

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A AND M UNIVERSITY BOARD  
OF TRUSTEES,

Petitioner,

vs.

Case No. 14-4929

GWENDOLYN D. KELLY,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 12, 2015, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert E. Larkin, III, Esquire  
Rebecca Lightle, Esquire  
Allen, Norton and Blue, P.A.  
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Tallahassee, Florida 32303

For Respondent: Warren James Pearson, Esquire  
1509 Twin Lakes Circle  
Tallahassee, Florida 32311

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Florida A and M University Board of Trustees ("FAMU" or the "University"), had

just cause to terminate the contract of employment for Respondent, Gwendolyn D. Kelly ("Ms. Kelly").

PRELIMINARY STATEMENT

On or about July 29, 2014, FAMU notified Ms. Kelly that the University intended to dismiss her from employment and was placing her on administrative leave without pay. The notice advised Ms. Kelly of her right to a Predetermination Conference to refute or provide explanation about the stated bases for the intended action. Ms. Kelly availed herself of that right; the Predetermination Conference was held on August 11, 2014. Following the conference, the University sent Ms. Kelly a Notice of Dismissal from Employment letter dated August 18, 2014. This Notice advised Ms. Kelly of her right to a formal administrative hearing to contest the dismissal. A petition for administrative hearing was timely filed and serves as the genesis of this proceeding.

At the final hearing, Petitioner called the following witnesses, each of whom is an employee of FAMU: Michael Thompson, Dean of the College of Pharmacy and Pharmaceutical Sciences; Verretta Young, coordinator for administrative services; Rodner B. Wright, Dean of the School of Architecture and Engineering; and Joyce Ingram, chief human relations officer. FAMU's Exhibits 1 through 6 were admitted into evidence. Ms. Kelly testified on her own behalf and called two other

witnesses: Thomas Fitzgerald, Assistant Dean of the (FAMU) College of Pharmacy and Pharmaceutical Sciences; and Joyce Harris, university steward for Florida Public Employees Council 79, American Federation of State, County, and Municipal Employees ("AFSCME"). Ms. Kelly's Exhibits A through D were admitted into evidence.

The parties indicated that a transcript of the final hearing would be ordered. By rule, the parties are allowed up to ten days after the transcript of the final hearing has been filed to submit a proposed recommended order. The Transcript was filed on February 26, 2015. The parties requested and were granted a short extension of time to submit the proposed recommended orders. Each party timely submitted a Proposed Recommended Order and each was duly-considered in the preparation of this Recommended Order. Respondent filed an Amended Proposed Recommended Order; it was accepted. Petitioner filed an Amended Proposed Recommended Order; it was accepted. (Each party's Proposed Recommended Order was well written and deserving of credit for correctness, accuracy, style, and content.)

#### FINDINGS OF FACT

1. Petitioner is the Board of Trustees at FAMU, a university within the State university system. FAMU is a nationally-known, historically-black college located in Tallahassee, Florida. By letter dated July 29, 2014, the

University notified Ms. Kelly of its intent to dismiss her from her employment at FAMU. The basis for the dismissal related to a memorandum Ms. Kelly had drafted, to be discussed more fully below.

2. Ms. Kelly was an employee of FAMU from June 2004 until her dismissal in 2014. She worked directly for Dr. Robert Thomas from 2004 until 2008, although she continued to report to him for one aspect of her job until the time of her dismissal. She began working directly for Dr. Thomas Fitzgerald in 2008.

Dr. Fitzgerald was Ms. Kelly's direct supervisor until the date of her termination from employment. Ms. Kelly was classified as a program assistant and described her duties as: academic support, doing correspondence, writing reports relating to the Title III grant under which she had been hired, ordering supplies, assuring on-line courses were set up, placing professional responsibilities on website, keeping the calendar for the school, and also acting as recording secretary for a committee. She made approximately \$34,000 annually in that position at all times pertinent to this proceeding.

3. Beginning in 2010, Ms. Kelly began trying to get her job reclassified from program assistant to a position called Coordinator/Academic Support. She believed that her duties and responsibilities had developed over the years and warranted such a change. She also knew that the reclassification would result

in an increase in her salary. After her annual performance evaluation in 2010, she met with Dr. Henry Lewis, III, the Dean of the College of Pharmacy and Pharmaceutical Sciences at that time, to discuss the possibility of a job reclassification. Dr. Lewis directed her to draft a memorandum for his signature, setting forth her duties and responsibilities. Ms. Kelly drafted the memorandum and Dr. Lewis signed it. Dr. Lewis then submitted the memorandum to the Title III office and/or human resources ("HR") for the purpose of getting Ms. Kelly's position reclassified. Apparently no action was taken on the request or it was denied.

4. In June 2012, Ms. Kelly approached the new Dean of the College of Pharmacy and Pharmaceutical Sciences, Dr. Michael D. Thompson, concerning her job. She requested that she be allowed to work from home. She also reiterated to Dr. Thompson her previous request (made to Dr. Lewis) concerning a raise and job reclassification. Neither of her requests was granted by Dr. Thompson. Later that year, after her annual performance evaluation, Dr. Fitzgerald attached a written recommendation for reclassification and salary increase to the performance evaluation form. Again, there was no apparent action taken on the recommendation.

5. In October 2013, Ms. Kelly received her next annual performance evaluation from Dr. Fitzgerald. Attached to the

evaluation form--which had been signed by Dr. Fitzgerald on October 29 and by Ms. Kelly on October 30--was an addendum entitled "Annual Evaluation for Gwendolyn Kelly [dated] November 1, 2013." The attachment was verbatim to the attachment to Ms. Kelly's 2012 evaluation, except for the date.

Dr. Fitzgerald, whose demeanor and candor at final hearing were greatly appreciated, had no plausible explanation for the addendum being dated after the performance evaluation had been signed, except that it was a simple mistake.

6. The addendum outlined Dr. Fitzgerald's glowing recommendation of Ms. Kelly's work and described some of her job duties and responsibilities. The addendum concluded with this sentence, "In light of the above-mentioned duties and responsibilities, I recommend a salary increase and I completely support a re-classification of Ms. Kelly's job description from Program Assistant to Coordinator/Academic Support."

7. Following her performance evaluation and Dr. Fitzgerald's glowing recommendation, Ms. Kelly was determined to pursue the job reclassification and salary increase she so desired. On October 30, 2013, the very day she signed her annual evaluation form, she drafted a memorandum (the "Thompson Memorandum") for the signature of Dr. Thompson, who as Dr. Lewis' successor was Dr. Fitzgerald's supervisor. The Thompson Memorandum was addressed to Dr. Wanda Ford, Interim Director of

the Title III program at FAMU. A federal Title III grant funded the program under which Ms. Kelly was employed at FAMU.

8. The Thompson Memorandum states in pertinent part as follows:

I am submitting this recommendation and supporting documentation for a job reclassification for Ms. Gwendolyn D. Kelly to Coordinator/Academic Support. Ms. Kelly's job responsibilities and the performance of her duties exceed her current job classification as Program Assistant.

[Description of job duties and responsibilities]

In light of Ms. Kelly's duties and responsibilities, I am recommending a reclassification of her job description from Program Assistant to Coordinator/Academic Support. This reclassification will involve an annual pay rate increase to \$60,000 annually.

Please do not hesitate to call me should you have questions regarding this job reclassification recommendation.

MDT/gk

9. The Thompson Memorandum was essentially identical to the memorandum she had drafted at the behest of the former dean, Dr. Lewis, following her annual evaluation in 2010. The 2010 version of the memorandum, however, recommended a raise in pay rate to \$43,000 annually. The \$60,000 figure in the Thompson Memorandum came from an informal survey done by Ms. Kelly on the internet. She looked at the salary of other persons designated

as Coordinator/Academic Support personnel in the state university system. She found that many of them had higher salaries than her current pay rate. At least one of those persons had a salary of \$50,000. Based upon her investigation, Ms. Kelly decided on \$60,000 as the appropriate salary for the position she was seeking. It is possible she was using that figure as a starting point for negotiations, but that is not clear from the evidence presented.

10. Ms. Kelly says she took the Thompson Memorandum to Dr. Thompson's assistant, Verretta Young, so that it would be presented to Dr. Thompson for signature. Ms. Young has no recollection of ever seeing the Thompson Memorandum before it became an issue in the decision to terminate Ms. Kelly's employment. She handles all of Dr. Thompson's incoming documents and believes the content of the memorandum, especially the \$60,000 salary, would have caused her to remember it. Her testimony in that regard is credible. Other than Ms. Kelly's self-serving statement, there is no competent evidence to support her contention that the memorandum was provided to Ms. Young or Dr. Thompson at that time.

11. Dr. Thompson did not authorize the Thompson Memorandum. He did not direct Ms. Kelly to prepare the Thompson Memorandum. Neither Ms. Kelly nor her supervisor, Dr. Fitzgerald, approached Dr. Thompson at that time to request that he acquiesce to such a



document (or to the reclassification and raise). As of October 2013, the date of the Thompson Memorandum, Dr. Thompson was not aware of its existence.

12. In the summer of 2014, Ms. Kelly was made aware that a co-worker had received a merit bonus. Upon learning that fact, Ms. Kelly again asked Dr. Fitzgerald about "her reclassification and raise." He seemed surprised that nothing had been done about those issues following the 2013 performance evaluation.<sup>1/</sup>

Dr. Fitzgerald said that he would go see Dr. Ford in the Title III office to find out why. Ms. Kelly asked Dr. Fitzgerald to draft a letter of support for her and give the letter to Dr. Ford. She then showed Dr. Fitzgerald the Thompson Memorandum she had written for Dr. Thompson's signature, ostensibly for the purpose of giving Dr. Fitzgerald critical information for the letter he was going to write. Dr. Fitzgerald presumed the Thompson Memorandum had been signed and approved by Dr. Thompson (although the copy he was provided was not signed). Ms. Kelly did not tell him otherwise. Dr. Fitzgerald prepared a letter for presentation to Dr. Ford in the Title III office, using the Thompson Memorandum as a guide for filling in the details of his letter. Dr. Fitzgerald presumed that his letter was "simply reinforcing" what Dr. Thompson had already approved. Dr. Fitzgerald then went to the Title III office to inquire about the job reclassification and pay raise. He presented a copy of

his letter and a copy of the Thompson Memorandum to Dr. Ford. Dr. Ford said she had not previously received the Thompson Memorandum. Upon reflection, Dr. Fitzgerald said he would "probably not" have written his letter if he had known Dr. Thompson had not approved the Thompson Memorandum beforehand.

13. The Title III office advised Dr. Fitzgerald that it would be necessary for Dr. Thompson to be involved in any request for a change in Ms. Kelly's status because he (Dr. Thompson) was in charge of the program for which Ms. Kelly worked. In fact, Ms. Kelly's position was under a federal grant that has a four- or five-year budget. The salaries for all persons working within the grant have to be set in advance; they cannot be adjusted until the grant is renewed.

14. After talking to Dr. Ford, Dr. Fitzgerald went to see Dr. Thompson and while talking about the situation showed him the Thompson Memorandum. Dr. Thompson, who had not authorized Ms. Kelly to prepare the Thompson Memorandum, was incensed. He could not believe someone would present a memorandum prepared for his signature to the Title III office as if he had approved the request. As far as he knew at that time, it is exactly what had transpired.

15. Upon being shown the Thompson Memorandum, Dr. Thompson called Ms. Kelly to join him and Dr. Fitzgerald in his office. Dr. Thompson asked her if she had prepared the document and she

stated that she had. She told Dr. Thompson that it "was no big deal" and showed no remorse about drafting the document without his approval. Ms. Kelly could not understand Dr. Thompson's agitation concerning the Thompson Memorandum because she purportedly had written it as a draft; if Dr. Thompson did not agree with the contents, he did not have to sign it.

Dr. Thompson, on the other hand, could not believe this employee had made an assumption about what he (Dr. Thompson) thought concerning the employee's job status. Absent some conversation about the topic, the employee would not be privy to Dr. Thompson's thoughts on the issue. Dr. Thompson was exasperated and cut the meeting short, walking out of the conference room without further comment. He then called the University's HR office to seek guidance on how to proceed.

16. The next day Dr. Thompson called Dr. Fitzgerald and Ms. Kelly back to his office, as HR had advised him to do. He again questioned Ms. Kelly about authorship of the Thompson Memorandum. Ms. Kelly still showed no remorse for having drafted the Thompson Memorandum, saying she had done the same for Dr. Lewis in 2010. Ms. Kelly did not mention to Dr. Thompson that Dr. Lewis had asked her to draft a memorandum for him. She did attempt to justify the almost doubling of her salary by telling Dr. Thompson it merely reflected "inflation" and that "things go up." Dr. Fitzgerald went to Ms. Kelly's defense, but

stated he believed he was supporting Dr. Thompson's position. That was an erroneous assumption. Dr. Thompson felt as though Ms. Kelly was smirking, that she did not appreciate the gravity of the situation. He again terminated the meeting fairly abruptly.

17. After the meeting, Dr. Fitzgerald and Ms. Kelly discussed Dr. Thompson's comments. Ms. Kelly could not understand why Dr. Thompson was so upset. She maintained that drafting the memorandum for Dr. Thompson's signature was completely innocent. Dr. Fitzgerald believed her and was determined to support Ms. Kelly however he could. It is difficult to comprehend how Ms. Kelly believed her actions to be innocuous and "no big deal," but it is clear that was her thinking.

18. As it turns out, the Thompson Memorandum in and of itself could not have effectuated the job reclassification and salary increase sought by Ms. Kelly. It was an integral part to the process, but was not--standing alone--a vehicle for meeting her goal. The evidence presented at final hearing was contradictory as to the actual process for obtaining a raise and job reclassification. There is no evidence that at the time she wrote the memorandum, Ms. Kelly knew the memorandum was insufficient for that purpose. The most logical and reasonable presumption to be drawn from the facts presented was that

Ms. Kelly believed the Thompson Memorandum would provide the results she was seeking.

19. After thinking about the situation some more, in late July 2014, Dr. Thompson decided that he would seek termination of Ms. Kelly's employment on the basis of his "lack of trust" for the employee. Thinking that if Ms. Kelly was comfortable drafting a document such as the Thompson Memorandum without prior approval, Dr. Thompson lost confidence that she would act appropriately regarding her other duties. Besides, Dr. Thompson knew the memorandum to be inaccurate in some respects. For example, Ms. Kelly had included as one of her job duties that she "monitors the patient assessment lab budget and manages office and laboratory supply inventories, as well as provides written and oral responses to inquiries pertaining to the patient assessment lab budget and supplies." Dr. Thompson said those duties did not exist after the lab was initially stocked. The statement in the memorandum was untrue or, at best, embellished.

20. Dr. Thompson discussed the matter with Interim Provost and Vice President of Academic Affairs, Rodner B. Wright. Provost Wright prepared a Notice of Intent to Dismiss from Employment and a Notice of Administrative Leave without Pay, to be hand-delivered to Ms. Kelly. The Notices were dated July 29, 2014. The stated charges in the Notice of Intent were:

- 1) Falsification of records; and
- 2) Conduct unbecoming a public

employee. At final hearing, Dr. Thompson seemed completely serious and truthful about his displeasure with the fact the memorandum had been prepared. He credibly expressed his rationale concerning the need to terminate Ms. Kelly's employment.

21. It seems somewhat incongruent, but on the same day the Notice of Intent was being prepared, Dr. Fitzgerald and Ms. Kelly met with the AFSCME university steward, Joyce Harris, about Ms. Kelly's desired job reclassification and raise. Ms. Harris advised them to submit a request for a desk audit, as that was a preliminary step in obtaining the reclassification and raise Ms. Kelly was seeking. Ms. Harris was told about Dr. Thompson's anger concerning the Thompson Memorandum, but she said he must be included in the request for a desk audit because he oversaw the program. That is consistent with what Dr. Ford had advised Dr. Fitzgerald earlier. Dr. Fitzgerald prepared a memorandum to the Human Resources office at FAMU. The memorandum contained signature lines for himself, Dr. Thomas, and Dr. Thompson. Dr. Fitzgerald and Dr. Thomas each signed the memorandum, but when Dr. Thompson received the memorandum (on an unknown later date) he predictably wrote "Not approved" on his signature line.

22. The very next day, Friday, July 30, the Notice of Intent letter was hand-delivered to Ms. Kelly at around 4:30 or 5:00 p.m. Ms. Kelly then left her office not fully understanding

whether the notice was effective immediately or not. Later that evening, Dr. Fitzgerald called to tell her it was effective immediately. She did not return to work after that date.

23. The Notice of Intent contained a provision granting Ms. Kelly the right to request a Predetermination Conference to discuss her response to the charges against her. She opted to attend the Predetermination Conference, and did so with Dr. Fitzgerald and Ms. Harris as support. The conference was held on August 11. At that time, Ms. Kelly was allowed to state her defenses and responses to the charges against her. She read a three-page letter that she had written and submitted the letter and various attachments to the committee conducting the conference. (Her letter and attachments were not introduced into evidence at final hearing and do not form a basis for the findings and conclusions in this Recommended Order.)

24. Meanwhile, Dr. Fitzgerald continued to support Ms. Kelly. He sent a letter to Provost Wright on August 8 stating his continuing support for Ms. Kelly and re-asserting his recommendation for a job reclassification and raise. Dr. Fitzgerald did not suggest what Ms. Kelly's salary should be. He frankly admitted that had he paid particular attention to the Thompson Memorandum when it was presented to him, he would have questioned the \$60,000 proposed salary. That would constitute an almost fifty percent increase in salary for Ms. Kelly.

25. On August 18, 2014, a Notice of Dismissal from Employment was sent by regular U.S. Mail and via Certified Mail to Ms. Kelly. The notice again cited the same two bases for termination of her employment: Falsification of records, and Conduct unbecoming a public employee. The first charge related to the presentation of the Thompson Memorandum to Dr. Fitzgerald without explaining that it had never been approved by Dr. Thompson. The second charge related to Ms. Kelly's action in preparing a substantive document allegedly for signature by someone other than her supervisor, especially when that document was to be used to obtain a significant raise for herself.

26. Other than the generation of lack of trust by one of Ms. Kelly's superiors, there are no "aggravating factors" in this case. The fact that Ms. Kelly proposed an almost fifty percent salary increase for herself, based solely on general salary information obtained on the internet, is naïve and baseless, but not especially egregious.

27. Ms. Kelly offers the fact that she previously prepared a similar memorandum for Dr. Lewis' signature as a mitigating factor. However, that factor is outweighed by the fact that Dr. Lewis instructed Ms. Kelly to draft the memorandum for his signature while Dr. Thompson did not.



## CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to a contract between the Division and Florida A and M University. The proceeding is governed by sections 120.569 and 120.57(1), Florida Statutes (2014). Unless specifically set forth otherwise herein, all references to statutes will be to the 2014 version.

29. As the party seeking the termination of an employee's employment contract, the University carries the burden of proof, by a preponderance of the evidence, that the basis for termination is true. Allen v. Sch. Brd. of Dade Cty., 571 So. 2d 568 (Fla. 3rd DCA 1990).

30. The termination of Ms. Kelly's employment was based upon two of FAMU's Regulations and Policies contained within Regulation 10.302, "Disciplinary and Separation from Employment Actions for University Support Personnel System Employees." The two regulations at issue are as follows:

Regulation 10.302(3)(w) Falsification of Records - This includes misrepresentation, falsification or omission of any fact, whether verbal or written, of work and production records including attendance and leave, employment status, employment application, travel vouchers, work orders, and payroll certifications.

Regulation 10.302(3)(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.

31. It is undisputed that Ms. Kelly drafted the Thompson Memorandum without authorization from its purported author. She did not forge Dr. Thompson's name or specifically convey to anyone that Dr. Thompson had actually written the memorandum. She did, however, present the memorandum to her supervisor, Dr. Fitzgerald, without explaining that the memorandum had not been reviewed or approved by Dr. Thompson. She did not check with Dr. Thompson or anyone in his office to find out the status of his approval or denial of the memorandum's content. Ms. Kelly is guilty of the "omission of any fact" portion of Regulation 10.302(3)(w). She failed to mention to Dr. Fitzgerald or Dr. Ford that she alone had drafted the memorandum and had not received any authority from Dr. Thompson to use or distribute the document.

32. Despite Ms. Kelly's representation that she was simply displaying "initiative" by drafting the memorandum without being asked to do so, such an action was not justified in her job description. She said she had never had an occasion before to draft a document for Dr. Thompson (or anyone else) without being asked to do so. Her "initiative" was self-serving and appears to

be less than forthright, especially in light of never presenting the memorandum to Dr. Thompson for review.

33. If there was a requirement in the cited Regulations for intentionally wrongful actions, Ms. Kelly may not be deemed guilty of violating them. She seemed to be sincere in her belief that what she had done was not wrong. She simply fails to understand the significance of her actions. There was no mens rea or guilty intent proven by the University. But the evidence does support that Ms. Kelly falsified records by failing to advise her supervisor that the Thompson Memorandum was not of Dr. Thompson's doing or acquiescence. And despite her claim of acting per initiative, her somewhat subversive distribution of the memorandum through Dr. Fitzgerald constituted conduct unbecoming a public employee.

34. Having found that Ms. Kelly violated the two Regulations at issue, the question of the appropriate level of discipline must be addressed. Under Regulation 10.302(2)(c), dismissal of an employee (i.e., termination of employment) may be appropriate for the initial discipline for a serious offense. Falsification of records and conduct unbecoming a public employee are arguably serious offenses. Thus, even though progressive discipline was not followed in this matter, termination of employment is justified.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Florida A and M University Board of Trustees, upholding the termination of Respondent, Gwendolyn Kelly's employment.

DONE AND ENTERED this 18th day of March, 2015, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of March, 2015.

ENDNOTE

<sup>1/</sup> Ms. Kelly said she had not followed up with Dr. Thompson about the memorandum she had written some nine months ago because of several serious personal issues in her life.

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.