

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A & M UNIVERSITY,)
)
 Petitioner,)
)
vs.) Case No. 99-3856
)
JAMES STRICKLAND,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 18 through 19, 2000, in Tallahassee, Florida, before the Division of Administrative Hearings, by its Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Bishop C. Holifield, Esquire
Avery D. McKnight, Esquire
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For Respondent: Thomas W. Brooks, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's employment with Petitioner should be terminated for violation of Rule 6C3-10.103, Florida Administrative Code.

PRELIMINARY STATEMENT

By letter dated August 6, 1999, Petitioner Florida A & M University (Petitioner), advised Respondent James Strickland (Respondent) that he would be dismissed from employment for violation of Rule 6C3-10.103, Florida Administrative Code. On August 23, 1999, Respondent requested a formal administrative hearing to contest allegations that he had violated Petitioner's rule against sexual harassment. Petitioner referred this matter to the Division of Administrative Hearings on September 14, 1999.

A Notice of Hearing scheduled the case for hearing on January 12 through 14, 2000. After a couple of continuances, the case was heard as rescheduled on April 18 through 19, 2000.

Petitioner presented the testimony of five witnesses and offered 43 exhibits, which were accepted into evidence. Respondent testified on his own behalf and presented the testimony of four additional witnesses; he offered five exhibits, which were accepted into evidence.

On April 20, 2000, Respondent filed a Consented Motion to Reopen and Supplement Record. A copy of the deposition testimony of James Carlton Williams was filed that same day. An order granting the motion was issued on April 21, 2000.

The court reporter filed a copy of the Transcript on May 5, 2000.

On May 30, 2000, Respondent filed an Unopposed Motion for Extension of Time for Filing Post Hearing Documents. This motion was granted by order dated June 6, 2000.

The parties filed their proposed findings of fact and conclusions of law on June 7, 2000.

On June 7, 2000, Respondent also filed a Motion to Strike certain lines from the deposition testimony of Yolando Gibson, Petitioner's Exhibit No. 33. Petitioner filed a response to this motion on June 14, 2000. An order dated June 20, 2000, granted the motion.

FINDINGS OF FACT

1. Respondent has been a member of Petitioner's faculty for 30 years. He teaches in the Department of Biology and in the Physical Therapy Program. Over the years, Respondent taught comparative anatomy, developmental anatomy, pathophysiology, biology and other courses in the graduate and undergraduate biology programs.

2. Yolanda Gibson (Gibson) attended school at Florida A & M University from 1995 to 1999. She enrolled in Respondent's comparative anatomy lecture class and comparative anatomy lab class in the fall of 1995.

3. Gibson received a midterm exam grade of 93 in the comparative anatomy lecture class. In December 1995, Gibson was officially excused from taking the final exam in the comparative

anatomy lecture class due to illness. Respondent subsequently assigned her an incomplete ("I") grade for the lecture class.

4. Gibson had a "B" grade average going into the final exam for the comparative anatomy lab class. However, she failed to take the exam. Gibson's testimony to the contrary is not persuasive. Respondent assigned her an "I" grade for the lab class even though she did not have an excuse for missing the final exam.

5. On February 3, 1996, Respondent gave Gibson a make-up exam for the comparative anatomy lecture class. She took the make-up exam in Respondent's office along with one other student, Soyini McClellan.

6. Respondent reviewed Gibson's make-up exam and graded the objective portion. Based on Respondent's initial review, it was obvious that Gibson had performed poorly on the make-up exam. Respondent intended to go back and carefully grade the essay portions of the exam but neglected to do so right away. Subsequently, Respondent misplaced Gibson's make-up exam.

7. Respondent submitted a change-of-grade form for at least five students who took a make-up exam in spring of 1996 for the comparative anatomy lecture class. Gibson was not one of those students.

8. Later in the spring of 1996, Gibson asked Respondent about the grade on her make-up exam in the comparative anatomy

lecture class. Respondent did not tell her that she had made an "F." Rather, as was his custom, Respondent informed Gibson that she "did not do well" on the exam and suggested that she "sit in" on the course again and retake the final.

9. Respondent had a regular practice of permitting students with an incomplete grade who did not do well on a make-up exam to sit in on a subsequent class and retake the final examination rather than assign them a grade of "F." He also routinely allowed students who did poorly on a final examination to take a grade of "I" in lieu of a failing grade in an attempt to raise that grade by sitting in on the class in a subsequent term. Respondent's practice in this regard was improper and resulted in an excessive number of incomplete grades. However, Respondent has not been accused of violating Petitioner's grading policy relative to any student other than Gibson.

10. When Respondent reviewed the objective section of Gibson's make-up exam in the comparative anatomy lecture class, he was aware that Gibson wanted to be admitted to the physical therapy program. She had asked him to write a letter of recommendation for her admission. Respondent was willing to write the letter in part as a favor to his lab assistant, Larry Barnes, who was a good friend of Gibson's. Respondent had helped Mr. Barnes gain admission to the program.

11. The physical therapy program has stringent admission requirements. Respondent and Gibson knew that she could not obtain admission to the program with the grade and minimal skill reflected on her comparative anatomy lecture make-up exam. Therefore, Respondent suggested that Gibson sit in on the class in a subsequent term, not only to prevent her from having a failing grade on her record, but also to ensure her knowledge of the material and her success in the program if she gained admission. Respondent's recommendation would have been the same if he had been aware that Gibson's overall grade in the lecture class had been a "D" instead of an "F."

12. Gibson made no effort to make-up the comparative anatomy lab exam in the spring of 1996. Respondent and Gibson knew that she had a grade of "I" in that class, but neither one raised the subject of a make-up exam with the other.

13. As a result of Respondent's failure to turn in a make-up grade in the lecture and lab classes within the time required under Petitioner's grading policies, Gibson's "I" grades became "F" grades in both classes.

14. In the summer of 1997, Respondent permitted Gibson to sit in on his comparative anatomy lecture and lab courses without registering for the classes. Respondent also suggested, at the urging of Mr. Barnes, that Gibson become one of his laboratory assistants. Respondent made this suggestion in the

hope that the experience would assist Gibson in her admission to the physical therapy program.

15. Gibson was not happy about having to sit in on the classes again, but she accepted Respondent's offer of becoming a laboratory assistant because of the opportunity of obtaining financial aid. Respondent's subsequent attempts to secure financial aid or pay for Gibson in exchange for her services as a lab assistant were unsuccessful. However, it is not uncommon for a student to act as a teaching assistant or a lab assistant solely for the benefit of the experience.

16. When Gibson agreed to sit in on Respondent's summer classes and to act as one of his lab assistants, she had no reason to think that Respondent had any sexual interest in her. Respondent did not put any conditions on getting her grades changed by sitting in and taking the exams.

17. During the summer term, Gibson and Carlton Williams served as Respondent's laboratory assistants. Respondent introduced Gibson and Mr. Williams as lab assistants at the beginning of the lab class. Gibson acted as a lab assistant throughout the summer, although her participation and attendance were sporadic from the middle to the end of the lab class. Some of her absences were due to her mother's illness, which required Gibson to leave town for part of the summer.

18. At the beginning of the comparative anatomy lecture in the summer of 1997, Respondent called on Gibson to answer questions in class. He did so to assist Gibson in learning the material. He wanted her to be prepared for the competition she would face if admitted to the physical therapy program. His questions were not meant to single her out or to be unfair.

19. In the summer of 1997, Gibson began working at the mobile concession stand operated by Henry Norton on or near Petitioner's campus. Respondent has known Mr. Norton for approximately 20 years. Mr. Norton was married at one time to a friend of Respondent's. At all times relevant here, Mr. Norton worked for Petitioner at Palmetto North, a residence hall. Gibson became aware of the relationship between Mr. Norton and Respondent after summer classes began.

20. Respondent admits that he had several conversations with Mr. Norton about Gibson during the summer. These conversations were limited and related to one of the following: (a) Respondent's need to get in touch with Gibson about her lab duties; (b) Respondent's agreement to tutor Gibson and her roommate; and (c) Respondent's consent to loan Gibson money to pay her rent or car payment.

21. Because Gibson was his lab assistant, Respondent had a need to contact her from time to time regarding preparation for and review of the material for the lab course. Respondent knew

Gibson worked for Mr. Norton. Sometimes Respondent would contact Mr. Norton at work in an effort to contact Gibson. Other times Respondent would either call Gibson's home, leaving her messages, or page her on her pager. On one occasion, Respondent called Gibson at her mother's home in Ft. Pierce, Florida, to discuss class business, including Gibson's class performance.

22. During the summer of 1997, Respondent tutored Gibson and her roommate in another professor's anatomy and physiology class. These sessions were usually conducted in the student lounge at Palmetto North in the evenings. Respondent did not initiate the tutoring sessions, but agreed through conversations with Mr. Norton to meet the students at the residence hall.

23. Respondent also agreed to tutor Gibson and her roommate at lunch or dinner on several occasions during the summer. Respondent reviewed old anatomy and physiology tests during some of these engagements; other dinner meetings were more in the nature of a social relationship between students and teacher. However, Respondent never sought to have lunch or dinner with Gibson as a date for purposes of establishing a romantic relationship.

24. Respondent did not invite Gibson to have dinner with him at his home. On one occasion Gibson and her mother went by Respondent's home for a visit.

25. Mr. Norton and Gibson showed Respondent how to contact Gibson on her pager. At that time, Gibson was under the mistaken impression that Respondent had purchased the pager for her. Persuasive evidence indicates that Mr. Norton and not Respondent purchased the pager for Gibson.

26. Respondent may have referred Gibson to his dentist in the summer of 1997. There is no persuasive evidence that Respondent paid her dental bill.

27. Respondent did not give Gibson money to have her hair done. The only competent evidence in the record indicates that Gibson received that money from Mr. Norton. Gibson's understanding that Respondent gave the money to Mr. Norton to give to her was incorrect.

28. Sometimes Respondent goes to the dog track. On one occasion, one of his male students drove him there. However, the greater weight of the evidence shows that Respondent did not go to the dog track with Gibson.

29. Respondent did not kiss or attempt to kiss Gibson in Jones Hall or at any other location. Gibson's testimony to the contrary is not credible.

30. Respondent did not offer to give Gibson an unlimited charge card. Gibson's testimony that Respondent confirmed this offer in person is not persuasive. The same is true regarding

Gibson's testimony that Respondent paid for gas in her car and for an oil change.

31. At the end of the summer, Respondent became aware in his conversations with Mr. Norton that Gibson needed money to pay her rent and/or car payment. Respondent felt guilty and obligated to help Gibson because she had worked as a lab assistant and he had not been able to secure financial assistance for her through the work/study program.

32. Respondent loaned or gave Gibson \$300.00 on two occasions: August 3, 1997, and August 7, 1997. On each occasion Gibson gave Respondent her deposit slips so that he could make the deposits directly to her bank account. Respondent did not make these deposits with the intent of establishing an inappropriate sexual relationship with Gibson.

33. On at least one other occasion, Respondent loaned a male student some money. The male student subsequently repaid the loan.

34. Respondent also has given money to Brendetta Douglas, one of his former students, in exchange for her assistance in monitoring his diabetes. Ms. Douglas was a student of Respondent's in 1995. She began assisting with Respondent's medical condition in 1997. At that time, Ms. Douglas was not one of Petitioner's full-time students. The relationship

between Ms. Douglas and Respondent continues today. It is not now and never has been sexually motivated.

35. Gibson opened her bank account with approximately \$100.00 in cash. Respondent did not give the cash to Gibson directly or indirectly through Mr. Norton.

36. Gibson did not take the midterm or final exam in the comparative anatomy lecture course during the summer of 1997. She chose instead to focus on the anatomy and physiology class for which she was officially enrolled. She did not have time to study for her comparative anatomy lecture course after missing classes to care for her mother.

37. Gibson took the final exam in the comparative anatomy lab class in the summer of 1997. She earned a "B" in that class. Respondent intended to submit a form to change her "F" grade in the 1995 lab class to a "B" grade. Because Gibson was not officially registered in the 1997 lab course, Respondent did not submit Gibson's name and grade on the regular grade sheet. He forgot to submit a separate grade form to change Gibson's grade at that time.

38. The matter of Gibson's grade in the lab class slipped Respondent's mind until after she filed her complaint. Respondent submitted individual grade change forms for Gibson's lab grade in January 1999 and November 1999 without success.

39. In January 2000, Respondent tried a third time to change Gibson's lab grade. However, he mistakenly indicated he was changing a grade for the Summer 1997 course for which Gibson was not registered. Respondent's efforts failed again.

40. Respondent became Gibson's faculty advisor in the summer of 1997. In that role, Respondent suggested that Gibson take his developmental anatomy course in the fall of 1997. Respondent made this suggestion in an effort to ensure that Gibson had the proper academic background for admission to and success in the physical therapy program.

41. At the beginning of the 1997 fall term, Gibson indicated to Respondent that she wanted to drop his developmental anatomy course. During that conversation, Gibson stated that Mr. Norton was not Respondent's friend because Mr. Norton wanted to use Gibson to obtain money from Respondent. Gibson noticed a surprised expression on Respondent's face as he replied, "Why? He can come to me for that." At no time in this or any other conversation did Respondent acknowledge that he was withholding Gibson's grades for sexual favors or that everything Mr. Norton was telling Gibson was true. Respondent never told Gibson that she needed to do anything to get her grades changed other than to sit in on his classes and take the examinations again.

42. Subsequently, Gibson dropped the developmental anatomy course and changed her major to psychology. She never returned to Respondent's office or otherwise contacted him about her grades in comparative anatomy lecture and lab.

43. In January 2000, Respondent renewed his efforts to find Gibson's February 1996 make-up exam for the 1995 comparative anatomy lecture class. With the help of Ms. Douglas, Respondent finally located the make-up exams taken by Gibson and her classmate, Ms. McClellan, on February 3, 1996.

44. After completing the grading process, Respondent determined that Gibson had failed the exam. He gave the test to another professor who confirmed Gibson's grade on the test. Gibson accumulated only 94 points out of 199 total points for a score of 47 percent. Her make-up exam score is an "F" under the applicable grading scale. Her overall grade should have been 62, a passing grade equivalent to a "D."

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

46. In order to prevail, Petitioner must prove by a preponderance of the evidence that Respondent's actions constitute proper cause for dismissal under Rule 6C3-10.103,

Florida Administrative Code. Allen v. Dade County School Board,
571 So. 2d 568 (Fla. 3rd DCA 1990).

47. Rule 6C3-10.103, Florida Administrative Code,
authorizes Petitioner to dismiss employees who have engaged in
acts of sexual harassment against its students; it states as
follows, in pertinent part:

(6) Definition of Discrimination and
Harassment.

* * *

(b) Harassment shall include:

1. Any slurs, innuendos [sic] or other verbal or physical conduct reflecting on an individual's race, ethnic background, gender or handicapping condition which has the purpose or effect of creating an intimidating, hostile or offensive educational or work environment; has the purpose or effect of unreasonably interfering with the individual's work or school performance or participation; or otherwise adversely affects an individual's employment or educational opportunities.
2. The denial of or the provision of aid, benefits, grades, rewards, employment, faculty assistance, services, or treatment on the basis of sexual advances or requests for sexual favors.
3. Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or educational career; submission to or rejection of such conduct is used as a basis for educational or employment decisions affecting the individual; or such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational

performance or creating an intimidating, hostile or offensive working or educational environment.

48. The instant case is a quid pro quo sexual harassment case in which Respondent is charged with withholding Gibson's grades in an attempt to gain her sexual favors. Petitioner has not met its burden of proving that Respondent's withholding of Gibson's grades was sexually motivated.

49. There is no dispute that Gibson's initial grade of "I" in the comparative anatomy lecture class was legitimate. Subsequently, she failed the make-up examination and earned a final grade of "D." Respondent should have recorded that grade in a timely fashion, but there is no persuasive evidence that his failure to do so was sexually motivated. Instead, Respondent became focused on helping Gibson, at her request, gain admission to the physical therapy program. Having committed to this course of action, and following his improper but routine practice of allowing students to improve their grades by retaking a final after sitting in a subsequent class, Respondent had no reason to submit a grade change form prior to Gibson's sitting in on the course again.

50. Gibson's testimony that she repeatedly asked Respondent to change her grades after she took the February 1996 make-up final exam and before the summer of 1997 is not credible. Gibson did not change her goal of gaining admission

to the physical therapy program until the fall of 1997. At that time, she changed her major to psychology.

51. Gibson agreed to sit in on the comparative anatomy lecture class again in the summer of 1997. Gibson did not take the midterm or final exam. Respondent cannot be faulted for failing to request a grade change in the lecture class at that time.

52. As to Gibson's comparative anatomy lab grade, she never took the final exam in 1995 and did not attempt to take a make-up final in 1996. Respondent should have given Gibson an "F" grade in 1995 because she did not have an excuse for not taking the exam. Instead, Respondent gave Gibson an "I" grade, which later turned into an "F."

53. Respondent subsequently agreed to let Gibson sit in on a subsequent comparative anatomy lab class and to change her 1995 lab grade if she passed the course. This decision was contrary to Petitioner's grading policy, but was consistent with Respondent's policy of helping his students achieve their career goals.

54. Respondent has never denied that Gibson earned a "B" in the comparative anatomy lab class in the summer of 1997. He was negligent in not turning in a grade change form in a timely fashion. When he discovered his oversight, Respondent tried unsuccessfully to correct his mistake.

55. There is no evidence that any of Respondent's actions before the summer of 1997 was in any way sexually motivated. Gibson had no reason to suspect that Respondent was improperly withholding her grades until she began working for Mr. Norton after summer school began in 1997. By that time, Gibson was sitting in on the lecture and lab classes and working as one of Respondent's lab assistants. Respondent and Gibson believed that she would gain valuable work experience and a financial benefit.

56. The situation began to change after Mr. Norton came into the picture. At that time, Gibson began to assume that Respondent was being nice to her in order to gain her sexual favors. This mistaken belief was based on false statements made by Mr. Norton to Gibson regarding Respondent's intentions. There is no evidence that Respondent was aware of the things Mr. Norton was saying until the fall of 1997 when Gibson dropped Respondent's developmental anatomy class.

57. In the summer of 1997 Respondent had legitimate reasons to contact Gibson by phone, on her pager, and at Mr. Norton's concession stand. At times he needed to talk to Gibson about her lab duties. At other times Respondent needed to discuss arrangements for anatomy and physiology tutoring sessions with Gibson and her roommate. Respondent's efforts to contact Gibson were not sexually motivated.

58. Respondent graciously agreed to assist Gibson and her roommate by tutoring them in anatomy and physiology, a core subject for the physical therapy program. Most of these sessions took place on campus in a residence hall where Mr. Norton worked. Perhaps it was not wise for Respondent to meet Gibson and her roommate for tutoring sessions during lunch and dinner. However, Respondent's only objective was to help his students academically. Respondent's conduct during these sessions was never inappropriate and never implied that he desired anything other than a student/teacher relationship with Gibson. Respondent certainly never attempted to kiss Gibson.

59. Respondent freely admits that he gave Gibson \$600.00 in August of 1997. He did so only because he had been unable to obtain work/study funds for her. He felt obligated to help her and did so with no ulterior motive or improper purpose.

60. There is no credible evidence that Respondent gave Gibson money or gifts other than the \$600.00, which he deposited into her bank account. There is evidence that Mr. Norton gave Gibson cash money and paid for the pager.

61. When Gibson went to Respondent's office in the fall of 1997 to drop her developmental anatomy class, she was not sure whether Respondent was aware of the statements allegedly made by Mr. Norton. Respondent expressed genuine surprise when Gibson described Mr. Norton's alleged statements and conduct. Even in

that conversation, no discussion of withholding grades for sex occurred.

62. Gibson's conclusion that Respondent withheld her grades to gain sexual favors is based entirely on the alleged statements by Mr. Norton. Mr. Norton did not testify at the hearing. His alleged statements are inadmissible hearsay. Section 120.57(1)(c), Florida Statutes. Moreover, to the extent that Mr. Norton's statements are admissible, they are contrary to the greater weight of the evidence.

63. There was no conspiracy or agency between Respondent and Mr. Norton. Respondent never told Gibson that everything Mr. Norton was saying was true. There is no non-hearsay evidence in the record to establish precisely what Mr. Norton was telling Gibson. If Mr. Norton was telling Gibson that Respondent would take care of her if she granted Respondent sexual favors, Respondent was unaware of it.

64. This case contains conflicts in the evidence, inconsistency in witness testimony and recollections, and some unexplained events. On balance, it is more likely that Respondent and Gibson were victims of Mr. Norton's scheming.

65. Respondent is the proverbial absentminded professor. He is a kindhearted old gentleman who can be manipulated by others. His generosity and commitment to helping his students by allowing them to sit in on his classes and retake exams when

they are not entitled to do so contributed to the suspicion of his guilt in this case. However, there is no credible evidence that Petitioner violated Rule 6C3-10.103, Florida Administrative Code.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Petitioner enter a final order reinstating Respondent with back pay and all lost employment benefits, plus interest where applicable, from the date of loss.

DONE AND ENTERED this 24th day of July, 2000, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2000.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.