

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A AND M UNIVERSITY,)
)
 Petitioner,)
)
vs.)
) Case No. 08-4095
ROBERT L. THOMAS,)
)
 Respondent.)

)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on October 22, 2008, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Avery D. McKnight, Esquire
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For Respondent: Dr. Robert L. Thomas, pro se
10548 Coral Key Avenue
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STATEMENT OF THE ISSUE

Whether Respondent should be required to pay Petitioner's claimed overpayment of salary as calculated in the amount of \$2,603.86, for the pay periods between July 2, 2007, and July 26, 2007, and whether the effective date for modification

in salary as assigned by Petitioner should be consistent with the date of Respondent's amended contract.

PRELIMINARY STATEMENT

Respondent, an employee of Petitioner, Florida Agricultural and Mechanical University (FAMU), requested a disputed-fact hearing as more fully described in the following Findings of Fact. The cause was referred to the Division of Administrative Hearings (DOAH) on or about August 20, 2008.

On August 28, 2008, the case was noticed for hearing on October 8, 2008, in Tallahassee, Florida. A Motion for Continuance, filed October 3, 2008, was granted by an Order entered October 7, 2008.

At the disputed-fact hearing, held October 22, 2008, FAMU presented first, as appropriate to the burden of proof herein. FAMU presented the oral testimony of Jacqueline Lester, Dr. Henry Lewis III, and Respondent, and had FAMU Exhibits 1-13 admitted in evidence. Respondent was permitted to examine Ms. Lester out of order and testified on his own behalf. He had Thomas Exhibits 1-7 admitted in evidence. Additionally, the Prehearing Stipulation was admitted as Joint Exhibit A, and FAMU Regulations 10.102, 10.105, and 10.209, and FAMU Board of Trustees Policy 2005-15, as stipulated correct and applicable to this case, were admitted in "hard copy" as Joint Exhibit B.

A Transcript was filed on November 5, 2008.

A November 21, 2008, Order amended the style of this cause, as set out above, to reflect the burden of proof and duty to go forward.

Petitioner's Proposed Recommended Order, filed November 25, 2008, has been considered in preparation of this Recommended Order. Respondent filed no proposed recommended order, despite having been sent an instructional Post-Hearing Order dated November 5, 2008.

FINDINGS OF FACT

1. Respondent is currently employed as a tenured associate professor in the FAMU College of Pharmacy and Pharmaceutical Sciences (COPPS). At all times material, he has been a tenured employee of FAMU. He currently resides in Tampa and is responsible for developing a professional experience program from Tampa to Orlando, Florida.

2. Although at hearing Respondent orally requested reimbursement of his travel expenses to the hearing, at no time prior to hearing did he object to the scheduling of hearing in Tallahassee, Florida. His oral request is here treated as a motion, to be resolved in the following Conclusions of Law.

3. Herein, FAMU contends that \$2,603.86,^{1/} amounting to 1.9 pay periods (July 2, 2007-July 26, 2007), constitutes an overpayment of salary FAMU made to Respondent in the capacity of interim dean, together with concomitant federal tax considerations. FAMU now seeks reimbursement from Respondent.

4. Respondent's first employment contract appointing him to serve in an administrative capacity as interim dean and associate professor for COPPS shows a signature on a line provided for "President/Provost/Vice-President" on June 16, 2004, acceptance by Respondent on July 1, 2004, and appointment dates of August 8,

2004, through August 7, 2005. That contract provided for an approval by the president or the president's designee. Prior to that first interim appointment, Respondent was employed in COPPS as an associate dean and associate professor, and Dr. Henry Lewis III was employed as Dean of COPPS.

5. In 2007, Respondent signed three contracts, only the first of which was for employment as interim dean.

6. All 2007 employment contracts referenced throughout this Recommended Order specified that:

This employment contract between Florida A&M University Board of Trustees and the employee is subject to the constitution and laws of the State of Florida, the rules and guidelines of the Board of Governors, the regulations of the University Board of Trustees (BOT), and in accordance with Article 6, Nondiscrimination, Article 1.3, Employment Contract, and Article 20, Grievance Procedure and Arbitration of the United Faculty of Florida (UFF) contract with Florida A&M University. Neither this employment contract nor any action or commitment taken pursuant to it, is final or binding upon the parties until, and unless, the signature of the University President, [sic] President's designee, as approving authority and the signature of the employee have been affixed and the employment contract has been returned to the appropriate authority as specified herein. The signature of the employee affixed hereto shall not be deemed a waiver of the right to process a grievance with respect hereto.

* * *

... This offer of employment will be withdrawn and not processed for payroll if this employment contract is not signed and returned to the appropriate authority within twenty (20) days from the date of offer. (Emphasis supplied.)

7. Faculty employment contracts are prepared by the Office of the Provost and Vice President of Academic Affairs and forwarded to the FAMU Payroll Office for appropriate processing and payment. All contracts in evidence have been treated by all parties as valid, regardless of whether they bear FAMU's president's signature or the signature of anyone on his behalf signed on the president's "line." Presumably, this is because the signator for the vice-president/provost was the president's "designee" with final approval authority on behalf of the president.

8. At no time has Respondent ever filed a grievance with regard to any 2007, employment contract.

9. Respondent's first 2007, employment contract reflected an administrative appointment as interim dean and associate professor. It was offered on May 31, 2007; was executed by Respondent on June 15, 2007; and was signed by someone on FAMU's President's signature line on June 22, 2007. Thereby, Respondent was employed at an annual salary rate of \$158,417.00, and a biweekly amount of \$6,069.61. The period of appointment specified was from July 1, 2007, through June 30, 2008.

10. At all times material, FAMU Board of Trustees Policy No. 2005-15 has provided, in pertinent part:

II. Application

This policy applies to employees holding both a tenured faculty position and serving as a senior administrative and academic officer of the University, but who are leaving their senior administrative and academic office to return to the tenured faculty or an administrative position. Examples of such positions are the vice

presidents, assistant or associate vice presidents, deans and directors.

III. Lack of Property Interest in Office
Senior Academic and Administrative Officers are employees "at will"; thus, the President may not purport to confer on any officer a period of employment of fixed duration or otherwise confer any property interest in such employment. However, such an officer may be appointed to a period of employment as provided in Rule 6C3-10.105 Florida Administrative Code, so long as the instrument accomplishing such an appointment status states clearly that the incumbent officer is subject to removal at any time, during that period, at the option of the President.

III. [sic] Joint Appointments
Tenure status as a member of the faculty, held concurrently by any Senior Academic and Administrative Officer of the University is separate and distinct from the administrative office, and such tenure status is governed by the provisions of Rule 6C-10.211, Florida Administrative Code. Those tenure rules and regulations have no bearing upon and do not govern the administrative appointment covered by these regulations, and the Senior Academic and Administrative Officer does not have tenure in his or her administrative positions.

IV. Return to a Faculty Position
A Senior Academic and Administrative Officer who holds a concurrent tenured faculty appointment may return to that appointment with all the rights and responsibilities of faculty in his or her original department . . .
. The salary of the administrator shall be adjusted . . . to a . . . faculty salary.
(Emphasis supplied.)

11. None of Respondent's 2007, contracts contain any language about "subject to removal at any time at the option of the President," but both parties herein have signed new contracts on that basis.

12. At all times material, FAMU Board of Trustees Policy Number 2005-19, has provided, in pertinent part:

4. Salary Overpayments

The University will seek reimbursement for salary overpayments and as stated in federal and state laws and policies. ^[2/]

13. In a letter dated June 28, 2007, FAMU President-Elect James H. Ammons offered Dr. Henry Lewis III the position of Dean of COPPS.

14. Dr. Lewis accepted the position as dean in a letter dated July 2, 2007.

15. Also on July 2, 2007, a general faculty meeting was held. At that time, President Ammons introduced his leadership team and announced that Dr. Lewis had been reinstated as Dean of COPPS. Respondent was present when this announcement was made.

16. A contract as Dean of COPPS was offered by the Provost/Vice-President to Dr. Lewis on July 3, 2007. Dr. Lewis executed the contract on July 3, 2007. The copy in evidence does not show any signature by the President or on his signature line. This contract reflects Dr. Lewis's retroactive appointment as Dean of COPPS for the period July 1, 2007, through June 30, 2008, the same period as was set forth in Respondent's then-existing contract as interim dean. (See Finding of Fact 9.)

17. In a letter dated July 9, 2007, and received by Respondent on July 12, 2007, President Ammons notified Respondent, "pursuant to FAMU Regulations 10.102 and 10.105," of Respondent's "change-in-assignment and removal of administrative duties as interim dean of" COPPS, "effective to June 30, 2007." Respondent was further informed thereby that his duties and

responsibilities as an associate professor would be provided to him by Dean Lewis. The letter also states, in pertinent part:

In addition, your annual salary will be adjusted in accordance with the rules and regulations of the FAMU Board of Trustees. A new employment contract reflecting this employment action will be subsequently provided to you. (Emphasis supplied).

18. FAMU Regulation 10.102, provides, in pertinent part:

* * *

(9) An employee assigned to an acting appointment (temporary change in assignment), in instances in which responsibilities have changed, may be provided a pay increase. Upon the employee's return to his or her original responsibilities, the pay may be adjusted to the employee's responsibilities. (Emphasis supplied.)

* * *

(11) When the assignment of Faculty serving in an administrative position such as Vice President, Dean, Director, or Department Chair is changed, the pay and appointment period shall be adjusted to reflect the new responsibilities. Pay adjustments shall be completed in accordance with the Board of Trustees Policy No. 2005-15 (Separation and Return of Senior Administrative and Academic Officers to Faculty), as now or hereafter amended. (Title underlined in original; other emphasis supplied.)

19. FAMU Regulation 10.105, provides, in pertinent part:

(3) Appointments
(e) No appointment shall create any right, interest, or expectancy of continued employment. . . .

20. FAMU Regulation 10.209, provides, in pertinent part:

Change-in-Assignment of Faculty and administrative and Professional Employees The President or President's designee may for the best interests of the University, at any time, assign a Faculty or Administrative and Professional (A&P) employee to other

institutional assignments only after consultation with the employee and the departments or other units affected. Regardless of the change-in-assignment, however, the University is committed to compensate the employee. Employees whose assignments are being made in conjunction with a nonreappointment [sic] shall be reassigned pursuant to Regulation 10.207.^[3/] This regulation shall only apply to a change in assignment when nonreappointment [sic] is not intended by the University. Work assignments are grievable pursuant to Regulation 10.206.

21. Dean Lewis testified credibly that, following some conversations between himself and Pharmacy Director Angela Hill, Respondent's class and teaching assignments were made on his behalf by Director Hill.

22. Dean Lewis expected Respondent to immediately begin to prepare to teach four sections of medical terminology for the 2007, fall semester, as referenced on an Assignment of Responsibility Form. The date of the first of these classes was August 27, 2007, and there is no evidence that Respondent did not start teaching that class on that date. However, Respondent did not acknowledge the Assignment of Responsibility Form by signing it until August 29, 2007. Director Hill did not sign it until August 30, 2007, and Dean Lewis signed it on September 7, 2007.

23. Respondent was not assigned any administrative duties or responsibilities as interim dean after July 2, 2007, inclusive of the period in dispute, July 2, 2007, through July 26, 2007.

24. Although he testified that between July 2, 2007, and August 27, 2007, Respondent did some work in the Dean's office, closing out unspecified administrative matters left in his tray,

the greater weight of the evidence reflects that Respondent did not perform any identifiable administrative duties or responsibilities as interim dean after July 2, 2007. Moreover, Respondent requested, and Dean Lewis granted him 88 hours of annual leave for the dates of July 9, and July 16-27, 2007.

25. A new faculty employment contract administratively appointing Respondent as associate professor was offered/signed by the provost/vice-president, on August 10, 2007, and signed by Respondent on either August 10, or August 22, 2007 (the date has been scribbled over), for the period from July 1, 2007, through June 30, 2008. It bears no signature on President Ammons' signature line. This contract reflects an annual associate professor salary rate of \$106,442.00, and biweekly amount of \$4,078.23.

26. Based upon that first 2007, associate professor contract (see Finding of Fact 25), Respondent's biweekly salary was supposed to be modified to \$4,078.24, beginning with the August 17, 2007, pay-date. However, for the pay-dates between July 2, 2007, and July 26, 2007, FAMU continued to pay Respondent a biweekly amount of \$6,069.61, as if he were still interim dean. (See Finding of Fact 9.)

27. Due to a salary amount error made on the first 2007 associate professor contract (see Finding of Fact 25), a revised contract was generated by Academic Affairs. It is clearly labeled "revised" and shows an offering date of September 20, 2007, signed by the provost/vice-president; was signed by Respondent on September 21, 2007; and bears no signature on the

president's line. This second, revised 2007, associate professor contract, yet again reflects the appointment dates of July 1, 2007, to June 30, 2008, as did the 2007, interim dean contract (see Finding of Fact 9), and the same appointment dates as the first 2007, associate professor contract (see Finding of Fact 25), but it bears a corrected annual salary rate for associate professor of \$122,648.00, and biweekly amount of \$4,699.15.

28. Pursuant to this second/revised 2007, associate professor contract, FAMU's payroll office took steps to correct Petitioner's salary information, and Respondent began receiving the corrected weekly amount of \$4,699.15, beginning with his October 12, 2007, pay-date. Respondent did not then, and does not now, contest the annual salary rate or biweekly amount reflected on this revised contract.

29. In a letter dated October 4, 2007, Jacqueline Lester, FAMU's associate director of payroll, informed Respondent that, due to an administrative error, FAMU had overpaid him (at the rate of interim dean) by a net amount of \$1,748.07. Her letter also informed Respondent that, "Pursuant to Volume V, Section VI of The Bureau of State Payrolls Manual, Office of the State Comptroller," FAMU's payroll department was required to recover the overpayment from him. She requested that Respondent refund the overpayment amount, and provided him options of how to accomplish repayment. If he selected neither option, there would be involuntary reductions from his future salary checks.

30. Respondent was obliquely advised of the federal tax consequences of a delay in repayment by a blank form attached to

Ms. Lester's October 4, 2007, letter, which blank form Respondent was requested to fill out and sign in acknowledgment that:

I understand that if the full payment is not made by 12-31-2007, the payment amount will be recalculated to include withholding taxes that were deducted from the overpayment. This recalculation will result in an increase in the amount due because the withholding taxes paid cannot be recovered by the state.

31. Petitioner never signed the foregoing form.

32. Ms. Lester's October 4, 2007, letter also informed Respondent that he had a right to request an administrative hearing, pursuant to Section 120.57, Florida Statutes.

33. By a letter dated October 15, 2007, Respondent requested an administrative hearing.

34. On October 12, 2007, before Respondent requested his hearing, FAMU paid Respondent additional gross pay in the amount of \$2,483.68. FAMU provided this additional payment to pay Respondent the wages construed as underpayment beginning with the August 17, 2007, pay-date, due to the annual salary error on his first 2007 associate professor contract. In other words, the October 12, 2007, payment brought Respondent's biweekly salary up to the appropriate amount of \$4,699.16, for an associate professor (see Finding of Fact 27) and reimbursed him for the lesser and incorrect salary amount listed in the first 2007, associate professor contract (see Finding of Fact 25), which incorrect amount had been paid out between the August 17, 2007, and October 12, 2007, pay-dates, apparently covering the period of July 27, 2007, to September 20, 2007. Respondent accepted this money from FAMU.

35. Respondent did not immediately get a Section 120.57(1), hearing upon his October 15, 2007, request. Instead, he got a meeting with Ms. Lester and Ms. Carucha Nelson. Ms. Nelson was Ms. Lester's subordinate who had in-put Respondent's salary information. Respondent did not then, and does not now, disagree with FAMU's salary calculations. He only disagreed/disagrees with "the period that the [revised] contract covered." During their meeting, Ms. Lester told Respondent that he needed to talk to someone in FAMU's Academic Affairs Department about his primary dispute over the beginning date of his faculty employment contract and that she would take no final action to recoup any money from him until his contractual concerns were resolved. She further told him that his questions about his contract commencement date had to be resolved in order for her to re-calculate, and orally advised him of the tax consequences if the dispute were not resolved by December 31, 2007. Although Ms. Lester testified that she considered this meeting to constitute the administrative hearing Respondent had requested,^{4/} it is clear that both Ms. Lester and Respondent assumed Respondent would have to get some additional action from the provost's and university attorney's office(s) before any FAMU decision about the money became final.

36. On November 8, 2007, Respondent e-mailed the provost. Respondent received no response by November 16, 2007, so on November 16, 2007, Respondent e-mailed Ms. Lester, inquiring what else he could do to get a hearing. She e-mailed him back to the effect that contractual issues should be referred to FAMU's

Academic Affairs and Human Resources Departments, and gave him a hierarchy and/or chronology of persons to contact. On November 19, 2007, she warned him that the matter must be resolved before December 31, 2007. Respondent copied appropriate persons with the foregoing series of e-mails, without specifically requesting an administrative hearing.

37. No one contacted Respondent about this again in 2007. Ms. Lester continued to hold the recoupment in abeyance. FAMU took no final agency action throughout 2007.

38. After an exchange of letters in March 2008, Ms. Lester once again requested that Respondent repay salary overpayments for the period of July 2, 2007, through July 26, 2007, in the amount of \$2,603.86. Apparently, this corrected amount included withheld amounts of 2007, federal income tax, which FAMU remitted to the Internal Revenue Service on Respondent's behalf during 2007, and which amounts Respondent had not reimbursed to FAMU before the end of that year.

39. FAMU ultimately recognized a March 25, 2008, letter from Respondent as a request for formal hearing, and on or about August 20, 2008, the case was referred to DOAH, resulting in this proceeding.

40. Respondent has not refunded any money to FAMU.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause,

pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

42. Respondent has cited no authority, and there are no legal grounds upon which he can be awarded travel expenses to the formal hearing. Consequently, his oral motion to that effect is denied.

43. On the merits, FAMU has the duty to go forward and the burden of proof by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.; Department of Corrections v. Career Service Comm., 429 So. 2d 1244, 1246 (Fla. 1st DCA 1983); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

44. Section 1012.80(1)(b), Florida Statutes, states in pertinent part:

Any person who accepts the privilege extended by the laws of the state of employment at any state university shall, by working at such institution, be deemed to have given his or her consent to the policies of that institution, the policies of the Board of Governors, and the laws of this state

Accordingly, Respondent's employment contracts were subject to the regulations and policies of FAMU and the Department of Financial Services Bureau of State Payrolls.

45. The Department of Financial Services, Bureau of State Payrolls' Manual, Volume V, Section 6, defines a salary overpayment as "compensation greater than the maximum authorized for payment in accordance with the provisions of applicable personnel rules and regulations."

46. Pursuant to the aforementioned Manual and FAMU Policy 2005-19, Petitioner FAMU is responsible for collecting and seeking reimbursement for salary overpayments in a timely manner, but before a salary overpayment can be collected, it must be proven that there was an overpayment in the first place.

47. FAMU contends that Respondent's right to the interim dean's salary ended on July 2, 2007, when President Ammons announced the appointment of Dr. Lewis as Dean; that Respondent was overpaid at the interim dean's salary level for the period between July 2, 2007, and July 26, 2007; and that Respondent should pay back the overpayment.

48. Respondent initially suggested that until FAMU's president signed one of the associate professor contracts, Respondent had a valid interim dean contract. Since FAMU's president did not sign any of the contracts herein, it is conceivable that all of the contracts could be declared void ab initio. Under that reasoning, if any of the contracts herein could be said to meet all its required internal 2007 criteria for validity, Respondent's initial 2007, contract as interim

dean, at least signed by someone other than the president on the president's signature line, might prevail. (See Finding of Fact 9.) However, due to the parties' course of doing business (see all Findings of Facts, particularly Findings of Fact 4, 7, and 11; and Conclusion of Law 49), that argument is without merit.

49. "A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to, and supplement or qualify the terms of, an agreement." 11 Fla. Jur. 2d Section 166, and cases cited therein. Herein, all contracts, including that of Dr. Lewis, were signed by someone up the chain of command who, presumably, had been designated by the president to perform that ministerial act. Moreover, it is a long-established principle of contract law that one who actually signs a contract (herein, Respondent) when another does not sign (herein, the president), is estopped to deny the validity of the contract. In this case, Respondent personally signed each successive contract, including two contracts as associate professor, both of which commenced retroactive to July 1, 2007.

50. Respondent finally contended that he had a valid employment contract at the Interim dean's salary at least until he received formal, written notification on July 12, 2007, of his removal from that position, but his proposed resolution of

all issues argued at page 111 of the Transcript does not mathematically meet that reasoning.

51. Respondent does not dispute that FAMU has complied with FAMU Policy 2005-19, and the guidelines of the Department of Financial Services, Bureau of State Payrolls. At no time has he contested Petitioner's salary calculation. Even though Respondent contends that he performed some "dean" duties after July 2, 2007, Respondent stipulated as fact in the Joint Pre-hearing Stipulation that by July 2, 2007, his duties and responsibilities as interim dean had been removed, and the evidence bears this out. Further, he agrees that he is required to repay the amount of his salary overpayments. He contends that the calculation of any overpayment could not begin until July 12, 2007, when he physically received President Ammons' June 9, 2007, letter, concerning his removal from administrative duties as interim dean and change-in-assignment to associate professor, but even so, he has signed two associate professor contracts, each of which specify a term of July 1, 2007, to June 30, 2008, and he has taken no steps to repay amounts he apparently agrees are incorrect, running July 13, 2007, to July 26, 2007.

52. The parties, by their actions and reliance upon their final associate professor contract, and specifically by Respondent's signing that contract clearly labeled "revised,"

which specifies a term of employment as associate professor from July 1, 2007, to June 30, 2008, and Respondent's acceptance of pay pursuant to that contract's specified salary for an associate professor, including FAMU's lump sum payment to correct errors in the first associate professor contract (see Findings of Fact 9, 25, 27, 34, and 40), establish that the parties, including Respondent, intended to be bound by the terms of the second/revised associate professor contract retroactive to July 1, 2007. Having signed that revised contract which established his associate professor employment dates; having accepted payment pursuant to that contract; and having twice not timely pursued a grievance concerning his transfer to associate professor/non-dean status retroactive to July 1, 2007, Respondent is hard put to now claim that July 12, 2007, or any date other than July 1, 2007, is the date that he was reassigned from the interim dean position to a tenured teaching position. The fact that he has not reimbursed FAMU for overpayments from July 12, 2007, (the date he now contends might be appropriate) to July 26, 2007, diminishes his argument.

53. Respondent's argument herein is further diminished by his retention of the lump sum reimbursement by FAMU to reconcile underpayments to the amount in the revised associate professor contract. (See Findings of Fact 27 and 34.) "A party's right to rescind is subject to waiver if he retains the benefits of

the contract after discovering the grounds for rescission.”

Mazzoni Farms, Inc. v. E.I. DuPont DeNemours and Co., 761 So. 2d 306 (Fla. 2000), answer to certified question conformed to 221 F.3d 1199 (11th Cir. 2000), and answer to certified question conformed to, 223 F.3d 1275 (11th Cir. 2000).

54. Pursuant to FAMU Board of Trustees Policy No. 2005-15, adopted June 30, 2005, which has been in effect at all times material, Respondent had no property interest or tenure in his administrative capacity as interim dean and could have his administrative responsibilities removed at any time by the university president.

55. Although Respondent disputes the beginning date of his faculty employment contract as an associate professor, the evidence clearly shows that his duties and responsibilities as interim dean were removed effective July 2, 2007. Such employment action was consistent with the provisions of FAMU Regulation 2005-15 and Rule 10-209. In fact, Respondent acknowledges that he became aware on Monday July 2, 2007, of President Ammons' decision to reinstate Dr. Lewis as the Dean of COPPS. Thus, Respondent knew that his services as interim dean were no longer required by FAMU on July 2, 2007, and he acknowledged, in two successive contracts, a beginning date of July 1, 2007, as associate professor.

56. Respondent resists any obligation to repay FAMU for the portion of its claim that constitutes the federal tax consequences of Respondent's failure to pay back, before December 31, 2007, the amounts requested by FAMU, because he contends that the tax consequences are the result of FAMU not referring him for an administrative hearing before December 31, 2007.

57. Respondent's chagrin over the delay in getting to hearing is understandable, but there is no guarantee that an immediate referral to DOAH in October 2007, would have resulted in a favorable resolution for Respondent or even a resolution sufficiently speedy to allow him to pay the money he owed before the end of 2007.

58. Pursuant to the pertinent provisions of Volume V, Section 6, of the Bureau of State Payrolls' Manual, calculations for salary overpayments not repaid in the same calendar year are resolved as follows:

The agency will have to re-enter the salary refund record in the new year and advise the employee of the amount owed to the agency. When a salary overpayment is repaid and fully processed in the same year in which the overpayment occurred, the employee's taxable gross, social security gross, Medicare gross, federal withholding tax, social security taxes, and Medicare taxes are adjusted. Overpayment not repaid in the same calendar year in which the overpayment occurred will NOT have taxable gross of federal withholding tax adjusted.

59. Due to Respondent's failure to repay the instant salary overpayment prior to December 31, 2007, FAMU appropriately re-entered the salary refund record in the new year 2008, and advised Respondent of the new amount owed to FAMU totaling \$2,603.86. This new payment amount is consistent with the requirements of the Bureau of State Payrolls' Manual to not have taxable gross of federal withholding taxes adjusted.

60. Filing an amended federal tax return after he has paid the amount due to FAMU is not out of the question and may resolve some of Respondent's money troubles.

61. The evidence clearly shows that Respondent received inappropriate salary overpayments. There is no dispute that these overpayments total \$2,603.86. Petitioner has the authority to recoup salary overpayments from Respondent. New v. Department of Banking and Finance, 554 So. 2d 1203 (Fla. 1st DCA 1989).

RECOMMENDATION

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

RECOMMENDED that a final order be entered requiring Respondent to repay \$2,603.86, to Florida Agricultural and Mechanical University.

DONE AND ENTERED this 26th day of January, 2009, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 2009.

ENDNOTES

1/ The Pre-hearing Stipulation, admitted as Joint Exhibit A, contains a statement of FAMU's "position" that only \$2,483.68 is owed. However, that was not stipulated as a "fact, requiring no further proof", and the evidence herein shows that the figure of \$2,603.86, was acknowledged and addressed by both parties throughout trial of the case.

2/ "Hard copy" of Policy 2005-19, was admitted in evidence as FAMU Exhibit 6.

3/ FAMU Regulation 10.207 was not provided nor offered in evidence. In the course of preparing this Recommended Order, and after giving telephone notice to Respondent, the undersigned requested a copy of the regulation and received a copy thereof from FAMU's counsel. This regulation requires various types of written notice in cases of non-reappointment, and is irrelevant to the instant case.

4/ This is a clearly erroneous concept.

COPIES FURNISHED:

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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.