boswell*, 46 FPER ¶ 86. Even where no group activity exists, an

individual employee's action is protected concerted activity if it encompasses the well-being of her fellow employees. *Id.*

In applying this standard, we first consider whether Milon's activity was concerted in nature and was pursued for the purpose of either collective bargaining or other mutual aid or protection. Here, Wood approached Milon after he was suspended, and the pair discussed his grievance and various issues under the CBA. Milon offered her informal opinion to Wood on issues such as whether she believed the University treated other professors more leniently, whether the CBA provision pertaining to job abandonment was applicable, whether his suspension was a constructive dismissal, and whether annual evaluations were needed. It is unclear what position Milon took on any of these issues. Further, Milon did not file any lawsuits on Wood's behalf, did not appear in a proceeding against the University as a legal representative or attorney for Wood, did not enter into a written retainer agreement, and did not receive any compensation from Wood.

As we have previously stated, the Commission "must broadly construe provisions which protect the rights of public employees to speak freely and to engage in protected concerted activity under [section] 447.301(3), especially in view of statutory and policy considerations encouraging robust and open discussion of labor relations matters," so long as such activity is not unlawful or indefensibly repugnant. *Southwest Florida Police Benevolent Association, Inc. v. City of North Port*, 15 FPER ¶ 20179 (1989). We have often emphasized the "high degree of protection for speech" when employees are engage in protected concerted activity for the benefit of other members. *Dickey v. David Gee, Sheriff of Hillsborough County*, 35 FPER ¶ 191 (2009) (holding that a sheriff committed an unfair practice by suspending an employee, who also served as a

bargaining unit's president, after he wrote and posted comments on a union website); *see also United Faculty of Palm Beach Junior College v. District Board of Trustees of Palm Beach Junior College*, 11 FPER ¶ 16101 (1985), *aff'd*, 489 So. 2d 749 (Fla. 4th DCA 1986) (mailing survey results to high-ranking state officials in an attempt to receive more favorable treatment by the employer at the bargaining table was protected activity); *City of Dunedin v. Local No. 2327, International Association of Firefighters*, 4 FPER ¶ 4258 (1978) (requesting a city commission to discharge a fire captain was protected activity). Such protections do not extend to threatening or abusive language, libelous speech, language that constitutes extortion or bribery, or where language would create the real threat of immediate disruption in the workplace.

We conclude that the reasoning of these cases is equally applicable here, where two union members (Milon and Wood) were discussing a grievance, including the related provisions of the CBA. Thus, the employee activity at issue in this case was concerted in nature and was pursued for the purpose of mutual aid or protection.

Next, we must consider whether the conduct was prohibited by law. The University alleges that this activity is prohibited on the basis of section 112.313(7)(a), Florida Statutes, which provides in relevant part:

> No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; <u>nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or</u>

> her public duties or that would impede the full and faithful discharge of his or her public duties.

§ 112.313(7)(a), Fla. Stat. (emphasis added). The University does not allege that all employees who discuss a grievance will fall under this provision, but contends that it does apply if one of the employees is an attorney who discusses a grievance with a fellow union member in a manner that may trigger the attorney-client privilege. The University appears to recognize that Milon was never employed by Wood, but instead contends that if Milon and Wood had an attorney-client relationship, this automatically is considered a "contractual relationship," regardless of whether the parties entered into a retainer agreement.

We conclude that Milon's conduct was not prohibited by the plain and unambiguous words of section 112.313(7)(a), Florida Statutes. In order for Milon's conduct to be contrary to law under this provision, the University must show each of the conditions in section 112.313(7)(a) are met. As an initial matter, when Milon and Wood discussed Wood's grievance, Milon's "private interests" were not involved. Rather, their discussions involved the collective rights that union members have when they are engaging in collective bargaining and providing mutual aid or protection. Further, Milon's conduct in discussing a grievance and the CBA provisions with a fellow union member did not impede the "full and faithful discharge" of her public duties. Milon held these conversations after work hours, while she was driving home.

Finally, we reject the University's argument that because Milon invoked the attorney-client privilege during arbitration and engaged in these discussions with Wood, she automatically had a contractual relationship with Wood. The University's argument

on this point rests on a misunderstanding of the attorney-client privilege. Here, Milon was prohibited from engaging in conflicts of interest based on her actions. However, as the University recognizes in its arguments, the existence of an attorney-client relationship "does not depend on the actions of the lawyer." Respondent's Exceptions at 24 (quoting *Blackhawk Tennessee, Ltd. Partnership v. Waltemyer*, 900 F. Supp, 414, 418 (M.D. Fla. 1995)).

The attorney-client privilege is triggered if a person has communications with an attorney in her professional capacity as a lawyer and reveals confidences the person intended to be kept confidential. *See* § 90.502(1)(c), Fla. Stat. In other words, the privilege is triggered by statements told to Milon—not by Milon's conduct. The Florida Rules of Professional Conduct require an attorney to keep those statements confidential because "[t]he purpose of the [lawyer-client] privilege is to encourage clients to make full disclosure to their attorneys." *State v. Branham*, 952 So. d 618, 621 (Fla. 2d DCA 2007) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). However, an attorney may not always know whether the privilege applies. For example, statements made "to [a] lawyer merely as a personal friend" are not subject to the privilege. *Id.* (quoting *Modern Woodmen of America v. Watkins*, 132 F.2d 352, 354 (5th Cir. 1942)). Thus, if an attorney is unsure whether a communication was intended to remain confidential, the attorney should assert the privilege so the appropriate tribunal can conduct an inquiry into the circumstances to determine whether such communications are protected by the attorney-client privilege.

In this case, it is unclear whether the privilege is even applicable, nor is it necessary to decide this matter to resolve the case. We find that Milon's sporadic

conversations with Wood over union matters concerning his grievance do not amount to the contractual relationship envisioned by section 112.313, Florida Statutes, particularly where the privilege can be triggered simply by a person revealing confidences to a co-worker who happens to also be an attorney.

To the extent that the University asserts that a different standard should apply to attorneys who seek to discuss grievances with fellow union members or other legal matters, like specific provisions of a CBA, we find that our decision is supported by the Florida Supreme Court's decision in *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999). That case addressed whether public employees who are working as attorneys may join and engage in collective bargaining and its related activities. There, the Florida Legislature initiated a wholesale ban on collective bargaining by government lawyers by precluding "[t]hose persons who by virtue of their positions of employment are regulated by the Florida Supreme Court" from engaging in collective bargaining with their government employer. *See* § 447.203(3)(j), Fla. Stat. (1997). The Florida Supreme Court declared the prohibition to be contrary to Article I, Section 6, of the Florida Constitution, which states that "[t]he right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." *See Chiles*, 734 So. 2d at 1037.

Because the right to bargain collectively is a "fundamental right," the Court explained that any statutory provision that diminishes this right could survive a constitutional challenge only if the State demonstrated that the law serves a "compelling state interest in the least intrusive means possible." *Id.* The State asserted that this burden was met based on a committee staff analysis that stated: "[G]overnment attorneys

must give complete confidentiality, fidelity and loyalty to the State and local government while conducting its legal affairs." *Id.* The State argued that lawyers may not unionize without first securing the State's consent because of the adversarial nature of collective bargaining. *Id.* at 1036. The Court agreed that collective bargaining in general entails an adversarial procedure but nonetheless determined that the State failed to show its interest in preserving the attorney-client relationship warranted a complete ban on government lawyer collective bargaining. *Id.* at 1036-37.

The *Chiles* decision is instructive here, where the University is also relying on the adversarial nature of union activities, such as aiding a fellow union member in a grievance proceeding, to claim the existence of a conflict of interest. As in *Chiles*, we reject the University's argument that Milon was required to secure the University's consent before she could provide mutual aid to a fellow union member by discussing his grievance and the provisions of the CBA. In fact, here, the potential conflict of interest is even less than it was in *Chiles* because while Milon is a licensed attorney, her position at the University is to instruct her students on legal studies, as opposed to providing the University with her opinions and legal advice.

The University relies significantly on *CEO Advisory Opinion 16-12*, where the Commission of Ethics found that section 112.313(7)(a), Florida Statutes, prohibited a public school teacher, who was also a licensed attorney, from acting as a general counsel to a non-profit organization that would include representing her client in lawsuits against the school board that employs her. As addressed above, we do not find that Milon was engaged in outside legal employment that would involve representing parties in lawsuits against her employer, which was the specific issue addressed in *CEO*

Advisory Opinion 16-12. Thus, the opinion is factually distinguishable. Further, this ethics opinion did not address any conflict of interest involving employees' rights to collectively bargain and provide mutual aid to each other, nor does it address a grievance procedure under a CBA. In fact, the University does not even explain what actions Milon took that were "against" the University. While the record shows what topics Milon and Wood discussed, it does not show what position Milon took that was contrary to the University, other than her testimony during arbitration was critical of Smith. Thus, *CEO Advisory Opinion 16-12* does not support a conclusion that Milon's conduct in engaging with other union members in regards to grievances violated the law.

As a part of exception 2, the University alleges that its rule requiring employees to report potential conflicts of interest and outside activities is facially neutral and cannot be considered to interfere with an employee's right to engage in protected concerted activity. It requests that the Commission adopt how the NLRB reviews whether a facially neutral work rule or policy, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their rights under the NLRA. *See The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). In support, the University relies on *G&E Real Estate Management Services, Inc.*, 369 NLRB No. 121 (July 16, 2020), where the NLRB held the employer's moonlighting policy was lawful because it was aimed at preventing potential conflicts of interest presented by outside work activities.

We find no reason to consider the NLRB's standards in this context because, as we previously found, Milon was not engaged in outside employment or activities when she spoke to a co-worker and fellow union member about his grievance and disciplinary issues. Likewise, we reject the University's argument that requiring employees to obtain

permission before discussing grievance matters with a fellow union member is a facially neutral restriction on speech and cannot be considered as interference with an employee's right to engage in protected concerted activity. While the scope of Milon's activities may have been unclear initially, she clarified the scope of her interactions with Wood; however, the University still concluded that it constituted a conflict of interest based on its rule.

In conjunction with these two exceptions, the University summarily challenges the hearings officer's findings of fact 43, 44, 46, 48, 50, 53, 55, and 104-106. After a review of the record, we conclude that findings of fact 43, 44, 46, 48, 50, 53, 55, and 104-106 are supported by competent substantial evidence. *See* Day 1 Trans. at 33-41, 51, 93-94, 99, 129-30, 134, and Day 2 Trans. at 103. In light of the foregoing, we reject the University's first two exceptions.

University's Exception Three

In the University's third exception, it asserts that the hearing officer erred in her finding of fact and legal conclusion that the University was not contractually permitted to conclude that Milon's attorney-client relationship with Wood constituted a prohibited conflict of interest. According to the University, the hearing officer failed to give any meaningful effect to the clear and unambiguous language contained in Articles 19 and 20 of the CBA, which prohibit conflicts of interest. Further, the University avers that based on the CBA, the Union waived its right to challenge the University's conclusion that Milon's conduct constituted a prohibited conflict of interest.

In its first sub-issue under this exception, the University alleges the hearing officer erred in concluding that Milon's legal representation of Wood did not qualify as an

"outside activity" pursuant to Article 19.2 of the CBA. Article 19.2(a) defined an "outside activity" as follows:

> [A]ny private practice, private consulting, additional teaching or research, or other personal commitment, e.g., service on a Board of Directors participation in a civic or charitable organization, political activity, etc., whether compensated or uncompensated, that is not part of the employee's assigned duties and for which the University provides no compensation.

We agree with the hearing officer's findings that nothing in Article 19 supports the University's assertion that the Union waived its right to challenge the University's actions under Article 19. We further agree with the hearing officer's determination that Milon's discussion of work conditions, grievances, and the CBA with other union members does not constitute an "outside activity." To the extent that Article 19.2 defines private consulting and private practice as outside activities, we do not find that informal conversations between two employees who are part of the same bargaining unit, such as here, qualify as an outside activity. If, in fact, Milon's conduct in informally discussing a grievance with a fellow union member is considered to be private practice, the same rationale could be used to prevent any employee from discussing dissatisfaction with working conditions, grievances, or provisions of the CBA with other union members by considering such discussions to be "private consulting."

In the next sub-issue, the University contends that the hearing officer erred in concluding that Milon's conduct did not constitute a "conflict of interest" as defined by Article 19.2(b) of the CBA. This provision defines a "conflict of interest" as:

> (1) any conflict between the private interests of the employee and the public interests of the University, the Board of Governors, or the State of Florida, including conflicts of interest specified under Florida Statutes; or

(2) any activity that interferes with the full performance of the employee's professional or institutional responsibilities or obligations.

We also reject this argument. As addressed above, Milon's conduct in discussing another union member's grievance with him did not constitute a "private interest" but rather a collective interest in providing mutual aid and support to another union member.

In the University's final argument, it alleges that pursuant to Article 20.5, the Union has the exclusive right to represent bargaining unit members, and pursuant to Article 20.6, the Union must provide the University with a list of all persons authorized to act on behalf of the Union's bargaining members. According to the University, since the Union has not notified the University that Milon is authorized to act on behalf of its members, Milon violated these provisions when she discussed Wood's grievance with him and provided advice to him.

The University's argument is without merit. Nothing within these provisions prohibits union members from providing assistance to each other. Further, Milon did not act as Wood's union representative by discussing his grievance with him. In fact, reading these provisions as suggested by the University would have a chilling effect on all union members during grievance proceedings since a union representative is not required to be an attorney. Accordingly, the University's third exception is denied.

University's Exception Four

In its fourth exception, the University alleges that the hearing officer erred in concluding that it was not entitled to attorney's fees in defending the Union's retaliation claim. A prevailing respondent is entitled to attorney's fees if the charge was frivolous, unreasonable, or groundless when filed or if the charging part continued to litigate after

the charge clearly became so. *United Faculty of Palm Beach State College v. Palm Beach State College Board of Trustees*, 41 FPER ¶ 394 (2015). We agree with the hearing officer's finding that the Union's retaliation argument was not so unreasonable as to justify an award of attorney's fees to the University. In fact, the evidence did show that the University considered disciplining Milon for her conduct. Accordingly, we deny the University's fourth exception.

University's Exception Five

Finally, in exception five, the University summarily alleges that the hearing officer erred in rejecting or in failing to incorporate the University's proposed findings of fact 3-7 and 28-30 into her recommended order. The Commission will require additional fact finding only when a fact that is allegedly omitted is essential to the ultimate determination and appears to have been overlooked. *See, e.g.*, *Forrester v. Career Service Commission*, 361 So. 2d 220 (Fla. 1st DCA 1978). We have reviewed the proposed findings identified in the exceptions and conclude that they are either incorporated in the hearing officer's facts, unnecessary, or not supported by the record evidence. Thus, the University's exception five is denied.

Union's Exception One

The Union first challenges the hearing officer's recommendation not to award attorney's fees even though the Union established that the University violated section 447.501(1)(a), Florida Statutes, by applying section 112.313(7), Florida Statutes, in an overbroad manner that had a chilling effect on the right of bargaining members to engage in protected concerted activity. In support, the Union asserts that section 112.313, Florida Statues, is not a recently enacted statute, and its plain language did not prohibit

Milon's conduct. The Union also emphasizes the well-established law that state lawyers may bargain collectively. Further, the Union asserts that even if the University was not aware of Commission precedent concerning protected concerted activity, the University was later placed on notice that finding Milon had engaged in a conflict of interest would chill the exercise of protected concerted activity. The Union stresses that the conflict of interest statute does not address union activity. While the Union recognizes that this is a matter of first impression, it asserts that it is "only because no public employer had previously dared to apply section 112.313(7) to protected concerted activity." The Union alleges that attorney's fees are warranted because the University refused to change its course of action even though it had ample time to study and reconsider its position.

A charging party is entitled to an award of reasonable attorney's fees and costs when the charging party demonstrates that the respondent knew or should have known that its conduct was violative of Chapter 447, Part II, Florida Statutes. *See Leon County Police Benevolent Association v. City of Tallahassee*, 8 FPER ¶ 13400 (1982). Pertinent to this inquiry is whether the law is well-settled in light of prior Commission decisions. *See Fort Walton Beach Fire Fighters Association v. City of Fort Walton Beach*, 11 FPER ¶ 16240 (1985).

We agree with the hearing officer that an award of attorney's fees is not warranted in this case. Based on Article 19 of the CBA, employees agreed to observe the highest standards of ethics consistent with the Code of Ethics of the State of Florida and the advisory opinions rendered with respect thereto. The conflict here arose when Milon invoked the attorney-client privilege during Wood's arbitration hearing. At that time, the reason that Milon invoked this privilege was not clear, and these matters were not fully

resolved until the evidentiary hearing on the matter before us now. In the Union's responses to the University's first set of interrogatories, the Union stated that Milon "did serve in an attorney-client relationship with Robert Wood with regard to his grievances." Thus, relying on the *CEO Advisory Opinion 16-12*, the University believed this attorney-client relationship automatically constituted a conflict of interest. However, in light of the facts elicited during this evidentiary hearing, we determine that the aforementioned ethics opinion is factually distinguishable from the instant case, as addressed above. In fact, even the Union has recognized that the Florida Commission on Ethics does not appear to have addressed the issue of whether activity, such as what occurred here, constitutes a conflict of interest. This supports our conclusion that this case presents a novel issue. Accordingly, we deny the Union's first exception.

Union's Exception Two

In its second and final exception, the Union alleges that that the hearing officer erred in concluding that the University did not retaliate against Milon in violation of section 447.501(1)(a) and (1)(b), Florida Statutes, which prohibits an employer from undertaking actions that discourage or encourage membership in an employee organization. While adverse actions often involve discipline, the Union emphasizes that imposing discipline is not required under the relevant test. According to the Union, an action against an employee should be deemed adverse when an employee should reasonably fear that it may be used later to justify a more severe form of discipline, such as suspension or termination. The Union details how four University employees were involved in deciding that Milon's conduct was an unapproved conflict. Serra wrote to DeBoer that because they anticipated Milon would be grieving the issue, Serra wanted "strong language for

also marking it as unapproved." Piper initially suggested a reprimand for not reporting the conflict. The Union contends that these actions were intended to inhibit and discourage protected concerted activity and demonstrated a conscious disregard for Milon's rights.

The hearing officer correctly noted that when addressing a retaliation claim, we apply the test from the seminal case of *Pasco County School Board v. Public Employees Relations Commission*, 353 So. 2d 108 (Fla. 1st DCA 1977), to determine whether an adverse employment action constitutes an unfair labor practice. According to *Pasco*:

> In order to determine whether the evidence sustains a charge alleging an unfair labor practice, when it is grounded upon an asserted violation of protected activity, the following general principles should be considered by the hearing officer and by PERC:
>
> (1) In any such proceeding the burden is upon the claimant to present proof by a preponderance of the evidence that (a) his conduct was protected and (b) his conduct was a substantial or motivating factor in the decision taken against him by the employer.
>
> (2) If the hearing officer determines the decision of the employer was motivated by a non-permissible reason, the burden shifts to the employer to show by a preponderance of the evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision affecting the employee anyway.

(Footnotes omitted.) *See also United Faculty of Florida v. Florida Polytechnic University Board of Trustees*, 46 FPER ¶ 63 (2019). The hearing officer further recognized that to satisfy the *Pasco* Test, the Union must "show that a reasonable employee would have found the challenged action materially adverse." HORO at 25 (relying on *Koren v. School Board of Miami-Dade County*, 97 So. 3d 215, 219 (Fla. 2012), and *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53, 68-71 (2006)). The hearing officer found there were "no tangible punitive impacts" on Milon as a result of the disapproved

conflict and the statements on the COI Form, which was in stark contrast to all of the cases upon which the Union relied. Accordingly, the hearing officer rejected the Union's claim because no adverse employment action occurred.

We agree with the legal analysis as stated by the hearing officer. In *Koren*, 97 So. 3d at 219, the Florida Supreme Court addressed whether an employee alleged a prima facie charge of retaliation and held that to state a claim, the employee must allege that the employer subjected the employee to an "adverse employment action" after the plaintiff had engaged in protected activity. The Court explained that whether an employment action was "materially adverse" is judged from the perspective of a reasonable person in the employee's position, considering all the circumstances. *Id.* Thus, transfers, suspensions, dismissals, and reprimands can all constitute adverse employment actions that would violate section 447.501(1), Florida Statutes, if such an action was taken in retaliation for protected concerted activity. *See, e.g.*, *United Faculty of Florida v. Florida Polytechnic University Board of Trustees*, 47 FPER ¶ 4 (2020) (recognizing a reprimand can be an adverse employment action); *Koren*, 97 So. 3d at 219 (recognizing a transfer can be an adverse employment action); *Warren v. Martin County Tax Collector*, 45 FPER ¶ 316 (2019) (recognizing a dismissal can be an adverse employment action); *Schafer v. City of Pompano Beach*, 39 FPER ¶ 120 (2012) (addressing claims of a negative evaluation and suspension as adverse employment actions but determining that the employee failed to prove these actions were taken in retaliation for protected concerted activity); s*ee also* Black's Law Dictionary at 65 (10th ed. 2014) (defining an adverse employment action as "[a]n employer's decision that

substantially and negatively affects an employee's job, such as a termination, demotion, or pay cut").

Here, the Union has not cited any decision from the Commission or elsewhere where written comments on a form have been considered adverse employment action. Upon consideration, we determine that the University's written comments on Milon's COI Form do not constitute an "adverse employment action." As the Florida Supreme Court has recognized, an employer's adverse action must be "materially adverse" in the eyes of a reasonable person. Based on the evidence and the facts of this case, the Union did not meet this standard. Accordingly, we agree with the hearing officer's legal analysis on this issue, and the Union's second exception is denied.

CONCLUSION

Upon consideration, 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. Therefore, we adopt the hearing officer's findings of fact. § 120.57(1)(l), Fla. Stat. We also agree with the hearing officer's analysis of the dispositive legal issues, her conclusions of law, and her recommendations. Accordingly, the hearing officer's recommended order is incorporated into this order, and the Union's unfair labor practice charge pertaining to applying section 112.313(7)(a), Florida Statutes, in an overbroad manner is SUSTAINED. § 120.57(1)(*l*), Fla. Stat. The remaining portions of the unfair labor practice charge are DISMISSED.

Pursuant to section 447.503(6), Florida Statutes, the University is ORDERED to:

1) Cease and desist from:

(a) Applying section 112.313(7)(a), Florida Statutes, in an overbroad manner that has the effect of chilling the right of bargaining unit members to engage in the protected concerted activity of assisting other bargaining unit members in disciplinary or grievance matters; and

(b) In any like or related manner interfering with, restraining, or coercing bargaining unit members in the exercise of any rights guaranteed them under Chapter 447, Part II, Florida Statutes.

2) Take the following affirmative action:

(a) Rescind the unapproved conflict of interest, including rescinding the comments and disposition on Milon's 2018-19 COI Form and any other University documents in an unambiguous way that clears Milon's name;

(b) Immediately post or transmit, depending on the manner in which the University customarily communicates with its employees, a Notice to Employees.[2]

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, and the Florida Rules of Appellate Procedure.

[2]The University can satisfy this requirement by e-mailing the Notice to Employees to bargaining unit members or by posting the Notice to Employees on its website. *See School District of Orange County v. Orange County Classroom Teachers Association*, 146 So. 3d 1203 (Fla. 5th DCA 2014) (questioning the practicality of requiring the actual posting of notices given the advancement in modern technology).

It is so ordered.
POOLE, Chair, BAX and KISER, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on February 5, 2021.

BY: ______________________
Clerk

/kep

COPIES FURNISHED:

For Charging Party
Tobe M. Lev, Esquire

For Respondent
Barron Frederic Dickinson, Esquire
Michael Mattimore, Esquire

NOTICE TO EMPLOYEES

Case No. CA-2019-031

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 AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT apply section 112.313(7)(a), Florida Statutes (2020), in an overbroad manner that has the effect of chilling the right of bargaining unit members to engage in the protected concerted activity of assisting other bargaining unit members in disciplinary or grievance matters.

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

WE WILL rescind the unapproved conflict of interest, including rescinding the comments and disposition on Abby Milon's 2018-19 COI Form and any other University documents, in an unambiguous way that clears her name.

DATE	BY	TITLE

University of Central Florida Board of Trustees

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)