

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A & M UNIVERSITY,)
BOARD OF TRUSTEES,)
)
 Petitioner,)
)
vs.) Case No. 08-5576
)
NOVELLA FRANKLIN,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on March 4, 2009, in Tallahassee, Florida, before Barbara J. Staros, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Linzie F. Bogan, Esquire
Florida A & M University
Office of the General Counsel
300 Lee Hall
Tallahassee, Florida 32307

For Respondent: John Londot, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Respondent should be dismissed from her employment with Petitioner for the reasons set forth in a termination letter dated October 3, 2008.

PRELIMINARY STATEMENT

By letter dated October 3, 2008, Petitioner, Florida A&M University, Board of Trustees (FAMU), notified Respondent, Novella Franklin, that she was dismissed from employment, effective at the close of business on October 16, 2008.

Respondent filed a Request for Formal Hearing and Protest of Dismissal Action. Petitioner referred the request for hearing to the Division of Administrative Hearings on or about November 4, 2008.

A Notice of Hearing, dated November 14, 2008, scheduled the hearing for February 2 and 3, 2009.

On January 15, 2009, Petitioner filed a Motion to Compel and Request for Continuance. Following a telephone hearing on the Motion, the Request for Continuance was granted and the hearing rescheduled for March 3 and 4, 2009. The parties later indicated that only one day would be necessary. The case was heard on March 4, 2009.

At hearing, Petitioner presented the testimony of five witnesses: Janet Johnson, Sharla Givens, Rosa Christie, Danielle Kennedy-Lamar, and Ronald Gaines. Petitioner offered

exhibits lettered A through M, which were admitted into evidence.

Respondent testified on her own behalf and presented the testimony of two additional witnesses, Allison McNealy and Sandra Inge. Respondent offered Exhibits numbered 12, 14, 19, and 20 which were admitted into evidence. Respondent's Exhibit 21 was proffered. A ruling on the admissibility of Respondent's Exhibit 21 was withheld and the parties given the opportunity to address this issue in proposed orders. Upon consideration, Respondent's Exhibit 21 is rejected and not in evidence.^{1/}

A Transcript consisting of two volumes was filed on March 19, 2009. On April 16, 2009, the parties filed an Agreed Motion for Continuance to Submit Proposed Recommended Order. The Agreed Motion was granted and the parties timely filed Proposed Recommended Orders which have been duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent Novella Franklin began her employment with FAMU in 1987. From 1993 to December 1996, and again from November 1999 through 2008, Ms. Franklin worked in the Registrar's Office. At all times material to this proceeding, Respondent held the position of Office Manager in the Registrar's Office.

2. On or about June 2, 2008, Ms. Janet Johnson accepted the position of Registrar at FAMU. Ms. Johnson's first day of employment was July 7, 2008. Prior to that date, the position of Registrar had been vacant for some time.

3. Ms. Johnson had previously worked for FAMU at a time not material to this proceeding. Ms. Johnson and Respondent knew each other from the time of Ms. Johnson's previous employment there.

4. In mid-June 2008, Respondent asked Roland Gaines, Vice President for Student Affairs, for Ms. Johnson's telephone number so that she could contact Ms. Johnson regarding several matters related to her transition to employment at FAMU. Mr. Gaines' assistant provided Ms. Johnson's telephone number to Respondent.

5. In mid-to-late June 2008, Respondent phoned Ms. Johnson to welcome her back to FAMU and to assist Ms. Johnson with her transition back to FAMU. During telephone conversations, Respondent asked Ms. Johnson if she needed Respondent's assistance with securing employment related items such as a parking decal, name plate, business cards, and access into the building where the Registrar's Office is located. Respondent also asked Ms. Johnson if she wanted Respondent to order signature stamps for the office.

6. At all times relevant to this proceeding, Denise Jones was the Administrative Assistant for the Office of the Registrar.

7. On June 26, 2008, Ms. Johnson sent an e-mail addressed to Respondent and Ms. Jones which stated as follows:

Good morning ladies,

Novella, thanks for contacting me and gathering pertinent information to assist with my arrival to FAMU.

Attached are several copies of my signature, select one (a good looking clear one) and use for the documents & stamps needed in the office. Select from one of the Janet E. Johnson signatures.

Please protect these signatures. In the past they should be destroyed once used.

I look forward to seeing you all on the 7th.

Janet E. Johnson

8. Attached to the e-mail were several versions of Ms. Johnson's signature, as referenced in the e-mail.

9. After receiving Ms. Johnson's e-mail, Respondent spoke to Ms. Jones, who provided Respondent with the name and phone number of the Tallahassee Stamp Company. Ms. Jones is the person who typically orders supplies for the Registrar's Office through a requisitioning process. Respondent learned from Ms. Jones that the budget had not yet been approved to purchase office supplies.

10. In late June or the beginning of July, Respondent called Tallahassee Stamp Company and spoke to an employee there. On July 2, 2008, Respondent sent an e-mail to Tallahassee Stamp Company wherein she placed an order for a signature stamp containing Ms. Johnson's signature. The e-mail contained the same attachment that Ms. Johnson provided in her e-mail to Respondent and Ms. Jones. Respondent's e-mail to the stamp company stated, "Good morning. See attached signature for a stamp. The third from the top."

11. At the time she placed the order for the stamp, Respondent did not inform anyone at FAMU that she had placed the order.

12. On July 21, 2008, Ms. Jones prepared a requisition for five signature stamps containing Ms. Johnson's name. On July 24, 2008, Ms. Johnson approved the requisition for the five signature stamps.

13. In addition to her position as Office Manager at the Registrar's Office, Respondent was the Head Coach of the FAMU women's bowling team. On July 25, 2008, Respondent left to attend a funeral in Chicago for a student athlete who had been killed in a car accident. Respondent returned to work mid-day on July 29, 2008.

14. On July 30, 2008, Respondent reported to work in the morning and then left for a doctor's appointment. On the way

back to work, she stopped by Tallahassee Stamp Company. She picked up one stamp with Ms. Johnson's signature and paid for it with her personal funds. She then stopped for lunch and thereafter returned to work around 12:30 p.m.

15. Upon returning to work, Ms. Sharla Givens, a Transcript Specialist in the Registrar's office, walked by Respondent's desk. Respondent then showed Ms. Givens the signature stamp she had just picked up from the stamp company and informed Ms. Givens that she had purchased it with her own funds. Ms. Givens describes her reaction to Respondent having the stamp as "shocked."

16. Respondent then went to the desk of Rosa Christie, the receptionist for the Registrar's Office, and showed Ms. Christie the stamp. Ms. Christie's desk is just outside Ms. Johnson's office.

17. Respondent informed Ms. Christie that she had purchased the stamp for Ms. Johnson and that Ms. Johnson should not have to wait until funds were available to receive a signature stamp. Ms. Christie told Respondent that that was "nice." Respondent also told Ms. Jones and another staff member, Ms. Thomas, about having the signature stamp.

18. That afternoon, at approximately 4:45 p.m., Respondent was called into Ms. Johnson's office and received a written reprimand for a matter unrelated to the allegations which form

the basis for this proceeding. This meeting took 20 to 25 minutes. Respondent did not inform Ms. Johnson that she had the signature stamp during this meeting or at any other time.

19. Respondent was upset at having received a written reprimand. She prepared a written response which was ultimately submitted to the Assistant Registrar on August 5, 2008.

20. Danielle Kennedy-Lamar is the Associate Vice President for Student Affairs and is in charge of enrollment management. Prior to the time that Ms. Johnson was hired as Registrar and for a short time thereafter, student transcripts were stamped by Ms. Kennedy-Lamar's administrative assistant, Allison McNealy.

21. Ms. McNealy learned from Ms. Givens that Respondent had a signature stamp. Ms. McNealy reported this to Ms. Kennedy-Lamar and inquired whether she, Ms. McNealy, would continue to stamp transcripts.

22. On August 1, 2008, Ms. Kennedy-Lamar had a previously scheduled meeting with Ms. Johnson. During this meeting, Ms. Kennedy-Lamar asked Ms. Johnson if Ms. Johnson was aware that Respondent had a stamp bearing Ms. Johnson's signature. Ms. Johnson informed Ms. Kennedy-Lamar that she was not aware that Respondent had a signature stamp.

23. Ms. Kennedy-Lamar then instructed Ms. McNealy to ask Ms. Givens if she had any transcripts and, if so, to have

Respondent stamp them. Ms. Kennedy-Lamar did this to determine whether such a stamp existed.

24. Ms. Givens then delivered several transcripts to Respondent, asked Respondent to stamp the transcripts, and advised Respondent that Respondent had the authority to stamp the transcripts.

25. Respondent did not immediately stamp the transcripts, but eventually stamped them as instructed.

26. At the time she stamped the transcripts, Respondent did so with authorization from Ms. Kennedy-Lamar's office.

27. The transcripts then were returned to Ms. Kennedy-Lamar, who recalls that there were approximately 20 transcripts. Ms. Kennedy-Lamar then gave the stamped transcripts to Ms. Johnson. The stamped transcripts were not disseminated to the students or whoever requested them.

28. Ms. Johnson thereafter instructed Ms. Jones to cancel the stamp order that she had previously authorized and prepared another signature to order a different signature stamp.

29. At the time Respondent was instructed to stamp transcripts, the standard procedure was as follows: Ms. Givens or Ms. Thomas from the Registrar's Office, or on some occasions Respondent, would bring printed transcripts to Ms. McNealy in Ms. Kennedy-Lamar's office. Ms. McNealy would stamp the transcripts. Ms. McNealy would then notify Registrar staff that

the transcripts were ready for pickup. Ms. Givens, Ms. Thomas, or on some occasions Respondent, would retrieve the stamped transcripts. Ms. McNealy did not conduct a review of the transcripts before stamping or ask Ms. Kennedy-Lamar to review them prior to stamping them.

30. Roland Gaines is Vice-President for Student Affairs at FAMU. On May 8, 2008, Dr. James Ammons, President of FAMU, delegated to Mr. Gaines the authority to administer all applicable FAMU regulations, policies, and procedures affecting employment and personnel actions consistent with Chapter 10 of FAMU regulations.

31. On September 18, 2008, Mr. Gaines wrote a letter to Respondent notifying her of the University's intent to dismiss her from employment and placing her on leave with pay. The letter cites FAMU Regulations 1.019(4), 10.111(1), 10.111(2)(b), 10.302(3)(y), and 10.302(3)(cc) as authority, and states in pertinent part as follows:

This employment action is being considered against you for the following alleged work violations:

* * *

This proposed employment action is being considered against [sic] for your alleged failure to follow the protocols established by the University Registrar's Office for processing student transcript requests. In addition, you allegedly requested, via e-mail, the production of a facsimile stamp

bearing the signature of the Registrar; used your personal funds to purchase the stamp; and embossed 43 transcripts totaling 140 documents which were released without appropriate review and approval by the designated University authority. The enclosed documents from the Division of Audit and Compliance provide further details of the subject allegations of misconduct.

32. The September 18, 2008, letter also provides Respondent with an opportunity to request a predetermination conference to present an oral or written statement, or both, to refute or explain the charges against her.

33. Respondent submitted a written response and a predetermination conference was held on September 29, 2008.

34. On October 3, 2008, Mr. Gaines notified Respondent by letter that she was dismissed from employment effective at the close of business October 16, 2008. The letter again cited the same FAMU regulations which were cited in the September 18, 2008, letter and added no additional or different factual bases for Respondent's termination.

35. The October 3, 2008, letter also advised Respondent of her right to appeal this action.

36. FAMU referred Respondent's appeal of her termination to the Division of Administrative Hearings, and this de novo proceeding ensued.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008), and its contract to hear such cases.

38. The parties stipulated that FAMU has the burden of proving by a preponderance of the evidence that Respondent should be dismissed from her employment for the reasons specified in the October 3, 2008, termination letter from Mr. Gaines to Respondent.

39. FAMU Regulations 10.111, 10.302, and 1.019 are duly promulgated regulations which were in effect at all times material to this proceeding.

40. The October 3, 2008, dismissal letter alleged that Respondent violated Regulation 1.019(4) which reads in pertinent part as follows:

University Code of Conduct:

(4) Conflict of Interest and Commitment- Faculty and staff of the University owe their primary professional allegiance to the University and its mission to engage in education, scholarship and research. . . Thus, all officers, faculty, principal investigators, staff, student employees and others acting on behalf of the University hold positions of trust, and the University expects them to carry out their responsibilities with the highest level of integrity and ethical behavior. In order to protect the University's mission, members of

the University community with private or other professional or financial interests which conflict with applicable State of Florida's, state or federal laws and University rules and policies must disclose them in compliance with the University's conflict of interest/conflict of commitment policies and the Florida Code of Ethics for Public Officers and Employees.

41. The October 3, 2008, dismissal letter alleges that Respondent violated Regulation 10.111(1) and (2)(b), which reads as follows:

(1) Disruptive Conduct—Faculty, Administrative and Professional, and USPS employees who intentionally act to impair, interfere with, or obstruct the orderly conduct, processes, and functions of the University shall be subject to appropriate disciplinary action by the University authorities.

* * *

(2) Disruptive conduct shall include, but not be limited to, the following:

* * *

(b) Theft, conversion, misuse or willful damage or destruction of University property, or the property of employees of the University.

42. The October 3, 2008, dismissal letter alleges that Respondent violated Regulation 10.302(3)(y) and (cc), which reads as follows:

Disciplinary and Separation from Employment Actions for University Support Personnel System Employees.

(3) Offenses- Standards for Disciplinary Action. The most common occurrences are listed below, but the list is not all-inclusive. The disciplinary actions for the listed offenses have been established to help assure that employees who commit offenses receive similar treatment in like circumstances.

* * *

(y) Willful Violation of University Written Rules: Regulations and Policies; or Willful violation of State Laws - This includes the willful disregard of internal department written rules and policies. . .

* * *

(cc) Conduct unbecoming a Public Employee-Conduct, whether on or off the job, that adversely affects the employee's ability to continue to perform his/her current job, or which adversely affects the University's ability to carry out its assigned mission.

1. First occurrence- Written reprimand, five (5) days suspension or dismissal.
2. Second occurrence- Five (5) days suspension or dismissal.
3. Third occurrence- Dismissal.

43. Before analyzing the individual regulations alleged to have been violated, the allegations of Respondent's conduct must be examined. These allegations or charges were set out in Mr. Gaines' September 18, 2009, letter to Respondent and were not expanded in the October 3, 2008, termination letter. These letters constitute the charging documents in this case and,

therefore, define the parameters of this analysis. The September 18, 2008, letter states in pertinent part:

This proposed employment action is being considered against [sic] for your alleged failure to follow the protocols established by the University Registrar's Office for processing student transcript requests. In addition, you allegedly requested, via e-mail, the production of a facsimile stamp bearing the signature of the Registrar; used your personal funds to purchase the stamp; and embossed 43 transcripts totaling 140 documents which were released without appropriate review and approval by the designated University authority. The enclosed documents from the Division of Audit and compliance provide further details of the subject allegations of misconduct.

44. The evidence does not establish the allegation or charge that Respondent failed to follow protocols established by the Registrar's office for processing transcript requests. The evidence established that Respondent stamped the transcripts only after being instructed to do so and with the understanding that she, at that particular time and under the particular circumstances, had the authority to do so from the Office of the Associate Vice-President of Student Affairs.

45. The evidence does not establish the allegation or charge that Respondent embossed 43 transcripts, totaling 140 documents which were released without appropriate review and approval by the designated University authority. As to the number of transcripts, the evidence established that 15-to-20

transcripts totaling approximately 43 sheets of paper were stamped or embossed.

46. Further, the evidence does not establish the allegation or charge that the transcripts were released without appropriate review. The usual practice for stamping transcripts was, in essence, ministerial in nature. The transcripts stamped by Respondent received as much "review and approval" as any other transcripts stamped at that time, inasmuch as they usually were stamped at the direction of Ms. Kennedy-Lamar, but not with any substantive review or approval by her or her office.

47. The evidence does establish the allegation or charge that Respondent requested via e-mail the production of a facsimile stamp bearing the signature of the Registrar, and paid for with her personal funds. Since this allegation or charge was established by the evidence, the question then becomes, did Respondent violate any of the regulations cited as authority in the charging documents when she ordered the production of the facsimile stamp bearing the signature of the registrar and paid for it with her personal funds?^{2/}

48. FAMU argues that by securing the Registrar's signature stamp, which it characterizes as a clandestine process, which did not involve the Registrar, and by failing to timely inform the Registrar that the stamp was in her possession, that Respondent violated both Regulations 1.019(4) and 10.302(3)(cc).

49. Respondent was one of two recipients of an e-mail from the incoming Registrar specifically instructing the recipients to select a clear signature and order a signature stamp. The body of the e-mail from the incoming Registrar references Respondent, not the other recipient. This communication clearly involved the incoming Registrar. Once Respondent picked up the stamp, she showed it to other staff members upon returning to the office. The facts simply do not support the description of Respondent's procurement of the stamp as clandestine.

50. There is no evidence that Respondent violated University Regulation 1.019(4) relating to the University Code of Conduct. The thrust of subsection (4) goes to disclosure of potential conflicts of interest, of which there are none in this case. Further, no evidence was presented that Respondent used or attempted to use the signature stamp for her own benefit. Finally, this regulation does not provide a disciplinary basis with respect to the conduct alleged to have been committed in this case.

51. Nor does the evidence support a conclusion that Respondent engaged in conduct unbecoming a public employee. Accordingly, the evidence does not support a conclusion that Respondent violated University Regulation 10.302(3)(cc).

52. Finally, the charging documents allege that Respondent violated University Regulation 10.111(1) and (2)b. Subsection

(1) advises that University employees who intentionally act to impair, interfere with, or obstruct the orderly conduct, processes, and functions of the University shall be subject to appropriate disciplinary action. Subsection (2)b. references theft, conversion, misuse or willful damage or destruction of University property.

53. Respondent did not steal, convert, misuse, or willfully damage or destroy University property when she ordered and purchased the signature stamp. She only used it when instructed to do so.

54. Finally, The undersigned is not persuaded that Respondent engaged in disruptive conduct as contemplated by subsection (1) of the above regulation. While Respondent did not use the requisition process that is normally used, she ordered the stamp after having received direction to do so.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order rescinding its October 3, 2008, letter terminating Respondent from employment, thereby entitling Respondent to reinstatement to a comparable position, and appropriate back pay from the effective date of her termination until the date of reinstatement.

DONE AND ENTERED this 23rd day of June, 2009, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of June, 2009.

ENDNOTES

1/ At hearing, FAMU objected to the admission of Respondent's Exhibit 21 on the basis of attorney-client privilege. Counsel for the parties describe Respondent's Exhibit 21 as an e-mail from FAMU's General Counsel to Dr. O'Dour, Vice President of Audit and Compliance for FAMU. Petitioner argues that the document was disclosed during discovery and, therefore, any privilege has been waived. FAMU describes the disclosure as inadvertent and made on the eve of hearing. FAMU argues that the document is protected as attorney work product, citing Section 119.07(1)(d)1., Florida Statutes. That argument is rejected as the disclosure was made during discovery, not as a result of a public records request. However, the undersigned recognizes that waiver of the attorney-client privilege is not favored in Florida. Liberty Mutual Ins. Co. v. Lease Am., Inc., 735 So. 2d 560, 562 (Fla. 4th DCA 1999), cited with approval in TIG Insurance Corp. of America v. Aben E. Johnson, et al., 799 So. 2d 339 (Fla. 4th DCA 2001). Moreover, the undersigned has considered the limited facts regarding the disclosure, has applied the "relevant circumstances test," See Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc., 698 So. 2d 276 (Fla. 3rd DCA 1997), and has determined that this inadvertent disclosure does not constitute a waiver of the privilege. Accordingly, Respondent's proffered Exhibit 21 is not in evidence and has not been considered.

2/ In its Proposed Recommended Order, FAMU conceded that no evidence was offered that suggests that Respondent violated internal department written rules and policies in violation of University Regulation 10.302.(3)(y). Therefore, the analysis will not address that regulation.

COPIES FURNISHED:

Avery McKnight, Esquire
Linzie F. Bogan, Esquire
Florida A & M University
Office of the General Counsel
300 Lee Hall
Tallahassee, Florida 32307

John K. Londot, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302

Dr. Eric J. Smith
Commissioner of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.