

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DARRYLL K. JONES,

Petitioner,

vs.

Case No. 16-3613

FLORIDA A&M UNIVERSITY
BOARD OF TRUSTEES,

Respondent.

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case in Tallahassee, Florida, on August 18, 2016.

APPEARANCES

For Petitioner: Darryll K. Jones, pro se
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For Respondent: Olorunfunmi O. Ojetayo, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to the relief requested in his Step Three salary grievance with Florida A&M University (FAMU).

PRELIMINARY STATEMENT

In this salary dispute, Petitioner, a Professor at FAMU College of Law (College of Law), contests a reduction in his base salary after being reassigned from his position as Interim Dean to Professor in early 2016. After Petitioner filed a grievance under FAMU Regulation 10.206 to contest the adjusted salary, by memorandum dated May 13, 2016, FAMU informed Petitioner that his Step Two grievance had been denied. Petitioner timely filed a Step Three grievance in which he requested a formal hearing to adjudicate the dispute. Pursuant to a contract, the matter was referred by FAMU to DOAH to conduct a formal hearing.

At the hearing, Petitioner testified on his own behalf and presented two witnesses, one by telephone. Petitioner's Exhibits 1 through 5 were accepted into evidence. FAMU presented the testimony of one witness. Respondent's Exhibits 1 through 6 and 12 through 14 were accepted in evidence. Finally, Joint Exhibits 1 through 10 were accepted in evidence.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In school year 2008-2009, Petitioner was a tenured professor at Stetson University College of Law (Stetson) in St. Petersburg. The FAMU College of Law, located in Orlando, was recruiting new faculty to improve its stature and academic standing. Besides Petitioner's academic stature as a tax and business law professor, the College of Law was then only provisionally accredited by the American Bar Association, and it sought an individual, such as Petitioner, who could help the College of Law achieve and retain full accreditation.

2. Like other state universities, College of Law faculty members are either on a nine-month (academic calendar), ten-month, or 12-month (annual calendar) contract. A 12-month contract is justified when a faculty member has regular year-round teaching, research, and/or administrative duties.

3. In late 2008, Petitioner was first contacted by the Dean of the College of Law, LeRoy Pernell, regarding a teaching position for the upcoming school year 2009-2010. By letter dated February 26, 2009, Dean Pernell informed Petitioner that he would recommend his appointment as a tenured, full professor under a nine-month contract at a salary of \$177,000.00. See Pet'r Ex. 1.

4. Had he returned to Stetson for the 2009-2010 academic year, Petitioner's base salary would have been \$154,230.00, plus

"benefit costs," including a summer teaching supplement and a tuition-matching program for his family, which totaled more than Dean Pernell's initial offer. See Pet'r Ex. 3. Accordingly, Petitioner rejected the offer and asked for a compensation package of around \$200,000.00.

5. Although Dean Pernell had no authority to establish a salary level, he agreed to recommend that Petitioner receive a salary of \$180,000.00 for a nine-month faculty contract, rather than \$177,000.00, and to "commit to providing a funded summer research grant to equal no less than \$15,000 for summers 2010-2012, assuming continuing availability of funding." See Pet'r Ex. 2. These proposed changes were handwritten on the initial offer letter previously tendered by Dean Pernell.

6. Dean Pernell's offer letter required that Petitioner work 12 months -- nine months as a professor and three months in a research role. The new offer was memorialized by the Dean in a third version of the initial offer letter dated February 26, 2009. As the testimony at hearing confirmed, the final version of the letter simply incorporated Dean Pernell's handwritten changes found on the second version and reads in pertinent part as follows:

This is to advise you that by a vote of the faculty and my full support, I am recommending that you be appointed to the faculty of the Florida A&M University College of Law as a professor. The formal

letter of offer from the Senior Vice President and Provost of Florida A&M University is forthcoming. This recommendation is as a tenured Professor [of] Law. The recommendation is that this appointment be effective commencing with the 2009-2010 academic year and commencing with a salary of \$180,000.00 for a 9 month contract. In addition, I will recommend that the College of Law commit to providing you a funded summer research grant equal to no less than \$15,000.00 for the summers 2010-2012, assuming continued availability of funds.

See also Jt. Ex. 9, p. 3.

7. The authority to make formal employment and salary offers to faculty members lies with the Provost and Vice President for Academic Affairs, who at that time was Dr. Cynthia Hughes-Harris. See FAMU Reg. 1.021; Jt. Ex. 2. She was not required to accept the recommendation of Dean Pernell and could make an offer that fit within FAMU's administrative and budget considerations. Dean Pernell made this clear during his negotiations with Petitioner.

8. On April 20, 2009, Provost Hughes-Harris informed Petitioner by letter that FAMU was offering him a full-time position with the College of Law. The letter stated in part as follows:

I am pleased to offer you a 12 month, full-time position as a full Professor and also, Associate Dean for Research & Faculty Development in the College of Law. Your position as professor is with tenure, subject to the approval of the Board of

Trustees. The Board of Trustees will meet regarding this matter no later than June 2009. The annual salary of \$180,000 with a \$20,000 stipend for administrative responsibilities will be paid on a bi-weekly rate of \$7,662.83. The appointment period is for the fiscal year, which will begin on July 1, 2009 and end on June 30, 2010.

Jt. Ex. 1.

9. While Provost Hughes-Harris' offer essentially matched the compensation recommended by Dean Pernell, the terms of the offer deviated in two material respects. First, rather than a nine-month faculty contract, Petitioner was offered a 12-month faculty contract. Second, rather than a "summer research grant" to supplement his salary, he was offered a 12-month position as Associate Dean for Research & Faculty Development, which required that he perform administrative duties on a year-round basis. Because of administrative duties, his teaching responsibilities were limited to a "maximum of two courses per academic year while Associate Dean." Id. The bottom line here is that Petitioner was offered the same compensation recommended by Dean Pernell, but he now had year-round administrative duties.

10. Petitioner voluntarily accepted the offer on April 28, 2009. See Jt. Ex. 1, p. 2.

11. At hearing, Provost Hughes-Harris denied ever receiving a copy of any offer letter by Dean Pernell, except the

initial offer letter of \$177,000.00. However, Provost Hughes-Harris did not make employment and salary offers without conferring with the recommending dean, and she acknowledged that there "was certainly conversation" with Dean Pernell before the offer letter was tendered. While she could not recall any details regarding that conversation, she recalled that her offer letter was for a 12-month faculty contract, and there was no way to "blend" a nine-month teaching contract with a 12-month administrator contract. This is because a nine-month position and a 12-month position require separate contracts and cannot be combined.

12. Each employment contract signed by Petitioner included the following conditions:

This Employment Contract between Florida A&M University Board of Trustees (FAMU) and the Employee is subject to the Constitution and laws of the State of Florida as constitutionally permissible, and the regulations, policies and procedures of [the] U.S. and the Florida Board of Governors and FAMU as now existing or hereafter promulgated.

* * *

This Employment Contract supersedes any and all prior agreements, contracts, understandings, and communications between the Employee and FAMU, whether written or oral, expressed or implied, relating to the subject matter of this Employment Contract and is intended as a complete and final expression of the terms of the Employment Contract between FAMU and the Employee and

shall not be changed or subject to change orally.

Jt. Ex. 1, 4, 5, 6, and 7.

13. Petitioner commenced employment with the College of Law in July 2009 and continued working as Associate Dean and a full Professor until the summer of 2015. During that period of time, he taught at least one class in the fall and spring semesters and performed administrative duties as Associate Dean on a year-round basis. By then, regular pay adjustments had increased his base salary for fiscal year July 1, 2015, through June 30, 2016, to \$189,304.30, plus a supplement of \$20,000.00 as Associate Dean. See Jt. Ex. 6.

14. When Dean Pernell stepped down as Dean in the summer of 2015, by letter dated June 15, 2015, the new Provost and Vice President for Academic Affairs, Marcella David, appointed Petitioner Interim Dean while a search for a new Dean was undertaken. Besides the base salary and supplement he already received as Associate Dean, Petitioner was given an additional supplement of \$10,000.00 for serving as Interim Dean, for a total supplement of \$30,000.00. See Jt. Ex. 8.

15. On June 26, 2015, Petitioner voluntarily signed the offer letter confirming his acceptance. Id.

16. Provost David's letter informed Petitioner that "upon cessation of [his] appointment as Interim Dean of the College of

Law and return to the position of Associate Dean," his salary would "be adjusted consistent with applicable FAMU Board of Trustee Regulations and Policies." Id. This obviously meant that once a new Dean was hired, and he reassumed the position of Associate Dean, he would no longer receive the extra \$10,000.00 supplement.

17. For the first time, the letter specifically advised Petitioner to be aware of Regulation 10.102 and Policy 2005-15. Id. Prior to that time, no reference to specific regulations or policies was made. However, each employment contract placed him on notice that all FAMU policies and regulations applied to employment contracts.^{1/}

18. Regulation 10.102 and Policy 2005-15 govern pay actions when faculty members serving in an administrative position return to a faculty only position. This meant that if Petitioner resumed full-time teaching with no administrative duties, he would be subject to the terms of those provisions.

19. Before signing the June 15, 2015, offer letter, Petitioner did not ask how the Regulation and Policy would affect his base salary if he returned to a full-time faculty position since more than likely he assumed he would again serve as Associate Dean and a tenured professor.

20. Subsections (11) and (12) of Regulation 10.102 read as follows:

(11) When the assignment of Faculty serving in an administrative position such as Vice President, Dean, Director, or Department Chair is changed, the pay and appointment period shall be adjusted to reflect the new responsibilities. Pay adjustments shall be completed in accordance with the Board of Trustees Policy 2005-15 (Separation and Return of Senior Administrative and Academic Officers to Faculty), as now or hereafter amended.

(12) An employee's base salary shall be adjusted 81.8 percent when changing from a twelve-month appointment to a nine-month appointment. An employee's base salary shall be adjusted by 122.2 percent when changing from a nine-month appointment to a twelve-month appointment.

Jt. Ex. 10, p. 2.

21. Section IV., Policy 2005-15, "Salary upon Change in Assignment to a Faculty Position," describes three ways in which to calculate an employee's salary after being reassigned from an administrative to faculty position. It reads as follows:

A. New Hire as Administrator

If the employee was hired upon initial appointment as an administrator, his or her new salary will be the median salary of the employees within the same professorial rank and discipline.

B. Tenured Faculty Prior to Becoming an Administrator.

If the employee was previously a tenured faculty member prior to becoming an administrator, his or her new salary will be the salary held by the employee immediately prior to the time of the administrative appointment and any increases received by

the faculty during the time of service as an administrator. These separate compensations will be noted in the appointment letter.

C. Other Consideration

Notwithstanding the provisions of IV.A. and IV.B., any agreed upon salary arrangement negotiated by the President or President's designee upon appointment as an administrator shall also be considered.

Jt. Ex. 3, p. 2.

22. On January 4, 2016, A. Felecia Epps was selected as the new Dean of the College of Law, with a start date of January 4, 2016. After assuming the position, Dean Epps restructured the College of Law leadership and its personnel. A determination was made that Petitioner would not continue in his role as Associate Dean and he would return to a full-time position as instructional faculty.

23. Because Petitioner no longer had the position and responsibilities as Associate Dean, and would work only nine months each year as a professor, he was tendered a new contract on March 3, 2016, which adjusted his base salary downward from \$189,304.00 to \$148,306.00. See Jt. Ex. 5. This calculation was consistent with Regulation 10.102(12). The term of employment was from August 1, 2016, through May 5, 2017, with no special supplements or conditions. The new salary represented compensation based on a nine-month contract as a professor rather than a 12-month contract with dual duties.

24. According to Provost David, who tendered the offer, this salary adjustment was in accord with section IV.A., Policy 2005-15, which governs salary changes for employees who are reassigned from an administrative position to a faculty position and were hired upon initial appointment as an administrator. She explained that Petitioner was initially hired by the College of Law as Associate Dean, and upon cessation of that appointment, section IV.A. provides that the employee's new salary "be the median salary of the employees within the same professorial rank and discipline." She further explained that the provision assumes the person being appointed as a new administrator is a faculty member, as it would not otherwise refer to the employee as having a professorial rank. This interpretation of the Policy is a reasonable one and not clearly erroneous.

25. On March 7, 2016, Petitioner filed a grievance arguing that he was entitled to the same compensation (\$180,000.00) agreed upon when he was initially hired as a professor in 2009, plus annual accruals. On March 18, 2016, Petitioner signed the contract under protest and subject to his grievance. See Jt. Ex. 5.

26. The current median salary of faculty members in the College of Law is \$148,306.00, which is the same as the adjusted salary first offered Petitioner in March 2016. Petitioner

points out, however, that at least three current College of Law faculty members of similar experience and expertise, hired just before or after he was hired in 2009, were given nine-month employment contracts with a base salary of around \$180,000.00.

27. Ten days before the final hearing, Provost David tendered Petitioner another employment contract that increased his annual base salary from \$148,306.00 to \$154,850.92. See Jt. Ex. 4. The rationale for this increase was first outlined in Provost David's memorandum dated May 13, 2016, which denied Petitioner's Step Two grievance. See Jt. Ex. 9, p. 6. As further explained by Provost David at hearing, by "generously" interpreting section IV.C., Petitioner's appointment as Interim Dean could be treated "as a new appointment as an administrator with a base salary identified there on a 12-month basis of \$189,000 and change, which allowed me to add approximately \$6,000 to the median salary that was calculated under Paragraph A."

28. Faculty members with a 12-month contract accrue both vacation and sick leave. A nine-month faculty member does not. Petitioner is aware of this distinction. After this dispute arose, Petitioner requested a pay-out of his unused accrued vacation leave and was given \$31,912.32.

CONCLUSIONS OF LAW

29. This matter was heard pursuant to a contract between FAMU and DOAH. See FAMU Reg. 10-206(9).

30. The burden of proof is on Petitioner to establish by a preponderance of the evidence that he is entitled to the requested relief. See FAMU Reg. 10.206(3); § 120.57(1)(j), Fla. Stat.

31. Section 1012.80(1)(b), Florida Statutes (2016), provides in part:

(b) 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. Section IV., Policy 2005-15, governs the process for determining the salary of an employee upon change in assignment from an administrative position to a faculty position. The evidence clearly shows that Petitioner was initially hired under a 12-month contract with dual administrative and teaching responsibilities. After being reassigned to a teaching position only, his employment contract was converted from a 12-month appointment with year-round duties to a nine-month faculty appointment. Thus, he is subject to the policy. By interpreting the policy in a manner that is most favorable to

Petitioner, he is entitled to a base salary of \$154,850.92 under a nine-month contract.

33. Petitioner argues the 2009 contract is ambiguous and extrinsic evidence should be considered to determine the parties' intent when he signed the contract. Barnett v. Destiny Owners Ass'n, Inc., 856 So. 2d 1090, 1092 (Fla. 1st DCA 2003). Because of this ambiguity, he contends one must look at the negotiations between him and Dean Pernell in order to determine what the parties intended. Petitioner asserts that the offer letter from Dean Pernell shows that the parties clearly intended that he be hired under a nine-month teaching contract.

34. There is no ambiguity in the contracts. The Provost's initial offer letter, the 2009 contract, and all subsequent contracts explicitly spell out that Petitioner was offered a "12 month, full-time position as a full Professor" with additional year-round administrative duties. At hearing, Petitioner acknowledged that he knew the difference between a nine-month and 12-month contract, and he agreed the 2009 contract stated it was for a term of 12 months. Moreover, each contract includes language that the contract supersedes any and all prior agreements, understandings, and communications between the employee and FAMU.

35. Petitioner also contends there is no evidence that Provost Hughes-Harris rejected Dean Pernell's offer. The

accepted evidence belies this assertion. Petitioner further argues that Policy 2005-15 was never mentioned in the first offer letter or contract. However, the first paragraph in each contract Petitioner signed provides that the employee is subject to the regulations, policies, and procedures of FAMU.

36. All other arguments have been considered and rejected.

37. Because the new base salary complies with the Policy and Regulation of FAMU, the grievance should be denied.

RECOMMENDATION

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

RECOMMENDED that Florida A&M University enter a final order denying Petitioner's Step Three grievance.

DONE AND ENTERED this 3rd day of November, 2016, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2016.

ENDNOTE

^{1/} Petitioner was well aware of the ramifications of the Policy and Regulation before that time, as another College of Law faculty member, Markita Cooper, filed a grievance over the same salary issue when she stepped down as Associate Dean for Academic Affairs and returned to a full-time teaching position in school year 2012-2013. See Resp. Ex. 6.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within ten days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the University. FAMU Reg. 10.206(9)(c).