EXHIBIT B.3

Please Read Instructions on Reverse Side of Yellow copy

Please print in ink or type

Arkansas
State Claims Commission
JUL 14 2016
RECEIVED

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

☒ Mr.
☐ Mrs.
☐ Ms.
☐ Miss

J. Thomas Sullivan, Claimant

vs.

State of Arkansas, Respondent

University of Arkansas at Little Rock

Do Not Write in These Spaces

Claim No. 17-0020-CC

Date Filed July 14, 2016 (Month) (Day) (Year)

Amount of Claim $ 56,375.00

Fund UALR

~~Breach of Contract~~

COMPLAINT

J. Thomas Sullivan (Name), the above named Claimant, of 1122 W. Capitol (Street or R.F.D. & No.) Little Rock (City) AR (State) 72201 (Zip Code) (501)227-5743 (Daytime Phone No.) County of Pulaski represented by Mark F. Hampton (Legal Counsel, if any, for Claim) of 1122 W. Capitol (Street and No.) Little Rock (City) AR (State) 72201 (Zip Code) (501)376-6277 (Phone No.) (501)376-6279 (Fax No.), says:

State agency involved: University of Arkansas at Little Rock Amount sought: $56,375.00

Month, day, year and place of incident or service:

Explanation: My claim is for recovery of lost compensation due to the unauthorized reduction in my annual compensation when Dean John DiPippa decided not to reappoint me to serve as the Judge George Howard, Jr. Distinguished Professor of Law at the conclusion of my initial term of appointment. The claim is summarized more specifically in Exhibit A. The Law School rule governing Distinguished Professorships is appended as Exhibit B and the relevant Board Policies of the UA Board of Trustees are appended to this Complaint as Exhibits E, F and G. Neither the Law School rule, nor Board Policies, authorize reduction in annual compensation based on Dean DiPippa's decisions. I have sustained a loss of in excess of $56,375, including the amount of salary enhancement and additional an annual 10% University contribution to the TIAA-CREF retirement program. My application for reappointment and the nomination letter of Senior United States Circuit Judge Morris S. Arnold are also appended to this Complaint as Exhibit C and D, respectively.

I request recovery for the last five years of reduction of annual compensation not authorized by University of Arkansas policy.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof? NO (Yes or No); when? _____ (Month) (Day) (Year); to whom? _____ (Department): and that the following action was taken thereon: _____

and that $ N/A was paid thereon: (2) Has any third person or corporation an interest in this claim? N/A; if so, state name and address _____ (Name) (Street or R.F.D. & No.) (City) (State) (Zip Code) and that the nature thereof is as follows: _____: and was acquired on _____, in the following manner: _____

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

J. THOMAS SULLIVAN
(Print Claimant/Representative Name)

J. Thomas Sullivan
(Signature of Claimant/Representative)

MARIETTA ALPHIN
MY COMMISSION # 12346618
EXPIRES: March 19, 2026
Saline County

SEAL

SWORN TO and subscribed before me at Little Rock (City) AR (State) on this 28th (Date) day of June (Month), 2016 (Year)

Marietta Alphin
(Notary Public)

My Commission Expires: March (Month) 19 (Day) 2026 (Year)

SF1-R7/99

Sullivan v. UALR Bowen School of Law
Arkansas Claims Commission
Summary of Claim and Supporting Facts

Summary of Claim

This claim is for loss of annual compensation resulting from a decision by the UALR Bowen School of Law Dean, John M.A. Dippa, not to reappoint claimant as the Judge George Howard, Jr. Distinguished Professor of Law for the 2011-12 academic year and subsequent three academic years. Holders of Distinguished Professorships at the Bowen School of Law receive a salary enhancement of $10,000 or more during each year in which they hold the professorship to which they have been appointed. The rules governing the selection of faculty to hold Distinguished Professorships applicable at the time of Dean DiPippa's decision not to reappoint the claimant, Professor J. Thomas Sullivan, are appended to this claim as Exhibit B. The claim is based upon the reduction in annual salary, or compensation, resulting from Dean DiPippa's decision to reduce Claimant's annual compensation by the amount of the salary enhancement in the absence of any authority to do so under the rule adopted by the faculty governing the award of Distinguished Professorships and without authority to do so under the University of Arkansas Board of Trustees Policies.

Summary of Facts

I was appointed as the first Honorable Judge George Howard, Jr. Distinguished Professor of Law at the UALR Bowen School of Law in 2005 by Dean Charles Goldner. The holder of a distinguished professorship is afforded additional compensation, which was initially set at $10,000 for the holder of the Howard and other named professorships at the Law School. There were no specific obligations imposed upon me as holder of the Howard Professorship, which was set to be considered for re-appointment at the conclusion of a four-year term of service.

As a result of a number of factors, including change in the Law School deanship following Dean Goldner's decision to return to full-time teaching in 2008, the reappointment process was delayed under the tenure of Interim Dean John M.A. DiPippa, until 2009. Once the reappointment process commenced, a protocol for reappointment adopted by the Law Faculty was followed in which senior faculty members interested in appointment to a Distinguished Professorship--including reappointment of those already holding those professorships--applied to be considered and rated "qualified" or "unqualified" by a faculty subcommittee of

senior professors not themselves applying for appointment. The rule adopted by the Bowen Law School Faculty governing appointment of faculty to Distinguished Professorships is appended to this claim as Exhibit C.

I applied for reappointment and included in my supporting packet of student teaching reviews, published scholarship and evidence of public service a nominating letter from United States Circuit Judge Morris Sheppard Arnold, with whom I had previously appeared as counsel for an indigent criminal defendant in the appeal of his sentence which was found to violate the proscription of cruel and unusual punishments included in the Eighth Amendment in an opinion that Judge Arnold wrote for the Court. The completed application, without exhibits, is appended to this claim as Exhibit D and a copy of Judge Arnold's nomination letter is appended as Exhibit E. Following consideration of the appointment applications by subcommittees of the Faculty Promotion and Tenure Committee, the appointment decision was announced by Dean John DiPippa, who had, by then, succeeded Dean Goldner as the permanent Dean of the Law School.

Although I was found qualified for reappointment by vote of the subcommittees, I was, nonetheless, notified by Dean DiPippa that he intended to appoint another faculty member, Michael Flannery, to the Howard Professorship and that I would not hold the Howard Professorship or any other Distinguished Professorship for the upcoming academic year, 2010-11. I requested a meeting with UALR Chancellor Joel Anderson and Dean DiPippa because of my concern that the denial of reappointment was based on a prior controversy in which I had been falsely accused of making "racist" statements in class by the President of the W. Harold Flowers Law Society during the spring, 2007, academic term. I had been been fully exonerated by Chancellor Anderson and Dean Goldner, a decision in which Interim Dean DiPippa expressly concurred.

Chancellor Anderson, Dean DiPippa and I met in the Chancellor's office on the UALR main campus in the spring of 2010, at which time I expressed concern that denial of my reappointment to the Howard Professorship was based upon political factors relating to the charges made by the Flowers Law Society years earlier. Dean DiPippa explained that his decision on appointment of faculty to the named professorships available to be filled at the time was based upon the reported vote of members of the subcommittee, three of whom voted me "unqualified" despite the fact that there were no performance criteria upon which the "qualified/unqualified" determination would be based. In fact, my performance had been exemplary during my four-year tenure as the Howard Professor. Judge Howard's wife had requested that I deliver a eulogy at his memorial service upon his death, which I

did, later writing a tribute to Judge Howard marking his lengthy career of service to the people of Arkansas published in the UALR Law Review.

At the meeting with Chancellor Anderson, Dean DiPippa denied any motive for his decision not to reappoint me based on perceived political opposition from the faculty members who voted me "unqualified" in the reappointment process. Instead, he explained that he decided to appoint Professor Flannery to the Howard Professorship based upon the unanimous finding of subcommittee members that he was qualified for appointment.

Dean DiPippa then explained that he decided to reappoint Professor Theresa Beiner to the Distinguished Professorship she had had held instead of me, because she had and I had received the same number of "qualified" votes for the remaining unfilled professorship. In essentially breaking the tie vote, he further explained that he made his decision to reappoint Professor Beiner to her professorship based on his assessment that her scholarship offered greater prospect for national recognition than mine. In contrast, I had expended a significant amount of energy in writing on Arkansas topics for the Arkansas courts and practitioners, drawing on my extensive practice experience and familiarity with state law as an attorney licensed to practice by the Arkansas Supreme Court. When I explained that I considered the decision damaging to my professional career, the Chancellor stated that such named professorships were "a dime a dozen" and that he believed the decision not to re-appointment would have no adverse consequences.

I specifically inquired of Chancellor Anderson if Dean DiPippa's decision would necessarily include a reduction in my annual compensation based on loss of the Howard Professorship, even though I had performed with sufficient productivity to receive a "qualified" during the term in which I held the professorship. The Chancellor responded that he would not overrule Dean DiPippa's decision to reduce the additional compensation that I had earned during the preceding five years while holding the Howard Professorship.

My recollection is that at some point, Dean DiPippa explained to me, and perhaps to the Chancellor, that the salary enhancement was a "stipend" that essentially expired as a result of the termination of the appointment and non-reappointment. Subsequently, after reviewing the express terms of the rule governing appointment and reappointment of Distinguished Professorships at the Bowen Law School, I emailed Dean DiPippa and pointed out that the rule did not authorize or contemplate reduction of compensation based upon a decision not to reappoint the holder of a Distinguished Professorship. He failed to address my point relating to

the terms of the rule, replying only that I would receive a salary for the coming academic year that would not reflect the salary enhancement I had previously earned as a result of my service as the Howard Distinguished Professor.

For the five subsequent academic years, I have suffered the annual loss of the additional compensation provided by the designation of Howard Distinguished Professor, a sum in excess of $56,375, including 10% annual contribution match to the TIAA-CREF retirement system by the University for faculty electing to contribute 10% of their compensation to the retirement system. Because there was no provision in the applicable rule expressly authorizing Dean DiPippa to make a decision to reduce my compensation based on his characterization of the salary supplement as a "stipend," and the absence of any University of Arkansas Board of Trustees Policy authorizing a salary reduction without a finding of cause as a disciplinary matter, Dean DiPippa violated my contractual relationship with the University of Arkansas at Little Rock by reducing my annual compensation without a finding of cause for reduction based on disciplinary infraction.

Nothing in the protocol then in place [Exhibit B], authorized reduction in compensation when a faculty member is not reappointed to a Distinguished Professorship. Moreover, at the time Dean DiPippa made his decision, the Altheimer Distinguished Professorship remained unfilled, according to Dean DiPippa's decision to hold that professorship in reserve for a future appointment. Dean DiPippa announced his decision to leave the position of Dean of the Bowen Law School at the end of the 2010-11academic year, retaining his own Distinguished Professorship with his return to the faculty. He was succeeded by Interim Dean Paula J. Casey, who served during the 2012-13 academic year.

Dean Michael Hunter Schwartz was appointed Dean in 2013 and his tenure commenced with the 2013-14 academic year. When the distinguished professorship process was again undertaken in 2014, Dean Schwartz directed the faculty subcommittee to review applications for the available Distinguished Professorships, including the vacant Altheimer Professorship, which he subsequently awarded to Professor Coleen Barger, a highly qualified member of the Bowen Law Faculty.

Applicable legal principles

The Arkansas Supreme Court has recognized that an action for breach of the employment contract of a tenured university professor against a state institution is barred by the doctrine of sovereign immunity and falls exclusively within the

jurisdiction of the Arkansas Claims Commission. *Arkansas Tech University v. Link*, 341 Ark. 495, 499, 17 S.W.3d 809, 812 (2000). Consequently, I have no option of bringing an action for monetary damages against the University of Arkansas, the Bowen Law School, or Dean DiPippa, for monetary damages for the loss of compensation based on the application of the doctrine of sovereign immunity that bars actions against the State of Arkansas or a state official for acts performed in their official capacity. Arkansas Constitution, Art. 5, § 20; *Link*, 341 Ark. at 501, 17 S.W.3d at 813; *Grine v. Board of Trustees*, 338 Ark. 791, 798, 2 S.W.3d 54, 59 (1991).

As Dean of the Bowen Law School at the time of his actions, Dean Emeritus DiPippa is not amenable to suit or judgment for his actions performed without malice in his official capacity as a state actor. *Grine*, 338 Ark. at 799; 2 S.W.3d at 59-60. The exception to application of the statute affording state employees immunity requires a showing that the state actor acted outside the course of their employment and with malice. I do not allege that Dean Emeritus DiPippa acted with malice or have no evidence that he did so in light of his stated explanation for his decision to reduce my compensation as a result of his decision not to reappoint me to the Howard Professorship.

I experienced the loss of significant income through reduction in my compensation commencing with the 2010-11academic year and continuing thereafter, including the compensation authorized by Dean Schwartz for the 2016-17 academic year. Pursuant to UA Trustees Board Policy 405.1 IIA [For references to Board Policy 405.1, see Exhibit G, appended to the Complaint]:

> General
>
> Appointments shall be for a specified period of time not to exceed one fiscal year. Except for appointments to faculty positions for summer school, appointments shall not extend beyond the end of a fiscal year.

Policy 405.1 IIC provides, with respect to tenured faculty, a presumption or right to successive appointments:

> Successive Appointments
>
> Tenured faculty members have a right to a next successive appointment except for the reasons for termination of a tenured appointment given in Section I under definition of tenure. Non-

tenured faculty do not have a right to a next successive appointment, but may be offered an appointment after the expiration of a current appointment, provided it does not extend the time in probationary status beyond the limits set in Sections IV.A.4 and IV.A.11. In the event that a non-tenured faculty member is not recommended for reappointment, the procedure described in Section IV.B. shall be followed.

Criteria and procedures for successive appointments of all faculty members on a campus shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be adopted by the faculty and chairperson of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval.

Pursuant to the Definitions provisions included in Board Policy 405.1 I, an "Appointment" is defined as:

Appointment - An appointment is employment by written contract ("Notice of Appointment") by the Board of Trustees of an individual in a given capacity for a specified time period at a stated salary. An appointment is valid only when the appointment form is approved and signed by the President of the University or the President's designee in accordance with authority delegated by the Board of Trustees, and the Notice of Appointment is signed by the individual being appointed and returned to the specified University official.

"Tenure" is defined:

Tenure - Tenure is the right of continuous appointment. It is awarded by the President to eligible members of the faculty upon successful completion by each of a probationary period and, once granted, it ceases to exist only by dismissal for cause according to the procedures in Section IV.C., demonstrably bona fide financial exigency, reduction or elimination of programs, retirement, or resignation.

"Cause" is defined:

> "Cause" is defined as conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University; examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty, and moral turpitude. The probation period may be waived as provided in Section IV.A.4. NOTE: Tenured faculty holding positions eliminated by reduction or elimination of programs will be relocated in other academic units of the campus whenever possible. A position occupied by a tenured faculty member which was eliminated as a result of reduction or elimination of a program may not be reactivated for a period of five academic years.

Thus, the University operates on a system of annual contracts for tenured faculty, who enjoy a right of continuous appointments, with renewal of the contract each year unless the faculty member is dismissed for cause.

Because the University relies on a system of annual contracts, each year contract that does not include the additional compensation reflecting the Distinguished Professorship salary enhancement in the total annual compensation paid during the year of the contract results in a breach of the University's contractual obligation because the failure to include the salary enhancement was not authorized under the Board Policies that govern the relationship between the University and faculty. Consequently, the University has breached its contractual obligations to me each year that I did not receive the salary enhancement and, thus, suffered a reduction in annual compensation, since Dean DiPippa's decision not to continue including the salary enhancement in my annual compensation beginning with the 2010-11 academic year.

Under the five year statute of limitations actions for actions based on breach of contract, I am entitled to claim a breach of my employment contract based on the loss of my compensation resulting from the non-reappointment to the Howard Distinguished Professorship, or equivalent compensation, based on each violation of the University's contractual obligation. I have received the notice from the President's designee, Dean Schwartz, showing that I will not receive the amount of compensation included in my annual compensation in holding a Distinguished Professorship during the years in which I held the Howard Professorship. Under Arkansas law, the statute of limitations for breach of written contract is five years. *See* Arkansas Code Ann. 16-56-111. I am limited in recovery to the preceding five

years for breach of this contractual obligation in claiming damages for the contractual breaches by Dean DiPippa, the Bowen School of Law, and the University of Arkansas at Little Rock.

I seek compensation from the Arkansas Claims Commission for the loss of compensation resulted from his unauthorized reduction in my annual compensation in violation of my contractual relationship with the University of Arkansas and the Bowen School of Law for academic year 2015-16 and the preceding four years. I request compensation in a sum in excess of $56,375, including 10% annual contribution match to the TIAA-CREF retirement system by the University for faculty electing to contribute 10% of their compensation to the retirement system, plus interest compounded at the normal, annual rate over the five year period of time.

Award of Named Professorships.

Unless otherwise designated by donor criteria, an award of a named professorship is made to tenured faculty members with the rank of full professor or who have applied for promotion to the rank of full professor and are recommended by the Promotion and Tenure Committee for promotion to that rank. The duration of an award shall be limited to a period of four years and thereafter rotated until development activities generate five or more additional named professorships, then the term shall be five years and thereafter rotated. A recipient of a prior award is eligible for consideration for a subsequent award if continued productivity justifies continued recognition.

At the request of the Dean, the Chair of the Promotion and Tenure Committee shall appoint a subcommittee of three members composed of at least one member currently holding a named professorship and two other full professors for the purpose of recommending faculty for the award of a named professorship. The Subcommittee shall identify and develop a file for each eligible candidate to assist the full Committee in its deliberations. Additionally, any full professor or applicant for promotion to full professor may submit a written request to be considered. Criteria for an award of a named professor include: consistent superior classroom teaching that is thoughtful, provocative, and effective; significant scholarly work, measured both by number and quality, as an author and/or panelist; national or international prominence in his or her field, unless the applicant's field is regionally based; and demonstrated commitment to the vision and mission of the law school. Materials to be considered by the Subcommittee include an updated c-v identifying recent publications, law school committee assignments, and professional and community service; annual performance reviews of law school and other service; internal and external reviews of recent publications; a letter of recommendation from an outside source; and current teaching evaluations. The Subcommittee shall recommend to the full Committee those who should be recommended to the Dean for an award of a named professorship and may, as part of its recommendation, rank the eligible candidates.

The Promotion and Tenure Committee shall recommend to the Dean those to whom an award of a named professorship should be granted and may, as a part of its recommendation, rank the eligible candidates. If the number of eligible candidates exceeds the number of available awards, the committee may recommend that the named designations be withheld and that the Dean allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made.

In the exercise of his or her discretion, the Dean shall award named professorships among those recommended by the Promotion and Tenure Committee with the goal of implementing the donor's criteria, furthering the mission of the law school, providing recognition for meritorious work, and stimulating continued productivity among those recommended and the broader law school community. With or without a recommendation from the Promotion and Tenure Committee on the use of monetary awards as a merit bonus, the Dean may allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made. The awarding of named professorships may occur in any semester.

J. THOMAS SULLIVAN
JUDGE GEORGE HOWARD, JR. DISTINGUISHED PROFESSOR OF LAW
WILLIAM H. BOWEN SCHOOL OF LAW/UNIVERSITY OF ARKANSAS AT LITTLE ROCK
1201 McMATH AVENUE/LITTLE ROCK, ARKANSAS 72202-5142
501/324-9940 • jtsullivan@UALR.edu

June 16, 2009

John M.A. DiPippa, Dean
Professor Philip Oliver, Chair
Promotion and Tenure Committee and Chair,
Subcommittee on Appointment of Named Professorships

Re: Application for Reappointment
Judge George Howard, Jr. Distinguished Professorship in Law

To Dean DiPippa, Professor Oliver, and Members of the Promotion and Tenure Committee,

I request reappointment to serve as the Judge George Howard, Jr. Distinguished Professor of Law for the coming four year term of appointment. My current resume, reprints of publications, pleadings and briefs, and other documents supporting my application are appended to this letter.

In reviewing the rules governing appointment to named professorships I note that there are no criteria established for the designation of the faculty member to serve as the Judge George Howard, Jr. Distinguished Professor of Law at the Law School, nor are there any apparent criteria established by the donor or pursuant to the creation of this professorship. Consequently, I have attempted to discern those aspects of professional life that would most favorably reflect on Judge Howard's legacy in this application.

My limited personal acquaintance with the Judge is supplemented by the history of his life's work, first, in the practice of law, and then, as a jurist. I draw upon the same information that formed the basis for the article that I wrote at the request of the Law Review for its *Tribute* to Judge Howard

published in Volume 30, Issue 2 of the review: *The Honorable Judge George Howard, Jr.—A Life of Courage and Civility in the Law*, 30 UALR L. Rev. 245 (2008). Based on my understanding of Judge Howard's personal values, I believe the professorship honoring his life and career and bearing his name should reflect most significantly professional service in the representation of the poor, the disenfranchised, and those least likely to be treated fairly by the justice system and, thus, most needing the assistance of dedicated and competent counsel. I also believe that Judge Howard would appreciate legal scholarship that advances the causes of civil rights and individual liberty, equal protection and due process, and improvement in judicial process.

Because my record of service and scholarship demonstrates my commitment to goals that I believe were shared by Judge Howard during his life, I request consideration for reappointment to serve the Law School in the capacity of the professorship bearing his name for another four-year term. Along with supporting materials mentioned earlier, I have prepared a summary of my work that I request be considered in the review of my application for reappointment to the Judge Howard professorship. Because I have served in this capacity for initial term of appointment following the creation of this professorship, I have limited my discussion of service and scholarship to my performance during the past four years. I must assume that my initial appointment was based on prior performance that warranted that determination by Dean Goldner and was supported by Judge Howard and the Howard family at that point in time.

A copy of Judge Morris Sheppard Arnold's nomination is appended to this letter of application for reappointment.

Thank you for your consideration.

Sincerely,

J. Thomas Sullivan

SERVICE IN THE PURSUIT OF JUSTICE

Consistent with my understanding of Judge Howard's own view of the duties and civic responsibilities of lawyers in this society, I offer the following summary of my service to the cause of justice largely through the representation of indigent criminal defendants over the past four years. This recitation is supported by documentation of my representation that will demonstrate that I have represented my clients with diligence, competence and without regard to their social status, lack of fiscal resources, race or ethnicity or the often heinous nature of crimes for which they have been charged or convicted in pursuing their interests and out of primary concern for protection of their constitutional rights. This summary is organized by client and contains no information that is not part of official court records otherwise available to the public. Citations to published and unpublished decisions, where available and pertinent, are included in my resume.

Ralph Rodney Earnest (New Mexico)

I represented Mr. Earnest in his appeal from his conviction for capital murder committed in New Mexico in 1982. I initially won a reversal in the New Mexico Supreme Court in 1986, but the decision was vacated by the United States Supreme Court after argument of the State's cert petition and, on remand, the state court affirmed the conviction. After coming to UALR I filed a petition for postconviction relief in the New Mexico state courts, then filed for federal habeas relief, losing in the Tenth Circuit in *Earnest v. Dorsey* in 1995.

In 2004 I filed a second petition for postconviction relief in the New Mexico courts based on the United States Supreme Court's intervening decision in *Crawford v. Washington*, in which the majority repudiated over twenty years of precedent that had led the New Mexico Supreme Court to affirm Earnest's conviction on remand from the Court in 1987. The state trial court granted relief on the petition and the Attorney General filed an action for extraordinary relief in the state supreme court to bar enforcement of the trial court's order granting habeas corpus and ordering a new trial in the case. I argued this case in the New Mexico Supreme Court in May, 2005, and prevailed. Thereafter, the Attorney General petitioned the USSCt for certiorari and I successfully defended Earnest in my Brief in Opposition in that Court. After I had succeeded in preventing a stay of mandate in the state courts, I prepared pretrial motions in contemplation of the retrial, after

more than twenty years of the case. Original trial counsel and I appeared in the district court in September, 2006, and announced ready for trial. When the prosecution was unable to force testimony from an alleged accomplice who had never been subjected to cross-examination—the precise issue addressed by the Supreme Court in *Crawford*—the State was unable to proceed to trial and the case was dismissed. Earnest was released immediately from confinement after approximately 24 years spent in prison.

Citations: *State v. Forbes and Earnest, Real Party in Interest*, 119 P.3d 144, 138 N.M. 264, 2005-NMSC-027 (2005), *cert. denied*, 127 S.Ct. 1482 (holding USSCt decision in *Crawford v. Washington*, 541 U.S. 36 (2004) applied retroactively and granting habeas relief to inmate convicted on testimonial statement of co-defendant not subject to cross-examination. Petitioner Earnest was released from custody after 24 years incarceration upon dismissal of capital murder charges); *New Mexico v. Earnest*, 477 U.S. 648 (1986), *vacating* 103 N.M. 95, 703 P.2d 872 (1985), *opinion on remand* 106 N.M. 411, 744 P.2d 539 (1986); *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996*), cert. denied*, 519 U.S. 1016 (1996) (holding that standard for admission of non-testifying accomplice's statement inculpating accused is reliability of statement, rather than opportunity for cross-examination, under Sixth Amendment)

The *Earnest* litigation has provided the impetus for two law review articles addressing the Supreme Court's decision in Crawford and its place in Confrontation Clause jurisprudence and the retroactivity rule recognized by the Court in *Danforth v. Minnesota* that authorizes state courts to afford retroactive application of new rules announced by the Court as a matter of state law, rather than being bound by federal retroactivity doctrine. These articles are:

Danforth, Retroactivity and Federalism, 63 Oklahoma Law Review 425-502 (2008)

Crawford, Retroactivity and The Importance of Being Earnest, 92 Marquette Law Review 231-306 (2008).

Jesus Ledesma Aguilar (Texas)

In January, 2006, Magistrate Judge Felix Recio, SDTex, asked me to assume representation in a case out of Brownsville in which appointed counsel had been removed as a result of some disciplinary problem after the Fifth Circuit

upheld the denial of habeas relief. I agreed to take the case even though the certiorari petition was due in the USSCt in less than 45 days and an execution date had already been set. I filed the petition on behalf of Ledesma-Aguilar and began working on a successor petition based on a *Crawford v. Washington* cross-examination claim litigated on direct appeal, but not brought forward in the state and federal postconviction actions. The Court denied certiorari in the case on the same day that it granted certiorari to review the *Crawford* retroactivity issue in *Whorton v. Bockting*.

I had anticipated that the Court would grant certiorari in *Bockting* because the Ninth Circuit had held in a split panel decision that *Crawford* applied retroactively. Consequently, I had prepared to proceed in *Aguilar* once the Court did grant cert. I filed a motion in the Fifth Circuit for leave to file the successor and also filed a state action asserting the *Crawford* claim, arguing in both courts that the execution should be stayed pending the Supreme Court's decision on retroactivity in *Bockting* because a determination favoring retroactive application would arguably apply retroactively to the use of the uncrossed statement of an accomplice in the sentencing phase of Aguilar's capital trial. The Fifth Circuit and Texas Court of Criminal Appeals both denied relief and I petitioned for certiorari in these actions within days of the scheduled execution. The Court denied relief with four dissenting votes for stay of execution and I was notified approximately ten minutes of that action before the execution process commenced.

Citations: *Aguilar v. Dretke*, 547 U.S. 1136 (2006) (denying certiorari from 428 F.3d 526 (5th Cir. 2005)); *Aguilar v. Dretke*, 547 U.S. 1161 (2006) (denying stay application with four Justices dissenting); *Aguilar v. Quarterman*, 547 U.S. 1204 (2006) (denying writ of certiorari).

Gyronne Buckley (Arkansas)

Following successful representation of two Arkansas defendants, Grover Henderson, *see Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001) (reversing federal habeas court, Eighth Circuit holds that petitioner's life sentence imposed by jury, effectively life without parole under state law, for first offense delivery of less than ¼ gram of cocaine violates Eighth Amendment prohibition of cruel and unusual punishment) and Rodney Bragg, African-Americans who had sentenced to life terms for first offense sale of delivery of minute quantities of cocaine—less than one quarter gram—in each case, I was retained by the family of Gyronne Buckley to appeal the 56-year

sentence for two sales of similar amounts of cocaine on successive days in 1999. Mr. Buckley was originally sentenced to two life sentences, imposed consecutively. The appeal to the Arkansas Supreme Court was unsuccessful and I applied to the United States Supreme Court for a writ of certiorari, arguing that highly prejudicial constitutional error should not be subjected to procedural default as a result of trial counsel's failure to properly preserve error in accordance with state rules.

Once the writ application had been denied I filed a petition for post-conviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure, alleging misconduct in the local prosecutor's failure to disclose to original trial counsel that the drug agent who testified in the case had been shown to have committed perjury in the Rodney Bragg state court case. *See Bragg v. Norris,* 128 F.Supp.2d 587 (E.D. Ark. 2000) (Federal habeas court sets aside state conviction for first offense delivery of less than ¼ gram of cocaine resulting in life sentence upon finding after two day evidentiary hearing that narcotics task force officer fabricated offense and committed perjury in state court trial). I also alleged that state police officers had committed perjury at Buckley's trial and that trial counsel at the resentencing proceeding had failed to provide effective assistance in defaulting a number of otherwise meritorious claims.

The Arkansas Supreme Court ordered an evidentiary hearing in the case in 2005. At this point, Buckley had exhausted his fiscal resources and I proceeded with the case on a pro bono basis. I arranged for a former student to conduct the hearing and I withdrew to testify as a witness in the case, relating the evidence concerning the prosecutor's knowledge of the Bragg exoneration in explaining the basis for the claim of prosecutorial misconduct in failing to disclose this information to trial counsel.

Following evidentiary hearing, I appealed the case to the Arkansas Supreme Court. That court declined relief in Rule 37, holding that misconduct claims must be brought in coram nobis proceedings, applying an intervening decision to default these claims after having previously remanded the case for evidentiary hearing. I then asserted the misconduct claims already litigated and one additional claim in a petition for writ of error coram nobis which was then denied by the supreme court. I again applied for certiorari on federal constitutional issues rejected by the state supreme court on direct appeal and the Court denied the writ.

I then filed a petition for writ of habeas corpus in the United States District Court. Most recently, the United States Magistrate Judge ordered the State to disclose a videotaped interview conducted with the confidential informant in the case by the drug agent which was never disclosed to defense counsel during the ten years that the case has been pending in state and federal courts. I have moved for an evidentiary hearing on this misconduct ground based on exculpatory or impeaching evidence recorded on the tape and am awaiting decision on the Attorney General's motion to return the case to the state courts on this newly disclosed evidence which I have opposed.

Citations: *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002); *Buckley v. Arkansas*, 537 U.S. 1058, 123 S.Ct. 633 (2002). *Buckley v. State,* Not Reported in S.W.3d, 2005 WL 1411654 (Ark.); *Buckley v. State*, 2007 WL 1509323 (Ark.); *Buckley v. State*, 2007 WL 2955980 (Ark.); *Buckley v. Arkansas*, 128 S.Ct. 1281 (2008)

Glen Homer Shelton (Arkansas)

I undertook representation for Mr. Shelton in 2008 as a result of learning about the case from his Jefferson County Public Defender Tim Bunch who was visiting a lecture in my course in Criminal Procedure/Post-Trial that term. Shelton had been charged with the offense of capital murder in a factually-unusual case. Shelton was accosted on the farm that he farmed for the owner and where he lived in an abandoned school bus by his girlfriend. She was a methamphetamine addict who had acted violently toward him on occasion, including stabbing him in the neck a year earlier. On the day in question she had come to his residence to ask him to take her to buy drugs, but when he refused, she began shooting at him. He had no weapon and was unable to get into his car or house. Instead, he got onto the tractor and began chasing her off the property as she ran and continued firing at him. She left the property and ran up on the adjacent state highway and he followed, losing control of the tractor as he tried to negotiate the ditch below the shoulder. In the process, the tractor ran over the woman. Witnesses driving on the highway reported her being run over and after returning the tractor to the property, he ran away, hiding in nearby woods. The following day he surrendered to the sheriff and gave a statement in which he explained that he had lost control of the tractor, did not mean to kill her and characterized her death as an accident.

Prior to trial the defense gave notice of its intent to rely on self-defense. Based on this defensive theory, the State stipulated to admission of the prior drug use and violent acts of the deceased. During opening statement the prosecution told jurors of the confession and its contents, referring the Shelton's explanation that the death had been an accident. Defense counsel then explained to jurors that Shelton would claim self-defense, reiterating that he had lost control of the tractor during the chase. Following his opening, the prosecutor moved for mistrial, arguing that the defense had changed its theory to accident and thereby compromised the State's position with regard to the admission of the victim's drug and violence history. Defense counsel offered the trial judge Arkansas authority on the law of imperfect self-defense, but the court granted the mistrial and set the case for retrial.

At this point, I volunteered to pursue an interlocutory appeal on the prior jeopardy claim authorized by both federal and state constitutional law. I filed a lengthy motion styled "plea in bar," asserting multiple grounds for relief from the order for retrial. I argued the motion in Pine Bluff in May, 2008, and proceeded on appeal when the trial court denied relief. Following briefing, I argued the case in the Arkansas Supreme Court on June 18, 2009. The Court reversed, 6-1, agreeing with my argument, in its opinion issued on June 25th.

Citation: *Shelton v. State,* 2009 Ark. 165, --- S.W.3d ----, 2009 WL 775113

Calupp Henderson (New Mexico)

I filed the certiorari petition on behalf of Mr. Henderson to assist the New Mexico Public Defender Department in his representation following the affirmance of his conviction on direct appeal. The issue involved a permutation on *Crawford v. Washington* and *Coy v. Iowa* in which I argued that the complainant's refusal to appear to testify before the jury at trial should bar use of his cross-examined preliminary hearing testimony because there was no valid public interest involved in excusing the Sixth Amendment's requirement for face-to-face confrontation in the presence of the trial jury. When the Court denied certiorari, I then filed a petition in state court alleging a number of theories of relief as a matter of both federal and state constitutional law. I continue to work with private counsel who agreed to represent Mr. Henderson in the trial court on contract with the Public Defender Department.

I have consistently provided assistance to Arkansas public defenders charged with capital murder and other serious offenses. This spring, for instance, I prepared motions in non-death capital prosecutions raising novel issues. In *State v. Holman*, I assisted the public defender for whom one of my students was clerking in filing a motion challenging a capital charge on collateral estoppel grounds where the more culpable codefendant had been convicted on the lesser charge of first degree felony murder in a severed capital trial.

In the other, *State v Butler*, No. 2007-4949, Pulaski County Circuit Court, I prepared a motion attacking the charging instrument in a capital murder prosecution alleged to have been committed in a drive-by shooting context where the defense intended to rely on self-defense at trial. On the facts the shooting occurred during a verbal altercation when the defendant was driving from the scene and believed the other man was getting a firearm from his car to shoot at him after threatening to kill the defendant. Under the erroneous, but applicable rule of Arkansas law, a "drive-by" shooting charge does not give rise to the lesser-included offense of manslaughter, while the claim of self-defense to an intentional shooting would permit reliance on the lesser offense of manslaughter. The felony murder prosecution was resolved by favorable plea and the other case was continued by the trial court with directions to the prosecution to reconsider its theory of the offense.

Representative briefs and pleadings filed in these cases are available in my office and will be provided as Exhibits to this application for reappointment at the request of the subcommittee, Promotion and Tenure Committee, or the Dean.

SCHOLARSHIP COMPLETED DURING TENURE AS JUDGE GEORGE HOWARD, JR., DISTINGUISHED PROFESSOR OF LAW

Developing a State Constitutional Law Strategy for New Mexico Prosecutions. 39 New Mexico Law Review___(forthcoming, 2009). This is the most comprehensive article to date on the development of state constitutional doctrine in the decisions of New Mexico courts providing alternative sources of individual protections to those afforded by the Federal constitution bearing on the prosecution of offenses in New Mexico state courts.

Danforth, Retroactivity and Federalism, 63 Oklahoma Law Review 425-502 (2008). This article draws upon my experience in the *Earnest* litigation and the Supreme Court's decision in *Danforth v. Minnesota* recognizing that state courts may afford retroactive application to United States Supreme Court decisions recognizing "new rules" of constitutional interpretation even when the Court, itself, has not determined that the new rule is to be given retroactive effect as a matter of federal doctrine. *Earnest* is the only state court defendant who has been afforded the retroactive benefit of the Court's decision in *Crawford v. Washington* to date and was afforded relief in a decision pre-dating the Court's holding in *Danforth* and correctly anticipating that decision.

Crawford, Retroactivity and The Importance of Being Earnest, 92 Marquette Law Review 231-306 (2008). In this article I detail the 22 year history of litigation in the capital murder case of New Mexico inmate Ralph Rodney Earnest, set against the United States Supreme Court's evolving view of the Sixth Amendment Confrontation Clause over the same period of time, culminating with Earnest's eventual release from custody following the Supreme Court's dramatic reversal of doctrine in *Crawford v. Washington.* A copy Marquette Law Professor Daniel Blinka's review of this article is included with this summary.

The Honorable George Howard, Jr.—A Life of Courage and Civility in the Law, 30 University of Arkansas at Little Rock Law Review 245-64 (2008). I wrote this article in response to a request from the Law Review to include my thoughts in a tribute to Judge Howard's life and career published last spring. I focused on his legal work on behalf of his community and civil rights in the Dollarway School desegregation litigation and briefly on his

decisions on the bench while serving on the Arkansas Supreme Court, Arkansas Court of Appeals and United States District Court.

Ethical and Effective Representation in Arkansas Capital Trials, 60 Arkansas Law Review 1-184 (2007) This is the most comprehensive treatment of the Arkansas capital punishment statutes and duties of criminal defense attorneys representing Arkansas capital defendants. I note common problems in representation in capital litigation and raise questions about substantive flaws in the capital murder and capital sentencing statutes that I believe should be raised by defense counsel and addressed by the Arkansas Supreme Court.

The Clinician as Ethical Role Model in the Criminal Appellate Clinic, 75 Mississippi Law Journal (Criminal Appeals Clinical Program Symposium Issue) 741-767 (2006). I was invited to write this article for the Mississippi Law Journal's symposium on criminal appellate clinics initiated by the Director of the Criminal Appeals Clinic at Mississippi, Philip Broadhead. I based my comments on a prior article I had published at Seton Hall advocating developments of criminal appellate litigation clinics as an important component of clinical legal education. Both articles reflected my own experiences as Director of the SMU Appellate Litigation Clinic that operated under a Department of Education Clinical Education grant at SMU from 1984-86.

The Perils of Online Legal Research: A Caveat for Diligent Counsel, 29 American Journal of Trial Advocacy, 81-100 (2005). In this article I related a number of interesting anecdotes about the rather transitory nature of digital information, including opinions or orders issued by appellate courts in pending cases. I emphasized the need to be aware that authority may occasionally disappear in this context in a way that does not occur with printed material and suggested that careful lawyers should constantly check to make certain that the information on which they relay remains available and unaltered.

Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority, 59 University of Miami Law Review 341-382 (2005). This is the second of two articles in which I advocate a position contrary to conventional wisdom in encouraging appellate lawyers to advocate aggressively for favorable changes in the law or to carefully seek to distinguish existing authority in support of their clients' positions, rather than simply deferring to established precedent as beyond challenge and change.

Unpublished Opinions and No Citation Rules in the Trial Courts, 47 Arizona Law Review 419-59 (2005). This article was finished before my appointment, but released during the year of my appointment as Howard Professor. Following on a substantial list of articles tracing their subject matter to Judge Richard Arnold's now-famous opinion in *Anastasoff v. United States,* questioning the legitimacy of rules denominating some judicial decisions as non-precedential based on the decision not to publish, I analyze the proper response by trial counsel and trial courts when considering unpublished opinions that reflect the position of an appellate court when the jurisdiction prohibits their citation or reliance on unpublished decisions as precedent. I propose a novel rule for use in those jurisdictions that recognizes the legitimate desire of trial courts to properly apply the law in uncertain areas when unpublished opinions shed light on what would otherwise be controlling, or conflicting, views on the correct resolution of an issue.

Reprints of these articles are submitted as Exhibits to this application for reappointment.

http://law.marquette.edu/facultyblog/2009/06/05/confrontation-avoidance-part-i-a-good-article-to-read-while-waiting/

Confrontation Avoidance? Part I: A Good Article to Read While Waiting

June 5, 2009 | Posted by: Daniel D. Blinka
Category: Criminal Law & Process, Evidence, Federal Law & Legal System, U.S. Supreme Court |

Like nearly every criminal lawyer, I eagerly await – and wait and wait – for the Supreme Court's long overdue decision in *Melendez-Diaz v. Massachusetts* (07-591), the only case outstanding from the Court's November sitting (per SCOTUSBLOG). The case addresses the prosecution's use of crime laboratory reports against the accused without testimony by the person who performed the analysis and wrote the report. We need not get bogged down in the constitutional niceties at present, if only because its delayed appearance renders the case's auguries especially hard to read.

So while we wait for a case that is certain to affect a staggering percentage of criminal cases, both pending appeal and awaiting trial, I highly recommend J. Thomas Sullivan's timely article, *Crawford, Retroactivity, and the Importance of Being Earnest*, 92 Marq. L. Rev. 231 (Winter 2008). To grossly oversimplify things, in 2004 the Supreme Court held its nose and unceremoniously dropped 25 years of case law (and countless law review articles) into law's dumpster. The discarded doctrine loosely regulated the prosecution's use of hearsay under the Sixth Amendment's confrontation clause; its flaccid "reliability" approach had green lighted nearly all forms of hearsay imaginable (and then some).

Crawford v. Washington held instead that the framers had distinguished between "testimonial" and "nontestimonial" hearsay which are subject to vastly different conditions for admissibility. Without belaboring the history here, *Crawford* triggered seismic –no, tectonic – shifts in the use of hearsay evidence, a feature of every trial. The only glitch was that the Court did not share with us the meaning of "testimonial hearsay" or the reach of hinted-at exceptions for business records, coconspirator statements, or dying declarations. Hence, we are on tenterhooks to see what comes of *Melendez-Diaz*.

Sullivan's article illuminates *Crawford* while addressing its impact on the thousands of prisoners convicted before 2004. He approaches *Crawford* and the issue of retroactivity with insights based on practical experience and a scholar's command of law. Sullivan, a law professor, represented a man (Earnest) who spent 24 years in prison before his conviction was overturned based on a retroactive application of *Crawford*. The article places Earnest's story in the context of the doctrinal turmoil that has marked the confrontation clause for decades.

J. THOMAS SULLIVAN/ATTORNEY
P.O. BOX 17007/LITTLE ROCK, ARKANSAS 72222

CURRENT POSITION

Judge George Howard, Jr. Distinguished Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock; UALR since 1988; subjects taught: Criminal Law, Arkansas Criminal Trial Practice, Trial Advocacy, Law and Psychiatry, Criminal Procedure (Trial and Post-Trial), Film and Criminal Law (seminar); Jury Selection (interterm course)

Adjunct Professor of Law and Psychiatry, University of Arkansas for Medical Sciences

UALR Faculty Excellence Award for Research, 1993
UALR Faculty Excellence Award for Service; 1999

Founding Editor, THE JOURNAL OF APPELLATE PRACTICE AND PROCESS; faculty-edited review published by UALR School of Law distributed to all federal and state appellate judges

EDUCATIONAL BACKGROUND

B.A. with Highest Honors, University of Texas at Austin, 1972; elected to membership: Phi Beta Kappa; Phi Kappa Phi

J.D., Southern Methodist University School of Law, 1976; estimated class rank: upper 15%; AmJur Awards: Civil Procedure, Administrative Law

LL.M., Texas, 1983; thesis topic: *Specificity Requirements in Pleading Texas Charging Instruments*, supervised by George Dix

PROFESSIONAL EXPERIENCE

Admitted to practice: Texas, 1976; New Mexico, 1982; Colorado, 1986; Arkansas, 2006; United States Supreme Court, 1981; United States Courts of Appeals for the Fifth, Eighth and Tenth Circuits; United States District Courts: Northern District of Texas; Colorado

Director, SMU Appellate Clinic, 1984-86; Texas Criminal Procedure

Private Practice: Dallas, Texas, 1976-1987: civil and criminal trial and appellate practice, including state and federal death penalty litigation

Appellate Defender, New Mexico Public Defender Department, Santa Fe, 1983-84; Assistant Appellate Defender, 1982-83

PUBLICATIONS

Developing a State Constitutional Law Strategy for New Mexico Prosecutions. 39 New Mexico Law Review___(forthcoming, Spring, 2009)

Danforth, Retroactivity and Federalism, 63 Oklahoma Law Review 425-502 (2008)

Crawford, Retroactivity and The Importance of Being Earnest, 92 Marquette Law Review 231-306 (2008).

The Honorable George Howard, Jr.—A Life of Courage and Civility in the Law, 30 University of Arkansas at Little Rock Law Review 245-64 (2008)

Ethical and Effective Representation in Arkansas Capital Trials, 60 Arkansas Law Review 1-184 (2007)

The Clinician as Ethical Role Model in the Criminal Appellate Clinic, 75 Mississippi Law Journal (Criminal Appeals Clinical Program Symposium Issue) 741-767 (2006)

The Perils of Online Legal Research: A Caveat for Diligent Counsel, 29 American Journal of Trial Advocacy, 81-100 (2005)

Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority, 59 University of Miami Law Review 341-382 (2005)

Unpublished Opinions and No Citation Rules in the Trial Courts, 47 Arizona Law Review 419-59 (2005)

Foreword, *Death Row and the Cancer Ward*, 5 Journal of Appellate Practice and Process No. 1 (Spring 2003)

Twice Grilled, 5 Journal of Appellate Practice and Process 151-155 (2003) (included in *First Oral Arguments at the Supreme Court of the United States—A Collection of Essays;* permission to reprint granted by JAPP to Gregg Ivers and Jennifer A. Segal, *Inside the Judicial Process* (West 2006))

An Introduction to Imagining the Law: Lawyers and Legal Issues in the Popular Culture, 25 UALR Law Review 439-441 (2003)

Imagining the Criminal Law: When Client and Lawyer Meet in the Movies, 25 UALR Law Review 665-680 (2003) (included in Ben J. Altheimer Symposium *Imagining the Law: Lawyers and Legal Issues in the Popular Culture)*

Ethical and Aggressive Appellate Advocacy: The "Ethical" Issue of Issue Selection, 80 Denver University Law Review 155-197 (2002); reprinted in 53 Defense Law Journal 1-50 (2004)

Foreword, *Judge, Scholar and Friend* (Tribute to Hon. Richard S. Arnold on the occasion of the hanging of his portrait in the United States Courthouse), 4 Journal of Appellate Practice and Process No. 2 (Fall 2002)

Foreword, *Death of a Friend* (Eulogy for Dean Howard Eisenberg, Marquette University Law School), 4 Journal of Appellate Practice and Process No. 1 (Spring 2002)

Justice White's Principled Passion for Consistency, 4 Journal of Appellate Practice and Process 79-87 (2002)

Concluding Thoughts on the Practical and Collateral Consequences of Anastasoff, 3 Journal of Appellate Practice and Process 425-451 (2001)

Foreword, *The Role of Appellate Judges in Intermediate Courts,* 2 Journal of Appellate Practice and Process No. 1 (Winter 2000)

The Culpability, or Mens Rea, Defense in Arkansas, 53 Arkansas Law Review 805-884 (2000)

Redefining Rehearing: "Previewing" Decisions On-Line, 2 Journal of Appellate Practice and Process 435-454 (2000)

Requiem for RFRA: A Political and Philosophical Response, 20 UALR Law Journal 795-812 (1998)

Prosecutorial Misconduct in Closing Argument in Arkansas Trials, 20 UALR Law Journal 213-263 (1998)

The Changing "Burden" of Proof in Federal Habeas Actions, 26 U. Memphis Law Review 205-255 (1995)

Psychiatric Defenses in Arkansas Criminal Trials, 48 Arkansas Law Review 439-509 (1995)

The Arkansas Remedy for Retaliatory Discharge of Workers' Compensation Claimants, 16 UALR Law Journal 373-447 (1994); reprinted in 18 Workers Comp. L. Rev. 439-513 (1995-96)

Separation of Powers Conflicts in the "Reform" of Arkansas Workers' Compensation Law, 18 Seton Hall Legislative Journal 581-612 (1994)

New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation to Inefficiency, Ineffectiveness and Injustice, 24 New Mexico Law Review 24-50 (1994)

A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys, 25 Arizona State Law Journal 317-347 (Summer 1993); reprinted, *A*

Practitioner's Guide to Recent Developments in Federal Habeas Corpus, 1 Criminal Practice Law Report No. 11 (Clark Boardman Callaghan, December 1993); reprinted in *Criminal Law Review, 1993* (Clark Boardman)

"Reforming" Federal Habeas Corpus: The Cost to Federalism; the Burden for Defense Counsel; and the Loss of Innocence, 61 UMKC Law Review 291-328 (1992)

An Overview of the Law Relating to Jury Selection for Arkansas Criminal Trial Lawyers, 15 UALR Law Journal 37-69 (1992)

Teaching Appellate Advocacy in an Appellate Clinical Law Program, 22 Seton Hall Law Review 1277-1307 (1992)

Use of the "Zola Plea" in New Jersey Capital Prosecutions, 21 Seton Hall Law Review 3-63 (1990)

The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 UALR Law Journal 651-667 (1988-89)

Retaliatory Firings: The Remedy Under the Texas Workers' Compensation Act, 19 Texas Tech Law Review 85-148 (1988)

Ethical Duties of Appointed Counsel on Appeal, 5 Fifth Circuit Reporter 351-373 (March 1988)

Litigating the Novel Course and Scope of Employment Issue: INA of Texas v. Bryant, 5 Review of Litigation 297-317 (1986)

Unexplained Accidents and Assaults: The Problems and Burdens of Proof Under the Texas Workers' Compensation Statute, 16 Texas Tech Law Review 875-937 (1985)

The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation, 15 New Mexico Law Review 41-71 (1985), cited in *State v. Zola*, 112 N.J. 384, 548 A.2d 1021 (1988)

Query: Should Users of the Legal System Pay for Legal Education, 68 Judicature 6 (June/July 1984)

When Death is the Issue: Uses of Pathological Testimony and Autopsy Reports at Trial, 19 Willamette Law Review 579-607 (1983)

The Texas Court of Criminal Appeals: A Modest Critique of Appellate Decisionmaking, 10 American Journal of Criminal Law 113-160 (1982)

The Defense of Necessity in Texas: Legislative Invention Come of Age, 16 Houston Law Review 333-364 (1979)

SIGNIFICANT LITIGATION

Shelton v. State, 2009 Ark. 165, --- S.W.3d ----, 2009 WL 775113 (reversing trial court's order denying Shelton's plea in bar following grant of mistrial on motion of prosecution after defense opening statement in capital murder trial, and ordering prosecution dismissed)

Steinbuch v. Cutler, et al, 518 F.3d 580 (8th Cir. 2008) (remanding for jurisdictional discovery in Plaintiff's diversity action based on invasion of privacy)

State v. Forbes and Earnest, Real Party in Interest, 119 P.3d 144, 138 N.M. 264, 2005-NMSC-027 (2005), *cert. denied*, 127 S.Ct. 1482 (holding USSCt decision in *Crawford v. Washington*, 541 U.S. 36 (2004) applied retroactively and granting habeas relief to inmate convicted on testimonial statement of co-defendant not subject to cross-examination. Petitioner Earnest was released from custody after 24 years incarceration upon dismissal of capital murder charges).

New Mexico v. Earnest, 477 U.S. 648 (1986), *vacating* 103 N.M. 95, 703 P.2d 872 (1985), *opinion on remand* 106 N.M. 411, 744 P.2d 539 (1986); *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996), *cert. denied*, 519 U.S. 1016 (1996) (holding that standard for admission of non-testifying accomplice's statement inculpating accused is reliability of statement, rather than opportunity for cross-examination, under Sixth Amendment)

Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001) Reversing federal habeas court, Eighth Circuit holds that petitioner's life sentence imposed by jury, effectively life without parole under state law, for first offense delivery of less than ¼ gram of cocaine violates Eighth Amendment prohibition of cruel and unusual punishment.

Bragg v. Norris, 128 F.Supp.2d 587 (E.D. Ark. 2000) Federal habeas court sets aside state conviction for first offense delivery of less than ¼ gram of cocaine resulting in life sentence upon finding after two day evidentiary hearing that narcotics task force officer fabricated offense and committed perjury in state court trial.

State v. Strother, No. 99-21B, (Circuit Court of Yell County, Arkansas), August 31 through September 14, 2000, co-counsel for Defendant Strother in capital murder trial resulting in acquittal on capital and first degree murder charges, mistrial based on hung jury on second degree murder.

United States v. Kehoe and Lee, No. LR-CR-97-243(1), (United States District Court, Eastern District of Arkansas), March 3, 1999 through May 10, 1999, co-counsel for Defendant Kehoe in Federal capital trial involving RICO and conspiracy counts alleging murder in furtherance of intent to create white, separatist state in Pacific Northwest; engaged in investigation, pre-trial motions practice, conducted capital voir dire examination, direct and cross-examination of witnesses, closing argument on guilt and punishment phases of trial. Jury imposed life sentence upon conviction on capital counts.

Sterling v. Texas, 513 U.S. 996 (1994), *vacating* 26 F.3d 29 (5th Cir. 1994) and remanding for consideration in light of *McFarland v. Scott*, 512 U.S. 849 (1994) *(vacating* Fifth Circuit holding that federal habeas proceeding is not commenced for purpose of appointment of counsel for state inmate sentenced to death until filing of fully-exhausted petition under § 2254).

Fugate v. New Mexico, 470 U.S. 904 (1985), *affirming by equally divided Court*, 101 N.M. 5, 678 P.2d 861 (1984) (upholding application of "jurisdictional exception" to double jeopardy bar in successive New Mexico prosecutions)

Esquivel v. McCotter, 791 F.2d 350 (5th Cir. 1986), *cert. denied*, 476 U.S. 1165 (vacating habeas court's stay of execution in capital case on post-*Batson*, pre-*Allen v. Hardy* claim of discriminatory use of peremptory challenges to strike Hispanic venirepersons)

Fearance v. State, 771 S.W.2d 486 (Tex. Crim. App. 1988), *prior opinion,* 620 S.W.2d 577 (Tex. Crim. App. 1980) (affirming capital murder conviction and sentence of death on retrial after reversal for *Witherspoon/Adams* violation), *Fearance v. Scott*, 51 F.3d 1041 (5th Cir. 1995), *cert. denied*, 515 U.S. 1138 (1995) and *Fearance v. Texas,* 515 U.S. 1153 (1995).

Griffin v. State, 815 S.W.2d 576 (Tex. Crim. App. 1991), *reversing* 785 S.W.2d 179 (Tex. App.--Dallas 1990), *opinion on remand from* 779 S.W.2d 431 (Tex. Crim. App. 1989), *reversing* 725 S.W.2d 773 (Tex. App.--Dallas 1987) (setting forth correct standard for review of trial error in overruling proper objection to prosecution argument and applying harmless error standard)

King v. State, 816 S.W.2d 447 (Tex. App.—Dallas 1991), *on remand from* 800 S.W.2d 528 (Tex. Crim. App. 1990)(reversing conviction for DWI based on unconstitutional roadblock)

Wicker v. State, 740 S.W.2d 779 (Tex. Crim. App.), *cert. denied*, 485 U.S. 938 (1987) (rejecting argument that confession obtained by child abuse caseworker resulted from functional equivalent of custodial interrogation)

Posey v. State, 738 S.W.2d 321 (Tex. App.—Dallas 1987) (reversing based on denial of cross-examination of officer based on prior use of improper force with stun gun in another case and improper cross-examination of defendant on collateral matters)

Mattias v. State, 731 S.W.2d 936 (Tex. Crim. App.), *cert. denied*, 488 U.S. 831 (1987), *reversing* 683 S.W.2d 789 (Tex. App.--Eastland 1984) (defendant's statement of price in response to query by undercover officer constituted act of making or accepting offer to commit prostitution despite trial court's finding that defendant attempted to use inflated price to escape physically threatening situation)

McElroy v. State, 720 S.W.2d 490 (Tex. Crim. App. 1986), *affirming* 667 S.W.2d 856 (Tex. App.—Dallas 1984) (reversing defendant's conviction for construction fraud for insufficient evidence where evidence failed to establish defendant did not use trust funds for reasonable overhead expenses)

INA of Texas v. Bryant, 686 S.W.2d 614 (Tex. 1985), *affirming* 673 S.W.2d 693 (Tex. App.--Waco 1984) (holding worker who sustained injury while on employer's premises to pick up final paycheck following termination for economic reasons was within course and scope of employment when injured)

Walters v. American States Insurance Company, 654 S.W.2d 423 (Tex. 1983) (affirming jury verdict awarding death benefits under workers' compensation statute/employee and employer both killed by unknown assailant while in course and scope of employment)

Doyle v. State, 661 S.W.2d 726 (Tex. Crim. App. 1984) (reversing for insufficient indictment based on failure to allege sufficient facts concerning how or to whom threat against judge made)

Jackson v. State, 100 N.M. 487, 672 P.2d 660 (1983) (holding trial court's use of superseded uniform jury instruction constitutes fundamental error requiring reversal)

State v. Sinyard, 100 N.M. 694, 675 P.2d 426 (Ct. App. 1983) (recognizing sentencing error as *jurisdictional* or *fundamental* error in case of first impression)

Fulton v. Texas Farm Bureau Insurance Company, 773 S.W.2d 391 (Tex. App.--Dallas 1989, *writ ref'd*) (refusing to apply uninsured motorist policy coverage to passenger who exited vehicle after initial accident to obtain license plate number of hit-and-run vehicle which then struck him)

Simmons v. State, 741 S.W.2d 595 (Tex. App.--Dallas 1987, *pet. ref'd*) (reversing for denial of requested instruction on Texas law authorizing jury to disregard evidence seized illegally)

OTHER PROFESSIONAL ACTIVITIES

Participant, "Service-Learning" Workshop, sponsored by Office of Community Engagement, University of Arkansas at Little Rock, June 1-4, 2009 (developed proposal for creation of multi-clinic *Post-Trial Litigation Project*, including Criminal Appellate Litigation Clinic, Post-Conviction Representation Clinic, and Clemency Project).

Lecturer, "An Aggressive Approach to Litigating State Constitutional Law Issues in New Mexico," Appellate Defender's Section, New Mexico Public Defender Department, Santa Fe, May 20, 2009

Lecturer, "Moral Judgments and Clinical Judgments in Capital Cases" Department of Psychiatry Forensic Didactics, University of Arkansas for Medical Sciences, March 20, 2009

Speaker, "Preserving State Constitutional Error in New Mexico," and "Confrontation and Cross-examination," New Mexico Public Defender 2008 Annual Conference, Albuquerque, November 13—14, 2008.

Lecturer, "*Kennedy v. Louisiana*: Capital Punishment for Non-Death Crimes," Department of Psychiatry Forensic Didactics, University of Arkansas for Medical Sciences, February 15, 2008.

Speaker, "Preservation of Federal Constitutional Error for Review on Certiorari and Federal Habeas," New Mexico Public Defender Department, Albuquerque Trial Division, October 11, 2007, and Appellate Division, Santa Fe, October 18, 2007

Lecturer, "Criminal Law: Proof of Criminal Intent," Department of Psychiatry Forensic Didactics, University of Arkansas for Medical Sciences, September 7, 2007

Lecturer, "*Clark v. Arizona*, Section 303, and the viability of the Culpability or Mens Rea Defense in Arkansas," Department of Psychiatry Forensic Didactics, University of Arkansas for Medical Sciences, May 25, 2007

Panelist, "Jail Bait," discussion of press involvement in internet sting operations directed at adult solicitation of sexual activity with minors, sponsored by Society of Professional Journalists, Little Rock, April 20, 2007

Author, "Support for Judge Griffen," op-ed essay, Arkansas Democrat-Gazette, February 18, 2007, p. 3J, col. 1

Lecturer, "Psychiatric Issues in Capital Punishment," Department of Psychiatry Forensic Didactics, University of Arkansas for Medical Sciences, February 15, 2007

At large Member, Board of Directors of the Bar Association for the United States Court of Appeals for the Eighth Circuit, December, 2002—2004, Board Member, Eastern District of Arkansas, January, 2005—December, 2005

Speaker, "Ethical and Effective Representation in Arkansas Capital Trials," at The Death Penalty in Arkansas: Strategies for the Defense VI, sponsored by Arkansas Association of Criminal Defense Lawyers and The Arkansas Public Defender Commission, November 17-18, 2006, at Fayetteville.

Lecturer, "Charles Singleton's Tortured Road to Execution," Department of Psychiatry Grand Rounds, University of Arkansas for Medical Sciences, April 20, 2006

Co-sponsor, *Eighth Circuit Appellate Practice Institute*, Little Rock, March 10, 2006

Lecturer, "An Overview of the Death Penalty," Department of Psychiatry Forensic Didactics, University of Arkansas for Medical Sciences, February 2, 2006.

Speaker, "A Primer on Federal Habeas Corpus for New Mexico Appellate Defenders," and "Ten Novel Tactics for New Mexico Criminal Trial Lawyers," *New Mexico Public Defender Training Conference,* Albuquerque, October 21-22, 2004

Speaker and program sponsor, "Ethical Challenges Facing Appellate Lawyers, *Eighth Circuit Appellate Practice Institute*, St. Louis, 2004

Speaker, "Unpublished Opinions and No Citation Rules: Ethical Dilemmas for Arkansas Attorneys," *Arkansas Criminal Defense Lawyers Association annual program*, Tunica, Ms., May 14, 2004

Organizer and sponsor, *Eighth Circuit Appellate Practice Institute,* St. Louis, April 15, 2003

Speaker, "Technologically-driven Change Confronting Federal Practitioners," *Federal Practice Institute*, Arkansas Bar Association, Little Rock, December 7, 2002

Amicus Curiae brief on behalf of the American Civil Liberties Union of Arkansas in *Howard v. State*, No. CR 00-803 (Ark. Sup.) *on petition for rehearing*, challenging capital conviction and sentence of death

Speaker and program sponsor, "The Ethical Issue of Issue Selection," at *Eighth Circuit Appellate Practice Institute*, CLE program sponsored by UALR School of Law and Journal of Appellate Practice and Process, Little Rock, May 2, 2002

Speaker and program sponsor, "Ethical and Aggressive Appellate Advocacy, at *Eighth Circuit Appellate Practice Institute*, CLE program sponsored by UALR School of Law and Journal of Appellate Practice and Process, Little Rock, May 18, 2001

Speaker and program sponsor, "Ethical and Creative Representation in Capital Cases," *Death Penalty '01*, CLE program sponsored by UALR Criminal Law Association, Little Rock, May 4, 2001

Lecturer, "Expert Psychiatric Testimony after *Daubert*," Department of Psychiatry Grand Rounds, University of Arkansas for Medical Sciences, Little Rock, January 11, 2001

Panelist, "Wants, Needs and Legalities: A Case Presentation and Discussion on Intoxication in the ER," Department of Psychiatry, University of Arkansas for Medical Sciences, Little Rock, December 8, 2000

Speaker, "The Notion of Service in the Unholy Trinity of Teaching, Scholarship and Service," and conference participant, *Equal Justice Colloquium* sponsored by AALS and University of Arkansas School of Law, Fayetteville, November 17, 2000

Speaker and program sponsor, "Overlooked Issues in Arkansas Capital Cases" and "Ethical Issues for Defense Counsel in Capital Cases," *Death Penalty 2000*, CLE program sponsored by UALR Criminal Law Association, UALR School of Law, May 26, 2000

Speaker and program sponsor, "Avoiding Common Ethical Pitfalls for Criminal Defense Attorneys," *99 Fall Criminal Law Update,* sponsored by UALR Criminal Law Association, UALR School of Law, December 11, 1999

Lecturer, "The *Mens Rea* Defense in Criminal Trials," Department of Psychiatry Grand Rounds, University of Arkansas for Medical Sciences, Little Rock, December 4, 1998

Speaker and program sponsor, "Novel Defensive Strategies in Defending Against the War on Drugs," *Defense of Drug Cases,* CLE program sponsored by UALR Criminal Law Association, UALR School of Law, October 23, 1998

Speaker and program sponsor, "Prosecutorial Misconduct in Closing Argument," *Criminal Defense '98* CLE program sponsored by UALR Criminal Law Association, Arkansas Public Defender Commission and American Bar Association Death Penalty Litigation Project, UALR School of Law, May 9, 1998

Lecturer, "Restoring Competency for Execution: Ethical and Due Process Concerns in the Forced Medication of Mentally Ill Death Row Inmates," Department of Psychiatry Grand Rounds, University of Arkansas for Medical Sciences, Little Rock, September 19, 1997

Speaker and program sponsor, "Psychiatric Issues in Capital Trials," *Death Penalty '97* CLE program sponsored by UALR Criminal Law Association, UALR School of Law, May 9, 1997

Speaker, "Scientific Evidence after *Daubert," Advanced Forensic Investigation,* UALR Criminal Justice Institute professional program, Little Rock, May 30-31, 1996

Speaker and program sponsor, "*Teague's* Impact on Criminal Defense Counsel's Decisionmaking in the Post-Trial Process," *Death Penalty '96* CLE program sponsored by UALR Criminal Law Association, Little Rock, April 26, 1996

Speaker, "Counsel's Ethical Obligation to Raise Novel Defenses in the Criminal Trial," Pulaski County Public Defender CLE program: *Current Trends in Criminal Defense,* Little Rock, April 18, 1996

Panelist, "Professional Ethics in Mental Health," Arkansas Psychological Association, *An Overview of Sex Offender Evaluation and Treatment,* Little Rock, April 22, 1995

Lecturer, "Psychiatry and the Death Penalty," Department of Psychiatry Grand Rounds, University of Arkansas for Medical Sciences, Little Rock, February 3, 1995

Speaker, and program sponsor "The Danger in Changing the Rules for Child Complainants," *Trials of Child Abuse and Child Sexual Abuse Cases* CLE Seminar/UALR Criminal Law Association, January 28, 1995

Speaker, "*Brecht v. Abrahamson:* The changing burden of proof and role of federal habeas courts," Eighth Circuit Magistrate Judges' Workshop, Sylvan Lake, South Dakota, June 10, 1994

Speaker and workshop leader, "Voir Dire" and "Cross-Examination," *1994 Trial Practice Seminar* sponsored by the Arkansas Bar Association, Hot Springs, March 18-19, 1994

Speaker and program sponsor, "Psychiatric Defenses in Arkansas Criminal Trials," *Psychiatric Issues in Criminal Trials* CLE Seminar sponsored by UALR Criminal Law Association, Little Rock, March 5, 1994

Speaker, "Defense Counsel's Approach to the Testifying Agent" presented to assembled agents of Arkansas Office of the Federal Bureau of Investigation, Little Rock, May 21, 1993

Report, *New Mexico's Summary Disposition of Criminal Appeals: An Invitation for Injustice, Inefficiency and Ineffectiveness*, prepared on behalf of the New Mexico Appellate Defender for submission to the Chief Justice of the Supreme Court of New Mexico, November, 1992, published by the New Mexico Law Review

Speaker, "A Practical Guide to Federal Habeas Corpus for Practicing Attorneys," *Law Across the River* CLE seminar sponsored by Arkansas Institute for Continuing Legal Education, Memphis, September 25, 1992

Speaker, "Reforming Federal Habeas Corpus: The Cost to Federalism; The Burden for Defense Counsel; and the Loss of Innocence," United States Magistrates Section, Eighth Circuit Judicial Conference, Minneapolis, Minnesota, July 22, 1992

Speaker and program sponsor, "An Overview of the Law Relating to Jury Selection for Arkansas Criminal Trial Lawyers," CLE program, *Jury Selection,* sponsored by UALR Criminal Law Association, April 11, 1992

Speaker, "The Search for Truth v. The Search for Justice," Arkansas Psychological Association, November 7, 1991

Speaker, "The Role of Appointed Counsel in Federal District Court and on Appeal," *AICLE Federal Practice Institute*, Little Rock, March 30-31, 1990

Speaker, "Ethical Duties of Appointed Counsel on Appeal," *Fifth Circuit Appellate Practice Seminar*, sponsored by SMU School of Law, New Orleans, September 5-6, 1987

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT
P.O. Box 2060
LITTLE ROCK, ARKANSAS 72203

MORRIS SHEPPARD ARNOLD
JUDGE

(501) 324-6880

June 24, 2009

Dean John DiPippa
University of Arkansas at Little Rock
William H. Bowen School of Law
1201 McMath Avenue
Little Rock, AR 72202

Dear Dean DiPippa:

I write with an enthusiastic endorsement of Tom Sullivan's application for re-appointment to the Judge George Howard, Jr., Distinguished Professorship.

I have known Tom for many years. You will know of his distinguished publication record and so I will not rehearse it here. It will suffice for me to say that in volume, variety, and quality Tom's scholarly product is highly enviable.

What has impressed me the most as a judge over the years is how devoted Tom has been to the cause of the friendless. He has worked tirelessly and energetically to ensure that the rights of people accused of crime are assiduously honored. He has succeeded where many a very able advocate would have given up. All of this *pro bono* work reflects honor on our profession and on the law school. And Tom's ideals are the same ones that Judge Howard promoted during his long and distinguished career.

I therefore urge you to give Tom's application a most careful consideration.

All the best.

Very truly yours,

Morris S. Arnold
U. S. Circuit Judge

MSA/db

DISTINGUISHED PROFESSORSHIPS

The rank of distinguished professor is to be reserved for those individuals who are recognized nationally and internationally as intellectual leaders in their academic disciplines for extraordinary accomplishments in teaching; published works, research, or creative accomplishments in the performing arts; or other endeavors, and who have gained such recognition for distinction at this or another university prior to appointment as distinguished professors.

Appointments to this rank shall be made only when clear indication exists that individuals so appointed will provide exemplary academic and intellectual leadership and continue their professional activities in such a way as to maintain national and international recognition and a commensurate level of accomplishment.

September 19, 1980 (Revised)
May 7, 1955

RETRENCHMENT

Retrenchment is a reduction in programs and/or services which results in the termination of employment only because of (1) a bona fide financial exigency or (2) formal academic planning including Board approved changes in institutional missions, substantial program changes (pursuant to Board Policy 620.1), or major reallocations of resources for academic or support services. In the implementation of retrenchment, fair and humane treatment of faculty, staff, and students is of great concern. Serious efforts shall be made to relocate affected faculty and staff in other parts of the program area or in a different program area of the same campus or division. Similarly, currently enrolled students will be permitted, through special arrangements, to complete a program of studies begun before retrenchment was implemented.

Financial Exigency Retrenchment. A bona fide financial exigency will be certified when a unit of the University of Arkansas is threatened by an imminent monetary crisis which is of such gravity as to make imperative the termination of personnel. A certification of financial exigency shall involve the following steps:

1. The head of a unit[1] proposes a situation of financial exigency documented with budget summaries and projections.

2. Academic administrative personnel and a unit-wide governance standing committee which is representative of unit constituencies shall separately evaluate the documentation and within ten (10) calendar days recommend to the unit head whether they concur with the determination of the bona fide exigency. The governance body shall be informed of the recommendation made by its standing committee.

3. The unit head shall evaluate the recommendations made by the academic administrative personnel and by the committee and shall forward them, along with his/her final recommendation, to the President, who will report the results of the campus deliberation, along with his/her own recommendations, to the Board of Trustees for action.

4. The Board of Trustees shall either certify a bona fide financial exigency and the unit head shall initiate the retrenchment process, or declare the situation to be a financial stringency and the unit head shall ameliorate the situation through budget reductions which shall not involve the immediate termination of personnel.

If the Board of Trustees certifies a bona fide financial exigency, the unit shall initiate retrenchment. The unit head shall consult with appropriate administrators and the standing committee of the governance body before determining that major sub-unit(s) are to be retrenched and the financial level of retrenchment. In determining major sub-units to be retrenched, the following criteria must be

[1]Hereafter the Chancellor, Vice President for Agriculture, or director of a unit which reports directly to the President will be referred to as a head of a unit.

considered: (1) centrality of the sub-unit to the mission of the institution, (2) quality of the sub-unit, and (3) cost of the sub-unit, including the relative degree of economic self-sufficiency. In making this determination they shall examine nonacademic areas and programs for possible retrenchment as well as academic programs.

Once the extent of necessary retrenchment has been ascertained, each affected academic dean[2] or administrative officer of nonacademic areas shall be responsible for recommending programs to be retrenched and the number of personnel affected in accordance with criteria and procedures established by the appropriate campus governance body. In recommending programs to be retrenched, the criteria, listed above, must be considered. Alternatives to termination of personnel shall be considered such as early retirement, transfer, voluntary salary reduction, leave-of-absence without pay, as well as normal attrition of personnel, and reductions or postponements in benefits. Within a given department, any faculty member with tenure must be retained over a person who does not have tenure.

The college dean[3] or other administrative officer shall report his/her recommendations to the unit head through appropriate administrative channels. The unit head shall notify the employee(s) who are to be terminated. A person who has been terminated may, in writing, appeal the decision within ten (10) calendar days of the receipt of a certified letter of notification of termination. The appeal shall be based on whether there was material deviation from the established campuswide guidelines for termination because of retrenchment and shall be filed with the unit head and heard by a committee designated by the campus governance body. The committee shall make a report and recommendations within five working days to the unit head who shall make the final decision and notify the appellant immediately.

Classified employees retrenched because of financial exigency will be terminated in accord with Board Policy 405.4 and in no case will termination be effected without 30 days notice. Non-classified employees retrenched because of financial exigency cannot be assured that notice of the duration specified in Board Policy 405.1 will precede termination. Non-classified employees retrenched because of financial exigency shall be given notice at least 60 days in advance of termination.

Academic Planning Retrenchment: Academic Planning Retrenchment occurs when faculty, tenured or untenured, are to be terminated as a result of established planning activities. The three reasons for this retrenchment are Board approved changes in institutional mission, substantial program changes and major reallocations of resources for academic or support services. Academic Planning Retrenchment shall involve the following steps:

1. The head of a unit shall propose a retrenchment and justify the proposal with appropriate documentation.

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[2]The dean of a college or school or the head of a major academic sub-unit.

[3]See footnote 2.

2. The proposal shall be reviewed and recommendations made by the appropriate academic and other administrators and by the appropriate governance body or bodies. In all cases involving academic programs, the review shall be made pursuant to Board Policy 620.1.

3. The unit head shall evaluate the recommendations and shall forward them, along with his/her final recommendations, to the President, who will report the results of the campus deliberation, along with his/her own recommendations to the Board of Trustees.

If the Board of Trustees declares an Academic Planning Retrenchment, the unit head shall work with the appropriate administrators to determine the needed level of retrenchment and the personnel affected. Within a given academic program, any faculty member with tenure must be retained over a person who does not have tenure.

Faculty members, tenured and non-tenured, who are terminated under Academic Planning Retrenchment shall be given notice specified in Board of Trustees Policy 405.1, Section IV.B. Classified personnel and staff who are terminated under Academic Planning Retrenchment shall be governed by Board of Trustees Policy 405.4, Section 3. Any appeal made as a result of Academic Planning Retrenchment shall be in accord with the existing appellate structure.

All retrenchment recommendations, financial and academic, must be approved by the Board of Trustees.

The foregoing policy shall be utilized only in those instances in which the Board of Trustees has specifically determined that the policy and procedures therein are applicable. It is recognized that the President, Chancellors and the Vice President for Agriculture on occasion may be required to terminate staff or faculty members and other academic employees in positions for which tenure may not be awarded under the provisions of Board Policy 405.4 to implement functional changes, for budgetary reasons or other reallocation of institutional resources. The President, Chancellors and the Vice President for Agriculture shall continue to be authorized to effect terminations of such employees for the foregoing reasons on such terms and under such procedures as they might deem fair, reasonable and appropriate, consistent with the required notification provisions of Board Policy 405.4, and this Board Policy 405.5 shall not be applicable to such terminations.

November 12, 1993 (Revised)
September 14, 1984 (Revised)
February 18, 1983

APPOINTMENTS, PROMOTION, TENURE, NON-REAPPOINTMENT, AND DISMISSAL OF FACULTY

This policy, adopted by the Board of Trustees on February 8, 1980, to become effective on July 1, 1980, supersedes all existing policies concerning appointments, promotion, tenure, non-reappointment, and dismissal of faculty (specifically, Administrative Memorandum No. 43, dated August 31, 1962; Universitywide Administrative Memorandum 421.1, dated December 6, 1976; Universitywide Administrative Memorandum 450.1, dated November 17, 1975; and Board Policy 405.1, dated September 1, 1962, and revised). Nevertheless, an employee of the University of Arkansas who held the rank of instructor prior to the effective date of this policy is eligible for tenure in accordance with Section II.A.(1-4) of Board Policy 405.1 dated September 1, 1962, and revised. The Board of Trustees has the right to amend any portion of this policy at any time in the future.

Copies of this statement of policies shall be kept by the dean of each college or school and by each department head or chairperson or other appropriate official and shall be included without change or inter-lineation in the Faculty Handbook for each campus. Care shall be taken to insure that each faculty member is familiar with its contents, and the department chairperson or other appropriate official shall supply a copy to each new member.

I. Definition of Terms

For purposes of this policy, the following definitions shall apply:

Appointment - An appointment is employment by written contract ("Notice of Appointment") by the Board of Trustees of an individual in a given capacity for a specified time period at a stated salary. An appointment is valid only when the appointment form is approved and signed by the President of the University or the President's designee in accordance with authority delegated by the Board of Trustees, and the Notice of Appointment is signed by the individual being appointed and returned to the specified University official.

Dismissal - Dismissal is severance from employment for cause after administrative due process as specified in Section IV-C. Non-reappointment is not a dismissal (see further).

Faculty - Faculty are employees who hold academic rank of lecturer, master lecturer, assistant instructor, instructor, assistant professor, associate professor, professor, distinguished professor, University professor, or one of the above titles modified by clinical, research, adjunct, visiting, executive in residence, or emeritus, e.g., clinical professor, adjunct assistant professor.

Individuals holding the following non-teaching titles will also receive faculty rank, the highest rank for each title being as indicated. Both the title and the academic rank will be stated in the appointment.

Instructional and		Cooperative Extension	Instructional	

Research Ranks	Library	Service*	Development	Museum
University Professor, Distinguished Professor, Professor	Director of Libraries, Librarian	Extension Specialist IV	Instructional Development Specialist II	Curator
Associate Professor	Associate Librarian	Extension Specialist III	Instructional Development Specialist I	Associate Curator
Assistant Professor	Assistant Librarian	Extension Specialist II		Assistant Curator
Instructor		Extension Specialist I		

*Academic rank will be granted only if the individual is appointed in an academic unit.

Non-Reappointment - Non-reappointment means that a non-tenured faculty member is not offered a next successive contract for employment at the end of a stated appointment period. It is effected by a written notice sent in compliance with the time limits hereafter specified (IV.B.).

Probationary Period - The probationary period is the time a faculty member spends under appointments for full-time services in a tenure-track position on one campus of the University of Arkansas prior to being awarded tenure.

Promotion - Promotion is advancement based on merit to a higher rank or title. All promotions must be approved by the Board of Trustees and become effective with the next year's appointment following action of the Board of Trustees, unless a different effective date is approved by the Board for a specific case.

Resignation - Resignation is voluntary termination of employment by an employee. The dean or director of the unit to which the employee is assigned is authorized by the Board of Trustees to accept the resignation.

Suspension - Suspension is temporarily relieving an employee of duties.

Tenure - Tenure is the right of continuous appointment. It is awarded by the President to eligible members of the faculty upon successful completion by each of a probationary period and, once granted, it ceases to exist only by dismissal for cause according to the procedures in Section IV.C., demonstrably bona fide financial exigency, reduction or elimination of programs, retirement, or resignation. "Cause" is defined as conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University; examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty, and moral turpitude. The probation

period may be waived as provided in Section IV.A.4. NOTE: Tenured faculty holding positions eliminated by reduction or elimination of programs will be relocated in other academic units of the campus whenever possible. A position occupied by a tenured faculty member which was eliminated as a result of reduction or elimination of a program may not be reactivated for a period of five academic years.

Tenure-Track Positions - Tenure-track positions are ranks of assistant professor, associate professor, professor, distinguished professor, and University professor. Faculty appointed to clinical attending positions at the University of Arkansas for Medical Sciences, or other non-tenure-track positions approved by the President, may bear the designation of assistant professor, associate professor or professor but in no event shall be considered in tenure-track positions and shall acquire no tenure rights by virtue of occupying such positions. Such non-tenure track positions shall be set forth in applicable promotion and tenure policies approved by the President which may authorize term appointments beyond one year.

Terminal Appointment - A terminal appointment is a final appointment, the expiration of which results in termination of an individual's employment.

Termination - Termination is the general term to describe severance of employment from the University. Termination may be by resignation, retirement, dismissal, non-reappointment, or expiration of appointment.

Year - Year will be either a fiscal year (July 1 through June 30 next) or an academic year (fall and spring semesters of the same fiscal year), unless otherwise designated.

II. Appointments

The following principles shall apply to appointments to faculty positions:

A. General

Appointments shall be for a specified period of time not to exceed one fiscal year. Except for appointments to faculty positions for summer school, appointments shall not extend beyond the end of a fiscal year.

Recommendations for appointments to the faculty will be made by the departmental chairperson after consultation with the departmental faculty concerned, and subject to the approval of the dean, chief academic officer, and chief executive officer of the campus, who alone shall make the final recommendation for appointment. (See definition of appointment, Page 1.)

B. Initial Appointment

Criteria and procedures for the initial appointment of all faculty members on a campus shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be adopted by the faculty and chairperson[1] of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval.

An appropriate degree or professional experience is an essential qualification for appointment to positions at academic ranks.

Other important qualifications include experience in teaching, research, or other creative activity, and educational service either at other colleges and universities and/or in non-academic settings.

C. Successive Appointments

Tenured faculty members have a right to a next successive appointment except for the reasons for termination of a tenured appointment given in Section I under definition of tenure. Non-tenured faculty do not have a right to a next successive appointment, but may be offered an appointment after the expiration of a current appointment, provided it does not extend the time in probationary status beyond the limits set in Sections IV.A.4 and IV.A.11. In the event that a non-tenured faculty member is not recommended for reappointment, the procedure described in Section IV.B. shall be followed.

Criteria and procedures for successive appointments of all faculty members on a campus shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be adopted by the faculty and chairperson of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval.

III. Promotion

Promotion in academic rank shall be based primarily on the accomplishments of the individual while in the most recent rank. No minimum time in rank is required before a faculty member is

[1]For the purpose of this policy, and in reference to items involving professional librarians, extension specialists, instructional development specialists, or museum curators the terms "chairperson," "administrative officer," and "administrator" refer to the director or head librarian.

eligible for promotion, nor is there a maximum time an individual may remain in a given rank except as limited by Sections IV.A.4. and IV.A.11. However, individual accomplishments and potential for continued value to the University are required for promotion.

Recommendations for promotion shall originate with the chairperson, who shall inform the faculty members who are being considered for promotion and shall give them the opportunity to submit material which they believe will facilitate consideration of their competence and performance. Each campus shall provide for the inclusion of peer evaluation in the consideration of faculty nominated for promotion.

Criteria and procedures for promotion to each rank on a campus, including an appeals procedure for those desiring reconsideration of a negative recommendation, shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be adopted by the faculty and chairperson of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval.

IV. Tenure, Non-reappointment, and Dismissal

A. Tenure

1. The granting of tenure implies that the individual has completed successfully his or her probationary period and has become a permanent member of the University community. As such, he or she acquires additional procedural rights in the event that dismissal proceedings may be brought against him or her.

2. Only full-time faculty with ranks of assistant professor, associate professor, professor, distinguished professor, and University professor are eligible to be awarded tenure. Faculty and other employees with the following titles are ineligible to be awarded tenure: clinical, research, adjunct, visiting, or executive in residence faculty, research associates or research assistants, graduate associates or graduate assistants, instructors, assistant instructors, and lecturers. Faculty appointed to clinical attending positions at the University of Arkansas for Medical Sciences, or other non-tenure track positions approved by the President, although designated assistant professor, associate professor or professor, are ineligible to be awarded tenure. Academic administrators not appointed to a teaching or research unit may be awarded academic rank in addition to their administrative titles, with the concurrence of the faculty and administrative officer of the academic unit in which such rank could lead to tenure, in which case they may acquire tenure as faculty, but not as administrators. Other administrators and staff whose primary duties do not involve teaching regularly scheduled credit-hour courses, but who occasionally teach courses

are not eligible for tenure and do not acquire credit for service toward tenure for such teaching activities.

3. Tenure rights apply to the area or areas of the faculty member's expertise and in the academic unit(s) in which his or her position is budgeted (examples: Department of English, UAF, not College of Arts and Sciences; School of Law, UALR; Library, UAM; Departments of Music and Education, UAPB). Tenure rights are confined to a particular campus and are not applicable on another campus of the University of Arkansas.

4. The probationary period may not extend beyond seven years, except as specifically provided herein. An initial appointment of one-half year (academic or fiscal) or less will not be included in the probationary period. If more than one-half of any year is spent in leave of absence without pay status, that year shall not apply toward the probationary period.

   During the first six years of the probationary period, a tenure-track faculty member may request, for reasons set forth below, that the probationary period be suspended by one (1) year. The reasons for such a request are the same as required under the Family and Medical Leave Act of 1993 and are as follows: (a) the birth of a child to the faculty member or his spouse and its care during the first year; (b) the adoption of a child by the faculty member or placement in the faculty member's home of a foster child; (c) the care of the faculty member's spouse, child, or parent with a serious health condition; (d) the serious health condition of the faculty member.

   A request to suspend the probationary period for these reasons shall first be directed in writing to the department chair for approval and must also be approved by the dean (or approved through other established administrative channels), the vice chancellor for academic affairs, the chancellor, and the president, under such procedures as the president shall approve. These procedures may include, but shall not be limited to, the manner in which the faculty member's duties and salary, if any, are determined during such year, the information which is required to substantiate a request and the extent to which a faculty member's performance during such year may be considered in awarding tenure. A faculty member who has been notified that he or she will not be reappointed may not subsequently request to suspend the probationary period under this policy.

   Upon the recommendation of the department chair, after consultation with the departmental faculty and with concurrence of the dean, the vice chancellor for academic affairs, and the chancellor, new appointees at the rank of associate professor, professor, distinguished professor, or university professor may be granted immediate tenure.

5. Recommendations for tenure shall originate with the chairpersons, who shall inform the faculty members in tenure-track positions who are being considered for tenure and shall give them the opportunity to submit material which they believe will facilitate consideration of their accomplishments and potential.

6. Criteria and procedures concerning the awarding of tenure on a campus, including an appeals procedure for those desiring reconsideration of a negative recommendation, shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be adopted by the faculty and chairperson of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval.

7. The President will not consider awarding tenure to a faculty member in a probationary status without the prior recommendation of the faculty member's departmental faculty, chairperson, dean, chief academic officer, and the chief executive officer of the campus concerned.

8. A faculty or staff member, on acquiring tenure rights, shall receive a notice from the chief executive officer of the campus affirming the acquisition of such rights. No person shall lose tenure rights by acceptance of leave-of-absence or by appointment to a University of Arkansas administrative position.

9. Tenure becomes effective at the beginning of the nine- or twelve-month appointment period following the President's action granting tenure (July 1 for twelve-month appointments, and the beginning of fall semester for nine-month appointments).

10. Each year at the meeting at which promotions are considered by the Board of Trustees, the President shall inform the Board of the names of each person awarded tenure during the preceding twelve months, and shall indicate for each such individual the rank and date of appointment to the University faculty.

11. An individual in a tenure-track position who was not awarded tenure with any of the first six academic year or fiscal year appointments must be evaluated as specified in Section IV.A.6. during the sixth appointment. If he or she is not approved for tenure, the seventh appointment shall be a terminal appointment.

12. A faculty or staff member holding tenure rights may be dismissed for cause only after the procedures prescribed in Section V.C. have been followed. A tenured person notified that he or she will be so dismissed will, except in cases of moral turpitude, be given notice of dismissal twelve months prior to termination of employment. This

provision does not create an award of severance pay, but assumes the full performance of University responsibilities and duties assigned for the period between dismissal notice and final termination.

13. No faculty member shall be dismissed or denied reappointment in violation of the following principles of academic freedom, but the observation of the limitations stated herein is the responsibility of each faculty or staff member. Mere expressions of opinions, however vehemently expressed and however controversial such opinions may be, shall not constitute cause for dismissal. The threat of dismissal will not be used to restrain faculty members in their exercise of academic freedom or constitutional rights.

    a. The faculty member is entitled to full freedom in research and in the publication of results, subject to the performance of his or her other academic duties, but personal research for pecuniary return requires prior approval by the appropriate University authorities and must be in accordance with Board Policy 450.1.

    b. The faculty member is entitled to freedom in the classroom in discussing the subject of the course, but should not teach material inappropriate or unrelated to the course.

    c. The University faculty member is a citizen, a member of a learned profession, and a member of an educational community. Speaking or writing as a citizen, the faculty member is free from institutional censorship or discipline. However, as a person of learning and as a member of an educational community, the faculty member has a responsibility for awareness that the public may judge the profession and the institution by his or her utterances. Hence, faculty should at all times make an effort to be accurate, exercise good judgment and appropriate restraint, show respect for the opinions of others, and indicate that they are not spokespersons for the institution.

B. Non-Reappointment

These procedures apply to non-tenured faculty members who are in tenure-track positions (assistant professors, associate professors, professors, distinguished professors, and University professors) who are not offered a next successive appointment for the period following the expiration of a current appointment. These procedures do not apply to faculty in clinical attending positions at the University of Arkansas for Medical Sciences bearing the designation of assistant professor, associate professor or professor.

The appointment of a non-tenured faculty member may be terminated effective at the end of the appointment period, at the option of either the individual or the University.

A chairperson, dean, or chief academic officer who decides not to recommend a non-tenured faculty member for reappointment shall notify him or her in writing in accordance with the following schedule and shall enclose a copy of this section with the letter of non-reappointment:

Not later than March 1 of the first year of service, if the appointment expires at the end of that year; or at least three months in advance of its termination if the appointment terminates during the first calendar year of continuous employment.

Not later than December 15 of the second year of service, if the appointment expires at the end of that year; or at least six months in advance of its termination if an appointment terminates during the second calendar year of continuous employment.

At least twelve months before the expiration of the terminal appointment after two or more consecutive academic, fiscal, or calendar years in the institution. The terminal appointment will be for the academic or fiscal year, according to the appointment last held by the individual.

The individual, upon being notified that he or she will not be reappointed, may request an interview within ten working days after receipt of the notice, first with the dean of the school or college, or other appropriate administrators, then, if the employee requests it, within an additional five working days, with the chief academic officer of the campus. The dean of the school or college, or other administrator, and the chief academic officer jointly will, within ten working days, make the final decision on any request that the decision be reconsidered.

Department chairpersons and other employees of that campus may be requested to participate in their individual capacities in the interviews by the individual concerned, by the chief academic officer, or by the dean or other appropriate administrator.

If the individual does not request these interviews within the time limits stated above after receipt of notification of non-reappointment, the matter shall be considered closed.

C. Dismissal

This section applies to all faculty members.

1. Preliminary Proceedings

When a chairperson or dean has reason to consider a decision to dismiss a person who has tenure rights or an untenured faculty member prior to the expiration of an appointment, he or she shall discuss the matter with that person privately. After the discussion, if the decision of the chairperson or dean is to recommend dismissal, he or she shall prepare a statement of the grounds constituting the cause for dismissal and

forward it through the chief academic officer to the chief executive officer on the campus, with a copy to the faculty member. If the faculty member requests it within five working days after receipt of the statement, a subcommittee of faculty members, as determined by procedures developed by each campus, shall be named by the chief executive officer to make an informal inquiry into the situation and to effect an adjustment, if possible. If no settlement is effected, the subcommittee shall determine whether, in its view, formal proceedings shall be instituted to consider the individual's dismissal, and it shall notify the individual concerned, the chief executive officer of the campus, and other appropriate administrators of its conclusion. If the subcommittee recommends that such proceedings be begun, or if the chief executive officer of the campus, after considering a recommendation of the subcommittee favorable to the individual, decides that a proceeding should be undertaken, action shall be commenced according to the procedures which follow.

2. Hearing Procedures

The formal proceedings shall be initiated by a communication addressed to the individual by the chief executive officer of the campus informing him or her of the dismissal and the grounds for it, and that, if he or she so requests, a hearing to recommend whether his or her employment by the University shall be terminated on the grounds stated, will be conducted at a specified time and place by a faculty committee constituted as described in Section 4 below. Sufficient time shall be allowed to permit the individual to prepare a defense. The individual shall be informed in detail, or by reference to published regulations, of the procedural rights to which he or she is entitled, including the right to advice of counsel.

The individual shall indicate whether he or she wishes a hearing and, if so, shall file with the chief executive officer of the campus within two weeks of the date of the mailing of the communication by the chief executive officer of the campus an answer to the statement of grounds for the proposed dismissal.

If the individual does not request a hearing, no further action shall be taken. Further, at the request of the individual the proceedings provided for herein may be terminated at any time after the request for a hearing on written notice to the chief executive officer of the employee's acquiescence in the dismissal. Similarly, the administration may drop dismissal proceedings at any stage.

3. Suspension

Suspension of the individual from normal duties or reassignment to other duties during the proceedings will occur only if an emergency exists which threatens harm to the individual, to others, or to the University. Determination of an emergency shall be made by the chief executive officer, in consultation with the President. Such suspension shall be with pay.

4. Hearing Committee

The faculty of each campus shall establish a systematically rotated panel of faculty from which hearing committees can be drawn. To hear a particular case a committee, selected from the panel in accordance with campus policies, shall be composed of faculty members of departments not involved in the dismissal.

Upon receipt from the chief executive officer of the campus of a copy of the statement of grounds for dismissal, accompanied by the individual's answer thereto, the chairperson of the hearing committee shall conduct hearings and recommend a course of action as provided in Section IV.C.5.

5. Committee Proceedings

The committee shall proceed by considering, before the time of the hearing, the statement of grounds for dismissal already formulated and the individual's written response.

In addition to the members of the committee, only the person requesting the hearing and his or her representative, the chief executive officer of the campus and/or his or her designee, and witnesses called by the committee are permitted to attend the hearing.

Charges contained in the initially formulated statement of grounds for dismissal may be supplemented at the hearing by evidence of new events occurring after the initial communication to the individual which constitute new or additional cause for dismissal. If such supplementary charges are adduced, the committee shall provide the individual with sufficient time to prepare his or her defense.

The chief executive officer of the campus shall have the option to attend or not to attend the hearing, and he or she may designate an appropriate representative to assist in developing and presenting the case.

The committee shall determine the order of proof and shall supervise the questioning of witnesses.

The individual shall have the aid of the committee when needed in securing the attendance of witnesses. The individual or his or her representative and the chief executive officer of the campus or his or her designated representative shall have the right within reasonable limits to question all witnesses who testify orally.

The committee will use its best efforts to provide an opportunity for those involved to confront all witnesses, but where this cannot be achieved despite the efforts of the

hearing committee, the identity of such non-appearing witnesses, and any written evidence they may have furnished, shall be disclosed to all interested parties during the hearing.

Subject to these safeguards, written statements may, when necessary, be taken outside the hearing and reported to it. All of the evidence shall be duly recorded. Formal rules of court procedure need not be followed, but the committee shall exercise reasonable efforts to protect the rights of the parties in the reception of evidence.

6. Consideration by Hearing Committee

The committee shall formulate its recommendation in private, on the basis of the hearing. Before doing so, it shall give opportunity to the individual and the chief executive officer of the campus or his or her designated representative to make oral statements before it. If written arguments are desired, the committee may request them. The committee shall proceed to arrive at its recommendation promptly without having the record of the hearing transcribed when it feels that a just decision can be reached by this means; or it may await the availability of a transcript of the hearing. It shall make explicit findings with respect to each of the grounds for removal presented.

The chief executive officer of the campus and the individual shall be notified of the recommendation in writing and a copy of the record of the hearing shall be available to both parties.

A copy of the record of the hearing and the recommendations of the hearing committee shall be furnished to the President of the University for his or her decision. The decision of the President shall be transmitted to the chief executive officer of the campus and to the individual involved.

7. Consideration by Board of Trustees

If the decision of the President is appealed to the Board of Trustees, or if the Board of Trustees chooses to review the case, the President shall transmit to the Board of Trustees the full report of the hearing committee, stating its recommendation and his or her own decision. The review shall be based on the record of the previous hearing, accompanied by opportunity for argument, oral or written or both, by the principals at the hearing or by their representatives. The decision of the Board of Trustees on review shall be final. It shall be communicated to the President and through him or her to the person involved.

V. Annual Review

An annual review of the work and status of each tenured and tenure-track faculty member shall be made on the basis of assigned duties and according to criteria and procedures required herein. Faculty not in tenure-track positions shall be evaluated by procedures adopted by each campus.

A. Faculty

The annual review of each faculty member shall provide the primary basis for the chairperson's recommendations relating to salary, promotion, granting of tenure, successive appointment, non-reappointment, and dismissal. Furthermore, this review is to provide guidance and assistance to all faculty in their professional development and academic responsibilities in the areas of teaching, scholarly and creative activity, and service.

Criteria and procedures for an annual review of all tenured and tenure-track faculty on a campus shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be recommended by the faculty and chairperson of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval. All procedures for annual reviews adopted by a campus shall include provision for and details for implementation of the following:

1. Within a reasonable time after the beginning of the first appointment of each faculty member: written notification to the faculty member of the criteria, procedures, and instruments currently in use in assessing performance;

2. Within a reasonable time after the beginning of each academic year: written notification to each faculty member of that year's assignments, review schedule, and the criteria, procedures, and instruments to be used that year;

3. Reasonable opportunity for each faculty member to submit any material desired to be considered in the annual review;

4. Peer evaluation;

5. Student evaluation of teaching;

6. Prior to the chairperson's making a recommendation in any year: (a) a meeting between the chairperson and faculty member to discuss all issues relating to the review, (b) the providing to that faculty member a copy of the chairperson's tentative recommendation(s), and (c) reasonable opportunity for the faculty member to submit a written response to be forwarded to each subsequent level of review;

7. As long as a faculty member is employed by the University and for at least three years thereafter: maintenance of annual review forms, summaries of annual discussions between the chairperson and faculty member, recommendations, and all other writings used in or resulting from the annual reviews of that faculty member;

8. Availability to each faculty member of all writings used in or resulting from the annual reviews of that faculty member.

Each year the chief academic officer of each campus shall (a) require of each chairperson an assessment of the performance of all faculty members in the academic unit, including an identification of all faculty development needs and of all problems in performance of faculty, (b) take steps designed to insure compliance on that campus with all criteria and procedures for annual reviews, and (c) provide the Chancellor with a written report indicating the extent of compliance during the past year, as well as any needs and problems identified and solutions planned.

NOTE: A University-wide committee has been established for the purpose of recommending criteria and procedures for an annual review of all administrative officers of the University. A report from this committee will be presented to the Board of Trustees at a fall 1989 meeting for appropriate action of the Board.

The annual review of each administrative officer shall serve as the basis for decisions relating to salary and continuation as an administrator. Furthermore, this review is to provide guidance and assistance to all administrative officers in their professional development.

October 2, 2001 (Revised)
September 18, 1998 (Revised)
August 11, 1998 (Corrected)
June 6, 1997 (Revised)
April 25, 1997 (Revised)
September 16, 1994 (Revised)
June 16, 1989 (Revised)
January 23, 1987 (Revised)
September 17, 1982 (Revised)
June 18, 1982 (Revised)
February 8, 1980 (Revised)
April 20, 1962, and Revisions

University of Arkansas at Little Rock
Personnel Action Form

This form *must* be typed

(Instructions available at http://ualr.edu/humanresources/index.php/home/forms/)

1.) Date 6/11/14
Contact Person: Tonya Bell
Phone: 324-9435
e-mail: trbell @ualr.edu

2.) Employee Name Sullivan (Last) J. (First) T (MI) SSN _____ T# 00004178

3.) Reason for Action: Position # R99140

☐ New Employee ☐ Reappointment ☐ Change in Status ☒ Other
☐ Termination ☐ Retirement Last Day Worked ____ Job Termination Date ____

Explanation: Change position number (Professor of Law)

4.) Employee Classification: ☒ Full-time ☐ Part-time 100 %

Non-instructional employee:
☐ Classified ☐ Grad Assistant ☐ Stipend
☐ Non-Classified (non-faculty) ☐ Non-Classified (faculty)

Instructional employee:
☒ Faculty
☐ Lecturer/Adjunct

Hourly employee: Total hours worked cannot exceed 1500 per fiscal year.
☐ Hourly Labor ☐ Work Study

5.) Instructional Employees only:
☒ 9 month ☐ 10.5 month ☐ 12 month ☐ Semester ☐ Other

6.) Proposed Status:

Home Org 660000 WTE Org DEAN11

Department/Unit Name: UALR Wm. H. Bowen School of Law NC-FY2015 - NHUSR R99140

Position Title: Professor of Law Annual Salary OR Hourly Rate: $ 133,727.00

Effective Dates		Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/14	5/15/15	110000	660000	610110	401100	FAC128			$89,597.00
8/16/14	5/15/15	110000	660000	610110	411000	FAC128			$44,130.00
									$
									$
									$

Total: $133,727.00

7.) Current Status:

Department/Unit Name: UALR Wm. H. Bowen School of Law R99140

Position Title: Professor of Law Annual Salary OR Hourly Rate: $133,727.00

Effective Dates		Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/14	5/15/15	110000	660000	610110	401100	FAC128			$89,597.00
8/16/14	5/15/15	110000	660000	610110	411000	FAC128			$44,130.00
									$
									$
									$

Total: $133,727.00

8.) Funding Source (if applicable) Use this section instead of a budget transfer form. Funds will be taken out of the FOAPAL listed below and put into the salary line or lecturer account listed in section 6.

Pos #	Fund	Org	Acct	Prog	Actv	Location

Account Name: _____ Authorized Signature: _____

9.) Grant funded Position: ☐ Yes ☒ No If yes, ORSP *must* sign before forwarding to VC or Human Resource Services.

10.) Signatures

Department Head/Supervisor Date

Dean/VC Date

ORSP Date

Vice Chancellor Date

HRS Use Only
☐ GOAINTL Status
☐ Termination - Code
Pos # R99140
Pos # R99140
Pos #
E-Class
Init Date 6/25/14

Budget Use Only
Init Date 8/28/14

Payroll
Init Date 8/25/14
Suffix

Benefits
Init Date

For questions regarding sections 1, 2, 3, 4, 5 & 10, contact Human Resource Services at 569-3180
For questions regarding sections 6, 7, 8, contact Budget Office at 569-8426
For questions regarding section 9, contact ORSP 569-8474

1. White – Payroll
2. Green – HRS
3. Blue – Originator
4. Canary – Vice Chancellor
5. Pink – Budget
6. Goldenrod - HRS

HRDAF.01.15.2012 NC

Name of Professorship	Current Holder(s)	Special Criteria (if any)	Date Next Open
Ben J. Altheimer Distinguished Professorship	None	Subject to approval by the UALR Chancellor	Fall 2014
Arkansas Bar Distinguished Professorship	Lynn Foster	Demonstrated excellence in teaching, excellence in scholarship, and significant contributions to serving the Bench and the Bar in Arkansas	Fall 2015 (five-year duration subject to change)
Charles and Nadine Baum Distinguished Professorships (2)	1. Terri Beiner (Nadine) 2. Sarah Jenkins (Charles)	None	Fall 2014
Byron M. Eiseman Distinguished Professorship in Taxation	Philip Oliver	Accomplishments in the teaching of or scholarship in the subject of taxation	Fall 2014
Judge George Howard, Jr Professorship	Michael Flannery	None	Fall 2014
Distinguished Professor of Law and Public Policy	John DiPippa	None	Fall 2015

Memorandum

To: Mike Schwartz

From: Patti Bell

Date: 8/7/2013

Re: Faculty Committees AY 2013-2014/Distinguished Professorships

---

Attached is a working copy of the committees populated by faculty preference data. We asked them to rank their preferences for three committees. If a faculty member specially stated she/he did not want to be assigned to a committee, I assigned "0" to that preference. I have also included all of the original preference forms submitted [TAB 1].

I did not receive preference forms from Adjoa Aiyetoro, Anastasia Boles, Felecia Epps, Lindsey Gustafson, Sarah Jenkins, Alicia Mitchell, Kelly Olson, and Suzanne Penn.

Finally, I have also attached some emails and working notes regarding committee assignments [TAB 2].

I have reviewed the policy for the Award of Named Professorships. A copy of the policy is attached as well as the general file for Named Professorships [TAB 3]. It appears that you first need to appoint a chair for P&T. Then the chair can create a subcommittee to consider the applications for the Named Professorships. I have spoken to Robert Fleming about the current status of the funding for the various professorships. The breakdown is:

1. Charles Baum – fully funded.
2. Nadine Baum – fully funded.
3. Byron Eiseman – fully funded.
4. Altheimer – fully funded.
5. George Howard – not self-sustaining.
6. Arkansas Bar – not self-sustaining.
7. Public Policy – not self-sustaining.

If I am reading the policy correctly, we are still in the four year award period phase. Just let me know if you have any questions or need more information.

Ben J. Altheimer Distinguished Professor of Law
Endowment level -- $ 245,715.06

Nadine Baum Distinguished Professor of Law
Charles Baum Distinguished Professor of Law
Endowment level -- $ 947,679.46

Byron M. Eiseman Distinguished Professor of Tax Law
Endowment level -- $ 261,066.03

Judge George Howard, Jr. Distinguished Professor of Law
Non-endowed

Distinguished Professor of Law and Public Policy
Endowment level -- $ 206,042.20

UNIVERSITY OF ARKANSAS AT LITTLE ROCK
WILLIAM H. BOWEN SCHOOL OF LAW
1201 McMath Avenue Little Rock, Arkansas 72202-5142
(O) 501.324.9927 (F) 501.324.9433 mfleming@ualr.edu
ualr.edu/law

interoffice
MEMORANDUM

To: Faculty, Administrators, and Staff

From: John DiPippa

Subject: Named Professorships

Date: November 2, 2009

After careful consideration of the recommendations of the Promotion and Tenure Committee, I am pleased to announce the recipients of the named professorships.

Arkansas Bar Foundation - Lynn Foster

Charles C. Baum - Sarah Hobbs

Nadine Baum - Terri Beiner

Judge George Howard Jr. - Michael Flannery

These professorships will begin on August 15, 2010 for a four year term, expiring on August 14, 2014.

I want to thank the Promotion and Tenure Committee and their chair, Philip Oliver, for their dedicated work on this matter.

interoffice
MEMORANDUM

To: Faculty, Administrators, Staff

From: Michael Schwartz, Dean

Subject: Named Professorships

Date: June 20, 2014

I am pleased to announce the recipients of the named professorships.

- Altheimer: Coleen Barger
- Charles Baum: Sarah Jenkins
- Nadine Baum: Terri Beiner
- Eiseman: Philip Oliver
- Howard: Michael Flannery

These professorships will begin on August 16, 2014. Each will last for a four-year term and expire August 15, 2018.

I want to thank the Named Professorships Committee and Subcommittee for their work on this project and thank Philip Oliver, as chair of the Promotion and Tenure Committee, for his efforts in organizing the process.

U·A·L·R
WILLAM H. BOWEN SCHOOL OF LAW
Office of the Dean

MEMORANDUM

To: All Students, Faculty and Staff; Chancellor Joel E. Anderson; Vice Chancellor and Provost David O. Belcher

From: Chuck Goldner

Subject: Appointment of Named Professors

Date: August 29, 2005

I am pleased to announce the appointment of five of our outstanding faculty members to hold named professorships:

Terri M. Beiner, Nadine H. Baum Distinguished Professor of Law

Lynn C. Foster, Arkansas Bar Foundation Professor of Law

Sarah Howard Jenkins, Charles C. Baum Distinguished Professor of Law

Philip D. Oliver, Byron M. Eiseman Distinguished Professor of Tax Law (the first appointment for this new professorship; Professor Oliver will no longer hold the Altheimer distinguished professorship); and

J. Thomas Sullivan, Judge George Howard, Jr. Distinguished Professor of Law (the first appointment for this new professorship).

While not a new appointment, please remember that Associate Dean John DiPippa holds the appointment of Distinguished Professor of Law and Public Policy.

Each of these individuals makes unique and valued contributions within our school and the greater community through outstanding work as a legal scholar, as a teacher, and as one who provides discipline-related service. Please join me in congratulating these faculty members.

We will hold a series of events this fall announcing these appointments and honoring both the faculty members and those whose gifts made the professorships a reality.

UNIVERSITY OF ARKANSAS AT LITTLE ROCK • 1201 MCMATH AVENUE • Little Rock, AR 72202-5142 • (501) 324-9434/FAX 324-9433

Arkansas
State Claims Commission
AUG 15 2016
RECEIVED

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

J. THOMAS SULLIVAN CLAIMANT

vs. No. 17-0020-CC

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK RESPONDENT

ANSWER

1. Respondent denies that it "reduced" Claimant's "annual compensation" as the result of his non-renewal of the Judge Howard Professorship. Respondent affirmatively states that the associated pay for the professorship was additional compensation over and above Claimant's regular salary and terminated upon expiration of the professorship in accordance with UALR policy.

2. Respondent therefore denies that it "breached" Claimant's employment contract.

3. Claimant's cause of action is outside the applicable statute of limitations and should be dismissed by statute and under Commission Rules and Regulations.

4. Respondent denies each and every allegation not specifically admitted herein.

5. Ark. Code Ann. §19-10-302 provides that the Commission shall hear no claim until the claimant has exhausted all remedies against insurers, including the claimant's insurer, and that the Claimant shall provide a sworn affidavit to the Commission to this effect. Claimant has not provided an affidavit with the required information, and therefore her claim should not be heard.

6. Respondent specifically asserts the affirmative defenses of failure to mitigate, respondeat superior, waiver, statute of limitations, laches, and any other matter constituting an avoidance or affirmative defense as set forth in Federal Rule of Civil Procedure 8(c).

7. Respondent reserves the right to amend its pleadings and to add additional

affirmative defenses.

8. Respondent has filed, contemporaneous with this Answer, a Motion for Summary Judgment seeking dismissal of Claimant' Complaint.

9. Should any amount be awarded in this claim, it would be charged against Agency Code No. 0145, Fund Code CEA 0000 and Account No. 6061008400.

WHEREFORE, having fully answered Claimant's Complaint, Respondent prays that said Complaint be denied and dismissed, and for all other relief to which it may be entitled.

Respectfully submitted,

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK, Respondent

By: 

SARAH L. JAMES ABA# 90135
Associate General Counsel
University of Arkansas
2404 North University Avenue
Little Rock, AR 72207-3608
(501) 686-2519

CERTIFICATE OF SERVICE

I, Sarah James, do hereby certify that a copy of the foregoing pleading has been served on claimant herein by mailing a copy of same, by U.S. Mail, postage prepaid, this 15th day of August, 2016, addressed to the following:

Mark F. Hampton
1122 W. Capitol
Little Rock, AR 72201

Sarah L. James

U·A·L·R
WILLAM H. BOWEN SCHOOL OF LAW
Office of the Dean

MEMORANDUM

To: All Students, Faculty and Staff; Chancellor Joel E. Anderson; Vice Chancellor and Provost David O. Belcher

From: Chuck Goldner

Subject: Appointment of Named Professors

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Sarah Howard Jenkins, Charles C. Baum Distinguished Professor of Law

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We will hold a series of events this fall announcing these appointments and honoring both the faculty members and those whose gifts made the professorships a reality.

UNIVERSITY OF ARKANSAS AT LITTLE ROCK • 1201 MCMATH AVENUE • Little Rock, AR 72202-5142 • (501) 324-9434/FAX 324-9433

Award of Named Professorships.

Unless otherwise designated by donor criteria, an award of a named professorship is made to tenured faculty members with the rank of full professor or who have applied for promotion to the rank of full professor and are recommended by the Promotion and Tenure Committee for promotion to that rank. The duration of an award shall be limited to a period of four years and thereafter rotated until development activities generate five or more additional named professorships, then the term shall be five years and thereafter rotated. A recipient of a prior award is eligible for consideration for a subsequent award if continued productivity justifies continued recognition.

At the request of the Dean, the Chair of the Promotion and Tenure Committee shall appoint a subcommittee of three members composed of at least one member currently holding a named professorship and two other full professors for the purpose of recommending faculty for the award of a named professorship. The Subcommittee shall identify and develop a file for each eligible candidate to assist the full Committee in its deliberations. Additionally, any full professor or applicant for promotion to full professor may submit a written request to be considered. Criteria for an award of a named professor include: consistent superior classroom teaching that is thoughtful, provocative, and effective; significant scholarly work, measured both by number and quality, as an author and/or panelist; national or international prominence in his or her field, unless the applicant's field is regionally based; and demonstrated commitment to the vision and mission of the law school. Materials to be considered by the Subcommittee include an updated c-v identifying recent publications, law school committee assignments, and professional and community service; annual performance reviews of law school and other service; internal and external reviews of recent publications; a letter of recommendation from an outside source; and current teaching evaluations. The Subcommittee shall recommend to the full Committee those who should be recommended to the Dean for an award of a named professorship and may, as part of its recommendation, rank the eligible candidates.

The Promotion and Tenure Committee shall recommend to the Dean those to whom an award of a named professorship should be granted and may, as a part of its recommendation, rank the eligible candidates. If the number of eligible candidates exceeds the number of available awards, the committee may recommend that the named designations be withheld and that the Dean allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made.

In the exercise of his or her discretion, the Dean shall award named professorships among those recommended by the Promotion and Tenure Committee with the goal of implementing the donor's criteria, furthering the mission of the law school, providing recognition for meritorious work, and stimulating continued productivity among those recommended and the broader law school community. With or without a recommendation from the Promotion and Tenure Committee on the use of monetary awards as a merit bonus, the Dean may allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made. The awarding of named professorships may occur in any semester.

EX. B

interoffice
MEMORANDUM

To: Faculty, Administrators, and Staff

From: John DiPippa

Subject: Named Professorships

Date: November 2, 2009

After careful consideration of the recommendations of the Promotion and Tenure Committee, I am pleased to announce the recipients of the named professorships.

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Nadine Baum - Terri Beiner

Judge George Howard Jr. - Michael Flannery

These professorships will begin on August 15, 2010 for a four year term, expiring on August 14, 2014.

I want to thank the Promotion and Tenure Committee and their chair, Philip Oliver, for their dedicated work on this matter.

MARK F. HAMPTON
Attorney At Law
424 East Sixth Street
Little Rock, Arkansas 72202

Marietta Alphin
Legal Assistant
marietta.alphin@sbcglobal.net

Telephone: (501) 376-6277
Facsimile: (501) 376-6279
MarkFHampton@aol.com

October 14, 2010

Hon. Fred Harrison, General Counsel
University of Arkansas
2402 North University
Little Rock, Arkansas 72207

Re: J. Thomas Sullivan
Professor of Law
University of Arkansas at Little Rock

Dear Mr. Harrison,

Tom Sullivan, a professor of law at the William H. Bowen School of Law, has retained me to review a situation that has developed over the past several years at the school seriously affecting his employment. In 2005 Professor Sullivan was named to serve as the first member of the law faculty as the Judge George Howard, Jr. Distinguished Professor of Law by former Dean Charles W. Goldner. His appointment followed an internal process conducted by the Promotion and Tenure Committee at the Law School, although the Howard Professorship was apparently created during the process itself, not having existed prior to commencement of the process.

Professor Sullivan accepted the appointment, although he had originally indicated that his interest was in the Arkansas Bar Foundation professorship that had previously been held by Professors Arthur Murphey and Dent Gitchel. In 2006 Professor Sullivan was formally appointed in a ceremony at the Law School honoring Judge Howard on his distinguished career of service as an attorney and judge in the State of Arkansas.

No specific information relating to the terms of the Howard Professorship was ever provided to Professor Sullivan by Dean Goldner or his successor. Professor Sullivan performed with excellence during the term of his appointment, fixed at four years by policy adopted by the Law Faculty, and applied for reappointment when the original term of appointment for all named professorships at the Law School terminated in 2009. Over objections of some faculty members, Dean Goldner's successor, John DiPippa, decided to

EX. D

delay reappointment of named professors for a year so that the process extended through 2010.

During the reappointment process, five professorships were made available for application by tenured faculty: the Howard and Arkansas Bar Foundation Professorships, the Charles A. Baum Professorship, the Nadine Baum Professorship and the Byron Eiseman Professorship. In addition, Dean DiPippa elected to retain the Law and Public Policy Distinguished Professorship that he had held through his tenure as Associate Dean once he assumed the Deanship. Seven tenured members of the faculty applied for the open positions, including Professor Sullivan and three other professors who had previously held named professorships, Theresa Beiner, Lynn Foster and Sarah Howard Hobbs. Professor Philip Oliver applied for reappointment to the Eiseman Professorship which, under its express terms is designed to honor excellence in the field of taxation. Two other professors, Coleen Barger and Richard Peltz, applied for appointment for both the general professorships and the Arkansas Bar Foundation professorship.

All seven applicants for the four positions other than the Eiseman Professorship were voted "qualified" by the nine members of the Promotion and Tenure Committee eligible to vote. However, negative votes or abstentions were recorded for almost all applicants. For example, Professors Beiner and Sullivan both received six "qualified" votes, with Sullivan receiving three "unqualified" votes and Beiner receiving two "unqualified" votes and one abstention. No explanations were offered or required for negative votes and, with the exception of the Arkansas Bar Foundation Professorship, there were no specific limitations or qualifications stated for the named professorships.

Dean DiPippa was apprised of the P&T Committee vote totals and apparently made decisions accordingly with regard to his reappointment of Professors Foster and Hobbs to the professorships they previously held and his appointment of Professor Flannery to the Howard Professorship. When Dean DiPippa met with UALR Chancellor Joel Anderson and Professor Sullivan last March, he also explained that he treated the vote totals for Professors Beiner and Sullivan as equivalent and decided to award the final named professorship to Professor Beiner based on his perception that she had greater national reputation than Professor Sullivan. Chancellor Anderson concluded, based on Dean DiPippa's explanation of the process followed, that the process was appropriate and that Professor Sullivan had no valid basis for complaint concerning Dean DiPippa's decision not to reappoint him to the Howard Professorship.

As a result of Dean DiPippa's action, Professor Sullivan has suffered significant injuries in terms of his employment relationship with UALR and his professional and academic reputation. He has suffered a loss of annual compensation of at least $11,275 based on the reduction in compensation attributable to Dean DiPippa's determination that he would no longer receive a "stipend" paid as holder of a named professorship and the loss of UALR TIAA-CREF matching contribution to his retirement account, plus any accrued interest benefits on investment of that retirement contribution, which would have totaled approximately $2,050 annually. He has also lost the prestige and benefit from the loss of

the recognition accorded holders of named professorships within the academic and professional communities.

When Professor Sullivan inquired of Dean DiPippa concerning his expected decrease in annual compensation and the statutory and UA rule authority for reduction of compensation, Dean DiPippa offered no explanation other than that Professor Sullivan would receive his then current salary and any raise for this year. He offered no authority for his decision to reduce Professor Sullivan's compensation.

We are concerned that a state official has effectively ordered a reduction in a public employee's compensation without statutory authority to do so, or without having to demonstrate cause for the reduction based upon some failure of performance. Moreover, the UALR Law Faculty Handbook provision relating to the process for filling named professorships includes no express authority for reduction in compensation when a faculty member who is otherwise qualified for reappointment is denied reappointment.

We assume that you reviewed this situation at Dean DiPippa's request when Professor Sullivan inquired about his future compensation following Dean DiPippa's decision not to reappoint him. In order to properly advise my client concerning the propriety or lawfulness of Dean DiPippa's decision, I request that you provide me with the information Professor Sullivan requested from the Dean, but did not receive, relating to Board policy regarding both distinguished professorships and authority for administrators to make salary determinations resulting in reduction of compensation that have been set forth in formally adopted rules and the Arkansas statute(s) authorizing the Dean to make this type of decision.

If I do not hear from you by October 25, 2010, I will assume that you cannot provide any additional information regarding the decision made by Dean DiPippa in this instance as it affects Professor Sullivan's compensation and employment relationship with the University.

Sincerely,

Mark F. Hampton

MFH:ma

UofA
UNIVERSITY OF ARKANSAS SYSTEM

Office of the General Counsel

October 25, 2010

Mr. Mark F. Hampton
Attorney at Law
424 East 6th Street
Little Rock, AR 72202

Re: J. Thomas Sullivan, Professor of Law, UALR

Dear Mr. Hampton:

Fred Harrison has asked that I respond to the letter you transmitted to him on October 14, 2010. I am more familiar with the situation surrounding the award of distinguished professorships at the Bowen School of Law last Fall. As you correctly state, Professor Sullivan applied for reappointment to one of the professorships, having held the George Howard, Jr. Professorship beginning in 2005, but was unsuccessful in being reappointed. Before discussing the selection process in general, and addressing some specific concerns you have presented on behalf of Professor Sullivan, let me correct a few misunderstandings that are evident from your letter.

First, it is incorrect to state that Dean DiPippa decided to delay the appointment of the named professors "so that the process extended through 2010." It is true that the process was delayed for some time, partly due to Dean DiPippa being out for a period of time for medical reasons, and partly due to Dean DiPippa being asked to assume the permanent deanship after a national search proved unsuccessful in finding a candidate with qualifications superior to his. However, the process for selecting the named professorships took place between late Spring-mid-Fall, 2009, and concluded on November 2, 2009, when Dean DiPippa announced the recipients of the named professorships.

Second, you make the statement that once Dean DiPippa assumed the deanship, he elected to retain the Distinguished Professorship that he had held through his tenure as Associate Dean, as if there was something inappropriate in that regard. You should be aware that Dean DiPippa was appointed to his Distinguished Professorship in 2000 on a permanent basis. In 2004-05, when the Law School developed a new procedure to limit new appointments to four

2404 North University Avenue / Little Rock, Arkansas 72207-3608 / 501-686-2520 / Fax 501-686-2517

year terms, Dean Chuck Goldner asked Dean DiPippa if he would agree to hold his professorship as long as he was an administrator, plus two years. He agreed to do so. Consequently, Dean DiPippa is still in the Professorship he was appointed to in 2000.

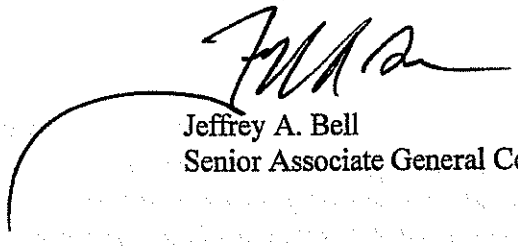
Your letter insinuates that for at least some period of time, Professor Sullivan was not aware of any "specific information" relating to the terms of the Howard Professorship he held until recently. During the selection process in 2004, it was made clear that for the Howard Professorship and several others for which there had not been any specific requirements set by the persons endowing the professorships, the professorships would be governed by the terms found in the "Award of Named Professorships" statement, a copy of which is attached for your convenience. This clearly sets forth the general criteria for the award of a named professorship, and the procedure to be used in selecting the professorship.

As Dean DiPippa has previously explained to Professor Sullivan in a meeting between those two and UALR Chancellor Dr. Joel E. Anderson, Dean DiPippa determined that the Promotion and Tenure Committee had followed all appropriate policies and procedures in recommending persons for the professorships, and that he would follow their recommendations. Three persons received a substantially more favorable recommendation than Professor Sullivan, and those were to named professorships. Dean DiPippa stated that there was not much separation in the P&T recommendations for Sullivan and Terry Beiner, but that he had decided that Beiner should be awarded the final professorship because of her national reputation in her field, which was one of the criteria mentioned in the "Award of Named Professorships". It has never been stated or implied that Professor Sullivan is not qualified for the professorships. He was simply not determined to be as qualified as the four recipients who were chosen.

From your letter, it appears that Professor Sullivan's main concern is what he terms a "reduction in compensation" due to his not being reappointed to the Howard Professorship. It is entirely incorrect to state that Dean DiPippa has decided "to reduce Professor Sullivan's compensation." Nor is there any validity in your concern "that a State official has effectively ordered a reduction in a public employee's compensation without statutory authority to do so or without having to demonstrate cause for the reduction based upon some failure of performance." The simple fact of the matter is that, just as with a person who agrees to serve as a Chair or Dean, a person who is named to one of the professorships receives an additional stipend for the additional responsibilities that go along with the professorship. This is over and above the normal salary paid to the faculty member for his faculty service. Just as with a person who, at some point, ceases to serve as Chair or Dean, once a person ceases to hold one of the named professorships, that person simply reverts back to the status of a faculty member and receives his appropriate salary. No one has reduced Professor Sullivan's basic salary as a faculty member. He has received any appropriate raises that may have been authorized for the faculty during the past several years, keeping in mind that, along with all other University and State employees, there have been restrictions on raises that could be awarded to faculty members because of the state of our economy. Plain and simple, Dean DiPippa has not reduced Professor Sullivan's compensation; rather, Professor Sullivan has ceased to hold the additional duties of a named professorship and is now being paid his appropriate faculty salary.

I hope this information is useful in your analysis of this situation. In Dean DiPippa's mind, Professor Sullivan has not suffered any injuries to his employment relationship with UALR, but rather is still considered to be a long-term, valuable member of the Law School faculty.

Sincerely yours,



Jeffrey A. Bell
Senior Associate General Counsel

John Dipippa

From: J. Thomas Sullivan [jtsullivan@ualr.edu]
Sent: Wednesday, April 29, 2009 11:50 AM
To: Philip Oliver
Cc: Philip Oliver; jmdipippa@ualr.edu; afepps@ualr.edu; cmbarger@ualr.edu; tmbeiner@ualr.edu; pjcasey@ualr.edu; fsfendler@ualr.edu; mxflannery@ualr.edu; lcfoster@ualr.edu; ksgallant@ualr.edu; cwgoldner@ualr.edu; ksgould@ualr.edu; shjenkins@ualr.edu; rjpeltz@ualr.edu; kbolson@ualr.edu; rsoliver@ualr.edu
Subject: Re: named professorships --- subcommittee and procedures -- add'l info

Phil and John, I tried to send this earlier but the server shut down briefly.

I am concerned about compensation for the coming year if the professorship decision will not be made until fall. I have applied to be reappointed to the Howard professorship, which carries an annual stipend of $10,000 (perhaps more, I am not certain about that). Anyway, I assume each professorship carries some additional compensation and wonder whether we can expect to find our compensation cut if the professorships are not announced until the fall term and current holders are not renewed, whether the compensation will be cut with the beginning of the next annual pay period in July, or whether we will be entitled to compensation for the entire 2009-2010 academic year. I am concerned about family budgeting and others may have similar concerns since the professorships are not scheduled to be awarded prior to July 1st. If I am mistaken in my understanding of the compensation process, please correct me.

Also, I do not know what is meant by "outside" reviews. I was tenured before we adopted a policy of outside reviews of written work, as I recall--again, I may be wrong and please correct me--and I do not otherwise know what is meant by that. I probably asked for reference or recommendation letters when we first did this, but I do not have those and do not know who does. Please let me know who has those letters if that is what is meant by "outside reviews."

Thanks,

TS

EX. F

Sent To J.S. Off. 8-24-05

University of Arkansas at Little Rock
Personnel Action Form

This form *must* be typed (Instructions available at http://xena.ualr.edu/hrs/)

1.) Contact person: Tonya Moore
Phone: 324-9435
e-mail: trmoore @ualr.edu

2.) Employee Name Sullivan (Last) James (First) Thomas (MI) SSN: Date 8/24/05

3.) Reason for Action: Position #
☐ New Employee ☐ Reappointment ☐ Change in Status ☐ Retirement
☐ Termination ☒ Other Change in source of funds.
Explanation:

4.) Employee Classification: ☒ Full-time ☐ Part-time 100 %
* If you check one of the boxes with an asterisk, you MUST make sure there is a current Faculty Information Form on this person.

Non-instructional employee:
☐ Classified ☐ Non-Classified (non-faculty)
☐ Grad Assistant *☐* Non-Classified (faculty)

Instructional employee:
☒ Faculty
☐ Lecturer/Adjunct

Hourly employee: Total hours worked cannot exceed 1500 per fiscal year.
☐ Extra Labor ☐ Work Study
☐ Student Labor

5.) Instructional Employees only:
☒ 9 month ☐ 10.5 month ☐ 12 month ☐ Semester ☐ Other

6.) Proposed Status: Send Paycheck to Org # 660000
Department/Unit Name: UALR William H. Bowen School of Law
Position Title: Professor of Law Annual Salary OR Hourly Rate: 129,762.00

Effective Dates	Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/05 to 5/15/06	110000	660000	610110	401100	FAC128		61.7076	80,073.00
8/16/05 to 5/15/06	110000	660000	610110	411000	FAC128		30.3933	XX 39,439.00
8/16/05 to 5/15/06	290245	660000	610110	401100	FAC128		7.8991	10,250.00
to								
to								

Total: $129,762.00

7.) Current Status:
Department/Unit Name: UALR William H. Bowen School of Law
Position Title: Professor of Law Annual Salary OR Hourly Rate: 119,512.00

Effective Dates	Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/05 to 5/15/06	110000	660000	610110	401100	FAX128		67.0000	80,073.00
8/15/05 to 5/15/06	110000	660000	610110	411000	FAC128		33.0000	39,439.00
to								
to								
to								

Total: $119,512.00

8.) Funding Source (if applicable) Use this section instead of a budget transfer form. Funds will be taken out of the FOAPAL listed below and put into the salary line or lecturer account listed in section 6.

Pos #	Fund	Org	Acct	Prog	Actv	Location

Account Name: Authorized Signature:

9.) Grant funded Position: ☒ Yes ☐ No **If yes, ORSP *must* sign before forwarding to VC or Human Resource Services.**

10.) Signatures
Department Head/Supervisor Date
Dean/AVC Date 8/24/05
ORSP (see # 9 above) Date
Vice Chancellor Date

HRS Use Only
☐ PPAINTL Init
Pos #
Pos #
Pos #
E-Class #
Init Date

Budget Use Only
Init Date
Payroll
Init Date
Suffix
Benefits
Init Date

For questions regarding sections 1, 2, 3, 4, 5 & 10, contact Human Resource Services at 569-3180
For questions regarding sections 6, 7, 8, contact Budget Office at 569-8426
For questions regarding section 9, contact ORSP 569-8474

1. White – Payroll
2. Green – HRS
3. Blue – Originator
4. Canary – Vice Chancellor
5. Pink – Budget
6. Goldenrod - HRS

HR.002.092701

EX. G

Sent to ORSP 7/20/06

University of Arkansas at Little Rock
Personnel Action Form

This form *must* be typed (Instructions available at http://xena.ualr.edu/hrs/)

1.) Contact person: Tonya Moore
Phone: 324-9435
e-mail: trmoore @ualr.edu

2.) Employee Name Sullivan (Last) James (First) Thomas (MI) SSN ... ate 7/17/06

3.) Reason for Action: Position #

☐ New Employee ☐ Reappointment ☐ Change in Status ☐ Retirement
☐ Termination ☒ Other Source of funds.
Explanation:

4.) Employee Classification: ☒ Full-time ☐ Part-time 100 %

* If you check one of the boxes with an asterisk, you MUST make sure there is a current Faculty Information Form on this person.

Non-instructional employee:
☐ Classified ☐ Non-Classified (non-faculty)
☐ Grad Assistant *☐* Non-Classified (faculty)

Instructional employee:
☒ Faculty
☐ Lecturer/Adjunct

Hourly employee: Total hours worked cannot exceed 1500 per fiscal year.
☐ Extra Labor ☐ Work Study
☐ Student Labor

5.) Instructional Employees only:
☒ 9 month ☐ 10.5 month ☐ 12 month ☐ Semester ☐ Other

6.) Proposed Status: Send Paycheck to Org # 660000

Department/Unit Name: UALR William H. Bowen School of Law
Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 133,646.00

Effective Dates			Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/06	to	5/15/07	110000	660000	610110	401100	FAC128		59.3305	79,293.00
8/16/06	to	5/15/07	110000	660000	610110	411000	FAC128		33.0000	44,103.00
8/16/06	to	5/15/07	290245	660000	610110	401100	FAC128		7.6695	10,250.00
	to									
	to									

Total: $133,646.00

7.) Current Status:

Department/Unit Name: UALR William H. Bowen School of Law
Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 133,646.00

Effective Dates			Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
	to									
	to									
	to		(Exactly the same as above "proposed status")							
	to									
	to									

Total: $

8.) Funding Source (if applicable) Use this section instead of a budget transfer form. Funds will be taken out of the FOAPAL listed below and put into the salary line or lecturer account listed in section 6.

Pos #	Fund	Org	Acct	Prog	Actv	Location

Account Name: Authorized Signature:

9.) Grant funded Position: ☒ Yes ☐ No If yes, ORSP *must* sign before forwarding to VC or Human Resource Services.

10.) Signatures

Department Head/Supervisor Date
Dean/VP 7/18/06 Date
ORSP (see # 9 above) Date
Vice Chancellor Date

HRS Use Only
☐ PPAINTL Init
Pos #
Pos #
Pos #
E-Class #
Init Date

Budget Use Only
Init Date

Payroll
Init Date
Suffix

Benefits
Init Date

For questions regarding sections 1, 2, 3, 4, 5 & 10, contact Human Resource Services at 569-3180
For questions regarding sections 6, 7, 8, contact Budget Office at 569-8426
For questions regarding section 9, contact ORSP 569-8474

1. White – Payroll
2. Green – HRS
3. Blue – Originator
4. Canary – Vice Chancellor
5. Pink – Budget
6. Goldenrod - HRS

HR.002.092701

Sent to ORSP on 7/20/07

University of Arkansas at Little Rock
Personnel Action Form

This form *must* be typed (Instructions available at http://xena.ualr.edu/hrs/)

1.) Contact person: Tonya Bell
Phone: 324-9435
e-mail: trmoore @ualr.edu

2.) Employee Name Sullivan (Last) James (First) Thomas (MI) SSN: Date 7/18/07

3.) Reason for Action: Position #
☐ New Employee ☐ Reappointment ☐ Change in Status ☐ Retirement
☐ Termination ☒ Other Change in source of funds.
Explanation:

4.) Employee Classification: ☒ Full-time ☐ Part-time 100 %
* If you check one of the boxes with an asterisk, you MUST make sure there is a current Faculty Information Form on this person.

Non-instructional employee:
☐ Classified ☐ Non-Classified (non-faculty)
☐ Grad Assistant *☐* Non-Classified (faculty)

Instructional employee:
☒ Faculty
☐ Lecturer/Adjunct

Hourly employee: Total hours worked cannot exceed 1500 per fiscal year.
☐ Extra Labor ☐ Work Study
☐ Student Labor

5.) Instructional Employees only:
☒ 9 month ☐ 10.5 month ☐ 12 month ☐ Semester ☐ Other

6.) Proposed Status: Send Paycheck to Org # 660000
Department/Unit Name: UALR William H. BOwen School of Law
Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 137,512.00

Effective Dates	Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/07 to 5/15/08	110000	660000	610110	401100	FAC128			81,883.00
8/16/07 to 5/15/08	110000	660000	610110	411000	FAC128			45,379.00
8/16/07 to 5/15/08	290245	660000	610110	401100	FAC128			10,250.00
to								
to								
							Total:	$ 137,512.00

7.) Current Status:
Department/Unit Name: UALR William H. Bowen School of Law
Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 137,512.00

Effective Dates	Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
to								
to								
to	(Exactly the same as above "proposed status")							
to								
to								
							Total:	$

8.) Funding Source (if applicable) Use this section instead of a budget transfer form. Funds will be taken out of the FOAPAL listed below and put into the salary line or lecturer account listed in section 6.

Pos #	Fund	Org	Acct	Prog	Actv	Location

Account Name: Authorized Signature:

9.) Grant funded Position: ☒ Yes ☐ No **If yes, ORSP *must* sign before forwarding to VC or Human Resource Services.**

10.) Signatures
Department Head/Supervisor Date
Dean/VC Date 7/19/07
ORSP (see # 9 above) Date
Vice Chancellor Date

Rev'd

HRS Use Only
☐ PPAINTL Init
Pos #
Pos #
Pos #
E-Class #
Init Date

Budget Use Only
Init Date

Payroll
Init Date
Suffix

Benefits
Init Date

For questions regarding sections 1, 2, 3, 4, 5 & 10, contact Human Resource Services at 569-3180
For questions regarding sections 6, 7, 8, contact Budget Office at 569-8426
For questions regarding section 9, contact ORSP 569-8474

1. White – Payroll
2. Green – HRS
3. Blue – Originator
4. Canary – Vice Chancellor
5. Pink – Budget
6. Goldenrod - HRS

HR.002.092701

Sent to ORSP 6/16/08

University of Arkansas at Little Rock
Personnel Action Form

This form *must* be typed (Instructions available at http://xena.ualr.edu/hrs/)

1.) Date: 6/10/08
Contact Person: Tonya Bell
Phone: 324-9435
e-mail: trbell @ualr.edu

2.) Employee Name Sullivan (Last) J. (First) T. (MI) SSN _____ T # 00004178

3.) Reason for Action: Position # _____

☐ New Employee ☐ Reappointment ☐ Change in Status ☐ Retirement
☐ Termination ☒ Other To correct budget book.

Explanation:

4.) Employee Classification: ☒ Full-time ☐ Part-time 100 %

* If you check one of the boxes with an asterisk, you MUST make sure there is a current Faculty Information Form on this person.

Non-instructional employee:
☐ Classified ☐ Non-Classified (non-faculty)
☐ Grad Assistant *☐* Non-Classified (faculty)

Instructional employee:
☒ Faculty
☐ Lecturer/Adjunct

Hourly employee: Total hours worked cannot exceed 1500 per fiscal year.
☐ Extra Labor ☐ Work Study
☐ Student Labor

5.) Instructional Employees only:
☒ 9 month ☐ 10.5 month ☐ 12 month ☐ Semester ☐ Other

6.) Proposed Status: Home Org # 660000

Department/Unit Name: UALR William H. Bowen School of Law
Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 137,512.00

Effective Dates		Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/08	to 5/15/09	110000	660000	610110	401100	FAC128		59.5461	81,883.00
8/16/08	to 5/15/09	110000	660000	610110	411000	FAC128		33.0000	45,379.00
8/16/08	to 5/15/09	290245	660000	610110	401100	FAC128		7.4539	10,250.00
	to								
	to								
								Total:	$ 137,512.00

7.) Current Status:
Department/Unit Name: _____
Position Title: _____ Annual Salary OR Hourly Rate: _____

Effective Dates		Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
	to								
	to								
	to								
	to	(Exactly the same as Proposed Status Above)							
	to								
								Total:	$

8.) Funding Source (if applicable) **Use this section instead of a budget transfer form. Funds will be taken out of the FOAPAL listed below and put into the salary line or lecturer account listed in section 6.**

Pos #	Fund	Org	Acct	Prog	Actv	Location

Account Name: _____ Authorized Signature: _____

9.) Grant funded Position: ☒ Yes ☐ No **If yes, ORSP *must* sign before forwarding to VC or Human Resource Services.**

10.) Signatures
Department Head/Supervisor Date
Dean/AVC 6/16/08 Date
ORSP (see # 9 above) Date
Vice Chancellor Date

HRS Use Only
☐ GOAINTL
Status _____ Init _____
Pos # _____
Pos # _____
Pos # _____
E-Class # _____
Init _____ Date _____

Budget Use Only
Init _____ Date _____

Payroll
Init _____ Date _____
Suffix _____

Benefits
Init _____ Date _____

For questions regarding sections 1, 2, 3, 4, 5 & 10, contact Human Resource Services at 569-3180
For questions regarding sections 6, 7, 8, contact Budget Office at 569-8426
For questions regarding section 9, contact ORSP 569-8474

1. White – Payroll
2. Green – HRS
3. Blue – Originator
4. Canary – Vice Chancellor
5. Pink – Budget
6. Goldenrod - HRS

HR.002.050307

Sent to Grants 7-7-09

University of Arkansas at Little Rock
Personnel Action Form

This form *must* be typed (Instructions available at http://xena.ualr.edu/hrs/)

1.) Date: 7/6/09
Contact Person: Tonya Bell
Phone: 324-9435
e-mail: trbell @ualr.edu

2.) Employee Name Sullivan (Last) J. (First) T. (MI) SSN ___ T# 00004178

3.) Reason for Action: **Position #** ___

☐ New Employee ☐ Reappointment ☐ Change in Status ☐ Retirement
☐ Termination ☒ Other To correct budget book.

Explanation:

4.) Employee Classification: ☒ Full-time ☐ Part-time 100 %

* If you check one of the boxes with an asterisk, you MUST make sure there is a current Faculty Information Form on this person.

Non-instructional employee:
☐ Classified ☐ Non-Classified (non-faculty)
☐ Grad Assistant *☐* Non-Classified (faculty)

Instructional employee:
☒ Faculty
☐ Lecturer/Adjunct

Hourly employee: Total hours worked cannot exceed 1500 per fiscal year.
☐ Extra Labor ☐ Work Study
☐ Student Labor

5.) Instructional Employees only:
☒ 9 month ☐ 10.5 month ☐ 12 month ☐ Semester ☐ Other

6.) Proposed Status: **Home Org #** 660000

Department/Unit Name: ~~XXXXXX~~ UALR Wm. H. BOwen School of Law

Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 137,512.00

Effective Dates			Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/09	to	5/15/10	110000	660000	610110	401100	FAC128			81,883.00
8/16/09	to	5/15/10	110000	660000	610110	411000	FAC128			45,379.00
8/16/09	to	5/15/10	290245	660000	610110	401100	FAC128			10,250.00
	to									
	to									

Total: $ 137,512.00

7.) Current Status:

Department/Unit Name: UALR William H. Bowen School of Law

Position Title: Distinguished Professor of Law Annual Salary OR Hourly Rate: 137,512.00

Effective Dates			Fund	Org	Acct	Prog	Actv	Loc	% Salary	Dollars Encumbered
8/16/08	to	5/15/09	110000	660000	610110	401100	FAC128			81,883.00
8/16/08	to	5/15/09	110000	660000	610110	411000	FAC128			45,379.00
8/16/08	to	5/15/09	290245	660000	610110	401100	FAC128			10,250.00
	to									
	to									

Total: $ 137,512.00

8.) Funding Source (if applicable) **Use this section instead of a budget transfer form. Funds will be taken out of the FOAPAL listed below and put into the salary line or lecturer account listed in section 6.**

Pos #	Fund	Org	Acct	Prog	Actv	Location

Account Name: ___ Authorized Signature: ___

9.) Grant funded Position: ☒ Yes ☐ No **If yes, ORSP *must* sign before forwarding to VC or Human Resource Services.**

10.) Signatures

Department Head/Supervisor Date
Dean/AVC Date 7/6/09
ORSP (see # 9 above) Date
Vice Chancellor Date

HRS Use Only
☐ GOAINTL
Status ___ Init ___
Pos # ___
Pos # ___
Pos # ___
E-Class # ___
Init ___ Date ___

Budget Use Only
Init ___ Date ___

Payroll
Init ___ Date ___
Suffix ___

Benefits
Init ___ Date ___

For questions regarding sections 1, 2, 3, 4, 5 & 10, contact Human Resource Services at 569-3180
For questions regarding sections 6, 7, 8, contact Budget Office at 569-8426
For questions regarding section 9, contact ORSP 569-8474

1. White – Payroll
2. Green – HRS
3. Blue – Originator
4. Canary – Vice Chancellor
5. Pink – Budget
6. Goldenrod - HRS

HR.002.050307

Arkansas
State Claims Commission
AUG 15 2016
RECEIVED

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

J. THOMAS SULLIVAN CLAIMANT

vs. No. 17-0020-CC

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK RESPONDENT

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
AND TO DISMISS CLAIMANT'S COMPLAINT

Claimant, J. Thomas Sullivan, has filed a complaint against Respondent, University of Arkansas at Little Rock ("UALR") stating that his non-reappointment to a named professorship at the UALR W.H. Bowen School of Law for the 2010/11 academic year and "loss of compensation" associated with that professorship, is a breach of his employment contract. He seeks back payment in the amount of $56.375. Claimant's Complaint should be dismissed for two reasons: (1) the non-award of a named professorship and removal of the stipend associated with that professorship does not constitute a breach of Claimant's employment contact; and (2) the claim is barred by the five-year statute of limitations under Ark. Code Ann. § 16-56-111 and Commission rules.

I. NO BREACH OF CLAIMANT'S EMPLOYMENT CONTRACT

The issues presented in Claimant's Complaint are straightforward. Claimant is a tenured law professor at the Bowen School of Law. In August 2005, following an application process, Claimant was selected to receive the Judge George Howard, Jr. Distinguished Professorship, one of four professorships awarded that year. Ex. A. As Claimant states in his Complaint, the duration of the award is limited to four years, after which a prior recipient can apply for reconsideration. Ex. B. Claimant's term ran from August 2005 to August 2009. In 2009, as alleged, Claimant again applied to be considered for the professorship and submitted application

materials, which he has attached to his Complaint. The Promotion and Tenure Committee, however, selected another applicant they deemed more qualified and did not award the professorship to the Claimant. This decision was announced by then Dean John DiPippa on November 2, 2009. Ex. C. The new term commenced on August 15, 2010 and expired on August 14, 2014. Id. Claimant did not apply in 2014.

Although much of Claimant's Complaint consists of commentary on the merits of his non-reappointment and the qualifications of other candidates, the gravamen of his claim is that his non-reappointment in 2009 for the professorship caused him to suffer a "reduction" in his "annual compensation" for which he now seeks back payment. The Howard Professorship awarded an annual stipend, for each of the four years, of $10,250. Claimant received that amount, in addition to his regular salary, for academic years 2005/06 – 2009/10. Thereafter, his compensation reverted to his annual faculty salary. Ex. G. Claimant alleges that this "reduction" was "unauthorized" because it did not follow either Law School Rules governing the award of the professorship or UA Board policies. Claimant misconstrues the nature of the pay associated with the award and the applicable policies.

Claimant concedes in his Complaint (pg. 3) that he raised the matter with Dean DiPippa, who explained that the monetary award was a stipend which would be removed at the conclusion of the award. He also raised the exact same issue in an October 2010 letter by his attorney to University General Counsel, Fred Harrison. Ex. D. Jeff Bell, former Senior Associate General Counsel, responded, addressing in particular Claimant's "main concern" that he had suffered a "reduction in compensation due to not being reappointed to the Howard Professorship." Ex. E, pg.2, ¶ 4. As Mr. Bell fully explained, Claimant's characterization of the stipend associated with the professorship as part of, or the same as, his annual compensation is "entirely incorrect." A

stipend associated with a named professorship is an additional stipend over and above the normal salary to be paid and, in fact, are funded separately. The Personnel Action Forms (PAF's) for Claimant's compensation show one funding code for annual salary (110000) and a separate funding code for the stipend (290245). Ex. G; Complaint. It is axiomatic that when the responsibility associated with that stipend ends, so does the additional payment. The person's normal salary then continues. Mr. Bell pointed out that the term end of a named professorship is no different than when a person holding a Chair or Dean appointment steps down from that appointment to resume a regular faculty position. His or her salary then reverts to the appropriate level of compensation. Ex. E, p.2.

The Claimant apparently recognized this distinction back in 2009 when he reapplied for the professorship. In an email to Dean DiPippa and Phil Oliver, Committee Chair, Claimant explicitly referred to his monetary payment associated with the professorship as an "annual stipend" and that he "assumed each professorship carries some additional compensation." Claimant's primary concern in that email was that if the announcement of the professorship selection was not made until the coming fall, and if he was not reappointed, whether the stipend would be "cut" in July 2009 or whether he would be allowed to retain it for the entire academic year. Ex. F; in other words, not *if* the compensation would be removed, but *when*. Claimant thus new the stipend was not permanent pay and cannot seriously contend that this stipend is considered part of his annual salary.

As for his argument that "removal" of this pay was unauthorized, the UA Board policies attached to Claimant's complaint as Exhibit E - F – particularly 405.5 and 405.1 - plainly do not apply. These policies pertain to retrenchment (termination of employment) and the appointment, promotion, tenure and dismissal procedures for regular, permanent faculty positions – not to the

selection process and procedures for named professorships or other like appointments. As stated above, and as Claimant concedes, the professorship process is governed by the document in Exhibit B and was clearly adhered to by the selection committee. Thus, there is absolutely no merit to Claimant's contention that the "unauthorized" reduction of his pay constituted a breach of his law school employment contract, and Claimant's claim should be dismissed.

II. CLAIMANT'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

Even if Claimant's arguments could be construed as stating a claim for breach of his employment contract, the action which he says caused the breach - i.e. his non-reappointment and resulting loss of the stipend - occurred almost seven years ago, and the claim is clearly barred by state statute and Commission rules ("Claims based on incidents beyond the statutorily applicable code of limitations are not accepted for filing." Ark. Claims Commission Rules/Regulations). Claimant contends that the applicable statute is Ark. Code Ann. § 16-56-111(a), which governs written contracts and provides for a five-year statute of limitations. Assuming for purposes of argument that the statute applies in this instance, Claimant makes the bewildering assertion that the University "relies on a system of annual contracts" and thus each year he did not receive payment constituted a new breach of his contract. He asserts that the five-year statute then "limits his recovery" to the past five years. See Complaint, pg. 7. Claimant's argument is wrong.

For written contract actions, the statute of limitations begins to run "upon the occurrence of *the last element essential to the cause of action.*" *Phillips v. Union Pac. R.R. Co.*, 89 Ark. App. 223, 226, 201 S.W.3d 439, 441 (2005) (citing *Zufari v. Architecture Plus,* 323 Ark. 411, 914 S.W.2d 756 (1996) (emphasis added). "The test for determining when a breach of contract action accrues is the point when the plaintiff could have first maintained the action to a

successful conclusion." Id. (citing *Dupree v. Twin City Bank,* 300 Ark. 188, 777 S.W.2d 856 (1989)). "A cause of action for breach of contract accrues the moment the right to commence an action comes into existence...and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. *Oaklawn Bank v. Alford*, 40 Ark. App. 200, 203, 845 S.W.2d 22, 24 (1993) (citing *Dupree v. Twin City Bank,* 300 Ark. at 191, 777 S.W.2d at 858; *Eckels v. Arkansas Real Estate Comm'n,* 30 Ark.App. 69, 80, 783 S.W.2d 864, 870 (1990)).

Here, the alleged repudiation of the contract occurred when Claimant received notice that he had not been selected for reappointment to the professorship on November 2, 2009. Ex. C. At that time, the action was completed, and Claimant could have brought suit at that time. Claimant may contend that he was not made aware of the loss of the stipend until later in the academic year. The accrual date is the date the breach occurred. The action was completed at that time, not when Claimant understood his pay would be reduced. Claimant admits having discussions with Dean DiPippa about the issue of compensation sometime after the award was made, but does not state when these discussions took place. At any rate, he certainly knew about the "pay loss" by October 14, 2010, the date of his lawyer's letter to Fred Harrison complaining about the matter. Ex. D. Thus, even the most generous accrual date would place the time of the "last element essential to the cause of action" at almost six years ago; clearly outside the five-year limitation period allowed under the law.

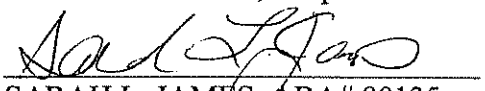
Claimant's creative argument that the clock began running anew each year his contract did not reflect the additional pay, is nowhere supported in the law and would defeat the very purpose of the statutes of limitations. Moreover, the University policies cited by Claimant do not establish that he had a yearly contract, but rather that he enjoyed continual appointment as a

tenured faculty member. Thus, his argument that each yearly "appointment" without the stipend constituted a new contract, and thus a new breach of that contract, is not founded on proper facts or interpretation of the laws on limitations. Under Claimant's theory, his cause of action would arise each year and could be extended indefinitely; thus, it could never be time-barred. Here, the complained of action giving rise to the alleged "breach" is the non-award and loss of pay associated with the professorship. The limitations period thus began running when that action occurred - November 2, 2009. Even the later October 2010 date is not enough of a stretch to save Claimant's cause of action. Claimant's complaint is clearly time-barred and should be dismissed.

For all the above-stated reasons, Respondent requests that the Claimant's Complaint be dismissed and for all other just and proper relief.

Respectfully submitted,

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK, Respondent

By: 

SARAH L. JAMES ABA# 90135
Associate General Counsel
University of Arkansas
2404 North University Avenue
Little Rock, AR 72207-3608
(501) 686-2519

CERTIFICATE OF SERVICE

I, Sarah James, do hereby certify that a copy of the foregoing pleading has been served on claimant herein by mailing a copy of same, by U.S. Mail, postage prepaid, this 15th day of August, 2016, addressed to the following:

Mark F. Hampton
1122 W. Capitol
Little Rock, AR 72201

Sarah L. James

Arkansas
State Claims Commission
AUG 15 2016
RECEIVED

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

J. THOMAS SULLIVAN CLAIMANT

vs. No. 17-0020-CC

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK RESPONDENT

MOTION FOR SUMMARY JUDGMENT
AND TO DISMISS CLAIMANT'S COMPLAINT

Comes Respondent, by and through its undersigned counsel, and for its Motion for Summary Judgment and to Dismiss Claimant's Complaint, states:

1. The non-award of a named professorship and removal of the stipend associated with that professorship does not constitute a breach of Claimant's employment contact.

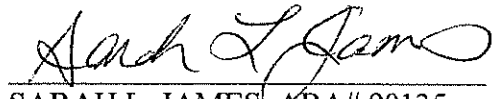
2. The claim is barred by the five-year statute of limitations under Ark. Code Ann. § 16-56-111 and Commission rules.

3. A brief in support of this Motion is attached.

WHEREFORE, Respondent requests that summary judgment be granted in its favor and that Claimant's Complaint be dismissed.

Respectfully submitted,

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK, Respondent

By: 

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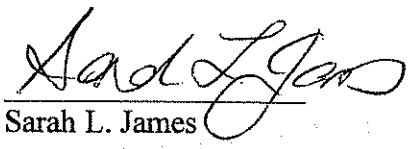

Sarah L. James

Arkansas
State Claims Commission
SEP 07 2016
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BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

J. THOMAS SULLIVAN, Claimant,	§ § §	
v.	§ §	NO. 17-0020-CC
STATE OF ARKANSAS, UNIVERSITY OF ARKANSAS AT LITTLE ROCK, Respondent.	§ § § § §	

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

TO THE ARKANSAS CLAIMS COMMISSION:

J. THOMAS SULLIVAN, Claimant, through his counsel of record herein, MARK F. HAMPTON, Attorney at Law, respectfully files this response to the Motion for Summary Judgment and supporting brief filed by Respondent UNIVERSITY OF ARKANSAS AT LITTLE ROCK, an agency of the STATE OF ARKANSAS, in this proceeding. In support of his response, as authorized by Rule 56 of the Arkansas Rules of Civil Procedure, applicable to this proceeding by Commission Rule 8.1, Claimant offers the following:

1. Respondent University of Arkansas at Little Rock (hereinafter "University") operates as an entity under the laws of the State of Arkansas and supervision of the Board of Trustees of the University of Arkansas.

2. Claimant filed his claim with the Arkansas Claims Commission on June 29, 2016. (Claimant's Ex. 1—File-marked copy of Complaint). [References to

Claimant's Exhibits in this response refer to exhibits appended to this response to the University's Motion for Summary Judge and supporting brief.]

3. Respondent served its answer, motion for summary judgment and brief in support of the motion for summary judgment by mail on Claimant on August 18, 2016.

4. Respondent University asserts two grounds in support of its Motion for Summary Judgment. The grounds are:

> 1. The non-award of a named professorship and removal of the stipend associated with that professorship does not constitute a breach of Claimant's employment contact.
>
> 2. The claim is barred by the five-year statute of limitations under Ark. Code § 16-56-111 and Commission rules.

5. Claimant addresses the grounds advanced by Respondent in the order presented.

I.

THE UNIVERSITY BREACHED CLAIMANT'S CONTRACT FOR EMPLOYMENT WITH THE UNIVERSITY BY REDUCING CLAIMANT'S ANNUAL COMPENSATION FOLLOWING NON-RENEWAL OF HIS APPOINTMENT TO SERVE AS THE JUDGE GEORGE HOWARD, JR. DISINGUISHED PROFESSOR OF LAW AFTER HIS INITIAL TERM OF SERVICE.

salary, even as a sanction available when discipline when is authorized. No such discussion exists for Named Professorships. By negative implication and logic, the absence of such authority in the instant setting is dispositive. That notwithstanding, Respondent wholly fails even to discuss these Board Policies, baldly asserting that they are inapplicable.

12. The fact is that no UA Board of Trustees Board Policy authorized then-Dean DiPippa's action in reducing Claimant's amount of annual salary.

13. Similarly, the UALR Policy governing distinguished professorships provides that the designation of "distinguished professor" is a separate one of rank, as set out in UA Trustees Policy 405.1 I (Definitions). The Board Policy references the ranks of "University Professor, Distinguished Professor, and Professor" as the ranks of included for Instructional and Research Professors. Similarly, the UALR policy references the *rank of distinguished professor*:

> *The rank of distinguished professor* is to be reserved for those individuals who are recognized nationally and internationally as intellectual leaders in their academic disciplines for extraordinary accomplishments in teaching; for published works, research, or creative accomplishments in the performing arts; or for other endeavors, and who have gained such recognition for distinction at this or another university prior to appointment as distinguished professors.
>
> Appointments to this rank shall be made only when clear indication exists that individuals so appointed will provide exemplary academic and intellectual leadership and continue their professional activities in such a way as to maintain national and international recognition and a commensurate level of accomplishment.

6. Claimant Sullivan seeks recovery of annual salary lost over the past five years of his employment with the University of Arkansas at Little Rock as a result of reduction of his annual salary following the decision of then-Dean John M.A. DiPippa not to reappoint him to the Howard Professorship for the four-year term of appointment commencing in the 2010-2011 academic year.

7. Claimant relied in his Complaint and supplemental explanation of his basis for claim on both the rule adopted by the UALR Bowen Law Faculty, "Award of Named Professorships,"—included by Respondent as its Exhibit B in support of its summary judgment motion, and UA Trustees Board Policy 470.1 Distinguished Professorships, in support of his claim that the reduction in his annual salary was *ultra vires*, not authorized by either the Law School's policy on appointment of Named Professorships, or by the Trustees Board Policy governing designation of Distinguished Professorships.

8. Respondent argues that the controlling document for award of Named Professorships and/or Distinguished Professorships is one policy adopted by the UALR Bowen Law Faculty. However, Respondent points to no language in this document that purports to authorize reduction in salary when a faculty member is not reappointed to a law-school Named Professorship. The policy doesn't speak whatsoever to the separate designation of university Distinguished Professor. The policy, set forth in Respondent's Exhibit E to the brief submitted in support of its

summary judgment motion, deals with the financial aspects of the appointment to a Named Professorship only as follows:

> The Promotion and Tenure Committee shall recommend to the Dean those to whom an award of a named professorship should be granted and may, as a part of its recommendation, rank the eligible candidates. *If the number of eligible candidates exceeds the number of available awards, the committee may recommend that the named designations be withheld and that the Dean allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made.*
>
> In the exercise of his or her discretion, the Dean shall award named professorships among those recommended by the Promotion and Tenure Committee with the goal of implementing the donor's criteria, furthering the mission of the law school, providing recognition for meritorious work, and stimulating continued productivity among those recommended and the broader law school community. *With or without a recommendation from the Promotion and Tenure Committee on the use of monetary awards as a merit bonus, the Dean may allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made.* The awarding of named professorships may occur in any semester.

(Respondent's MSJ Ex. E) (emphasis added).

9. Nothing in the Bowen Law Faculty policy references the situation from which Claimant's claim arises before the Commission. The only references included in the policy address allocation of monetary awards when "the number of eligible candidates exceeds the available awards," in which event the committee considering qualifications of applicants may recommend that the Dean simply

allocate available funds for monetary awards among the qualified candidates until such time as there are a sufficient number of designations for all qualified candidates. This provision did not apply to the process in which Claimant's application for re-appointment was in issue.

10. There is simply no language in the faculty policy addressing the option taken by then-Dean DiPippa in reducing Claimant's salary as a consequence of his decision not to reappoint Claimant to the Howard Named Professorship, the only named professorship for which Claimant applied, as his supporting documents offered as Exhibit C in support of his Complaint show.

11. Respondent ignores the lack of any language in any UA Board of Trustees Board Policy cited by Claimant relating to faculty status authorizing any reduction in salary upon a decision not to reappoint the faculty member to a Named Professorship previously held. Instead, Respondent simply argues that Board Policy 470.1, governing the general criteria for award of distinguished professorships; Board Policy 405.5, governing retrenchment; and Board Policy 405.1, Sec. IV(A)(12) and (C), governing range of sanctions that may be imposed for discipline of faculty, do not apply to the issue raised by Claimant. Respondent, obviously, misses the point that in *all* of these regulations, there is no authority whatsoever for reducing the salary of a professor after his Named Professorship title is not renewed. To be clear, these regulations do *not* address reduction in

(UALR Distinguished Professorships Policy 403.19) (emphasis added).

14. Thus, the designation of Distinguished Professor of Law, does not refer the title of the named professorship, the George Howard, Jr., Distinguished Professorship, but to the separate rank of "distinguished professor." A separate Board Policy references Distinguished Professorships, providing:

> The rank of distinguished professor is to be reserved for those individuals who are recognized nationally and internationally as intellectual leaders in their academic disciplines for extraordinary accomplishments in teaching; published works, research, or creative accomplishments in the performing arts; or other endeavors, and who have gained such recognition for distinction at this or another university prior to appointment as distinguished professors.
>
> Appointments to this rank shall be made only when clear indication exists that individuals so appointed will provide exemplary academic and intellectual leadership and continue their professional activities in such a way as to maintain national and international recognition and a commensurate level of accomplishment.

UA Board of Trustees Board Policy 470.1 Distinguished Professorships.

15. Respondent argues: "Claimant misconstrues the nature of the pay associated with the award and the applicable policies." (MSJ Supporting Brief, at 2).

16. In fact, Respondent can point to no statement of policy by the UA Board of Trustees, UALR, or the UALR Bowen Law Faculty, that describe "the nature of the pay associated with the award." Nor does Respondent discuss the policies and policy language at any point in its brief supporting the Motion for Summary Judgment. This is not surprising since none of these "policies," as Respondent

notes, either discuss the consequences of non-reappointment to a Named Professorship, nor authorize reduction in salary once the appointed faculty who has been denied reappointment to a Named Professorship after having been previously been awarded an increase in salary based upon the criteria of excellence described in each of the policy statements.

17. Respondent instead relies on two exhibits it appended to its supporting brief. First, it relies on representations made by Senior Associate University Counsel Jeff Bell in responding to a query previously submitted to the General Counsel by Claimant's counsel, in which Mr. Bell offered his personal explanation, as an interested counsel for Respondent here, on the operation of the Named Professorships rule at the Bowen School of Law. (MSJ Brief Ex. E). Mr. Bell's opinion letter is, however, only an opinion letter. It does not satisfy the requirements for summary judgment, or proper summary judgment evidence, as set forth in Rule 56(c) of the Arkansas Rules of Civil Procedure, which provides:

> (1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits.

Mr. Bell's letter, at the most, constitutes his personal opinion and argument, consistent with Respondent's argument in its Motion for Summary Judgment and supporting brief. It cannot, as a matter of procedural rule, support the judgment urged by Respondent.

18. However, Mr. Bell's argument expands upon Respondent's position in its supporting brief in a significant way. In his letter, he advised undersigned counsel that:

> Nor is there any validity in your concern "that a State official has effectively ordered a reduction in a public employee's compensation without statutory authority to do so or without having to demonstrate cause for the reduction based upon some failure of performance." *The simple fact of the matter is that, just as with a person who agrees to serve as a Chair or Dean, a person who is named to one of the professorships receives an additional stipend for the additional responsibilities that go along with the professorship. This is over and above the normal salary paid to the faculty member for his faculty service. Just as with a person who, at some point cases to serve as Chair or Dean, once a person ceases to hold one of the named professorships, that person simply reverts back to the status of a faculty member and receives his appropriate salary.* No one has reduced Professor Sullivan's basic salary as a faculty member. He has received any appropriate raises that may have been authorized for the faculty during the past several years, keeping in mind that along with all other University and State employees, there have been restrictions on raises that could be awarded to faculty members because of the state of our economy. Plain and simple, Dean DiPippa has not reduced Professor Sullivan's compensation; rather, Professor Sullivan has ceased to hold the additional duties of a named professorship and is now being paid his appropriate faculty salary.

(MSJ Brief, Ex. E) (emphasis added).

19. Respondent summarizes Mr. Bell's argument:

> Mr. Bell pointed out that the term end of a named professorship is no different than when a person holding a Chair or Dean appointment steps down from that appointment to resume a regular faculty position. His or her salary then reverts to the appropriate level of compensation. Ex.E,p.2.

(MSJ Brief, at 3).

20. The highlighted portion of Mr. Bell's explanation is particularly important precisely because the Trustees have in fact established a policy respecting the situation in which a faculty member, having served as a dean or department chair, returns to regular duties as a faculty member – as the Trustees must in order to effectuate a decrease in salary. The policy, Board Policy 435.3, adopted effective January 28, 2016, explains with specificity the process of establishing the amount of salary for faculty members upon leaving administrative positions. Respondent provides no comparable policy statement whatsoever governing a reduction in salary upon the decision not to reappoint a faculty member to a Named Professorship. Moreover, when an administrator returns to faculty, he/she has a change in job function. There is no change in job function, when a Named Professorship is not renewed. Thus, now, Respondent can articulate no basis whatsoever for reducing his salary.

21. The second line of argument urged by Respondent based on its exhibits involves its Exhibit G, the Personnel Action Forms for the relevant academic years relating to Claimant's term of appointment to the Howard Named Professorship. Respondent argues:

> As Mr. Bell fully explained, Claimant's characterization of the stipend associated with the professorship as part of or the same as, his annual compensation is "entirely incorrect." A stipend associated with a named professorship is an additional stipend over and above the normal salary to be paid and, in fact, are funded separately. The

> Personnel Action Forms (PAF's) for Claimant's compensation show one funding code for annual salary (110000) and a separate funding code for the stipend (290245).

(MSJ Brief, at 2-3). Claimant's Personnel Action Forms are attached to the summary judgment supporting brief as Exhibit G.

22. According to Respondent, these forms demonstrate that the additional sum paid as a "stipend"—a term not appearing anywhere on the form itself or in any policy statement or Board Policy provision relating to Named Professorships—is paid from a different account than Claimant's salary. The forms themselves, however, include no coding or explanation consistent with Respondent's assertion. In fact, there are *three* different sums indicated on the Personnel Action Form generated for academic year 8/16/06 to 5/15/07, only one of which Respondent claims is temporary. In fact, the sums that Respondent claims are permanent were drawn from *different* "programs," but again, the document affords no explanation, and the alleged "temporary" salary is drawn from one of the programs that funds the "permanent" salary. Respondent's arguments are post-hoc rationalizations, and not very rigorous at that.

23. What is important about Exhibit G appended in support of Respondent's brief supporting summary judgment is that the total sum of the salary numbers set out in the preceding paragraph are reported as Annual Salary on each Personnel Action Form included in the exhibit under "6.) Proposed Status."

24. Also of significance is the fact that on the Personnel Action Form for academic year 2005-2006, Claimant's Position Title, also listed in "6.) Proposed Status, is "Professor of Law." This was the first year of Claimant's appointment to serve as a Named Professor, as Mr. Bell noted in his letter to undersigned counsel. Thus, after awarded the Named Professorship, Claimant remained a Professor for an additional year. Subsequently, he was recognized as an expert [cite rule language] and permanently designated a Distinguished Professor.

25. For subsequent academic years, 2006-2007, 2007-2008, 2008-2009. And 2009-2010, respectively, Claimant's Position Title is "Distinguished Professor of Law." (MSJ Brief, Ex. G).

26. However, the Personnel Action Form for Claimant for academic year 2014-2015 shows that his Position Title was changed from "Distinguished Professor of Law" to "Professor of Law" at some time after he was not reappointed to the named Howard Professorship (Claimant's Ex. B).

27. The change in Claimant's Position Title in the Personnel Action Forms for the year of his appointment to the Howard Professorship to the years in which he held the Howard Professorship, then to the past year of his employment indicate that he has sustained a demotion in his professional titled without being advised of any action taken by the Law School or UALR to do so, and without any apparent authority to undertake such action.

28. Finally, the Judge George Howard, Jr., Named Professorship for which Claimant applied for reappointment, unlike many other Distinguished Professorships at UALR, is not endowed or self-sustaining, according to information supplied by UALR pursuant to Claimant's FOIA request, appended to this response. (Claimant's Ex. D).

29. The Howard Professorship was created and announced by then-Dean Charles Goldner in 2005 and Claimant served as the first faculty member to hold this Named Professorship. (Claimant's Ex. D, Memorandum from Chuck Goldner dated August 29, 2005).

30. The information disclosed by Claimant's FOIA request shows that the Charles Baum, Nadine Baum, Byron Eiseman, and Altheimer Professorships are fully funded, but that the Howard, Arkansas Bar Foundation and Public Policy Professorships are not fully funded with endowed funds, but are termed "not self sustaining." (Claimant's Ex. D, Memo from Patti Bell to Dean Schwartz dated 8/7/2013). Thus, the "not self sustaining" professorships are apparently funded from general revenues available to the Law School.

31. The records disclosed by the FOIA request also show that no appointment to fill the Altheimer Professorship was made by then-Dean DiPippa in 2009, when he declined to reappoint Claimant to the Howard Professorship, even though the

Altheimer Professorship was endowed and "fully funded." (Claimant's Ex. D, Memorandum from John DiPippa dated November 2, 2009).

32. During the most recent reappointment process, current Dean Schwartz did, in fact, elect to fill the Altheimer Professorship, appointing Professor Coleen Barger to this position. (Claimant's Ex. D, Memorandum from Michael Schwartz, Dean, dated June 20, 2014).

33. Thus, while then-Dean DiPippa could have elected to fill the Altheimer Professorship in 2009, which had been endowed and fully funded, he did not do so, even though this position had been left unfilled when Professor Philip Oliver was appointed to serve as the first holder of the Byron Eiseman Distinguished Professor of Tax Law position at the Law School. (Claimant's Ex. D, Memorandum from Chuck Goldner dated August 29, 2005, referencing the change in Professor Oliver's position from holder of the Altheimer Professorship to the Eiseman Professorship). The Altheimer Professorship was not filled by then-Dean DiPippa in the reappointment process conducted in 2009.

34. Further, because the Law School funds three Named Professorships that are not fully funded by endowments, the necessary funding for continuation—without reduction—of Claimant's salary would simply have been provided from the general revenues available to the Law School.

35. Claimant recognizes that his email to then-Dean DiPippa and Professor Oliver, Chair of the Promotion and Tenure Committee, dated August 29, 2009, included as Exhibit D in Respondent's brief in support of the Motion for Summary Judgment, indicates Claimant's own misunderstanding that non reappointment would entail loss of the salary increase earned with the appointment to the rank of Distinguished Professor and his request for clarification of the compensation consequences of the reappointment process.

36. In his email to then-Dean DiPippa, Claimant did refer to the "annual stipend," reflecting his perception of the salary enhancement, a perception likely shared not only by Dean DiPippa, but others involved in the appointment/reappointment process.

37. However, Claimant's understanding of the salary enhancement as an "annual stipend" was not then, and is not now, grounded in any language in the governing policies and UA Trustee Board Policies in place at the time of the reappointment process in 2009.

38. Respondent argues that the reference to "annual stipend" and Claimant's description of the salary enhancement should somehow bar his present claim. In fact, Respondent urges: "Claimant thus new (sic) the stipend was not permanent pay and cannot seriously contend that this stipend is considered part of his annual salary." (MSJ Brief, at 3).

39. The University has consistently misconstrued the language of the rule titled "Award of Named Professorships" to provide that the salary enhancement subsequent to the promotion to the rank of Distinguished Professor is a "stipend," as Mr. Bell states in his letter to undersigned counsel included as Exhibit E to the brief supporting Respondent's Motion for Summary Judgment.

40. Claimant was entitled to the salary enhancement, ordered upon a showing of performance qualifying him for the rank of Distinguished Professor under Board Policy 470.1, as Claimant pointed out in his explanation of the nature of his claim attached as Exhibit A to his original Complaint in this matter, where he stated:

> The Board Policies governing the University of Arkansas system promulgated by the Board of Trustees include a policy addressing the appointment of faculty to Distinguished Professorships. The policy, Board Policy 470.1, does not authorize any reduction in annual compensation for a professor appointed to a Distinguished Professorship. A copy of Board Policy 470.1 is appended to this claim as Exhibit E.

(Complaint, Ex. A, at 5).

41. Claimant's misunderstanding that the Law School policy provided for the enhancement as a "stipend"—shared by Mr. Bell and presumably, then-Dean DiPippa, obviously does not supply legal authority for an otherwise unauthorized reduction in his salary. The *ultra vires* action in reducing Claimant's salary cannot be legally rationalized by the suggestion that the parties misunderstood the

implications of the policy where the policy itself contains no provision authorizing the reduction in salary.

42. In summary, the documents appended to Respondent's brief supporting the Motion for Summary Judgment lead to an opposite conclusion from that argued by Respondent, which claims that its internal accounting documents show that the salary increase that coincided with the granting of Complaint's Named Professorship was temporary because those moneys came from a separate account. However, Respondent's accounting documents actually demonstrate the exact opposite:

A. First, Respondent's documents show that Claimant's salary is all drawn from the same account, and the money for some, but not all of the salary, come from the same "program" source as the increase incident to the Named Professorship. Respondent has pointed to no portion of its own internal documents that provides any explanation as to why Respondent believes that part of the salary is permanent and only one is temporary. Indeed, no such designation appears anywhere on Respondent's own forms.

Respondent's fantastic claim of temporary status of salary, with no documentation whatsoever, is not only incredible, it's not the province of summary judgment. Respondents own assertions demonstrate that they have made an issue

of material fact with the assertion that a portion of faculty salaries is somehow (without writing) only temporary.

B. Second, while the forms in no way designate any portion of the income as a stipend, temporary or otherwise, they all clearly state the the *total* amount provided -- from *all* three accounts -- is all "salary." It is axiomatic that salary is not a stipend, and a government salary cannot be reduced at an administrator's whim, due to his personal animus.

C. Third, the first form shows the salary that includes what Respondent calls a stipend is associated with the title "Professor of Law" -- *not* with the later status granted concomitant with the Named Professorship – that of "Distinguished Professor of Law." The importance of this admission by Respondent cannot be gainsaid. According to Respondent's own documents, Claimant received the so-called stipend before he was designated Distinguished Professor of Law, demonstrating three independent events: the award of the Named Professorship, the designation of Distinguished Professor, and the salary increase.

43. Respondent argues: "It is *axiomatic* that when the responsibility associated with that stipend ends, so does the additional payment." (MSJ Brief, 3, emphasis added). Reference to an *axiomatic* principle or rule is typically relied upon by counsel when there is no authority that exists to support the proposition asserted.

44. There is no authority for the proposition that the decision not to reappoint Claimant to the Howard Professorship, a Named Professorship, simultaneously required a loss of "additional payment" once "the responsibility associated with the stipend ends." In fact, that was no express definition of any specific responsibility associated with the Howard Professorship. (Claimant's Ex. C). Claimant earned the rank of Distinguished Professor by exhibiting the standards of performance required for this rank, yet it was subsequently arbitrarily removed and he was essentially demoted, resulting in the loss of salary he earned with the appointment.

45. As Mr. Bell pointed out in his letter: "It has never been stated or implied that Professor Sullivan is not qualified for the professorships." (MSJ Brief Ex. E). But Mr. Bell was incorrect in subsequently claiming:

> Plain and simple, Dean DiPippa has not reduced Professor Sullivan's compensation; rather, Professor Sullivan has ceased to hold the additional duties of a named professorship and is now being paid his appropriate faculty salary.

(MSJ Brief Ex. E). In fact, there were no additional duties associated with the Howard Professorship and Claimant's performance has remained consistent high with the level of performance warranting his promotion to the rank of Distinguished Professor and qualifying him to serve as the initial holder of the Howard Professorship. Respondent has not alleged otherwise.

II.

CLAIMANT'S CLAIM IS NOT BARRED BY THE FIVE YEAR STATUTE OF LIMITATIONS APPLICABLE TO CONTRACT ACTIONS.

46. Respondent's statute of limitations argument rests on the argument that Claimant failed to bring this claim within five years of the initial contract period when he suffered the loss of salary as a result of the decision not to reappoint him to serve as the Judge George Howard, Jr., Distinguished Professor of Law.

47. Claimant was notified that he would not be reappointed to the Named Professorship in November, 2009, but suffered no loss in terms of salary reduction until the commencement of the 2010-2011 academic year. Prior to that point in time, then-Dean DiPippa could have determined that the loss of the Named Professorship did not require, nor permit the reduction in Claimant's salary or loss of the rank of Distinguished Professor to which Claimant had been appointed.

48. Claimant recognizes that the five year limitations period would have run in a an "ordinary contract" action on the date when the last act essential to establishing the breach occurs, as the Court explained in *Smith v. Eisen*:

> In *ordinary* contract actions, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action.

97 Ark. App. 130, 140, 245 S.W.3d 160, 169 (2006) (emphasis added); *accord, Oaklawn Bank v. Alford,* 40 Ark.App. 200, 845 S.W.2d 22 (1993); *Dupree v. Twin City Bank,* 300 Ark. 188, 777 S.W.2d 856 (1989).

49. Respondent argues: "Here, the alleged repudiation of the contract occurred when Claimant received notice that he had not been selected for reappointment to the professorship on November 2, 2009. Ex. C." (MSJ Brief, 5).

50. This is not an "ordinary contract." Instead, Respondent, the University, has defined the contract under which Claimant's employment as a faculty member with the University is governed as a one year contract that is subject to renewal for tenured faculty. Board Policy 405.1. IIA provides:

> General
>
> Appointments shall be for a specified period of time not to exceed one fiscal year. Except for appointments to faculty positions for summer school, appointments shall not extend beyond the end of a fiscal year.

UA Trustees Board Policy 405.1 IIA.

51. Board Policy 405.1 IIC provides, with respect to tenured faculty, a presumption or right to successive appointments:

> Successive Appointments
>
> Tenured faculty members have a right to a next successive appointment except for the reasons for termination of a tenured appointment given in Section I under definition of tenure. Non-tenured faculty do not have a right to a next successive appointment, but may be offered an appointment after the expiration of a current appointment, provided it does not extend the time in probationary

status beyond the limits set in Sections IV.A.4 and IV.A.11. In the event that a non-tenured faculty member is not recommended for reappointment, the procedure described in Section IV.B. shall be followed.

Criteria and procedures for successive appointments of all faculty members on a campus shall be adopted by the faculty of that campus through its governance structure; the deans and chief academic officer of the campus shall have an opportunity to give their advice regarding these criteria and procedures; these criteria and procedures must be submitted to the Chancellor of the campus and the President for approval. More detailed criteria and procedures may be adopted by the faculty and chairperson of each academic unit; these criteria and procedures must be submitted to the dean, the chief academic officer of the campus, the Chancellor of the campus, and the President for approval.

UA Trustees Board Policy 405.1 IIC

52. Pursuant to the Definitions provisions included in Board Policy 405.1 I, an "Appointment" is defined as:

Appointment - An appointment is *employment by written contract ("Notice of Appointment") by the Board of Trustees of an individual in a given capacity for a specified time period at a stated salary.* An appointment is valid only when the appointment form is approved and signed by the President of the University or the President's designee in accordance with authority delegated by the Board of Trustees, and the Notice of Appointment is signed by the individual being appointed and returned to the specified University official.

"Tenure" is defined:

Tenure - Tenure is the right of continuous appointment. It is awarded by the President to eligible members of the faculty upon successful completion by each of a probationary period and, once granted, it ceases to exist only by dismissal for cause according to the procedures in Section IV.C., demonstrably bona fide financial exigency, reduction or elimination of programs, retirement, or resignation.

> "Cause" is defined as conduct which demonstrates that the faculty member lacks the ability or willingness to perform his or her duties or to fulfill his or her responsibilities to the University; examples of such conduct include (but are not limited to) incompetence, neglect of duty, intellectual dishonesty, and moral turpitude. The probation period may be waived as provided in Section IV.A.4. NOTE: Tenured faculty holding positions eliminated by reduction or elimination of programs will be relocated in other academic units of the campus whenever possible. A position occupied by a tenured faculty member which was eliminated as a result of reduction or elimination of a program may not be reactivated for a period of five academic years.

UA Trustees Board Policy 405.1 I (emphasis added).

53. Thus, the University operates on a system of annual contracts for tenured faculty, who enjoy a right of continuous appointments, with renewal of the contract each year unless the faculty member is dismissed for cause. This is not an "ordinary contract," and the faculty member is employed to serve in successive, one-year contracts.

54. Respondent argues:

> Claimant's creative argument that the clock began running anew each year his contract did not reflect the additional pay, is nowhere supported in the law and would defeat the very purpose of the statutes of limitations. Moreover, the University policies cited by Claimant do not establish that he had a yearly contract, but rather that he enjoyed continual appointment as a tenured faculty member. Thus, his argument that each yearly "appointment" without the stipend constituted a new contract, and thus a new breach of that contract, is not founded on proper facts or interpretation of the laws on limitations.

(MSJ Brief, 5-6).

55. In fact, it is the "creative" approach to contracts with faculty members expressly adopted by the UA Board of Trustees that distinguishes this action from one involving an ordinary contract, a "proper fact or interpretation" that Respondent ignores in failing to address the express language used by the University itself in Board Policy 405.1. IIA General: "Appointments shall be for a specified period of time not to exceed one fiscal year."

56. The argument that the limitations period was triggered by the decision not to reappoint him to the Howard Professorship in November, 2009, or Associate General Counsel Bell's 2010 letter in October, 2010, advanced by Respondent, also ignores the fact that there was no annual contract in effect for any year following these dates until the previous annual contract had been completed. The annual contract rule promulgated by Respondent's governing body, the University of Arkansas Board of Trustees, unequivocally establishes that the breach of the agreement occurs in each successive year of Claimant's employment. Otherwise, Claimant could never prove a prospective loss based on the breach because he would not be operating under the annual contract until the previous year's contractual obligations had been fulfilled and the contract completed.

57. The Arkansas Court recognized this exception to the usual or "ordinary" contract action in *Zufari v. Architecture Plus*, a decision referenced by Respondent in its brief. There, the Court explained:

> In routine contract actions, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action. *Hunter v. Connelly,* 247 Ark. 486, 446 S.W.2d 654 (1969). The test for determining when a breach of contract action accrues is the point when the plaintiff could have first maintained the action to a successful conclusion. *Dupree v. Twin City Bank,* 300 Ark. 188, 777 S.W.2d 856 (1989). We stated in *Dupree:*
>
>> As we stated on the question of statute of limitations for contracts, a cause of action "accrues the moment the right to commence an action comes into existence." *Hunter v. Connelly,* 247 Ark. 486, 446 S.W.2d 654 (1969). And if the right of action depends upon some contingency or condition precedent, the cause of action accrues and the statute of limitations begins to run when the contingency occurs or the condition precedent is complied with.
>
> 300 Ark. at 191, 777 S.W.2d at 858.

323 Ark. 411, 420, 914 S.W.2d 756, 761 (1996).

58. Claimant could not have maintained an action based on losses due to the breach of contract for contracts not having come into existence prospectively. The successive contract rule, expressly limiting faculty contracts to one year, annual obligations for employment, precluded Claimant from establishing prospective loss, with the rule operating to create completion of one annual contract as a condition precedent to the creation of the following year's annual contract.

59. Thus, Claimant's claim for breach of contract is predicated on each annual contract reflecting loss of salary for that specific contract. This principle precludes recovery, of course, for a breach having occurred in the annual contract for an academic year outside the five-year limitations period, such as 2010-2011, as

Claimant concedes. The New York court, in *Airco Alloys Division, Airco Inc, v. Niagara Mohawk Power Authority*, explained this application of limitations to situations involving successive contracts under that state's six year statute:

> The general rule applicable to contract actions is that a six-year Statute of Limitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation (State of New York v. Fenton, 68 A.D.2d 951, 414 N.Y.S.2d 58; 18 Williston on Contracts (3d ed.), s 2021A, p. 697). *However, where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit.*

430 N.Y.S.2d 179, 186 (Sup. Ct. App. Div.1980) (emphasis added); accord, *Barker v. Jeremiasen*, 676 P.2d 1259, 1261-62 (Colo. App. 1984); *Indian Territory Illuminating Oil Company v. Rosamond*, 120 P.2d 349 (Okla. 1941) ("The rule is that a breach of a continuing covenant gives rise to a cause of action each day the breach continues, and any claim for breach back of the statutory period within which the action may be brought is barred. The reason for the rule is that while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach, but accrues and the statute begins to run as and when each breach occurs.").

60. Thus, due to the nature of the University policy limiting employment contracts for faculty to annual, renewable contracts only for faculty, Claimant's recovery is limited to the most recent five year annual contracts based on

Arkansas' five year limitations period.

61. Claimant's "creative argument" is supported by Respondent's own summary judgment evidence, the Personnel Action Forms, created for the contract governing each annual year of Claimant's employment, submitted in support of its brief as Exhibit G. Each form for the annual contract governing the coming year reflects changes in salary under the new contract, as well as an indication of Claimant's rank for academic years 2006-2007, 2007-2008, and 2008-2009.

62. Claimant is entitled to recover lost salary for the academic years 2011-2012, 2012-13, 2013-2014, 2014-2015, and 2015-2016, based on the filing of his claim with the Commission on June 29, 2016, within the fifth year of the contract breached by the University on an annual basis following his non-reappointment to the Howard Professorship in 2009, resulting in breach of his contract for 2010-2011.

CONCLUSION

Respondent has failed to demonstrate that it is entitled to judgment as a matter of law based on the controlling rules of law and matters of fact. The Motion for Summary Judgment should be denied.

Respectfully submitted this 21st day of September, 2016.

Mark F. Hampton
AR850666
1122 West Capitol Avenue
Little Rock, Arkansas 72201
(51)376-6277

and

J. Thomas Sullivan, Claimant
AR2006019
1122 West Capitol Avenue
Little Rock, Arkansas 72201
(51)376-6277

CERTIF'ICATE OF' SERVICE

I hereby certify that a copy of the foregoing Response to the Motion for Summary Judgment has been served on Counsel for Respondent, Sarah James, by mailing same, first class postage paid, to her office address: Sarah James, Associate General Counsel, University of Arkansas, 2404 North University Avenue Little Rock., AR 7 2207 on September 21, 2016.

Mark F. Hampton

Arkansas
State Claims Commission
SEP 14 2016
RECEIVED

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

J. THOMAS SULLIVAN CLAIMANT

vs. No. 17-0020-CC

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK RESPONDENT

RESPONDENTS' REPLY TO RESPONSE TO
MOTION FOR SUMMARY JUDGMENT

I. Claimant never suffered a "reduction of his salary" and there was no breach of contract

In his Response to Respondent's Motion for Summary Judgment, the Claimant continues to cling to his incorrect assertion that the loss of the extra pay associated with the Judge George Howard Professorship constituted a "reduction of his annual salary" and that Respondent acted "ultra vires," or outside its authority, when this pay was "removed." Claimant bases much of his ultra vires argument on the fact that the law school policy governing the award of professorships (Ex. B to Respondent's Motion for Summary Judgment) does not specifically address the matter of the associated pay, and thus Respondent's actions constituted an unauthorized reduction of his salary and a breach of his employment contract. Just because Claimant says that the pay associated with his professorship constituted part of his "salary" does not make it so.

Claimant alleges that the detailed, explanatory letter to his attorney from Jeff Bell, attached as Exhibit E to Respondent's Motion, is not evidence, but merely Mr. Bell's "personal opinion and argument." Response, p. 8. He states this despite his agreement with, and recitation of, much of the same facts in his narrative complaint that Mr. Bell recites in his letter explaining UALR's position regarding the compensation. In the "summary of facts" section of his initial complaint, Claimant acknowledges that after he was not re-awarded the professorship, he met with then Dean John DiPippa and Chancellor Joel Anderson in the spring of 2010 to discuss why

he was not reappointed and, in addition, to address the "removal" of the pay associated with the professorship. He states that DiPippa explained to him that the pay was a "stipend that essentially expired as a result of the termination of the appointment and non-reappointment." Complaint narrative, pp. 3, 4. Chancellor Anderson concurred with this explanation. Id.

Attached as Exhibit 1 is an affidavit from former Dean John DiPippa. DiPippa too recalls the meeting and his discussion with Sullivan and Anderson. Ex. 1, para 6. As Claimant concedes, DiPippa explained to Claimant at that time that the monetary award from the professorship expired at the end of the four-year term. The extra compensation is not part of the employee's salary but, rather, compensation separate from, and over and above, annual salary. Id. As DiPippa further points out, Claimant's argument that because the named professorship policy is silent on the issue of compensation, the "removal" of the pay was unauthorized, is refuted by the very language and common sense application of the policy itself. In the final paragraphs, the policy sets forth how the "available monetary awards" for the professorships should be used in the event no recipients are named in a particular year. Ex. A to Ex. 1. The language clearly indicates that the professorships are tied to a specific and limited monetary award. Obviously, when the professorship term ends, so would the monetary payment. It is illogical and disingenuous to argue that, although Claimant knew the professorship he was awarded carried a limited term of four years, he had an expectation that the compensation for that award would become a permanent part of his base salary. Ex. 1.

Claimant argues that Respondent has "ignored" Board Policy 470.1. (Ex. E to Claimant's Response). This policy addresses only general criteria to be considered by University campuses in appointing faculty to the *rank* of distinguished professorship. It does not govern the designation of the named professorships here. Moreover, as Claimant notes, it does not contain

any language about terms and length of appointment, pay, or anything at all about the details of such appointments – simply that certain criterion should be used in recognizing this distinction. Clearly, the only applicable policy here is the law school's own policy for named professorships.

Further and very compelling evidence that Claimant's "salary reduction" argument is unfounded comes from his own admission in an email to DiPippa and Phil Oliver. In the email, Claimant acknowledges that the Howard professorship "carries an annual stipend of $10,000." He goes on to state: "Anyway, I assume that each professorship carries some additional compensation and wonder whether we can expect to find our compensation cut if the professorships are not announced until the fall term *and current holders are not renewed*, whether the compensation will be cut with the beginning of the next annual pay period…or whether we will be entitled to compensation for the entire 2009-2010 academic year." Response, p. 15; Ex. F to Respondent's Motion. He now claims that he was laboring under a "misunderstanding," and that it is Respondent who has mischaracterized his professorship pay. However, the email could not be clearer. Claimant knew and understood that the payment was not a permanent salary increase, but a stipend, contingent upon his retention of the professorship.

In addition, the Personnel Action forms (PAF) show that Claimant's salary was never affected. Claimant asserts that the PAF's submitted with Respondent's motion are not supported by explanation as to the funding sources of his compensation. Attached to this Reply is the Affidavit of Robert Fleming (Ex. 2). Mr. Fleming is the Budget Director at the Bowen School of Law. Fleming explains that for the 2005/06 nine-month pay period, Claimant's compensation sources were changed to reflect the new monetary award. Prior to receiving the award, the PAF shows compensation only for annual salary, designated by "fund" code 110000. There are two rows reflecting payment from this code because faculty is compensated for two components of

teaching – instruction and research. These two components are represented by two different "program" codes. Ex. 2, para. 6, 7.

After Claimant received the professorship award, the form was changed to add the new compensation. Each professorship receives its own unique funding code. The fund code for the Howard Professorship is 290245. Id. Mr. Fleming attests: "[Professorship] funding comes solely from private monies. *Compensation for a professorship is not part of the employee's annual salary*, but rather is compensation over and above the current base salary and is derived from a different funding source; therefore, it receives a separate funding code from that denoting an educational and general based salary (110000)." Ex. 2, para. 7 (emphasis added).[1] When the four-year term concluded and Claimant was not reappointed, Fleming states, his compensation returned to his normal salary amount. Ex. 2, para. 9. Lastly, Fleming states that calculations for an employee's merit or cost of living increases are based on the base salary amount, but not on additional compensation like the professorship award money. Ex. 2, para. 109. This is because the two sources are separate and unrelated. Claimant has, in fact, received all appropriate and allowable raises to his base salary. Id.

All of the foregoing shows that, far from being "post-hoc rationalizations" or "fantastic" unsupported assertions, as Claimant argues, the simple and undisputed evidence is this: Claimant applied for and received the designation of a named professorship, the terms of which were governed by the law school's Named Professorship policy and which limited the professorship to a four-year period. He was paid a stipend, funded by private monies, and designated by the school specifically for holders of the Howard Professorship. At the end of the

[1] Claimant has asserted that because the professorship shares a "program" code with the instruction component of his salary, the funding must derive from the same source. This is inaccurate. Program codes, as Fleming explains, are simply categories for use in Department of Higher Education's tracking and reporting purposes. They do not indicate sources of funding. Ex. 2, para. 6.

term, as was required, Claimant reapplied for the professorship, but was not selected. The Howard professorship designation, along with its monetary award, went to the next chosen recipient. Claimant's compensation then returned to his normal annual salary amount. He never suffered any reduction or removal, whatsoever, of his annual salary.

Respondent followed the governing policy in this case – the school's established procedure for the "Award of Named Professorships." Claimant availed himself of the opportunity afforded under this procedure and applied for and received the award. He cannot now complain that Respondent failed to follow appropriate policies. Respondent has submitted documentary evidence and affidavits from the appropriate school officials establishing that appropriate procedures were followed for the award and termination of the professorship, and Claimant's salary was never reduced or compromised in any way. The terms of the named professorship had nothing to do with the terms and compensation under Claimant's employment contract as a Bowen School of Law faculty member, and, therefore, there was no breach of Claimant's employment contract.

II. The applicable statute of limitations bars Claimant's Claim

Citing several state court cases from other jurisdictions, Claimant argues that the "successive contract rule" allows the clock to begin running anew each year his employment contract is renewed. The plain and short answer to this argument is that, as explained above and in Respondent's previous motion brief, the award of the named professorship and associated stipend had nothing to do with the terms and payment of his annual salary under that contract. Thus, even assuming, for purposes of argument, that Claimant's employment is governed by a one-year contract, and that the "successive contract" limitations argument applies to breaches of that employment contract, it is irrelevant because the non-award of the professorship and

"removal" of the stipend does not implicate his annual employment contract. There was no "loss of salary" under that contract and thus no breach.

The New York state court case cited by Claimant provides for the running anew of the limitations period where "a contract provides for continuing performance over a period of time." Response, p. 26. As stated above, the alleged "breach" here, the non-award and removal of the professorship stipend, does not involve the ongoing terms or performance of Claimant's employment contract. Nor can the argument be made that the award of the professorship constituted a "contract" which provided for continuing performance past the four-year term of duration which would allow the continuous restart of the limitations period. Rather, the professorship ended in 2009. This date is the first instance when Claimant had notice that he would not be reappointed to the professorship and thus no longer be paid the monetary award, and this is when he must have brought his claim. It is this date, almost seven years ago, that is the date of the "breach" for purposes of determining the limitations period. Claimant's complaint is time barred.

There are no factual disputes remaining for the Commission's consideration. Respondent respectfully requests that the Claimant's Complaint be dismissed.

Respectfully submitted,

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK, Respondent

By: 

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University of Arkansas
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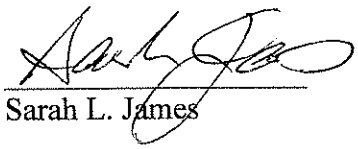
CERTIFICATE OF SERVICE

I, Sarah James, do hereby certify that a copy of the foregoing pleading has been served on claimant herein by mailing a copy of same, by U.S. Mail, postage prepaid, this 14th day of September, 2016, addressed to the following:

Mark F. Hampton
1122 W. Capitol
Little Rock, AR 72201



Sarah L. James

STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim $ 56,375.00

Claim No. 17-0020-CC

J. Thomas Sullivan
Claimant

Attorneys Mark F. Hampton, Attorney
Claimant

vs.

U of A Little Rock
Respondent

Sarah James, Attorney
Respondent

State of Arkansas

Date Filed July 14, 2016

Type of Claim Breach of Contract

FINDING OF FACTS

After reviewing the Respondent's "Motion for Summary Judgment and to Dismiss Claimant's Complaint" and the Claimant's response to that pleading, the Claims Commission hereby unanimously grants the Respondent's "Motion for Summary Judgment and to Dismiss Claimant's Complaint" due to the fact that the claim does not constitute a breach of Claimant's employment contract, and the fact that this claim is barred by the five-year statute of limitations. Therefore, this claim is denied and dismissed.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

The Claims Commission hereby unanimously grants the Respondent's "Motion for Summary Judgment and to Dismiss Claimant's Complaint." Therefore this claim is denied and dismissed.

Date of Hearing October 13, 2016

Date of Disposition October 13, 2016

Henry C. Fordham
Chairman

Bill Lancaster
Commissioner

Commissioner

**Appeal of any final Claims Commission decision is only to the Arkansas General Assembly as provided by Act #33 of 1997 and as found in Arkansas Code Annotated §19-10-211.

Arkansas
State Claims Commission
NOV 22 2016
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BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

J. THOMAS SULLIVAN,	§	
Claimant,	§	
	§	
v.	§	NO. 17-0020-CC
	§	
STATE OF ARKANSAS,	§	
UNIVERSITY OF ARKANSAS	§	
AT LITTLE ROCK,	§	
Respondent.	§	

MOTION FOR RECONSIDERATION

TO THE ARKANSAS CLAIMS COMMISSION:

J. THOMAS SULLIVAN, Claimant, through his counsel of record herein, MARK F. HAMPTON, Attorney at Law, respectfully moves for reconsideration of the Commission Order granting summary judgment in favor of Respondent UNIVERSITY OF ARKANSAS AT LITTLE ROCK, an agency of the STATE OF ARKANSAS. The Commission's Order was entered on October 13, 2016, and, pursuant to Commission Rule 7.1, this motion is timely if filed within forty days of the order, or November 22, 2016.

Claimant urges two points in moving for reconsideration of the Commission's holding denying relief on his claim. The first reconsideration point addresses the substantive question involving the terms of his employment agreement with Respondent UALR; the second addresses the application of the five year statute of limitations for contract actions under Arkansas law.

ARGUMENT AND AUTHORITIES

I.

SUMMARY JUDGMENT WAS NOT PROPER BECAUSE THE PLEADINGS AND SUPPORTING EVIDENCE DID NOT RESOLVE EVERY ISSUE OF MATERIAL FACT REQUIRING RESOLUTION BY HEARING BEFORE THE COMMISSION.

1. Denial of the claim rests on the Commission's finding "that the claim does not constitute a breach of Claimant's employment contract." [State Claims Commission Docket Opinion, issued October 13, 2016].

2. Summary judgment on the question of the terms of Claimant's employment contract was inappropriate because the question of the terms of the appointment to the Judge George Howard, Jr., Distinguished Professorship involve undecided issues of material fact rendering the summary judgment remedy unavailable.

3. Rule 56(c) of the Arkansas Rules of Civil Procedure, which governs process in a proceeding before the Claims Commission, Rule 8.1, provides, in pertinent part:

> (2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that *there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law* on the issues specifically set forth in the motion. (emphasis added).

4. Here, the Respondent has failed to demonstrate that there is "no genuine issue as to *any* material fact," because Respondent is unable to produce any written

provision of the rule adopted by the Bowen Law School faculty governing Distinguished Professorships—"Award of Distinguished Professorships"—included by Respondent in its summary judgment evidence [MSJ, Ex. B], that provides that the nonrenewal, or non-reappointment, to a Distinguished Professorship results in loss of compensation originally awarded upon an initial appointment to a *named* professorship, such as the Howard Professorship.

5. Claimant does not contest that the term of appointment for the Howard Professorship is four years, for instance. That limitation is made clear in the Award of Named Professorships rule adopted by the Law Faculty.

6. But the Award of Named Professorships rule does not expressly provide for reduction in compensation that has been increased as a result of the merit bonus awarded a recipient of a named professorship subsequently not reappointed, as in Claimant's case. Instead, the rule only provides:

> With or without a recommendation from the Promotion and Tenure Committee on the use of monetary awards as a merit bonus, the Dean may allocate the available monetary awards as a merit bonus among those recommended until named designations are available for each candidate or the earlier expiration of the four year period for the designations sought to be made. The awarding of named professorships may occur in any semester.

7. No written description of the Howard Professorship was forthcoming when the initial appointment was announced by then-Dean Charles Goldner in 2005. There was no accompanying provision relating to the specific terms of the

professorship regarding salary consequences in the event Claimant, the initial appointee, was not reappointed to at the conclusion of the four-year term of appointment.

8. Respondent's position is that because Claimant "understood" that nonrenewal of his appointment would result in diminution of his annual compensation in the amount of the salary enhancement attending the holding of the Distinguished Professorship, there was no breach of contract when his salary was reduced by that amount following non-reappointment for the 2010-2011 academic year. *See* Respondent's Brief in Support of Motion for Summary Judgment, at 5; and Respondent's Reply to Claimant's Response, at 3.

9. Respondent at no point referenced any language in the Award of Named Professorships authorizing reduction in salary based upon nonrenewal of Claimant's named professorship. In fact, then-Dean DiPippa admitted in his affidavit, offered in support of Respondent's Reply to Claimant's summary judgment response that the controlling rule did not expressly provide for reduction in compensation:

> 6. Following the announcement of the awards in 2009, at Professor Sullivan's request, I met with him, along with UALR Chancellor Joel Anderson. We discussed the selection process and the reasons for the decision of non-reappointment. *I also explained to Professor Sullivan that the monetary compensation associated with the award necessarily expired when the term of the award expired. I further explained that the monetary award is, in essence a stipend that ceases*

with the holding of the professorship and is separate compensation over and above the faculty member's annual salary.

7. *Although the policy governing the professorships does not specifically address the fact that the compensation ceases with the expiration of the four-year term*, the policy does address how the "available monetary awards" should be used in the event named designations are withheld in a particular year. Ex. A In other words, each professorship is tied to a finite monetary award which logically implies a cessation of that award when the recipient's professorship expires. *To establish a limited term for the award of the professorship, but make the stipend associated with that award permanent, would be illogical and contrary to the intent of the policy.* In addition, the professorships are paid from private monies, which are limited. *Continued payment to Professor Sullivan would tie up the limited funding available for that particular professorship and preclude the school from being able to offer any monetary compensation.*

See Affidavit of John DiPippa, supporting Respondent's Reply to Response to Motion for Summary Judgment, Ex. 1. (emphasis added).

10. Commission Rule 7.1 authorizes the filing of the motion for reconsideration only if there is evidence not previously available to the losing party "at the time of the scheduled hearing." In this case, of course, there was no hearing conducted, nor even scheduled, as the case was decided on the summary judgment motion and supporting evidence.

11. Here, the DiPippa affidavit raises a number of unresolved issues of material fact precluding summary judgment. Not only did he admit that the Rule regarding Award of Named Professorships did not specifically refer to reduction in monetary compensation, he made the claim that had Claimant not suffered the reduction in

compensation, there would not have been sufficient funding to provide for continuing support for the Howard Professorship. He specifically testified:

> *Continued payment to Professor Sullivan would tie up the limited funding available for that particular professorship and preclude the school from being able to offer any monetary compensation.*

See DiPippa affidavit, at ¶ 7. This statement references a material issue of fact regarding the availability of law school resources sufficient to maintain the "salary" reported for Claimant Sullivan on the Personnel Action Forms previously offered by Respondent in support of its summary judgment motion. *See* Respondent's Motion for Summary Judgment, Ex. G.

12. The Statement by then-Dean DiPippa indicates that the reduction in Claimant's salary was necessitated by lack of availability of funds to maintain the level of salary indicated by the Personnel Action Forms. The assertion that the Law School did not have sufficient funds to provide both enhanced compensation for the successor holder of the Howard Professorship, while maintaining Claimant's salary level, indicates that the decision to reduce Claimant's annual salary, or compensation was not mandated by policy, as DiPippa claims in ¶ 6 of his affidavit, but by funding considerations. This representation reflects an issue of fact, whether there were sufficient fiscal resources for the Law School to continue funding Claimant Sullivan's salary at the levels reflected on the Personnel Action Forms for academic years 2005-2009, such that discretionary action by Dean

DiPippa to reduce his compensation was not only unauthorized by the controlling rule, but not justified by the Law School's fiscal situation at the time the reduction was ordered.

13. Not only does the Law School rule governing Award of Named Professorships not authorize the action taken by then-Dean DiPippa in reducing Claimant's compensation, but Respondent ignored the lack of any language in any UA Board of Trustees Board Policy cited by Claimant relating to faculty status authorizing any reduction in salary upon a decision not to reappoint the faculty member to a Named Professorship previously held. Instead, Respondent simply argued that Board Policy 470.1, governing the general criteria for award of distinguished professorships; Board Policy 405.5, governing retrenchment; and Board Policy 405.1, Sec. IV(A)(12) and (C), governing range of sanctions that may be imposed for discipline of faculty, do not apply to the issue raised by Claimant. *See* Respondent's Reply to Response to Motion for Summary Judgment, at 2-3. But, it does not apply precisely because it contains no language authorizing reduction in compensation when the holder of a distinguished professorship is denied reappointment.

14. Arkansas law authorizes disposition by summary judgment only when the movant can show that there is no unresolved issue of material fact and that they are

entitled to judgment as a matter of law. In *Wagner v. General Motors, Corp.*, 370 Ark. 268, 271-72, 258 S.W.3d 749, 753 (2007), the supreme court explained:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Danner v. MBNA America Bank, N.A.*, 369 Ark. 435, 255 S.W.3d 863 (2007). The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. *A fact issue exists, even if the facts are not in dispute, if the facts may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law.* In such an instance, summary judgment is inappropriate. *Id.*
>
> *We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. Id.* The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *Lamar Advantage Holding Co., Inc. v. Arkansas State Highway Comm'n,* 369 Ark. 295, 253 S.W.3d 914 (2007). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

15. Here, there is an unresolved issue of material fact—whether the Law School was so close to being broke that it was necessary to reduce Claimant's annual salary, as stated on the Personnel Action Forms relied on by Respondent as a exhibits in support of its summary judgment motion—that the reduction in Claimant's annual compensation was necessary to permit the Law School to continue to fund the Howard Professorship.

16. This unresolved issue of material fact, undermines the assertion that reduction in Claimant's annual salary, or compensation, was integral to a logical intent of the policy.

> *[t]o establish a limited term for the award of the professorship, but make the stipend associated with that award permanent, would be illogical and contrary to the intent of the policy.*

See DiPippa affidavit, at ¶ 7. This is not a statement of uncontested fact, but the self-serving declaration of then-Dean DiPippa in justifying his decision to reduce Claimant's annual salary. This is evident in the fact that, as Claimant argued in his Response to the summary judgment motion, the University itself creates a rank of distinguished professor which is awarded based on a faculty member's achievement. There was no suggestion in the Respondent's argument that Claimant had somehow failed to maintain the level of achievement that warranted his appointment both to the named professorship and promotion to the rank of distinguished professor.

17. Further, the affidavit of Robert Fleming offered by Respondent in support of its Reply to Claimant's Response to the summary judgment motion, itself, undermines the credibility of then-Dean DiPippa's claimed basis for his decision not to reappoint Claimant to the Howard Professorship. Affiant Fleming, in discussing the source of funding allocations in the Personnel Action Forms offered by Respondent in support of its summary judgment motion, explained that the

salary set for an individual faculty member reflects two different components, the first for teaching responsibilities, the second for research or scholarship activities: next fiscal year printed budget book that are needed,

> 5. The PAF for Professor Tom Sullivan, attached as Ex. A, indicates a change in funding source was needed for the period of min-August 2005 to mid-May 2006. This was because Professor Sullivan was awarded the Judge George Howard professorship for: a four-year term beginning that year. Thus, the PAF was amended in #6, proposed status, to 1eflect this additional monetary compensation.
>
> 6. The "Fund" code, 1 10000, denotes an educational and general fund source. There are two separate amounts for this Fund Code because most faculty employee salaries are divided into two components: an instructional component and a research component. The program code 40 I I00 denotes instructional, and "Program" code 411000 denotes research. "Program" codes are simply functional categories used by the higher education accounting profession to help track various expenses for reporting purposes. They do not indicate sources of funding. *The Howard Professorship is more a function of teaching than research so it is placed in the category of instruction. Normally, these are the only two components (categories/programs) of a Bowen School of Law faculty member's annual nine-month salary.* The two annual salary components are reflected in #7 of Exhibit A.

See Affidavit of Robert M. Fleming, attached to Respondent's Reply, Ex. 2 (emphasis added).

18. Thus, according to the Law School's chief financial officer, Robert Fleming, testified that the Howard Professorship was "more a function of teaching than research" in explaining how the annual salary noted on the Personnel Action Forms offered as exhibits to the brief supporting Respondent's summary judgment motion.

19. However, Respondent had earlier offered the letter addressed to Claimant's counsel by former Assistant University Counsel Jeff Bell in support of its summary judgment motion. In responding to Claimant's counsel's request for explanation for the reduction of Claimant's salary. *See* Brief in Support of Motion for Summary Judgment, Ex. E.

20. Mr. Bell offered the following explanation for then-Dean DiPippa's decision not to reappoint Claimant to the Howard Professorship:

> Dean DiPippa stated that there was not much separation in the P&T recommendations for Sullivan and Terry Beiner, but that he had decided that Beiner should be awarded the final professorship because of her national reputation in her field, which was one of the criteria mentioned in the "Award of Named Professorships". It has never been stated or implied that Professor Sullivan is not qualified for the professorships. He was simply not determined to be as qualified as the four recipients who were chosen.

The explanation for the decision not to reappoint Claimant to the Howard Professorship was, according to University Counsel, the national reputation of another faculty member, a function of scholarship and research. This explanation offered by University Counsel based upon then-Dean DiPippa's own explanation for his decision not to reappoint Claimant, is contrary to the explanation offered by Mr. Fleming.

21. At no point has Respondent offered any written description of the parameters of the Howard Professorship and the assertions made by Mr. Fleming in his affidavit and University Counsel Bell are apparently simply based upon their

assumptions about the professorship, demonstrating an unresolved question of credibility in the testimony offered by Respondent in support of its summary judgment position.

22. Finally, Rule 56(c)(1) of the Arkansas Rules of Civil Procedure, which governs process before the Claims Commission except where specifically noted, pursuant to Commission Rule 8.1, does not authorize a further pleading by the party resisting summary judgment once the movant files their reply to the non-movant's response. The facts relied on by Claimant in this request for reconsideration are based on affidavits filed by Respondent in support of its Reply and were not previously available or know to Claimant in filing his Response. Consequently, the arguments advanced herein are new and fact-based, as required by Commission Rule 7.1.

II.

APPLICATION OF THE STATUTE OF LIMITATIONS TO BAR CONSIDERATION OF CLAIMANT'S CLAIM FOR COMPENSATION IS CONTRARY TO ARKANSAS LAW.

23. The Commission's reliance on the statute of limitations applicable to Arkansas contract actions: "this claim is barred by the five-year statute of limitations" is contrary to Arkansas law.

24. As Claimant has consistently argued, the five-year limitations period serves only to limit his right to recovery to the five years preceding the filing of his claim, for the years 2011-2012, 2012-13, 2013-2014, 2014-15, and 2015-16.

25. University of Arkansas Board of Trustees Policies specifically provide pursuant to Board Policy 405.1. IIA:

> General
>
> Appointments shall be for a specified period of time not to exceed one fiscal year. Except for appointments to faculty positions for summer school, appointments shall not extend beyond the end of a fiscal year.

26. Claimant has consistently relied on Board Policy 405.1.IIA in arguing that the University Trustees have created a specific limitation on the contractual obligations to faculty, while tenured faculty are afforded a presumption or right to successive appointments in Board Policy 405.1 IIC.

27. Because Claimant's employment with the University was based upon one-year contracts by operation of the University's express limitation, and the presumption to "successive appointments"—the term expressly used by the University Trustees in delineating the contractual rights of the parties—each year of employment has been governed by a distinct contract.

28. Under Arkansas law, the five-year statute of limitations is triggered by each individual contractual breach when contractual obligations arise only upon the completion of a precedent condition. In *Pacific Mutual Life Insurance Company of*

California v. Jordan, 190 Ark. 941, 825 S.W. 250, 252 (1935), the state supreme court applied this construction to an action for breach of contract based on default on a series of monthly obligations for disability payments by the carrier. The court considered the carrier's argument that the claim was barred by the five-year statute of limitations in contract, rejecting that position and explaining:

> Next, it is urged by appellant that appellee's alleged cause of action was barred by the 5-year statute of limitations (Crawford & Moses' Dig. §§ 6955, 6960). This suit is upon the contract of insurance for monthly indemnity and is not one for breach and renunciation. In the case of Ætna Life Ins. Co. v. Langston, 189 Ark. 1067, 76 S.W.(2d) 50, 51, we stated the applicable rule as follows: "The effect of the rule thus quoted is that in policies of insurance similar to the one under consideration and which provides a monthly indemnity to the insured for life in the event of total and permanent disability incurred during the effectiveness of the policy suits may be instituted, prosecuted, and maintained by the beneficiary at any time after receipt of such injury, *but the aggregate recovery is limited to a five-year period immediately prior to the filing of such suit.*" (emphasis added).

29. The *Jordan* Court then explained how the five year limitations period would impact the claim made by the plaintiff on the disability policy:

> In application of the rule just stated, it follows that appellee was entitled to recover in this action for a period of 5 years immediately prior to the filing of his suit and the trial court was correct in so deciding.

190 Ark. 941, 825 S.W. at 252.

30. Claimant followed just such a procedure here, seeking recovery for only the last five years of lost compensation, counting back from his filing at the conclusion

of the 2015-16 fiscal year, which is also the academic year upon which each individual one-year contract is based.

31. The same approach to limitations was applied by the Arkansas Court of Appeals in *Riley v. Riley*, 61 Ark. App. 74, 77, 964 S.W.2d 400, 401-02 (1998), where the cause of action arose in the context of the appellant's failure to make continuing payments on a property settlement agreement concerning an unpaid mortgage and other payments which was incorporated in a divorce decree. The court of appeals rejected the argument that the action was barred by the five-year statute of limitations:

> Appellant asserts, though, that since he discontinued payments as early as 1989, and perhaps even in 1988, appellee's cause of action is barred because she did not bring her cause of action until later than five years after his initial failure to pay. Appellee responds by stating that failure to pay each monthly mortgage payment as it became due was a cause of action unto itself. The chancellor determined that when an obligation is made payable by installments, the statute of limitations runs against each installment as it became due and unpaid.

32. The Arkansas Supreme Court confirmed the rule more recently in *Shelter Mutual Insurance Company v. Nash*, 357 Ark. 581, 184 S.W.3d 425 (2004) where the carrier argued that the five-year statute of limitations for breach of contract required dismissal of the plaintiff's action because the cause of action had arisen six years earlier. The court held that while the five year limitations period governs the typical contract action, it does not apply when successive contractual

obligations arise as a result of completion or fulfillment of a condition precedent. It explained:

> Arkansas law is clear that a cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time. *Ray & Sons Masonry, supra; Courtney v. First Nat'l Bank,* 300 Ark. 498, 780 S.W.2d 536 (1989). A cause of action for breach of contract accrues the moment the right to commence an action comes into existence, and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. *Dupree v. Twin City Bank,* 300 Ark. 188, 777 S.W.2d 856 (1989). *In ordinary contract actions, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action. Id.; Chapman v. Alexander, 307 Ark. 87, 88, 817 S.W.2d 425, 426 (1991). And if the right of action depends upon some contingency or a condition precedent, the cause of action accrues and the statute of limitations begins to run when the contingency occurs or the condition precedent is complied with. Id.*

357 Ark. 587-88, 184 S.W.3d 425, 428 (emphasis added).

33. Reaffirming the court of appeals holding in *Chapman, supra,* the *Nash* Court expressly held that where the obligation on the contract only arises upon the compliance with a condition precedent, the limitations period for the cause of action is triggered only when the new obligation is imposed. In Claimant's situation, the UA Board of Trustees has explicitly provided that a tenured faculty member, such as Claimant, is employed on a series of renewable one-year contracts, not a contract that extends until terminated by either party. While the tenured faculty member has an expectation or presumption of renewal under the Board's policies, the annual contract under which the faculty member works does

not come into existence until the prior year's contract has been satisfactorily completed.

34. Claimant recognizes that his recovery would be limited to only a five-year period, rather than the entire period subsequent to the breach of the initial contractual term. The rule in *Jordan* applies, and as Claimant conceded, he is only entitled to recover for five years of lost compensation preceding the filing of his claim.

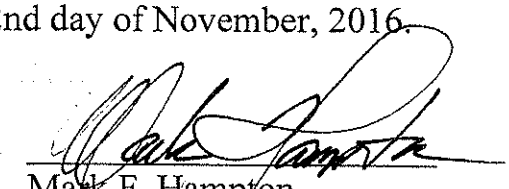
35. But, Arkansas law clearly recognizes that the nature of the specific nature of the contractual relationship between the parties distinguishes the application of the five-year period of limitations generally applied in contract actions, from the rule applicable when a series of contractual obligations are involved, creating a continuing source of obligations upon the parties. Here, Respondent operates under rules imposed by the UA Board of Trustees Policies, which limit the term of each contract for employment to one year. As a consequence, the Trustees assumed application of the limitations rule for breach of special contracts upon which Claimant is now entitled to rely.

36. The Commission order dismissing Claimant's claim based upon application of the five-year limitations period for breach of contract is contrary to settled Arkansas law and should be vacated.

CONCLUSION

Claimant Sullivan respectfully moves for reconsideration of the Commission's order dismissal his claim based upon the foregoing argument and authorities. Claimant prays the Commission vacate its order of October 13, 2016, and restore this matter for hearing before the Commission.

Respectfully submitted this 22nd day of November, 2016.



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and

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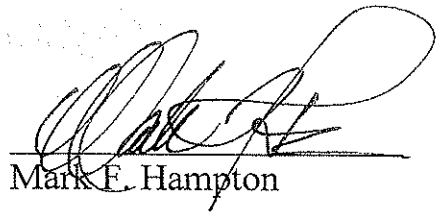
CERTIF'ICATE OF' SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration has been served on Counsel for Respondent, Sarah James, by mailing same, first class postage paid, to her office address: Sarah James, Associate General Counsel, University of Arkansas, 2404 North University Avenue Little Rock., AR 7 2207 on November 22, 2016.



Mark F. Hampton

Arkansas Claims Commission

DEC 06 2016

RECEIVED

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

J. THOMAS SULLIVAN CLAIMANT

vs. No. 17-0020-CC

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK RESPONDENT

RESPONDENT'S RESPONSE TO
CLAIMANT'S MOTION FOR RECONSIDERATION

Claimant has submitted his motion on the final day of the 40-day filing period, seeking the Commission's reconsideration of the same two arguments previously raised in his Complaint and fully briefed and considered by the Commission on summary judgment; namely whether there was a breach of Claimant's employment contract and whether his claim is barred by the statute of limitations. Motion, p. 1. The Commission determined that there was no breach of Claimant's contract and, further, that he was barred by the five-year statute of limitations.

As Claimant acknowledges in his motion, Rule 7.1 of the Claims Commission Rules provides: "....Motions for Reconsideration will only be entertained if they set forth *new or additional evidence* which was not available to the moving party at the time of the scheduled hearing." Claimant's motion sets forth no new or additional evidence. Furthermore, there is no merit to Claimant's contention that there are remaining issues of material fact which would preclude summary judgment. Throughout his Motion, Claimant continues to mischaracterize the stipend paid to him as "salary" and merely rehashes many of his previous arguments; chiefly, that because the "Award of Named Professorship" policy at the law school does not expressly provide for "reduction in compensation" at the end of the four-year term of the Professorship, then the removal of the stipend amount was an unauthorized reduction of his "salary" and a breach of his employment contract. See Motion, paragraphs 5-9. This is the exact same

argument presented in his Complaint and in his Response to the Motion for Summary Judgment, and which was rejected by the Commission.

Claimant has attempted to create a fact issue by arguing that the affidavit of former Dean, John DiPippa, attached to Respondent's Summary Judgment Reply, raises "a number of unresolved facts." Motion, ¶¶ 11, 12. Claimant cites to language in the affidavit where DiPippa recounts his meeting with Claimant, and explains that to continue paying Claimant the stipend amount after the expiration of the professorship would make the funds unavailable to future recipients. See Motion, ¶ 11, p.6; Reply, Ex. 1. However, Claimant omits the entire preceding portion of that paragraph in the affidavit, as well as the final three words of the quoted sentence, which gives the statement proper context and makes its meaning clear. What the quoted portion says, in full, is this:

> 7. Although the policy governing the professorships does not specifically address the fact that the compensation ceases with the expiration of the four-year term, the policy does address how the "available monetary awards" should be used in the event named designations are withheld in a particular year. Ex. A. In other words, each professorship is tied to a finite monetary award which logically implies a cessation of that award when the recipient's professorship expires. To establish a limited term for the award of the professorship, but make the stipend associated with that award permanent, would be illogical and contrary to the intent of the policy. In addition, the professorships are paid from private monies, which are limited. Continued payment to Professor Sullivan would tie up the limited funding available for that particular professorship and preclude the school from being able to offer any monetary compensation ***to future recipients***.

Reply, Ex. 1 (emphasis added). In other words, and by simple logic, DiPippa simply attested that if UALR were to continue paying Claimant the stipend amount associated with the Professorship indefinitely, beyond the limited four-year term of the award, then that amount, paid for with limited private monies for that purpose, would not be available for future recipients

of the award – a point Respondents have made from the outset of these proceedings. Paragraph 6 of the affidavit recounts DiPippa and Claimant's meeting in 2009 where he made this position clear to Claimant. Paragraph 7 further explains that position; it is not "new evidence."

Claimant, in an obscure and rather bizarre argument, quotes the last line - without the final words in bold above - and asserts that DiPippa's statement that the law school couldn't offer "any monetary compensation" means that "the decision to reduce Claimant's annual salary, or compensation was not mandated by policy....but by funding considerations." Motion, p. 6. Hence, Claimant continues, a fact situation is created as to whether "the law school was so close to being broke that it was necessary to reduce Claimant's *annual salary*, as stated on the Personnel Action forms relied on by Respondent as a exhibits (sic) in support of its summary judgment motion...." Motion, ¶ 15, p. 8. Claimant continues to cling to the erroneous characterization of the stipend as being part of his annual salary. Furthermore, he has misconstrued and misstated DiPippa's affidavit and explanation. There is no new evidence presented here; only Claimant's new (and misleading) twist on the same arguments.

Neither John DiPippa nor Robert Fleming's affidavit introduced new "facts" in the Reply brief. They merely expounded upon and clarified the arguments and materials that had already been presented. DiPippa's affidavit recites the process of awarding the Professorship and what he discussed with Claimant in their meeting after Claimant learned of his non-reappointment, further elaborating, in paragraph 7, on how the professorship is funded. These were all facts that were raised in Claimant's Complaint and discussed by both parties in their summary judgment briefs, with supporting documents. Likewise, Robert Fleming's affidavit simply discusses, in greater detail, the funding codes indicated on Claimant's personnel action forms and how those codes pertain to the separate funding for salary and the named professorship. This issue was

discussed in Respondent's initial summary judgment brief, and the accompanying PAF forms attached thereto. See MSJ Brief, pp.2, 3 and Exh. G. Respondent is unable to discern Claimant's argument that DiPippa's affidavit somehow contradicts Fleming's (see pp. 10, 11), and, in any event, there are again no "new" or disputed facts presented by Fleming's affidavit. Fleming merely supports the explanation already offered in Respondent's Motion for Summary Judgment; that "compensation for a professorship is not part of the employee's annual salary, but rather is compensation over and above the current base salary and is derived from a different funding source...." Reply, Exh. 2, ¶ 7; MSJ Brief.

Moreover, if Claimant truly felt it necessary to respond to matters raised in Respondent's Reply, he could have filed a surreply which, although not specifically addressed by the Arkansas Rules of Civil Procedure and Commission Rules, is customary. He chose not to do so. The purpose of the rule regarding reconsideration is for consideration of any new evidence that may arise *after* all the evidence is submitted and considered; here, the Motion for Summary Judgment, Response and Reply. No new evidence was "discovered" after the Commission's consideration of these pleadings.

As for the issue of whether Claimant's claim is barred by the statute of limitations (Section II of the Motion), Claimant asks the Commission to reconsider the exact same argument he presented in his Response to Summary Judgment; which is, in essence, that each year he began a new annual contract and was not paid the stipend for the professorship, constituted a breach of that year's contract. Thus, he argues, he should be allowed to recover for "breach" of his employment contract for the preceding five years. He cites to additional Arkansas cases in further support of his argument which were apparently omitted in his Response.

Claimant has not offered any newly discovered evidence, nor can he point to any

remaining disputed facts on this issue. His argument remains the same, and Respondent relies on the arguments presented in its Motion for Summary Judgment and Reply for its response here. If Claimant had a cause of action, at all, it accrued with the non-award of the professorship in 2009 (the alleged "breach") and is thus barred by the five-year period of limitations. Even assuming Claimant's assertion that the yearly renewal of his contract started the clock running anew is correct, it is of no moment. The non-award of the professorship and "removal" of the stipend does not implicate his annual employment contract, at all. There was no "loss of salary" under that contract and thus no breach. This issue was fully briefed by both parties and considered by the Commission in rendering its decision. There is no new evidence and no factual disputes remaining, and thus no basis for the rescission of the Commission's Order.

For all the foregoing reasons, Respondent respectfully requests that Claimant's Motion for Reconsideration be denied.

Respectfully submitted,

UNIVERSITY OF ARKANSAS
AT LITTLE ROCK, Respondent

By: 

SARAH L. JAMES ABA# 90135
Associate General Counsel
University of Arkansas
2404 North University Avenue
Little Rock, AR 72207-3608
(501) 686-2519
Email: sjames@uasys.edu

CERTIFICATE OF SERVICE

I, Sarah James, do hereby certify that a copy of the foregoing pleading has been served on claimant herein by mailing a copy of same, by U.S. Mail, postage prepaid, this 6th day of December, 2016, addressed to the following:

Mark F. Hampton
1122 W. Capitol
Little Rock, AR 72201

Sarah L. James

STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim $ 56,375.00

Claim No. 17-0020-CC

J. Thomas Sullivan
Claimant

Attorneys Mark F. Hampton, Attorney
Claimant

vs.

U of A Little Rock
Respondent

Sarah James, Attorney
Respondent

State of Arkansas

Date Filed July 14, 2016

Type of Claim Breach of Contract

FINDING OF FACTS

The Claims Commission hereby unanimously denies Claimant's "Motion for Reconsideration" for the Claimant's failure to offer evidence that would change the prior decision of the Claims Commission. Therefore, the Commission's October 13, 2016 order remains in effect.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

The Claims Commission hereby unanimously denies Claimant's "Motion for Reconsideration" for the Claimant's failure to offer evidence that would change the prior decision of the Claims Commission. Therefore, the Commission's October 13, 2016 order remains in effect.

Date of Hearing December 15, 2016

Date of Disposition December 15, 2016

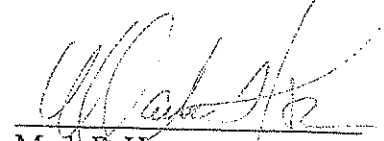
Chairman

Commissioner

Commissioner

**Appeal of any final Claims Commission decision is only to the Arkansas General Assembly as provided by Act #33 of 1997 and as found in Arkansas Code Annotated §19-10-211.

Respectfully submitted this ____ day of December, 2016.



Mark F. Hampton
AR850666
1122 West Capitol Avenue
Little Rock, Arkansas 72201
(51)376-6277

and

J. Thomas Sullivan, Claimant
AR2006019
1122 West Capitol Avenue
Little Rock, Arkansas 72201
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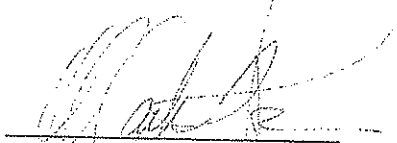
CERTIF'ICATE OF' SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been served on Counsel for Respondent, Sarah James, by mailing same, first class postage paid, to her office address: Sarah James, Associate General Counsel, University of Arkansas, 2404 North University Avenue Little Rock., AR 7 2207 on December 20, 2016.



Mark F. Hampton

STATE CLAIMS COMMISSION DOCKET
OPINION

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State of Arkansas July 14, 2016

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Arkansas
State Claims Commission
DEC 30 2016
RECEIVED

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

J. THOMAS SULLIVAN, Claimant,	§ § §	
v.	§ §	NO. 17-0020-CC
STATE OF ARKANSAS, UNIVERSITY OF ARKANSAS AT LITTLE ROCK, Respondent.	§ § § § §	

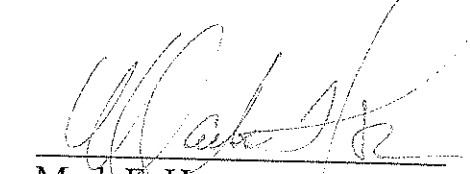
CLAIMANT'S NOTICE OF APPEAL FROM THE DECISION
RENDERED BY THE ARKANSAS CLAIMS COMMISSION

J. THOMAS SULLIVAN, Claimant, hereby gives notice pursuant to Arkansas Code Ann. § 19-10-211, gives notice of his appeal to the Arkansas General Assembly from the decision rendered by the Arkansas Claims Commission on October 13, 2016, granting the Respondent's Motion for Summary Judgment, and order denying Claimant's Motion for Reconsideration issued on December 15, 2016.

For the record on appeal, Claimant designates the entire record of the Commission pertaining to Claim No. 17-0020-CC, including any and all pleadings, motions, briefs, exhibits, evidence, and the notice of appeal.

Wherefore, Claimant prays that the Commission notify the Arkansas General Assembly and Legislative Claims Review Subcommittee and all parties to the claim of the filing of this notice of appeal.

Respectfully submitted this ____ day of December, 2016.



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(51)376-6277

and

J. Thomas Sullivan, Claimant
AR2006019
1122 West Capitol Avenue
Little Rock, Arkansas 72201
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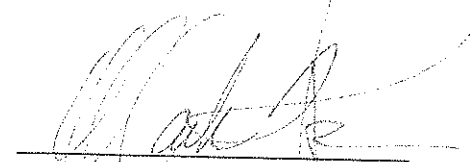
CERTIF'ICATE OF' SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been served on Counsel for Respondent, Sarah James, by mailing same, first class postage paid, to her office address: Sarah James, Associate General Counsel, University of Arkansas, 2404 North University Avenue Little Rock., AR 7 2207 on December 31, 2016.



Mark F. Hampton