

FILED  
DATE 4/22/15

STATE OF FLORIDA  
FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY

FLORIDA AGRICULTURAL  
AND MECHANICAL UNIVERSITY  
BOARD OF TRUSTEES,

Petitioner,

FAMU Case No. 14-003  
DOAH Case No. 14-4929

vs.

GWENDOLYN D. KELLY,

Respondent.

\_\_\_\_\_ /

**FINAL ORDER**

This matter was heard at the Division of Administrative Hearings on February 12, 2015, in Tallahassee, Florida, before Administrative Law Judge (ALJ) Bruce R. McKibben. Upon consideration of the hearing transcript and the orders proposed by both parties, ALJ McKibben submitted his Recommended Order in this matter to Florida Agricultural and Mechanical University Board of Trustees (“University” or “FAMU”) on March 18, 2015. A copy of the Recommended Order is attached hereto as Exhibit “A.” The Respondent, Gwendolyn D. Kelly, by and through counsel, timely filed Exceptions to the Recommended Order on April 2, 2015. The matter is now before the University for final action.

Preliminary Statement

Respondent requested an administrative hearing to determine whether the University’s decision to dismiss her from employment was based on just cause, pursuant to its personnel regulations. Specifically, Respondent challenged the University’s determination that she had violated FAMU Regulations 10.302(3)(w) and 10.302(3)(cc), and that these violations warranted

her dismissal. The University's decision to terminate Respondent's employment was based on a memorandum that she had drafted and distributed under the name of the Dean of the College of Pharmacy and Pharmaceutical Sciences, Dr. Michael D. Thompson ("Dean Thompson") without his approval or knowledge. The memorandum (hereinafter "the Thompson Memorandum") advocated for Respondent to receive a job reclassification and salary increase. Respondent contends that her actions did not violate the FAMU's cited regulations and, even if they did constitute violations, would not merit dismissal.

#### Standard of Review

Pursuant to Section 120.57(1)(l), Florida Statutes (2014), the University may adopt the recommended order as the final order of the agency. It may also "reject or modify the conclusions of law over which it has substantive jurisdiction," but "must state with particularity its reasons for rejecting or modifying such conclusion of law . . . and must make a finding that its substituted conclusion of law . . . is as or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. Findings of fact in the recommended order may be rejected or modified only if "the agency determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the substantial requirements of law." *Id.*

Competent substantial evidence is evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); see *Strickland v. Fla. A & M Univ.*, 799 So. 2d 276, 278-79 (Fla. 1st DCA 2001). In considering the findings in the recommended order, the agency may not "weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the

evidence to fit its desired ultimate conclusion.” *Heifetz v. Dep’t of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). An administrative law judge “is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses.” *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013) (quoting *Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006)).

If parties timely submit exceptions to the hearing officer’s recommended order, then the agency’s final order “shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.” § 120.57(1)(k), Fla. Stat.

Rulings on Respondent’s Exceptions to the Recommended Order

1. Respondent takes exception to paragraph 3 of the Recommended Order to the extent that it states:

She [Kelly] also knew that the reclassification would result in an increase in her salary.

This exception is denied. There is competent substantial evidence in the record that Respondent’s reclassification to a coordinator position was consistently connected to a salary increase (Tr. 167), that other individuals holding the coordinator position earned a higher salary than she did (Tr. 171), and that she would also receive a higher salary if she became a coordinator (Tr. 193, L. 24-25). Thus, ALJ McKibben’s findings of fact in paragraph 3 are supported by competent substantial evidence.

2. Respondent takes exception to paragraph 4 of the Recommended Order to the extent that it states:

She [Kelly] 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.

This exception is denied. There is competent substantial evidence in the record that, during the conversation in question, Respondent told Dean Thompson that she had asked his predecessor for a raise and that another employee had recently received a promotion and raise, which upset Respondent. (Tr. 20-21). There is also competent substantial evidence that during this conversation, Dean Thompson did not grant any requests from Respondent for a reclassification or raise. (*Id.*). Thus, ALJ McKibben's findings of fact in paragraph 4 are supported by competent substantial evidence.

3. Respondent takes exception to paragraph 9 of the Recommended Order to the extent that it states:

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.

This exception is denied. While Respondent testified that she did not expect to ultimately receive a salary increase to \$60,000 annually, she did not testify that she expected negotiations to take place. Given that Dean Thompson and his assistant, Ms. Verretta Young, ("Ms. Young") testified that they had never received the Thompson Memorandum from Respondent (Tr. 22-23, 66-68), ALJ McKibben's finding that her intention was "not clear" is supported by competent substantial evidence.

4. Respondent takes exception to paragraph 10 of the Recommended Order to the extent that it states:

She [Verretta Young] 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.

This exception is denied. The record contains competent substantial evidence that Ms. Young handles Dean Thompson's incoming documents. (Tr. 19, 64-65). The record also contains competent substantial evidence that Ms. Young believed she would have remembered the Thompson Memorandum based on its recommendation for a salary increase to \$60,000 annually, even if she would not necessarily remember all other documents after months had passed. (Tr. 68-69). Thus, ALJ McKibben's findings of fact in paragraph 10 are supported by competent substantial evidence.

5. Respondent takes exception to paragraph 12 of the Recommended Order to the extent that it does not include certain testimony given by Dr. Thomas Fitzgerald, ("Dr. Fitzgerald") Respondent's immediate supervisor. This exception is denied because there is no legal ground on which to grant the exception or to otherwise modify the findings of fact in paragraph 12. ALJ McKibben was entitled to omit testimony he found to be not credible or not material to the issue before him and whether the University had just cause to dismiss Respondent from employment.
6. Respondent takes exception to paragraph 18 of the Recommended Order to the extent that it states:

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.

This exception is granted in part. Respondent testified that by itself, the Thompson Memorandum "could not do anything for me." (Tr. 168, L. 1-8). This testimony constitutes some evidence that Respondent knew the memorandum was insufficient to secure a reclassification. However, the exception is also denied in part because ALJ

McKibben was not obligated to accept this testimony as credible. The record contains competent substantial evidence that Respondent drafted the Thompson Memorandum in the belief that it was necessary to provide the results she was seeking (reclassification and salary increase). (Tr. 167-68). Based on this evidence, and because the University has no basis to find Respondent's testimony credible where ALJ McKibben did not so find, the exception is granted only with respect to the fourth sentence of paragraph 18 (Respondent's first cited sentence above).

7. Respondent takes exception to paragraph 19 of the Recommended Order to the extent that it states:

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.

This exception is denied. Paragraph 19 represents ALJ McKibben's summary of Dean Thompson's testimony, not his own finding of fact. Even if the last sentence were a finding of fact, Dean Thompson's testimony constitutes competent substantial evidence to support this finding (Tr. 27-28), and the University is not entitled to substitute its own credibility determination by accepting Respondent's competing testimony on the same question. Thus, ALJ McKibben's findings of fact in paragraph 19 are supported by competent substantial evidence.

8. Respondent takes exception to paragraph 26 of the Recommended Order to the extent that it states:

Other than the generation of lack of trust by one of Ms. Kelly's superiors, there are no 'aggravating factors' in this case.

This exception is denied. The record contains competent substantial evidence that one of Respondent's superiors, Dean Thompson, lost trust in her due to her drafting and circulating the memorandum under his name without his knowledge. (Tr. 32, 34-35.) Thus, ALJ McKibben's findings of fact in paragraph 26 are supported by competent substantial evidence.

9. Respondent takes exception to paragraph 31 of the Recommended Order to the extent that it states:

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.

This exception is denied. Respondent testified that she did not explain to Dr. Fitzgerald that Dean Thompson had not reviewed or approved the memorandum. (Tr. 177-78.) Respondent also testified that she did not check with anyone in Dean Thompson's office to determine the status of his approval or denial of the memorandum's content. (Tr. 196-98.) Respondent's testimony constitutes competent substantial evidence to support the conclusions of law in paragraph 31. Respondent's belief that her actions were proper does not provide a basis for the University to find that an alternate conclusion with respect to FAMU Regulation 10.302(3)(w), or that such would be as or more reasonable than ALJ McKibben's conclusion.

10. Respondent takes exception to paragraph 32 of the Recommended Order to the extent that it states:

Her [Kelly's] 'initiative' was self-serving and appears to be less than forthright, especially in light of never presenting the memorandum to Dr. Thompson for review.

This exception is denied. Testimony by Dean Thompson and Ms. Young constitutes competent substantial evidence for the finding that Respondent did not present the memorandum to Dean Thompson for review (Tr. 21-24, 66-68), and ALJ McKibben is entitled to accept this testimony as credible to the extent it conflicts with Respondent's testimony. Further, ALJ McKibben concluded that, regardless of whether Respondent believed that she had properly submitted the memorandum initially, her failure either to follow up with Dean Thompson or to clarify the status of the memorandum for Dr. Fitzgerald was "less than forthright." Again, Respondent's belief that her actions were proper does not provide a basis for the University to find that an alternate conclusion with respect to her forthrightness would be as or more reasonable than ALJ McKibben's conclusion.

11. Respondent takes exception to paragraph 33 of the Recommended Order to the extent that it states:

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.

This exception is denied. The record contains competent substantial evidence that Dr. Fitzgerald assumed that the substance of the Thompson Memorandum had been approved by Dean Thompson, even if it was not signed. (Tr. 119, 121, 124). The record also



contains competent substantial evidence that this assumption was reasonable: (a) Respondent had secured the previous dean's endorsement before writing a similar memorandum for his signature (Tr. 192-93); (b) another University employee testified that the usual drafting process would be to give the document to the person who was to sign it before giving it to any other person (Tr. 155); and (c) Dean Thompson himself was disturbed when he discovered that Respondent had not followed this process (Tr. 29-30, 34-35). Further, regardless of whether Respondent knew that Dr. Fitzgerald would present the Thompson Memorandum directly to the Title III office, she testified that she gave the Thompson Memorandum to Dr. Fitzgerald specifically so that he could use its contents for his own letter to the Title III office. (Tr. 117-18, 177-78). Thus, the University has no basis to reject or modify ALJ McKibben's conclusion that Respondent's actions constituted falsification of records and conduct unbecoming a public employee.

12. Respondent takes exception to paragraph 34 of the Recommended Order to the extent that it states:

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.

This exception is denied. FAMU's Regulations as appropriately applied by ALJ McKibben permit dismissal of an employee for the first offense of either falsification of records or conduct unbecoming a public employee. See FAMU Regulations 10.302(3)(w) and 10.302(3)(cc). Neither regulation contains a *mens rea* element. ALJ

McKibben concluded that both violations could constitute serious offenses, and that Respondent's particular conduct included the aggravating factor of having lost the trust of Dean Thompson. The University has no basis to modify or reject these conclusions.

13. Respondent takes exception to paragraphs 32, 33, and 34 of the Recommended Order to the extent that they conclude that she engaged in conduct adverse to the University. This exception is denied. The record contains competent substantial evidence that Respondent's conduct was self-serving, in that she took actions intended to distribute the Thompson Memorandum and its substance – advocating for her own reclassification and salary increase – without first receiving any indication that Dean Thompson approved of it. (Tr. 192-94.) Respondent also testified that she knew Dr. Fitzgerald would be advocating for her promotion and raise based upon the substance of the unauthorized Thompson Memorandum. (Tr. 176-77.) Finally, the record contains competent substantial evidence that Respondent did not acknowledge any wrongdoing when Dean Thompson explained that he was upset by the memorandum, and that he ultimately felt unable to trust her after they discussed it. (Tr. 29-34, 179-80.) Based upon this evidence, ALJ McKibben concluded that Respondent's conduct was self-serving, subversive, and serious enough to justify dismissal. These conclusions are not dependent on Respondent's precise intentions, on the actual effect of the Thompson Memorandum, on whether Respondent initially submitted the memorandum to Dean Thompson's office, or on Respondent's custom of not seeking pre-authorization in the performance of her job duties. Thus, ALJ McKibben's conclusions in paragraphs 32-34 are not materially undermined by Respondent's arguments in stating her exception, and the University has no legal basis upon which to modify or reject these conclusions.

14. Respondent also takes exception to paragraphs 32, 33, and 34 of the Recommended Order because they fail to apply FAMU Regulation 10.302(3)(d) to Respondent's conduct. This exception is denied. FAMU Regulation 10.302(3)(d) defines the personnel violation of "Negligence," which is applied to the careless or inattentive performance of assigned duties and responsibilities. Respondent's conduct with respect to the Thompson Memorandum was in the service of her own professional advancement and was not within the scope of her assigned duties. Accordingly, FAMU Regulation 10.302(3)(d) is inapplicable to Respondent's conduct and does not provide the University with a legal basis upon which to modify or reject the ALJ McKibben's conclusions.
15. Finally, Respondent takes exception to paragraphs 32, 33, and 34 of the Recommended Order to the extent that they do not reach the result found in the case of *Costin v. FAMU Bd. of Trustees*, 972 So. 2d 1084 (Fla. 5th DCA 2008). This exception is denied. In *Costin*, an employee created a website that appeared to create inappropriate private affiliations with the University. Thereafter, Costin was dismissed from employment for engaging in conduct unbecoming a public employee. The Administrative Law Judge in that case recommended that her dismissal was unsupported by a preponderance of the evidence based upon a finding that she gave a "courteous, reasoned reply" to her supervisor when he questioned her about the website and that the University had not shown that her continued employment would "adversely affect the functioning of the University." See *Fla. A & M Univ. Bd. of Trustees v. Costin*, Case No. 06-1069, 2006 WL 2655784, at ¶¶ 25, 46 (Fla. Div. Admin. Hrgs. Sept. 14, 2006). By contrast, paragraphs 15 and 16 of the Recommended Order describe a fundamental disagreement between Respondent and Dean Thompson regarding the propriety of her actions. ALJ

McKibben found in paragraph 16 that Dean Thompson “felt as though Ms. Kelly was smirking” when he attempted to discuss the matter with her. The record contains substantial testimony from Dean Thompson, Chief Human Resources Officer Joyce Ingram, and then Interim Provost Rodner B. Wright that Respondent’s conduct and loss of her dean’s trust were adverse to the functioning of the College and University. (Tr. 34-38, 49-52, 76-77, 100-01). Accordingly, the University has no legal basis to modify or reject the ALJ McKibben’s conclusion that the University had just cause to terminate Respondent’s employment. *See Purvis v. Marion Cnty. Sch. Bd.*, 766 So. 2d 492, 498-99 (Fla. 5th DCA 2000); *Seminole Cnty. Bd. of Cnty. Comm’rs v. Long*, 422 So. 2d 938, 940 (Fla. 5th DCA 1982); *Fla. A & M Univ. Bd. of Trustees v. Smiley*, 2011 WL 478302 (DOAH Feb. 7, 2011); *Fla. A & M Univ. Bd. of Trustees v. Blue*, 2009 WL 1370888, at \*8 (DOAH May 14, 2009).


#### Conclusion

The University accepts the Findings of Fact as set forth in ALJ McKibben’s Recommended Order with the exception of the fourth sentence of paragraph 18. As modified, the Findings of Fact are adopted and incorporated herein as inclusions in the Findings of Fact for this Final Order. Further, the Conclusions of Law are adopted and incorporated herein as inclusions of the Conclusions of Law for this Final Order.

#### Order

Based on the foregoing, it is hereby ORDERED and DIRECTED that the Administrative Law Judge’s Recommended Order that the University enter a final order upholding the termination of Respondent, Gwendolyn D. Kelly, from her employment at Florida Agricultural and Mechanical University is ACCEPTED.

DONE and ORDERED this 21 day of April 2015, in Tallahassee, Florida.



Elmira Mangum, Ph.D.  
President  
Florida A&M University  
Suite 400, Lee Hall  
Tallahassee, Florida 32307  
(850) 599-3225

Filed with FAMU this  
22<sup>nd</sup> day of April, 2015.



Abigail V. Raddar  
FAMU Clerk

**NOTICE OF RIGHT OF JUDICIAL REVIEW**

Respondent may seek judicial review of this Final Order pursuant to Florida Rule of Appellate Procedure 9.190(b)(3), applicable to review of quasi-judicial decisions of an administrative body not subject to the Administrative Procedure Act, by filing a petition for certiorari review with the appropriate circuit court within thirty (30) days of the date this Final Order is filed with the FAMU Clerk. If Respondent seeks review with the court, a copy of the petition shall be provided to the FAMU Clerk, Office of the General Counsel, 1700 Lee Hall Drive, Suite 304, Foote-Hilyer Administrative Center, Tallahassee, Florida 32307.

Copy: Ms. Gwendolyn D. Kelly, c/o Warren James Pearson, Esq.  
Marcella David, Provost and Vice President, Academic Affairs  
Michael Thompson, Dean, College of Pharmacy and Pharmaceutical Sciences  
Thomas Fitzgerald, Associate Dean, College of Pharmacy and Pharmaceutical Sciences  
Joyce Ingram, Assistant Vice President and Chief Human Resources Officer  
Claudia Llado, Clerk, Division of Administrative Hearings  
Robert E. Larkin, III, Esq.  
Avery D. McKnight, Esq.