

**IN THE DISTRICT COURT OF RILEY COUNTY, KANSAS**

**JOSEPH M. CRAINE,**  
**Petitioner,**

**v.**  
**KANSAS STATE UNIVERSITY**  
**OF AGRICULTURE AND**  
**APPLIED SCIENCE,**  
**Respondent.**

**Case No. 2015 CV 148**

**ORDER ON PETITION FOR JUDICIAL REVIEW**

This Order is effective as of the date and time reflected in the Court’s electronic file stamp. The Petitioner has filed a petition pursuant to the Kansas Judicial Review Act (“KJRA”). The Petitioner, Dr. Joseph Craine appears through his attorney Rodney C. Olsen of Morrison, Frost, Olsen, Irvine and Schartz, LLP. The Respondent, Kansas State University of Agriculture and Applied Science (“KSU”) appears by Peter J. Paukstelis, Associate General Counsel. Oral argument was held on October 30, 2017. The Court has reviewed the briefs and argument, and makes the following findings and conclusions.

***Background***

1. Dr. Joseph Craine (Petitioner) was a Research Associate Professor of Biology at Kansas State University of Agriculture and Applied Science (Respondent). He was employed in this capacity through a series of one year contracts starting in 2007. The last one year contract was set to expire at the end of 2014. The Respondent terminated the Petitioner’s employment prior to the completion of the contracted term.

2. There are contentions in the record that the Petitioner and other members of the Division of Biology were not necessarily amicable prior to the events of this case. However, the genesis of this case occurred when the Petitioner sent an electronic message (e-mail) to the academic journal *Ecology*.
3. The e-mail from Petitioner to Don Strong, the Editor-in-Chief stated:

“If you are currently considering a paper by Ratajczak et al. regarding woody species at Konza, you might want to reconsider it. It pains me to say this, but I think the paper is fraudulent. I think you can understand that it would be better for me to address this discretely during the review process. I would prefer not to force a retraction publicly. If this paper is not currently within *Ecology*, I apologize. If I can provide more information, please let me know.” AR 51.
4. The paper referenced in the e-mail was prepared by other KSU employees: Dr. Jesse Nippert (Nippert) an associate professor of Biology, AR 1226; Dr. Troy Ocheltree (Ocheltree) a technician in Nippert’s lab, AR 1227-29; and Zak Ratajczak (Ratajczak) a graduate student in Nippert’s lab at the time. AR 1234. The article, “Abrupt transition of mesic grassland to shrubland: evidence for alternative attractors and critical thresholds” had been submitted to the *Ecology* Journal.
5. Whether it is labeled a review or comments, the Petitioner soon thereafter anonymously provided about a two page critique. It included the Petitioner’s recommendation of “Reject (not worthy of publication)”. AR 49-50.
6. By February, 2014, the article had successfully completed peer review and had been accepted for publication in *Ecology*. AR 724-725.

7. Ultimately, the Petitioner's actions with *Ecology* were communicated to person(s) at KSU. Dr. Spooner (Spooner), the Chair of the Division of Biology deemed the Petitioner's communications to be allegations of academic misconduct by the authors. A meeting between Spooner, the Petitioner and others occurred. After which, Spooner wrote a letter dated April 14, 2014 to the Petitioner. AR 288. Spooner felt compelled by KSU policy and procedures to initiate "appendix O" action. "This action is based on (1) allegations of fraud that you raised with the editorial office of the Ecological Society of America regarding a manuscript submitted to the journal *Ecology* that was authored by a Division of Biology graduate student and faculty member, and (2) subsequent allegations of improper conduct by another Division of Biology faculty member (the principal investigator of the NSF-funded Konza Prairie Long-Term Ecological Research program)."
8. KSU's University Handbook, Appendix O, states that "It should be emphasized that reporting misconduct in scholarly work is a responsibility shared by everyone at the University." AR 334.
9. The Petitioner was hesitant in going forward with allegations of misconduct, but the University deemed Appendix O a necessary procedure due to the allegations of fraud that had been asserted by the Petitioner.
10. The following is a time line of administrative action.

<u>Date</u>	<u>Event</u>
	<b>2014</b>
April 7	Inquiry team met with Dr. Craine.
July 28	Inquiry team met with Blair, Nippert and Towne.
August 28	Inquiry team report to Dr. Mason.
September 18	Dr. Craine meeting with Provost Mason.
September 24 329.	Dr. Mason terminated Dr. Craine effective October 24, 2014. AR
December 4	President Schulz affirmed decision.
	<b>2015</b>
May 1	First day of two day grievance hearing panel.
May 5	Second day of grievance hearing panel.
June 15	President Schulz upheld grievance panel decision.

A summary of due process within the administrative action included:

- 1) review by an Appendix O review team;
- 2) review by Provost, Dr. Mason resulted in termination of Dr. Craine's employment;
- 3) administrative appeal to University President, Dr. Schulz;
- 4) administrative appeal to Appendix G hearing panel;
- 5) University President, Dr. Schulz upholding the decision of the grievance panel.

Additional facts and the administrative process are included in the following section.

***Case History / Administrative Findings.***

On April 16, 2014 Dr. Brian Spooner, Director of the Division of Biology contacted Dr. Ron Trewyn, then Vice President of Research, to initiate Appendix O proceedings. The purpose was to address allegations that Dr. Craine made in emails to the editor in chief of *Ecology* on two different occasions. In the first email, on October 19, 2013, Dr. Craine stated he thought the manuscript written by Dr. Ratajczak, Dr. Nippert, and Dr. Ocheltree,

possibly under review at the journal, may be “fraudulent”. In the second email on February 28, 2014, Dr. Craine followed up on his initial concerns, requesting to see the since published paper’s appendices “to know whether the authors are still making false statements”. He further stated “the one thing you can’t do is lie to the readers” and adding that “the issue is rooted deep enough in the [Konza Prairie] LTER ... that [he] may need to involve NSF OIG.” Yet, once these allegations became known at KSU, Dr. Craine asserted the concerns expressed in his emails to *Ecology* did not rise to the level of academic fraud. Dr. Craine did not initiate the Appendix O proceedings.

Dr. Spooner and Dr. Blair believed, and ultimately testified, that Dr. Craine’s emails amounted to academic fraud and were frivolous and mischievous. Based on Appendix O, being the procedure to address such issues, Dr. Trewyn convened an inquiry team to investigate the allegations under Appendix O proceedings. Dr. Craine was designated as the complainant and Dr. Ratajczak, Dr. Nippert, and Dr. Ocheltree as the accused.

Two questions were under review by the Appendix O inquiry team:

1. Was there scholarly misconduct (by the accused)?

If yes, investigate the claim for misconduct and forward recommendations to the Provost whether or not to convene a Review Committee.

2. Is Dr. Craine guilty of misconduct for frivolous, mischievous or malicious misrepresentation?

If yes, continue with Appendix O process.

The Inquiry Team reviewed: Dr. Spooner’s initial letter; Dr. Blair’s memorandum;

Dr. Craine's *Ecology* emails; and met on May 21, 2014 to interview Dr. Craine. Dr. Craine declined to state whether his concerns were honest differences of opinion, fraud or something else. After meeting with Dr. Craine, the Inquiry Team deliberated and determined that there was insufficient evidence of research misconduct by the accused and that further investigation to determine whether Dr. Craine's allegations involved frivolous, mischievous or malicious misrepresentation was warranted.

Dr. Trewyn gave Dr. Craine the option of using the Inquiry Team or asking Provost Mason to convene a review committee. Dr. Craine declined to elect either. So, the Inquiry Team was charged with further investigation of whether Dr. Craine's allegations were frivolous, mischievous or malicious.

On July 17, 2014, the Inquiry Team interviewed Dr. Crain regarding potential misrepresentations. On July 28, 2014 they interviewed Drs. Blair, Nippert and Towne to obtain additional information about Dr. Craine's potential motives for his communications with *Ecology*. It was noted that Dr. Craine had himself published the data he then subsequently questioned in Drs. Ratajczak, Dr. Nippert, and Ocheltree publication.

Ultimately, the Inquiry Team concluded that "Dr. Craine did not have a genuine interest in resolving a genuine concern about academic misconduct and that his allegations were malicious and frivolous at best. The team based their reasoning on the following: Dr. Craine provided insufficient evidence in their estimation to support his allegations of fraud or deep rooted issues at the Konza Prairie LTER; he failed to follow the Appendix O procedures for alleging academic misconduct; he failed to exercise reasonable caution

before alleging fraudulence; he failed to contact individual authors to raise concerns about the manuscript in question; and that interviews with colleagues suggest that his actions fit in a pattern of antagonistic behavior towards colleagues, graduate students in particular. The Inquiry Team recommended that Provost Mason terminate his employment based on their findings.” AR 581

During September, 2014, Provost Mason reviewed the Inquiry Teams findings. She met with Dr. Craine to discuss the Inquiry Team report. At the meeting Dr. Craine claimed he had not published the data he called into question. He corrected this claim in a follow-up email to the Provost. Dr. Craine provided further information through drop box.

On September 24, 2014 Dr. Mason, in a letter to Dr. Craine, concurred with the Inquiry Team’s determination that Dr. Craine’s allegations were malicious and frivolous at best. This was based on the Inquiry Team’s report; Dr. Craine initially telling her he had not used the same data, when he had; his failure to substantiate his allegations against Konza Prairie LTER; and his failure to exhaust the University’s internal reporting system. The last reason was not based upon Dr. Craine failing to utilize Appendix O as a prerequisite or in a particular sequence, but failing to raise the concerns he had either directly with the parties involved, or the department head, dean or provost. Dr. Craine’s term appointment was terminated on October 24, 2014.

### ***Appendix G Grievance Proceeding***

Dr. Craine’s grievance challenged Provost Mason’s decision to terminate Dr. Craine’s term appointment before its expiration, after an Appendix O panel determined he

made malicious and/or frivolous allegations of academic misconduct against colleagues in the Division of Biology. Dr. Crain asserted his termination represented a violation and misapplication of the rules and regulations of KSU. That the decision to terminate was improper and arbitrary. That the nature of the complaint that prompted his termination was a violation of his academic freedom.

A grievance panel comprised of university members, including professors, was appointed. The panel held evidentiary hearings May 1, and May 8, 2015. The panel reconvened on May 13, 2015 and voted unanimously to deny Dr. Craine's grievance and recommended that his termination be upheld. See transcript.

*Grievance Panel Conclusions.*

The grievance panel concluded Craine's "concerns about the Ratajczak et al. paper and the Konza Prairie LTER that Dr. Craine raised to editors of Ecology – including that the paper may be 'fraudulent', wondering whether the authors are still making false statements", and the deep rooted issue in the Konza Prairie LTER – are sufficiently serious so as to amount to allegations of academic misconduct." AR 582. They concluded "the evidence supports that Dr. Trewyn acted appropriately and in good faith in determining that (a) Dr. Craine's allegations needed to be investigated by the university, (b) Appendix O was the appropriate means to investigate those allegations, and (c) that Dr. Crain was appropriately the complainant and that Ratajczak, Nippert, Ocheltree and Blair were appropriately the accused in this case." AR 582-83.



*Grievance panel reasoning.*

Considering the Ecology manuscript had been subjected to rigorous peer review and had undergone revisions before being published, Dr. Craine failed to provide sufficient evidence to support allegations of fraud or to counter the Inquiry Team's report that there was no evidence of academic misconduct by the accused. Instead, the research/publication amounted to either differences in opinion in scientific inquiry or honest mistakes that seemed to be addressed in the peer review process. AR 582.

Given that (a) Dr. Craine had not read the manuscript in question prior to raising concerns of fraudulence to the editors of Ecology, (b) Dr. Craine used some of the data in his own published research, and (c) Dr. Craine failed to substantiate to the inquiry team that a deeper rooted issue in the Konza Prairie LTER existed, there was sufficient evidence for the inquiry team to conclude that Dr. Craine's allegation were frivolous." AR 582.

The administrative process provided Dr. Craine with ample opportunity to substantiate his allegations. The proceedings "were conducted deliberately and with reasonable impartiality." AR 583

"The Evidence establishes that the University complied with the material provisions and spirit of Appendix O, that many violations of Appendix O were harmless or waived by the grievant, and that the grievant was afforded a full and fair opportunity to contest and respond to the allegations that eventually became the basis for his termination." AR 583.

"[t]he grievant has failed to establish that the application of Appendix O or the decision to terminate his employment was improper, arbitrary, or capricious." AR 584.

“The grievant has failed to establish that the University violated his academic freedom.” The evidence establishes that the grievant’s communications to the editors of Ecology were not protected by academic freedom and that the University’s response to these communications did not infringe the grievant’s academic freedom. AR 584.

*All of the above cited case / administrative history was taken from the record. A significant portion from AR 579-584.*

***Kansas Judicial Review Act: Standard and Scope of Review.***

The burden of proving the invalidity of the agency action is on the party asserting invalidity. K.S.A. 77-621(a)(1). Applied to the case at hand Dr. Craine bears the burden of proving the invalidity of KSU’s action in terminating his employment. The Court shall not reweigh the evidence or engage in *de novo* review. K.S.A. 77-621(d).

K.S.A. 77-621 further provides:

- (c) The court shall grant relief only if it determines any one or more of the following:
  - (1) The agency action, or statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
  - (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
  - (3) the agency has not decided an issue requiring resolution;
  - (4) the agency has erroneously interpreted or applied the law;
  - (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
  - (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
  - (7) the agency action is based on a determination of fact, made or implied by the agency,

that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) For purposes of this section, “in light of the record as a whole” means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency’s explanation of why the relevant evidence in the record supports its material finding of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

Finally, in making these determinations, due account shall be taken of the rule of harmless error. K.S.A. 77-621(e).

### **Issues**

The Petitioner raises seven issues in his memorandum brief.

1. Is Dr. Craine entitled to review under the Kansas Judicial Review Act?
2. Did KSU’s actions deny Dr. Craine his procedural due process rights under the United States Constitution?
3. Did KSU erroneously interpret its rules and regulations by forcing Dr. Craine, under threat of insubordination, to participate as a “complainant” in an Appendix O proceeding?
4. Did KSU engage in an unlawful procedure because the application of Appendix O on its face, and as applied to Dr. Craine, violated the Kansas Whistleblower

Act (“KWA”)?

5. Did KSU fail to follow its own prescribed procedures set forth in Appendix O?

6. Was KSU’s dismissal of Dr. Craine based upon determinations of fact, made or implied by KSU, that are not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole?

7. Is Dr. Craine entitled to relief under the Kansas Whistleblower Act (hereinafter “KWA”)?

The court shall make a separate and distinct ruling on each material issue on which the court’s decision is based. K.S.A. 77-621(b).

### *Analysis*

#### **1. Is Dr. Craine entitled to review under the Kansas Judicial Review Act?**

The Court finds that the Petitioner is entitled to have the termination of his employment reviewed under the Kansas Judicial Review Act (KJRA). However, the Respondent does dispute that Dr. Craine is entitled to review of his Kansas Whistleblower Act (KWA) claim. KSU maintains its position that the Petitioner did not properly exhaust his administrative remedies with respect to his KWA claim. The Court will discuss this topic subsequently in the KWA sections.

#### **2. Did KSU’s actions deny Dr. Craine his procedural due process rights under the United States Constitution?**

The KJRA states the Court shall grant relief if determines “the agency action, or

statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied[.]” K.S.A. 77-621(c)(1). The Petitioner had been employed by KSU for a period of time based upon the renewal of one year contracts. Accordingly, he asserts his employment creates a property interest that affords him due process protections under the Fifth and Fourteenth Amendments to the U.S. Constitution. The Respondent does not dispute that due process was owed to the Petitioner, but rather that it was extensively provided.

The Petitioner states that he did not file an accusation with anyone at the University under Appendix O and accordingly he should not be considered the complainant. However, he did state in the e-mail to *Ecology* that three employees of KSU had submitted a paper that he thought was “fraudulent”. Dr. Spooner, the Chair of Petitioner’s department considered this and other communications to be allegations of academic misconduct about researchers at the university. Accordingly, Spooner referred the matter to the Appendix O process. The Petitioner asserts this was the first violation of due process when he was forced into the Appendix O process.

An e-mail from Dr. Ron Trewyn dated May 19, 2014 states to the Petitioner “[y]ou are required to participate in the process as I have indicated, and failure to do so could well be considered insubordination. You should come prepared to provide all evidence you have of the alleged research misconduct Dr. Spooner described in his letter, as well as any other research misconduct about which you are aware.” AR 296. The letter also stated,

“Appendix O is designed to address allegations of research misconduct. I am not aware of anyone claiming that you have committed misconduct as part of your research. Consequently, you cannot – by definition – be the accused. On the contrary, in his letter Dr. Spooner says that you have made allegations of academic misconduct about other researchers at this institution. In your last e-mail, you said you look forward to ‘sharing your concerns’ about the research. Appendix O is the only mechanism the University has to address allegations of research misconduct. Thus by making allegations about the research of others at K-State, you have placed yourself in the position of being a complainant under Appendix O.” AR 296.

Although, the Petitioner did not formally file a complaint with the university, clearly he thought other employees did or could be committing fraud in their research. Enough so that Dr. Craine communicated this to an international journal. It should be equally clear, that it would be neglect by an academic research institution to ignore such assertions, regardless of whether they were formally filed with the University by the Petitioner. The expectation would be for KSU to examine such allegations within the framework of its policy and procedures. The employer university has authority to set reasonable policy and procedures regarding allegations of research misconduct. Requiring the accuser, even though he was not the “filer”, of the Appendix O complaint, to participate in the process does not make Appendix O or the process itself unconstitutional.

Dr. Craine also contends he was the accused under the Appendix O process. However, the record shows it was the three KSU employees he made accusations about that were the accused at that point. Rather his participation was due to the accusations he had made. Accordingly, due process protections afforded to an accused under Appendix O are different than those provided to the person making the accusations. Petitioner states

on page 13 of his brief that “[i]t is clear that an unwilling complainant under Appendix O has far less due process protections than an “accused”.” That may be a generally accurate statement, however, that does not by itself mean that the Petitioner was not afforded adequate due process.

Dr. Craine argues that he was the target of the Appendix O process because animosity with others in the department. Undoubtedly, the accused authors, and quite likely other faculty and administration would have been upset when learning of the Petitioner’s allegations to *Ecology*. There is evidence that the Petitioner and others in the department did not get along. However, the evidence does not support the conclusion that departmental acrimony was the basis to initiate the Appendix O proceeding. The University has an interest and obligation to investigate such allegations. There is substantial evidence that the Petitioner had made allegations about fraudulent research. That was the basis of the Appendix O proceedings. Appendix O does set forth that Dr. Craine should have raised attempted to resolve his concerns with the authors, but it does not prohibit him from raising his concerns with others. AR 334-36.

Dr. Craine states that he attempted to discuss his concerns with the senior author. AR 661. At best, the attempt seems minimal or inadequate from the record. Ultimately, the Petitioner’s inclusion in Appendix O does not pivot on whether he had a good faith basis for his e-mail assertions or they were impulsively made with ulterior motives as argued by the Respondent in the introduction and fact section of its brief citing to specific sections of the record. The fact that the Petitioner made allegations, and the nature of the

allegations, was enough to support an initiation of the Appendix O process and inclusion of the Petitioner as the complainant. In a more conventional circumstance Appendix O appears designed for a willing complainant, but nonetheless, provides adequate due process to an unwilling complainant. The Court recognizes that the grievance panel recommended that faculty senate review these procedures and consider whether future revisions should be considered regarding whether allegations of academic misconduct can be deemed frivolous, mischievous, or malicious in cases wherein the complainant is an unwilling participant. However, raising such an inquiry to possibly improve future procedures does not equate to a lack of present due process.

Due process is owed to Dr. Craine. The questions becomes what that due process entails. Although little legal authority is offered, the Petitioner he was denied due process in seven the seven aspects below. The Respondent argues, that due process rights are governed by *Cleveland Board of Education v. Loudermill*, 470 US 532, 105 S.Ct 1487 (1985) and that everything the Petitioner is claiming is not guaranteed under the constitution.

Although, summarily addressed here, the alleged violations cited by the Petitioner are further addressed throughout this Order.

(1) Right to be presented with a full account of the complaint against him. The record provides substantial evidence that Dr. Craine was apprised of the complaints against him.

(2) A full opportunity to respond to the complaint. As cited within this Order there



were extensive opportunities for Dr. Craine to respond.

(3) The right to counsel, with an attorney accompanying Dr. Craine at every stage of the proceedings. Dr. Craine's due process rights were different when in the role of complainant. Dr. Craine was not afforded counsel at that stage. Once his employment specifically came into jeopardy Dr. Craine's rights were adequate.

(4) The requirement that KSU have the burden of proof by clear and convincing evidence regarding its allegations against Dr. Craine. The Court is mindful of the burden of proof as it reviews KSU's actions and will address it throughout the Order as need be, but otherwise had found in its judicial review the standard to have been satisfied.

(5) An inquiry pursuant to Appendix O regarding the allegations against Dr. Craine. The application and due process elements of Appendix O are discussed throughout this Order and the Court finds them to be satisfied.

(6) Referral of the investigation to a Review Committee by the Provost for a full investigation, if the inquiry team finds that misconduct has occurred and that a full investigation is warranted. As more fully set forth herein the opportunity to have a Review Committee was afforded Dr. Craine, but when offered he did not make such an election. Therefore, the inquiry team basically performed this function.

(7) Protections against frivolous, mischievous, or malicious unfounded allegations against Dr. Craine by other university employees. It is not clear what allegations are being referenced, but Dr. Craine was afforded numerous opportunities throughout the administrative process to address any allegations.

Due process was afforded to Dr. Craine both pre-termination and post-termination.

Pre-termination.

Prior to his termination, Dr. Craine had two meetings with the Inquiry Team. AR 314-15. He received a copy of the Inquiry Team's report containing the discussion of evidence and recommendation that he be terminated. AR 785. Provost Mason met with Dr. Craine regarding the Inquiry Teams report and recommendations. AR 852-53. After the meeting Dr. Craine further communicated with the Provost via e-mail and documents via a dropbox link. AR 854-55. The Provost carefully reviewed the Inquiry team report, provided it to Dr. Craine, and gave him an opportunity to refute is conclusions. AR 583. In summary, the Petitioner was provided notice of the charges, an explanation of the employer's evidence, and the opportunity to present his side of the story.

Post-termination.

After Dr. Craine's termination, there was an administrative appeal to President Schulz. AR 4. Subsequently, a two day evidentiary hearing was held before his peers. AR 587-1270. These peers in certain respects are familiar with research, academic work and operate in a similar work environment to the Petitioner.

Dr. Craine's constitutional due process rights were not violated, as an employee, when he was required to participate in the Appendix O process. His allegations of fraud to the Ecology journal form an adequate basis for him to be designated as the complainant.

The administrative process in this case exceeds the standards set forth *Cleveland Board of Education v. Loudermill*.

3. **Did KSU erroneously interpret its rules and regulations by forcing Dr. Craine, under threat of insubordination, to participate as a “complainant” in an Appendix O proceeding?**

The issue of Dr. Craine being designated as the complainant is discussed in multiple sections. Once, Dr. Craine’s allegations to Ecology became known at KSU, he did not want to pursue them at the University level under Appendix O. He hoped his communications with Ecology were confidential and would not become known to the University. *Petitioner’s Memorandum Brief* Pg. 10.

Ultimately, when the allegations became known to KSU they could either have ignored them or investigated them. Ignoring an allegation of fraud made to an academic journal, about university employees, does not seem viable given the academic and research responsibilities and reputation of a university. Accordingly, a university has an obligation to investigate such allegations to determine the veracity and credibility of the alleged wrongdoing. The university had procedures set forth in Appendix O. It was appropriate to utilize those procedures to the extent they were applicable to this case. KSU substantially complied with the rules and procedures of Appendix O. Appendix O appeared to have been drafted more in mind a willing complainant and in some respects it was silent in these circumstances. Applying the rules to an unwilling participant can create some incongruences that might not exist in a more conventional scenario. In these few instances, the agency offered Dr. Craine choices or made reasonable inferences from the available

procedures. The agency did not engage in an unlawful procedure or fail to follow the prescribed procedure. K.S.A. 77-621.

It is appropriate and lawful for an employer to have established rules governing these issues. In this case, a university establishing rules, to govern an allegation of fraud about a research article submitted to an academic publication. If it is legal for a university to have established such procedures, which really is not disputed, then it follows it is generally appropriate to require participation by employees in the process when merited.

The question relates back to requiring Dr. Craine's participation under these facts. It is undisputed, what Dr. Craine alleged to Ecology, even if the reason, meaning or intent are debated. As mentioned previously, it would have not have been reasonable or realistic for a university to ignore Dr. Craine's allegations against the KSU authors. Appendix O states: "It should be emphasized that reporting misconduct in scholarly work is a responsibility shared by everyone at the University." AR 334. There is little, if any evidence, that Dr. Craine made a reasonable effort to discuss his concerns directly with the parties involved in an attempt to resolve them.

The Petitioner's assertion that he was required to participate in Appendix O as the complainant is accurate. However, Dr. Craine was in fact the party complaining of research conducted by other university employees, even if he was reluctant to file a written complaint at the university level. Dr. Trewyn wrote to Dr. Crain in a May 19, 2014 email:

"On the contrary, in his letter Dr. Spooner says that you have made allegations of academic misconduct about other researchers at this institution. In your last email, you said you look forward to 'sharing your

concerns' about the research. Appendix O is the only mechanism the University has to address allegation of research misconduct. Thus, by making allegations about the research of others at K-State, you have place yourself in the position of being a complainant under Appendix O." AR 296.

Under Appendix O, given the factual circumstances, it was appropriate for Dr. Spooner, as the department chair to refer the matter in a manner consistent with the Appendix O requirements. Under the facts of this case, it was not an erroneous interpretation of Appendix O to have Dr. Craine participate and more specifically designated as the complainant in the proceedings.

**4. Did KSU engage in an unlawful procedure because the application of Appendix O on its face, and as applied to Dr. Craine, violated the Kansas Whistleblower Act ("KWA")?**

The Crux of Petitioner's argument is "Appendix O violates the KWA because it requires university employees to 'internally report' (i.e., give notice to KSU) violations of KSU's rules and regulations regarding academic misconduct prior to reporting it to another 'person, agency or organization.'" *K.S.A. 75-2973(d)(2)* prohibits a state agency from requiring notice be given to it ("the supervisor or appointing authority"), before making a report under the KWA.

**"K.S.A. 75-2973 . . .**

**(d) No supervisor or appointing authority of any state agency shall:**

- (1) Prohibit any employee of the state agency from reporting any violation of state or federal law or rules and regulations to any person, agency or organization; or**
- (2) require any such employee to give notice to the supervisor or appointing authority prior to making any such report."**

Although the Court concurs with Petitioner's interpretation of the KWA, it differs

in respect to what Appendix O states. KSU's Appendix O does require every employee to report academic misconduct, but it does not require it to be done before making a report to another. AR 334-36. Appendix O states:

**“Any member of the university community who becomes aware of an apparent instance of academic misconduct has the duty to try to resolve the issue directly with the parties involved. If direct consultation is inappropriate or unsuccessful, the individual shall report the incident in writing to the appropriate department head, dean, or the provost.”**

AR 335. Neither the above provision, nor the remainder of Appendix O, contain a prerequisite of reporting academic fraud to KSU before reporting it elsewhere. The Court does not find Appendix O, on its face, is a violation of the KWA.

**5. Did KSU fail to follow its own prescribed procedures set forth in Appendix O?**

The Petitioner alleges KSU failed to follow six (A-E) different procedures under Appendix O.

(A) The Petitioner states an “Appendix O proceeding is initiated when a member of the university community reports the incident to the appropriate department head, dean or the provost.” Petitioner argues since he did not report any incident in writing he did not initiate the appendix O proceedings. The argument, as it is under other sections, becomes that Dr. Craine should not have been characterized as the complainant. The same analysis discussed elsewhere herein, also applies to KSU's compliance with Appendix O. Appendix O discusses other procedures prior to a written report being submitted to a superior administrator.

For example, in paragraph 1., Appendix O states:

“1. Any member of the university community who becomes aware of an apparent instance of academic misconduct has the duty to try to resolve the issue directly with the parties involved.” AR 335.

Note, it does not prohibit the accuser from making a report elsewhere. However, Dr. Craine’s e-mails to the *Ecology* Journal are characterized, they clearly fall within this contextual scope and therefore require something similar to a meet and confer to resolve, unless it would be inappropriate for some reason. An adequate reason has not been cited to relieve the requirement of the accuser to attempt to directly resolve the issue. During the administrative process KSU determined that Dr. Craine did not adequately satisfy this requirement and there is substantial evidence in the record supporting this finding.

Even if it were not appropriate for Dr. Craine to resolve the issue directly with the three accused, Appendix O requires him to report the incident in writing to “the appropriate department head, dean or the provost.” Dr. Craine argues since he did not file a written complaint he cannot be the complainant. While his premise, that he did not file a written complaint with an appropriate administrator is accurate, it does result in his desired conclusion that KSU did not adequately follow its own procedures. His reluctance to participate does not exempt him from the University procedures. In simple terms, once Dr. Craine told the academic journal *Ecology* that university employees have or may have committed fraud, after the appropriate follow-up, it was reasonable for the university to designate him as the complainant.

Ultimately, “Dr. Craine failed to follow the Appendix O procedures for alleging academic misconduct; he failed to exercise reasonable caution before alleging fraudulence;

he failed to contact individual authors to raise concerns about the manuscript in question[.] AR 581. Given the circumstances and alternatives, there is substantial evidence in the record to support that it was reasonable to designate Dr. Craine as the complainant.

(B) The next subpart within Petitioner's fifth argument is that KSU did not inform and train its employees regarding academic misconduct and reporting procedures. Again, the standard is not whether in the Court's judgment "best practices" were used or if the Court would have handled the matter differently itself. Even if this argument were valid, the court notes there were other reasons cited by the inquiry team and by Dr. Mason for the termination including that Dr. Craine's allegations were malicious and frivolous at best. They also included Dr. Craine initially telling Provost Mason that he had not used the same data, when he had. Additionally, Dr. Craine failed to substantiate his allegations against Konza Prairie LTER. At least one, if not all of three of these reasons, were not materially affected by KSU's level of informing or training employees.

It was determined during the administrative process that relevant information and particularly Appendix O was readily available to employees including being posted in the university handbook, on the university website. Administrators were available to discuss the same. Dr. Craine was not new to academia, research or KSU. It would seem implausible for faculty to not be aware of rules and regulations pertaining to this subject matter. Appendix O is only three pages. Dr. Craine being familiar with university policies and procedures is part of the expectation of employment at the university. AR 582. The faculty involved in the administrative process deemed there to be substantial evidence of



available information so as not to excuse the actions of Dr. Craine.

“The Evidence establishes that the University complied with the material provisions and spirit of Appendix O, that any violations of Appendix O were harmless or waived by the grievant, and that the grievant was afforded a full and fair opportunity to contest and respond to the allegations that eventually became the basis for his termination.” AR 583. “[t]he grievant has failed to establish that the application of Appendix O or the decision to terminate his employment was improper, arbitrary, or capricious.” AR 584. Petitioner’s argument does not undermine the conclusion that there is substantial evidence supporting KSU’s decision to terminate Petitioner’s employment.

(C) The next subpart within Petitioner’s fifth argument is that Dr. Craine’s e-mails did not allege violations of academic misconduct such that an Appendix O inquiry was required. Dr. Craine’s initial email included, “I think the paper is fraudulent.” While that does not exactly equate to saying “the paper is fraudulent” it is basically an allegation of fraud or possibly potential fraud. Either way, it would be inexplicable for a university, an academic research institution to simply ignore such an accusation. Once an accusation is known, the appropriate course of action is to utilize the rules and regulations in place – the Appendix O process.

“Academic misconduct is defined to include, but is not limited to, the following:

1. Fraud. For example, the fabrication, falsification or alteration of data.” AR 334.

Appendix O then list nine other examples, instances or meanings of academic fraud.

Upon the fraud allegations becoming known to Dr. Spooner, the Chair of the

Division of Biology, he deemed Petitioner's communications to *Ecology* to be allegations of potential academic misconduct by the authors. A meeting between Spooner, the Petitioner and others occurred. The Department chair then referred the matter in accordance with Appendix O. Contrary to Petitioner's argument, this was prudent and was "not a failure to follow its own prescribed procedures."

(D) The next subpart within Petitioner's fifth argument is that it was erroneous to find that Dr. Craine made representations that were malicious and at best, frivolous." AR 329. The Ecology manuscript had been subjected to rigorous peer review before being published, Dr. Craine failed to provide sufficient evidence to support allegations of fraud or to counter the Inquiry Team's report that there was no evidence of academic misconduct by the accused.

The Respondent cites reasons, other than Dr. Craine may have made the allegations to the Ecology Journal for reasons that were not based in good faith. If accurate, those reasons would support the notion of malicious behavior. Dr. Craine asserting fraud and that he wanted to "know whether the authors are still making false statements" without reading the submission first supports a conclusion of a frivolous representation. Dr. Craine wanted to follow up because "the one thing you can't do is lie to the readers." AR 38. While he was not concluding there had been a lie, it was certainly being entertained or suggested. Dr. Craine had not read the manuscript in question prior to emailing allegations to the editors of Ecology,

The fact that Dr. Craine had published some of the same data with Jesse Nippert

in a previous publication, whether distinguishable to some extent, and then opining the research to be fraud is another basis for determining the Petitioner's actions were malicious or frivolous. Further misrepresentations include Dr. Craine's initial response to Provost Mason that he had not used the data presented in the allegedly fraudulent paper in any of his own publications. He did later correct this statement. Likewise Dr. Crain made representations that there were deep rooted issues in the LTER that he never substantiated, despite being given the opportunity to do so.

Dr. Craine made allegations sufficiently serious so as to amount to allegations of academic misconduct. Instead the research/publication was determined to amount to either differences in opinion in scientific inquiry or honest mistakes that seemed to be addressed in the peer review process. AR 582. There is an adequate basis in the record to determine that Dr. Craine's misrepresentations were malicious or frivolous.

(E) The fifth subpart within Petitioner's fifth argument is that after determining the *Ecology* research paper did not involve academic misconduct, KSU erred by not convening a review committee to consider the inquiry team's findings. Appendix O does not directly address the scenario where no academic misconduct is determined to against the three accused, but the allegations made by Dr. Craine may be frivolous or malicious. However, Dr. Trewyn gave Dr. Craine the option of having Provost Mason convene a review committee or using the Inquiry Team. Dr. Craine declined to elect either. In essence his refusal served as a waiver of having a review team appointed or certain provisions that were specific to a review team, such as those found in section (F) below

utilized. The Inquiry Team was charged with further investigation of whether Dr. Craine's allegations were frivolous, mischievous or malicious. Ultimately, the inquiry team performed the function a review team would have. There is nothing in the record to conclude the inquiry team was not impartial in its duties.

(F) The sixth subpart within Petitioner's fifth argument is that all proceedings of a review committee should have been tape-recorded. The Petitioner cites page 336 which is in the context of proceedings by the review committee. As stated above, the Petitioner refused to have a review committee appointed. His actions basically could be considered a waiver. Just as a note, other proceedings were taped and the District Court ordered those to be paid for by the Respondent. Those include the subsequent Appendix G proceedings.

The Petitioner asserts KSU's failure to strictly follow the procedures demonstrates the motivation of KSU. However, the process for choosing university members for the Inquiry team and the Grievance panel were fair and appropriate. The records demonstrates they viewed their responsibilities seriously and were diligent and conscientious in their service.

Substantial evidence establishes that the University complied with the material provisions and spirit of Appendix O, that many violations of Appendix O were harmless or waived by the grievant, and that the grievant was afforded a full and fair opportunity to contest and respond to the allegations that eventually became the basis for his termination. There was substantial evidence to determine Dr. Craine failed to establish that the application of Appendix O was improper, arbitrary, or capricious.

**6. Was KSU’s dismissal of Dr. Craine based upon determinations of fact, made or implied by KSU, that are not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole?**

The Petitioner identifies seven subparts within this argument. Most or all have been addressed elsewhere in this Order. Under this section, the Petitioner argues the evidence was not substantial when viewed in light of the record as a whole. As the Court has evaluated the arguments herein, it has done so in the context of whether there was substantial evidence in the record to support the administrative findings. The Court concluded that there was substantial evidence in the record to support the agency action and more particularly as it applies to each of Petitioner arguments. The analysis and reasons are discussed elsewhere throughout this Order, but in summary:

- A) Dr. Craine’s e-mail(s) was not “improperly characterized” as academic misconduct;
- B) That Dr. Craine misrepresented facts related to academic misconduct;
- C) That it was appropriate for the university to utilize Appendix O in this circumstance;
- D) The university had an adequate basis to characterize Dr. Craine as a complainant under Appendix O;
- E) The Petitioner asserts that he did contact one of the authors about the issue and cites two pages of his testimony in the transcript to support this position. The cited record, however, does not support the notion that Dr. Craine tried “to resolve the issue directly with the parties involved”;
- F) Dr. Craine did make misrepresentations that were malicious, and at best, frivolous.

## **7. Kansas Whistleblower Act Claim.**

The Respondent previously filed a motion to dismiss Petitioner's claim under the Kansas Whistleblower Act (KWA). The Motion requested dismissal on the grounds the KWA claim was filed out of time and Dr. Craine failed to exhaust his administrative remedies. The Court entered an Order on July 25, 2017 denying the motion, but stated the Petitioner, "must prove, with citation to the record, that the KWA claim, was preserved at the administrative level[.]"

The Petitioner acknowledges, "that he did not specifically mention his protections under the KWA during the grievance hearing panel nor were they 'specifically' listed as a ground for appeal." However, the Petitioner asserts the issue was preserved during his meeting with Provost Mason. The record contains a few pages of handwritten notes from Provost Mason when she met with the Petitioner after the Appendix O findings. AR 390-393. The Petitioner cites AR 392 as proof of issue preservation of the KWA claim. The handwritten notation simply states "April, 2014 NSF – Director General Inspector General Whistle blower Act – He is protected." Out of basically 1270 pages in the record, this two line entry is the only citation. This does not appear to involve the KWA, but rather a reference to federal law, the NSF and Dr. Craine's unsuccessful federal whistleblower claim.

KSU argues that Craine did not raise KWA as part of the administrative appeal to President Schulz or the Appendix G process. In support of this argument, the Respondent

cites the record, or more accurately the lack of any reference in the transcript to KWA, whistle and whistleblower. While not in reference to the KWA specifically, there are multiple Kansas cases citing the requirement of issue preservation at the administrative level. It is worth noting that driver's license suspension administrative hearings are reviewed under the same judicial review provisions as this case, the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*

“[I]n an appeal from a decision by an administrative agency, a party may only argue the issues raised at the administrative hearing.” *Rebel*, 288 Kan. at 428. “The district court should not consider the issues raised in Kingsley’s petition for review because he failed to substantiate those claims with evidence at the administrative hearing – is more correctly characterized as a claim that those issues were not preserved for judicial review. *Kingsley*, 288 Kan. at 411. “In an appeal from a decision by an administrative agency, a party may only argue the issues raised at the administrative hearing.” *In re Tax Appeal of Panhandle Eastern Pipe Line Co.*, 272 Kan. 1211 (2002). See *Gonzales v. Kansas Dept. of Revenue*, 2016 Kan.App. Unpub. Lexis 1025. A district court may only review those issues litigated at the administrative process. *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764 (2006); See also *Kempke v Kansas Dept. of Revenue*, 281 Kan. 770, 795 (2006).

The Court finds, that the Petitioner has not adequately exhausted, litigated, or preserved the KWA claim at the administrative level. If the issues was not adequately resolved at the administrative level, it is because the issue was not adequately presented. The lack of preservation of the claim in the record is problematic as discussed in the Court’s

earlier Order on this issue. The Court shall not reweigh the evidence or engage in *de novo* review. K.S.A. 77-621(d). Frankly, there is not any evidence contained within the record to reweigh, because the KWA was not argued at the grievance hearing or elsewhere at the agency level. The KJRA limits new issues. Although, K.S.A. 77-617, identifies several basis for a person to obtain judicial review of an issues that was not raised before the agency, this Court does not find any of them applicable to the case at hand. Having not preserved the KWA at the administrative level and not having a basis to initiate a new issue not raised at the administrative level really concludes the analysis.

Even if the claim was not barred due to a failure to preserve it, the Court does not believe Dr. Craine presented a viable claim under the KWA. He does not assert a violation of state or federal law or rules and regulations under the KWA. K.S.A. 75-2973(d)(1). The position or communications on behalf of the Petitioner, subsequent to his allegations to the *Ecology Journal*, state he was not asserting allegations of academic misconduct. Petitioner states that was not his intention. If the Petitioner was not making such a claim, it would appear to limit his ability to pursue a claim within the KWA scope. Although, Petitioner attempts to rely on how KSU interpreted his allegations to try to obtain KWA coverage. *Petitioner's Reply* Pg. 36. According to Dr. Craine he was not attempting to report academic misconduct violations of rules or regulations, in the form of KSU's Appendix O or 45 C.F.R. 689.1. No other violation of rules or regulations are cited by the Petitioner. The Court does not find the Petitioner is entitled to relief under the KWA (K.S.A. 75-2973).

### **Summary**



Whether this Court, if in the shoes of the agency, would have potentially proceeded in the same or a different manner than the agency is not the role of the Court under the KJRA. Under judicial review, the Court does not reweigh the evidence or engage in a de novo assessment of the wisdom of the agency's action. As noted at the outset, Dr. Craine bears the burden of proving the invalidity of the agency action. Harmless error does not render the agency action invalid. The Court did measure the administrative proceedings against the statutory authority and criteria. Having considered a voluminous record containing about thirteen hundred pages, argument, and briefs, the Court determines there is substantial evidence supporting KSU's decision to terminate Petitioner's employment. Under that framework and for the reasons discussed herein, **IT IS ORDERED** that the above findings be made the order of the Court and that the Petition is denied.

**IT IS SO ORDERED.**

GRANT D. BANNISTER  
DISTRICT COURT JUDGE