

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A AND M UNIVERSITY            )  
BOARD OF TRUSTEES,                    )  
  )  
      Petitioner,                        )  
  )  
vs.                                        )     Case No. 10-9221  
  )  
MAR'SHELL L. SMILEY,                 )  
  )  
      Respondent.                      )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

A formal hearing was conducted in this case on December 13, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Avery McKnight, Esquire  
Linzie F. Bogan, Esquire  
Florida A & M University  
Lee Hall, Suite 300  
Tallahassee, Florida 32307

For Respondent: Theodore E. Mack, Esquire  
Powell & Mack  
803 North Calhoun Street  
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue is whether Petitioner properly determined that Respondent's employment should be terminated for violating certain work standards.

PRELIMINARY STATEMENT

By letter dated June 29, 2010, Petitioner Florida A & M University, Board of Trustees (Petitioner), advised Respondent Mar'Shell Smiley (Respondent) that her employment was terminated. The letter alleged that Respondent had violated the following regulations: (a) Regulation 1.019(4), University Code of Conduct: Conflict of Interest and Commitment; (b) Regulation 10.111(1), Disruptive Conduct; (c) Regulation 10.122(2), Outside Employment/Activities: Financial Interest and Other Conflicts; (d) Regulation 10.302(3)(y), Willful Violation of University Written Rules; and (e) Regulation 10.302(3)(cc), Conduct Unbecoming a Public Employee.

By letter dated August 25, 2010, Respondent filed an amended official request for a formal administrative hearing. Petitioner referred the case to the Division of Administrative Hearings on September 21, 2010.

A Notice of Hearing dated October 4, 2010, scheduled the hearing for December 13 and 14, 2010. When the hearing commenced, Petitioner presented the testimony of three witnesses and offered 12 exhibits that were accepted as evidence. Respondent testified on her own behalf, presented the testimony of one additional witness, and offered one composite exhibit that was accepted as evidence.

Upon agreement of the parties at the conclusion of the hearing, the parties were given an opportunity to file proposed recommended orders within 20 days of the filing of the Transcript. The court reporter filed the Transcript on January 5, 2010. The parties timely filed their proposed findings of fact and conclusions of law on January 25, 2011.

Except as otherwise noted, references hereinafter are to Florida Statutes (2010).

#### FINDINGS OF FACT

1. At all times relevant here, Respondent worked for Petitioner as Office Manager in Petitioner's Facility Planning and Construction Office (FPCO). Respondent's job responsibilities included the handling of paperwork and entering information into Petitioner's electronic system, including the creation of electronic requisitions and project change orders, subject to review and approval as described below.

2. Sam Houston, as Director of FPCO, was Respondent's supervisor. Respondent's office was next to Mr. Houston's office. At all times relevant here, Mr. Houston's office was overworked and understaffed.

3. Joseph Bakker is Petitioner's Associate Vice President of Administration and Financial Services. Petitioner's policy requires Mr. Houston and Mr. Bakker to approve all requisitions and change orders for the purchase of goods and/or services.

4. In contracting for goods and services in the usual course of business, a project manager will create a written "Scope of Work" for a project. For some smaller projects or emergency projects, the project manager may not create a written "Scope of Work" but will verbally describe the project scope to various vendors. The project manager for the projects at issue here was Sunday Edukore.

5. After learning about the scope of a project, an interested vendor will submit a written proposal to do the work. The proposal is usually submitted before the vendor begins work.

6. Based on the proposal, the project manager routinely fills out and signs a requisition order form. The requisition order form is then forwarded to Mr. Houston's office, where it is reviewed by Chuks Onwunli, Associate Director of FPCO. Respondent or someone in the office would then give the requisition order form to Mr. Houston and Mr. Bakker for their approval and signatures.

7. After the requisition order form is approved, Respondent usually inputs the information in the computer system to create an electronic requisition. She sends the electronic requisition to Mr. Houston and Mr. Bakker for their electronic approval. Finally, the Purchasing Office uses the approved electronic requisition to create a purchase order.

8. When the work on the project is completed, the vendor submits an invoice, together with a notarized Certificate of Contract Completion, directly to the project manager or through the mail to FPCO. If the invoice is mailed to FPCO, it is logged at the front desk. In any event, the project manager signs the invoice and sends it to Mr. Houston's office.

9. Next, Mr. Houston and Mr. Bakker review and sign the invoice before it is sent to Petitioner's Comptroller. Finally, the Comptroller makes the payment to the vendor.

10. If, when doing the work, there is an unforeseen condition that requires more work, a change order may be necessary. In a small project, such as the ones involved in this case, Respondent would be responsible for creating a new electronic requisition or adding a line to the original electronic requisition.

11. In either case, the change order would first be approved by the project manager. It would then be logged in at the front desk and given to Respondent. Next, Mr. Houston would sign off on the change order and give it back to Respondent.

12. After Mr. Houston approves the change order, Respondent puts it in the electronic system. Finally, the amended requisition is electronically approved by Mr. Houston and Mr. Bakker before being sent to the comptroller for payment.

13. At all times relevant here, Sandra Ford was the President and an owner of Dynamics Professional Cleaning and Staffing, Inc. (Dynamics). As one of Petitioner's vendors, Dynamics began providing cleaning services to Respondent in 2005 on a contract basis.

14. Ms. Ford and Respondent became friends in May or June of 2009. Occasionally, they had lunch and went shopping. They attended a concert together. On more than one weekend, they traveled together to Biloxi, Mississippi, to play blackjack in a casino. On those trips, Ms. Ford and Respondent sometimes lent each other money.

15. Ms. Ford often visited with Respondent in her office. Respondent's testimony that she did not know Ms. Ford's company had been one of Petitioner's vendors in the past is not credible. It is also not believable that Respondent did not know Dynamics wanted to continue to do cleaning work for Petitioner's facilities.

16. One day in the fall of 2009, Ms. Ford visited Respondent in her office at the university. During the visit, Respondent told Ms. Ford that Respondent was about to lose her house in foreclosure. Respondent then asked Ms. Ford to loan her \$2,000 to save her house.

17. Ms. Ford later discussed the request for a loan with her cousin/business partner. Ms. Ford and her cousin decided to

lend Respondent the money, hoping that Dynamics would then get its invoices processed faster.

18. Ms. Ford gave Respondent a check in the amount of \$2,000. The check, dated September 15, 2009, was written on Dynamics' bank account. Respondent cashed the check, promising to repay the loan on a monthly basis.

19. Respondent made one payment in November 2009 in the amount of \$300. From then on, the friendly relationship between Respondent and Ms. Ford changed. Respondent began avoiding Ms. Ford and evading inquiries about payment on the loan. Respondent never advised Mr. Houston about her friendship with Ms. Ford or the \$2,000 loan.

20. In December 2009, Dynamics completed a cleaning project for Petitioner at the old Developmental Research School (old DRS). The project manager, Sunday Edukore, did not create a written "Scope of Work" for the small job because it needed to be done quickly. Instead, Mr. Edukore provided Ms. Ford with the following verbal description: (a) sanitizing six bathrooms; (b) installing nine toiletry dispensers, five soap dispensers, and four paper towel dispensers; (c) cleaning walls and stall dividers, including removal of mildew; and (d) uninstalling tissue dispensers from Jones Hall and reinstalling them at the old DRS bathroom facilities.

21. For the old DRS cleanup project, there is no record of Dynamics' written proposal with a December 2009 date. Additionally, there is no record of a December 2009 requisition order form for the job.

22. The record contains a written proposal, dated January 7, 2010, to do the work at the old DRS. The proposal states that Dynamics would do the work for \$1,400. This proposal obviously was created after the work at the old DRS was completed in December 2009.

23. On or about January 7, 2010, Mr. Edukore gave Ms. Ford a written "Scope of Work" for cleaning Jones Hall. The job included the following: (a) removing and disposing all debris in all spaces on five floors; (b) debris includes non-fixed furniture/equipment; and (c) vendor responsible for dumpster.

24. In a written proposal dated January 15, 2010, Dynamics agreed to clean Jones Hall for \$3,750. That same day, Mr. Edukore completed and signed a requisition order form for the Jones Hall cleaning.

25. The record also contains a requisition order form dated January 15, 2010, for the old DRS cleaning job. The requisition order form appears to contain Mr. Edukore's signature dated February 2, 2010.

26. Additionally, the record contains Dynamics' invoice, dated January 18, 2010, for the work done at the old DRS

building. It appears that Mr. Edukore signed the invoice on February 1, 2010.

27. On or about February 1, 2010, Mr. Edukore insisted that Ms. Ford submit invoices for the cleaning of the old DRS and Jones Hall before he went on a three-week out-of-country vacation. Ms. Ford gave him the invoices that same day.

28. Dynamics' invoice for the job at Jones Hall is dated February 1, 2010. The record also includes a notarized Certificate of Contract Completion for the Jones Hall job signed by Mr. Edukore on February 1, 2010.

29. Sometime in early February 2010, Respondent contacted Ms. Ford by telephone. Respondent advised Ms. Ford that she was paying the invoice for the Jones Hall cleaning in the amount of \$3,750. Respondent then stated that she wanted to hold up on payment of the invoice for the old DRS cleaning in order to do a change order in the amount of \$1,000. Respondent stated that the purpose of the change order was to cover \$1,000 towards the money she owed Ms. Ford. Ms. Ford understood that Respondent wanted to pay Dynamics \$2,400 instead of the \$1,400 contract price for the old DRS cleaning.

30. Ms. Ford refused Respondent's suggestion for a change order because it would jeopardize Dynamics' relationship with Petitioner as well as Respondent's job. Respondent tried to persuade Ms. Ford to change her mind by stating that Ms. Ford

did not have to do anything and that Respondent would handle it all. Ms. Ford did not agree.

31. Petitioner paid Dynamics \$3,750 for the Jones Hall cleaning on February 12, 2010. At that time, Ms. Ford believed that Dynamics would receive a check for \$1,400 for the old DRS cleaning.

32. The record contains a copy of a purchase order for the old DRS cleaning dated February 22, 2010. The purchase order includes a notation that states as follows: "Hold From Further Processing."

33. Sometime in March 2010, Ms. Ford contacted Respondent to inquire about payment for the old DRS cleaning. Respondent responded that she did not know anything about the invoice.

34. Ms. Ford contacted Mr. Houston's office to complain that she had not been paid for the old DRS cleaning and to advise him about Respondent's offer to create a change order. Mr. Houston asked Ms. Ford to put her complaint and concerns in writing. Ms. Ford did so in a letter dated March 24, 2010.

35. Petitioner paid Dynamics \$1,400 for the old DRS cleaning on March 30, 2010. During a subsequent investigation, Mr. Houston was unable to find all of the documentation for the old DRS cleaning job that is usually required in soliciting bids and paying invoices.

FINDINGS OF FACT

36. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569, 120.57(1), and 120.65(7), Florida Statutes.

37. Petitioner has the burden of proving by a preponderance of the evidence that Respondent violated work standards and should be terminated. See Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

38. Petitioner is authorized to promulgate university regulations in accordance with the Regulation Development Procedure adopted by the Board of Governors pursuant to section 1001.706(6)(a), Florida Statutes, and Regulation 1.001 of the State University System of Florida, Board of Governors. Respondent is charged with violating Florida Agricultural and Mechanical University (FAMU) Regulations 1.019(4), 10.122(2), 10.302(3)(y), 10.302(3(cc)), and 10.111(1). The preponderance of the evidence establishes that Respondent violated the following regulations.

39. FAMU Regulation 1.019, University Code of Conduct, provides as follows in relevant part:

(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. The University has obligation to parents and students, government, external organization, and donors to use its resources responsibly and, where required, for designated purposes. Thus, all officers, faculty, principal investigators, staff, student employees and others action 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 of 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.

40. FAMU Regulation 10.111, Disruptive Conduct, states 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 function of the University shall be subject to appropriate disciplinary action by the University authorities.

41. FAMU Regulation 10.122, Outside Employment/Activities; Financial Interests and Other Conflicts, provides as follows in pertinent part:

(2) The responsibility of the University employee is the full and competent performance or all duties pertinent to his/her employment with the University.

Outside employment/activities or financial interest which interferes [sic] with the employee's obligations to the University is prohibited. Employees of the University should avoid actual or apparent conflict of interest between their University obligation and their outside employment/activities or financial interests.

42. FAMU Regulation 10.302(3)(y), prohibits the willful violation of University rules, regulations, policies, and state laws.

43. FAMU Regulation 10.302(3)(cc), prohibits an employee from engaging in "[c]onduct, 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."

44. Respondent knew or should have known that Dynamics was one of Petitioner's vendors. Respondent also knew she would be responsible for an important part of the process in paying Dynamics' invoices. In this case, Respondent's private financial interests were in conflict with Petitioner's public interest of operating a transparent procurement process. Respondent's borrowing money from Dynamics then offering to do a change order to increase payment to Dynamics is precisely the type of dealing that FAMU Regulations 1.019 and 10.122 were designed to guard against.

45. Additionally, Respondent's conduct was clearly unbecoming of a public employee, in violation of FAMU Regulation 10.302(3)(cc). Respondent acted in willful disregard of FAMU's written rules, regulations, policies and state laws as proscribed by FAMU Regulation 10.302(3)(y).

46. Respondent's attempt to manipulate Petitioner's procurement processing and payment system for the purpose of reducing a private debt obligation is a clear violation of FAMU Regulation 10.111(1) because any such "offer," in and of itself, interferes with and obstructs FAMU's processes and functions related to operating a transparent procurement process. The question whether Respondent could have successfully accomplished her impermissible objective is immaterial.

47. The only remaining issue relates to the severity of Respondent's discipline. FAMU Regulation 10.302 provides for progressive discipline with a first violation of FAMU Regulations 10.302(3)(y) and 10.302(3)(cc), resulting in a written reprimand, five days' suspension, or dismissal. For such a serious offense as the one committed by Respondent here, the appropriate discipline is dismissal from employment.

#### RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order terminating Respondent, Mar'Shell L. Smiley's employment for cause.

DONE AND ENTERED this 2nd day of February, 2011, in Tallahassee, Leon County, Florida.

*Suzanne F. Hood*

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Filed with the Clerk of the  
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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.