

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

BOSTON CULINARY GROUP INC.,
d/b/a/ CENTERPLATE

CASE NO.: 2019-CA-003653-O

Petitioner,

v.

UNIVERSITY OF CENTRAL FLORIDA,

Respondent.

Petition for Writ of Certiorari
from the decision of the University
of Central Florida.

Cindy A. Laquidara, Esq.,
Allison M. Staocker, Esq.,
Thomas O. Ingram, Esq.,
for Petitioner.

Michael D. Crosbie, Esq.,
Nicole L. Ballante, Esq.,
Jennifer P. Sommerville, Esq.,
for Respondent.

Before ASHTON, CRANER, and O’KANE, JJ.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner Boston Culinary Group Inc., d/b/a/ Centerplate (hereinafter Centerplate) seeks a writ of certiorari quashing an order issued by the University of Central Florida (hereinafter “UCF”) regarding the award of attorney’s fees and costs. This Court has jurisdiction under Florida Rule of Appellate Procedure 9.190(b)(3). The Petition for Writ of Certiorari is granted.

FACTS AND PROCEDURAL BACKGROUND

Centerplate held a ten-year concessions-service contract with UCF which was set to expire in 2017. In preparation for the award of the next contract, UCF began the bidding process as mandated by the Florida Board of Governors (hereinafter “BOG”).¹ See BOG Regulation 18.001.² Centerplate made a bid as did several other vendors. UCF posted an intent to award the contract to a company other than Centerplate on July 20, 2017. In accordance with BOG Regulation 18.002, Centerplate protested the Intent to Award (hereinafter “ITA”) and on August 8, 2017, pursuant to the same regulation, UCF referred the protest to the Division of Administrative Hearings for the appointment of an Administrative Law Judge, as a Quasi-Judicial Officer,³ to decide the merits of Centerplate’s protest. A hearing was held before Administrative Law Judge John D. C. Newton, II, (hereinafter “Q-JO” or “Judge Newton”) on September 6, 2017, after which he issued a recommended order on November 21, 2017 in compliance with BOG Regulation 18.002(13)(i). Judge Newton’s Recommended Order effectively upheld Centerplate’s protest and recommended UCF “enter a final order declaring the Intent to Award invalid and rejecting all proposals to Invitation to Negotiate Number ITN1617NCSA.”⁴ After some back and forth pursuant to BOG Regulation 18.002(13)(j) retiring, long-time UCF President, Dr. John Hitt, signed the “Final Order for Final Action” (hereinafter “Hitt Order”) in February 2018 in compliance with BOG Regulation 18.002(13)(k) incorporating, in toto, Q-JO’s Recommended Order. Notably, the Hitt Order specifically included language acknowledging Q-JO’s retention of jurisdiction to “resolve [the]

¹ Since 2003 the State University System of Florida, of which UCF is a member, has been administered by the Florida Board of Governors.

² Current BOG regulations are published at: <https://www.flbog.edu/regulations/active-regulations/>

³ BOG Regulation 18.002(2)(q) defines “Quasi-Judicial Officer” as the presiding official which may be an Administrative Law Judge or a qualified attorney with a minimum of five years’ experience practicing law. 18.002(13)(a) requires the appointment of a quasi-judicial officer in cases involving issues of material fact.

⁴ ITN1617NCSA was issued by UCF at the beginning of the bidding process. An “invitation to negotiate”, otherwise known as an ITN, invites vendors to bid on contracts for goods and services.

issue [of attorney’s fees] . . . after the final order is rendered and any appeal has been finally disposed of[.]”

Having ostensibly prevailed on the merits, Centerplate moved Q-JO to award fees and costs. The award of attorney’s fees and costs, in the present case, is controlled by BOG Regulation 18.002(22) which Judge Newton found, after an extensive hearing, to be applicable and awarded Centerplate \$140,769.90 in fees and \$4,141.63 in costs. Judge Newton issued his Final Order Awarding Fees and Costs (hereinafter “Q-JO Fees Order”) on January 10, 2019 and sent a copy to Dr. Dale Whitaker who had replaced Dr. Hitt as UCF President. Events of no apparent relevance to the case at bar took place at UCF causing Dr. Whitaker to abruptly resign leaving Chief Innovation Officer and Vice President for Partnerships, Dr. Thad Seymour, Jr. to be named by the UCF Board of Trustees as interim President on February 21, 2019. The next day, Dr. Seymour signed an order, over Centerplate’s exceptions, abrogating Q-JO’s award of fees and costs, and substituted UCF’s own “Final Order on Petitioner’s Motion for Attorney’s Fees and Costs” awarding neither fees nor costs. It is UCF’s Final Order on Petitioner’s Motion for Attorney’s Fees and Costs (hereinafter “UCF Fees Order”) dated February 22, 2019 signed by Dr. Seymour that is the subject of the Petition before this Court.

STANDARD OF REVIEW

In a certiorari proceeding, the circuit court is limited to determining whether the lower tribunal’s decision was supported by competent substantial evidence, whether there was a departure from the essential requirements of the law, and whether procedural due process was accorded. *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (en banc).

ARGUMENTS PRESENTED

Essentially, the Court is being asked to determine by who, when, and how attorney's fees should be awarded in this procurement protest as viewed through the lens of this certiorari proceeding. Centerplate petitions for a writ quashing the UCF Fees Order as *ultra vires*; resultantly this would mean the Q-JO Fee Order would stand. Centerplate argues that the plain meaning of 18.002(22) vests the authority to determine fees and costs in a quasi-judicial officer and is not subject to review and amendment by UCF. UCF counters that any order by a quasi-judicial officer under BOG Regulation 18.002 is subject to final approval by its President under 18.002(13) therefore issuance of the UCF Fees Order denying fees and costs was appropriate and Q-JO's issuance of a final order usurped UCF's authority.⁵ UCF argues that Centerplate's Petition should be denied because the UCF Fees Order afforded Centerplate due process, the essential requirements of the law were observed, and it was supported by competent substantial evidence. Alternatively, UCF argues, 18.002(22) is "unconstitutional as it violates the separation of powers guaranteed by the Florida Constitution."

DISCUSSION

The UCF Fees Order of February 22, 2019 is the "lower tribunal decision" the certainty of which this Court is being asked to determine using the standard from *Heggs* and *Vaillant* stated *supra*. Certiorari review requires the Court to examine whether procedural due process was accorded the Petitioner. The Court agrees with UCF that Centerplate has not made arguments in its Petition regarding whether the UCF Fees Order afforded due process. Resp. 10. Likewise

⁵ In his Final Order Awarding Fees and Costs, entered January 10, 2019, Judge Newton references Florida Statutes § 120.68 as the proper procedure for judicial review of his order. UCF has used the procedure found in § 120.68 to appeal the Q-JO Fees Order to the Fifth DCA, however, this fact is immaterial to the Petition before this Court, as the order at issue is UCF Fees Order of February 22, 2019, not the QJ-O's. Nor does the Court reach whether the Q-JO's invocation of Florida Statutes is proper.

Centerplate has not made arguments that there was not substantial evidence for UCF to make a determination of fees and costs. Reply 3. Rather Centerplate has only made arguments contending that UCF departed from the essential elements of the law in attempting to abrogate the Q-JO Fees Order. Pet. 16-21. The Court need not address arguments that the Petition has not made as they are deemed waived. *See D.H. v. Adept Community Services, Inc.*, 271 So. 3d 870, 880 (Fla. 2018). The sole remaining *Heggs/Valliant* determination is whether UCF deviated from the essential elements of the law in issuing the UCF Fees Order.

In its certiorari review the Court has identified three areas as a matter of law that are dispositive: 1) The entirety of this procurement dispute, including attorney's fees, is controlled by a BOG Regulation 18.002 which unequivocally states, "[T]his Regulation . . . shall be the exclusive set of procedures applicable to all such [procurement] protests."; 2) The record shows that the award of attorney's fees was disposed of by motion, and BOG 18.002(18) gives Q-JO the power to conduct proceedings and enter orders necessary to dispose of issues raised by motion; 3) BOG Regulation 18.002(22) allows for the award of attorney's fees and costs, and has vested the power to award same in Q-JO officer. "If the Quasi-Judicial Officer determines that the non-prevailing party has participated in the hearing for an improper purpose, the Quasi-Judicial Officer may award attorney's fees and cost to the prevailing party, as appropriate." BOG Regulation 18.002(22).

As to this last point, *University Hotel and Learning Ctr., LLC v University of Cent. Fla.*, No. 14-4661BID (Fla. DOAH Mar. 18, 2015) (Recommended Order); 2015 WL 1303654, is illustrative. In *University Hotel*, Administrative Law Judge Donald R. Alexander declines to award attorney's fees to UCF in paragraph 77. The reason he denied attorney's fees is not material; as is the fact that he denies the request for fees in a recommended order. Rather, it is the fact that he

clearly denies the request as a final matter and does not discuss it at all in his recommendations. Contrast paragraph 77 with paragraph 76, where Judge Alexander states that the “protest *should* be denied and decision to award the contract . . . sustained.” The plain language of the regulation vests the determination of fees and costs in the quasi-judicial officer. In such instance, the regulation’s plain and ordinary meaning must control. *See Daniels v. Florida Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005) (internal citations omitted).

An order deviates from the essential elements of law when it purports to order something outside the scope of its authority. *See e.g. Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). The record in the present case show that the Q-JO was tasked with answering two questions using separate sections of BOG Regulation 18.002. First, did Centerplate’s protest have merit? Second, who is to be awarded attorney’s fees, if at all? Using the entirety of 18.002(13), including the judicial review provision of 18.002(13)(1), the question of merit was answered in the affirmative when the time to appeal the Hitt Order expired in March 2018. At that moment Centerplate’s protest was meritorious. More importantly to the case at bar, UCF agreed in the Hitt Order to the procedure and resolution of the question of fees and costs by Q-JO when it included language that any award of attorney’s fees was to be *resolved* by the Q-JO after the time to appeal the final order on the merits had expired. Neither party petitioned to have the Hitt Order judicially reviewed and UCF participated in the hearing of Centerplate’s Motion for Fees and Costs on October 25, 2018. Once an adverse ruling by Q-JO resolved that UCF owed fees and costs, UCF entered an order resolving that it did not.

Finally, UCF has raised a constitutionality question for the first time in its Response to Petition for Writ of Certiorari. Resp. 23-29. UCF is challenging BOG 18.002(22) as a facially unconstitutional regulation implementing a constitutional provision. While the circuit courts have

the power to rule on constitutional questions, in the context of challenges to administrative action, this type of constitutional challenge should be refrained from as a matter of judicial policy. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Imp. Tr. Fund*, 147 So. 2d 153, 157 (Fla. 1982). “Judicial intervention in the decision-making function of the executive branch must be restrained in order to support the integrity of the administrative process and to allow the executive branch to carry out its responsibilities as a co-equal branch of government.” *Id.* In the present case, UCF is arguing that it is proper for the Court to deny the Petition and allow the UCF Fee Order to stand because the portion of the regulation allowing for the award of fees unconstitutionally encroaches on an arguably exclusive legislative branch power. Continuing, UCF says that the tipsy coachman doctrine allows that the UCF Fee Order to stand, though completely silent as to unconstitutionality, because it is nevertheless correct in its denial of fees. As *de novo* review is demanded when declaring a statute or rule unconstitutional, this is a bridge too far in the context of a certiorari proceeding in circuit court. *See Id.* at 158 (“If the agency fails to act to correct the rule, then the district court may review both the constitutionality of the rule and the agency action “comprehensively, on all appropriate issues, in a single judicial forum.”).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **GRANTED** and the Final Order on Petitioner’s Motion for Attorney’s Fees and Costs issued by UCF on February 22, 2019 is hereby **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this ___ day of March, 2020.

/S/ _____
JEFFREY L. ASHTON
Presiding Circuit Judge

CRANER, and O’KANE, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Cindy A. Laquidara, Esq., Allison M. Stocker, Esq. and Thomas O. Ingram, Esq.**, Akerman LLP, 50 N. Laura St., Suite 3100, Jacksonville, FL 32202; and **Michael D. Crosbie, Esq., Nicole L. Ballante, Esq. and Jennifer P. Sommerville, Esq.** Shutts & Bowen, LLP, 300 S. Orange Ave., Ste, 1600, Orlando, FL 32801; on this ____ day of March, 2020.

/S/

Keitra Davis

Judicial Assistant