

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A AND M UNIVERSITY)
BOARD OF TRUSTEES,)
)
Petitioner,)
)
vs.)
)
COLIN ANDERSON,) Case No. 10-1444
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on June 23, 2010, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of 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: Colin Anderson, pro se
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Petitioner overpaid Respondent in the amount of \$14,190.41 for the pay periods

between July 10, 2009, and October 15, 2009, and, if so, whether Respondent should be required to reimburse Petitioner for those overpayments.

PRELIMINARY STATEMENT

In a letter dated January 6, 2010, Petitioner Florida A and M University ("FAMU"), through the associate director of payroll for its Office of Human Resources, Jacqueline Lester, stated as follows to Respondent Colin Anderson:

As a result of an internal payroll audit, this letter is to inform you that an administrative error was made resulting in an overpayment to you by an amount of \$14,190.41. The overpayment occurred on the check(s) dated 07/31/09, 08/14/09, 08/28/09, 9/11/09, 09/25/09, 10/09/09, and 10/23/09. Pursuant to Board of Trustees Policy Number 2005-19 and guidelines of the Department of Financial Services, Bureau of State Payrolls, the University is required to recover salary overpayments from employees (present and former) that have been overpaid. We are requesting, therefore, that you repay the overpayment amount of \$14,190.41.

The letter went on to explain the acceptable methods of repayment, and to give Respondent notice of his right to file a petition for a formal administrative hearing to contest FAMU's preliminary decision. On January 25, 2010, Respondent timely filed a written request for a formal administrative hearing pursuant to section 120.57(1), Florida Statutes.

On March 17, 2010, the case was referred to the Division of Administrative Hearings. The case was noticed for hearing on June 23, 2010, and conducted as scheduled.

At hearing, FAMU presented the testimony of Respondent, Colin Anderson, and of Jacqueline Lester. FAMU's Exhibits 1 through 5 and 7 through 22 were admitted into evidence. Respondent testified on his own behalf. Respondent's Exhibits A through D were admitted into evidence.

A transcript of the hearing was filed at the Division of Administrative Hearings on July 13, 2010. On July 26, 2010, FAMU filed a motion for a 30-day extension of the time to file a proposed recommended order, which motion was granted by order dated July 27, 2010. Respondent timely filed a Proposed Recommended Order on August 20, 2010. FAMU timely filed a Proposed Recommended Order on August 25, 2010.

FINDINGS OF FACT

1. On October 16, 2008, Respondent signed an employment contract with FAMU to act as the coordinator of statistical research for the "Teachers for a New Era" ("TNE") initiative, a project funded at FAMU and other universities by a grant from the Carnegie Corporation of New York. Dr. Gwendolyn Trotter is the director of the Carnegie-funded portion of the TNE initiative at FAMU.

2. The contract signed by Respondent was an "Administrative and Professional (A&P) Employment Contract."

The contract stated as follows, in relevant part:

This employment contract between Florida A&M University (FAMU) Board of Trustees and the below-named employee is subject to the Constitution and Laws of the State of Florida as constitutionally permissible, and the regulations, policies, and procedures of the Board of Governors and Florida A&M University Board of Trustees (BOT), as now existing or hereafter promulgated...

An employee's contract may be non-renewed and/or the employee may be separated from employment as set forth in University Regulation 10.106, regardless of the above appointment dates.

Employment will cease on the date indicated, and no further notice of cessation of employment is required for the following categories of employees: (1) employees holding visiting appointments; (2) those appointed for less than one academic year; or (3) those who are paid from contracts, grants, auxiliaries, or local funds.

3. The appointment dates set forth in Respondent's employment contract were October 10, 2008, through June 30, 2009.

4. The contract stated that Respondent would be paid at an "annual salary rate" of \$55,000. The contract further stated that the amount to be paid to Respondent during his appointment period would be \$39,615.00, and that Respondent's bi-weekly salary would be \$2,107.27.

5. Respondent was an employee "paid from . . . grants" for purposes of the cessation of employment paragraph of the employment contract, as set forth in the third inset paragraph of Finding of Fact 2, supra.

6. Under the heading "Appointment Status," the employment contract stated, "Regular."

7. FAMU Regulation 10.106 provides, in relevant part:

(1) The President or President's designee may choose not to renew the employment of Administrative and Professional (A&P) employees, including the Executive Service. The notice of non-reappointment or intention not to reappoint an A&P employee shall be in writing. On or before March 1st of each contract year, the President or President's designee shall notify any employee who will be non-reappointed.

* * *

(b) A&P employees who are appointed to established positions with an appointment status modifier or type, other than Regular (for example, Acting, Temporary or Visiting) are not entitled to a notice of non-reappointment.

(c) A&P employees who are issued an employment contract with a clause providing that employment will cease on the date indicated and further notice is not required, are not entitled to the notice of non-reappointment referenced in this regulation.^{1/}

8. FAMU Regulation 3.019, relating to delinquent accounts, provides in relevant part that FAMU "shall use due diligence and

make every effort in the collection of all accounts owed to the University by employees, students, vendors and other parties."

9. FAMU Board of Trustees Policy 2005-19 provides that FAMU will seek reimbursement for salary overpayments.

10. Respondent testified that when he was hired for the coordinator of statistical research position, Dr. Trotter told him that the TNE project would last for two years, but that his initial employment period would be for one year with a second year contingent upon his initial performance. This testimony was plausible, credible, and not contradicted by any testimony or documentary evidence presented by FAMU.

11. The written A&P employment contract signed by Respondent was not for one year, but for the period from October 10, 2008 through June 30, 2009. Respondent testified that the provost's administrative assistant explained that no contract could extend beyond the end of the current fiscal year on June 30, 2009, and that he would be issued a second contract to cover the period from July 1, 2009, through October 9, 2009.

12. Respondent was never given a second written contract extending beyond June 30, 2009, nor was he ever given written confirmation of the terms that he said were communicated orally to him by Dr. Trotter.

13. FAMU's associate director of payroll, Jacqueline Lester, testified at the hearing and essentially confirmed

Respondent's testimony that the university does not issue contracts that extend beyond the current fiscal year.

Ms. Lester stated that if an A&P employee such as Respondent is to work beyond the end of the current fiscal year, he will be issued a new contract that covers the carryover portion of his engagement. Ms. Lester further testified that if a new contract is not issued, then the employee is expected to stop work at the end of the current fiscal year.

14. Respondent testified that he and Dr. Trotter found themselves at odds over research protocols, and that this disagreement completely fouled their professional relationship. Respondent stated that Dr. Trotter thereafter set out to humiliate and intimidate him, and to isolate him professionally from the other members of the TNE initiative.

15. As the end of the fiscal year approached in June 2009, Respondent noticed that his fellow employees were receiving new contracts for the upcoming fiscal year. On June 29, 2009, Respondent sent an e-mail to Dr. Trotter inquiring as to the status of his contract.

16. Dr. Trotter responded on the same date with an e-mail informing Respondent that TNE would "take on an extremely targeted direction for the coming year." The e-mail went on to state the following:

I am in the process of working through contracts starting July 1, 2009. Your contract does end on June 30, 2009. Your 2008-2009 contracted pay was based on a 12-month pay scale. However, your contract started in September 2008, and ends June 30, 2009.

I am working with Mr. Herbert Bailey in Academic Affairs to conclude contracts ending on June 30, 2009.

17. Dr. Trotter's e-mail twice stated that Respondent's contract would end on June 30, 2009, but also stated that she was "working through" contracts that would start on July 1, 2009, leaving open, in Respondent's mind, the possibility that his was one of the new contracts still being processed. Dr. Trotter did not unequivocally state that Respondent's services would no longer be required on the TNE initiative after June 30, 2009.

18. On the morning of July 6, 2009, Respondent sent the following e-mail to Dr. Trotter:

I am following up on the email I sent you regarding my contract. I received a reply from you stating that you were working on contracts ending June 30, 2009.

I continue to come to work under the 12-month contractual agreement since October 10, 2008. I am therefore requesting definitive information about the status of my contract.

19. Telephone discussions and further e-mail exchanges occurred between Respondent and Dr. Trotter over the course of

the next two days. Respondent continued to insist that he had a 12-month contractual agreement, and attributed the misunderstanding to the fact that FAMU never issued an official letter of employment that explained the terms under which he had been hired.

20. Finally, on the afternoon of July 8, 2009, Dr. Trotter sent the following e-mail to Respondent:

As noted in an earlier e-mail your contract did end on June 30, 2009. You will be compensated for the days worked beyond June 30, 2009. You should not continue to work beyond tomorrow.

Thanks for working with Teachers for a New Era.

21. July 9, 2009, was the last day that Respondent worked pursuant to his A&P employment contract.

22. Respondent was paid by FAMU pursuant to his A&P employment contract for all days worked through July 9, 2009.

23. Due to an error on the part of FAMU, Respondent continued to receive regular bi-weekly gross pay of \$2,107.28 from FAMU through the pay period ending October 18, 2009.

24. At the hearing, Respondent conceded that he received these payments despite the fact that he had stopped working for FAMU as the TNE coordinator for statistical research on July 9, 2009. Respondent testified that he believed the university was paying him for the remainder of his one-year contract.

25. On June 30, 2009, Respondent accepted an Other Personal Services ("OPS") appointment to work as an adjunct instructor in the FAMU Department of Economics. The OPS appointment was to teach one economics class per week. Respondent was to be paid \$25.00 per hour, five hours per week, for a biweekly gross pay of \$250.00. The appointment was for the sixteen-week fall semester, from August 24, 2009, through December 11, 2009, with Respondent receiving total gross pay of \$2,000.00 for the period.

26. However, Respondent worked in the OPS position for only one week before starting a full-time faculty position at Savannah State University in Georgia on September 11, 2009. Respondent was correctly paid by FAMU for the one week he worked in the OPS position.

27. Due to an error on the part of FAMU, Respondent continued to receive regular bi-weekly gross pay of \$250.00 through the pay period ending October 18, 2009.

28. In total, Respondent received \$14,190.41 in unearned compensation from FAMU.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.^{2/}

30. FAMU has the burden of providing sufficient evidence to support its case. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue unless the burden is otherwise established by statute. Young v. State, Dep't of Cmty. Aff., 567 So. 2d 2 (Fla. 3d DCA 1990); Wilson v. Dep't of Admin., Div. of Ret., 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989); Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). The standard of proof in an administrative hearing such as this one is a "preponderance of the evidence." Dep't of HRS v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974).

31. Respondent's employment was subject to the regulations and policies of FAMU, pursuant to section 1012.80(1)(b), Florida Statutes, which provides in pertinent part:

Any person who accepts the privilege extended by the laws of this 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....

32. As noted in Findings of Fact 5 and 6 supra, Respondent's was an A&P position that was paid from grants, and Respondent's A&P employment contract characterized his "Appointment Status" as "Regular." These findings have led to

disagreement as to Respondent's proper treatment under FAMU Regulation 10.106, set forth in full at Finding of Fact 7, supra.

33. Respondent contends that as a "Regular" employee, he was entitled to notice of non-reappointment on or before March 1, 2009, pursuant to FAMU Regulation 10.106(1)(b), which states that employees "other than Regular" are not entitled to such notice.

34. FAMU contends that FAMU Regulation 10.106(1)(b) cannot be read in isolation, but must be harmonized with FAMU Regulation 10.106(1)(c), which applies to all A&P employees regardless of their appointment status. While conceding Respondent's "Regular" appointment status, FAMU points out that Respondent's contract contained a "clause providing that employment will cease on the date indicated and further notice is not required," and that Respondent's status as an employee paid from grants rendered that contract provision applicable to him. Therefore, even as a "Regular" employee, Respondent was not entitled to notice of non-reappointment under FAMU Regulation 10.106(1)(c).

35. Adopting Respondent's position would have the effect of negating both the express language of the contract and the application of FAMU Regulation 10.106(1)(c). FAMU's position gives effect to all provisions of the contract and the

regulation, and is therefore the better reading of the documents in question. FAMU was not required to give Respondent written notice of its intention not to reappoint Respondent.

36. As Coordinator of Statistical Research for the TNE initiative, Respondent was an A&P employee whose position was funded through grants. The appointment dates set forth on Respondent's A&P employment contract were October 10, 2008, through June 30, 2009. By its own terms, Respondent's contract expired on June 30, 2009, and his employment with FAMU pursuant to this contract ended on that date.

37. Respondent contended that he had an oral agreement with FAMU that his contract was to last for one year, to expire on October 9, 2009. Respondent therefore contends that he was entitled to at least a portion of the overpayments made pursuant to his A&P employment contract.

38. Respondent's testimony regarding his discussions with Dr. Trotter and with the provost's administrative assistant was credible. FAMU presented no evidence disputing Respondent's version of these discussions. FAMU did not indicate that there was any legal impediment to Dr. Trotter's orally offering Respondent a one year employment contract that required separate written executions on either side of the fiscal years overlapped by said contract, aside from a general assertion that such an oral agreement must be reduced to writing to be effective.

39. The evidence established that professional disagreements between Respondent and Dr. Trotter blossomed into personal animosity. This evidence leads to the inference that Dr. Trotter decided to take advantage of the fiscal year overlap to terminate Respondent's employment prior to the conclusion of the agreed-upon one-year period.

40. However, the evidence also established that Dr. Trotter expressly stated to Respondent, in writing, that Respondent's contract ended on June 30, 2009, and that Respondent should stop work on July 9, 2009. The clear meaning of these statements was that FAMU did not intend to pay Respondent for any days worked after July 9, 2009.

41. At this point, Respondent had been placed on clear notice that his services under the A&P employment contract were no longer desired by the university. The only written contract in evidence concluded on June 30, 2009. FAMU was arguably in breach of an oral contract made between Respondent and Dr. Trotter as FAMU's representative, for which Respondent might have pursued a judicial remedy. However, Respondent was not entitled to pocket the money that FAMU was mistakenly sending him. Respondent's testimony that he believed the university was merely paying off the remainder of his one-year contract was not credible in light of his e-mail exchange with Dr. Trotter in early July 2009.

42. As to his OPS appointment as an adjunct instructor, Respondent did not dispute that he worked in this capacity for only one week before starting his new position at Savannah State University. Respondent was entitled to be paid for the week of August 24, 2009, but should not have kept the subsequent payments he received through the pay period ending October 15, 2009.

43. Respondent may have had a breach of contract claim against FAMU, but this is not the forum in which to pursue such a claim.^{3/} Vincent J. Fasano, Inc. v. Sch. Bd. of Palm Beach Cnty., 436 So. 2d 201, 202-203 (Fla. 4th DCA 1983) (breach of contract is ordinarily a matter for judicial rather than administrative consideration).

44. The evidence produced at the hearing established that Respondent received \$14,190.41 in salary overpayments from FAMU, that FAMU acted in accordance with its regulations and policies, and that FAMU has the authority and the duty to recoup those overpayments from Respondent.

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 \$14,190.41 to FAMU.

DONE AND ENTERED this 8th day of March, 2011, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 2011.

ENDNOTES

^{1/} Florida Administrative Code Rule 6C3-10.233(2)(b)6 likewise provides:

Employees who are issued an employment contract with a clause providing that employment will cease on the date indicated and further notice is not required, are not entitled to the notice of non-reappointment referenced in this rule.

^{2/} Unless otherwise indicated, all references are to the 2009 Florida Statutes.

^{3/} The statements made in this Recommended Order express no opinion on the merits of a suit to enforce an oral contract against FAMU.

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.