AP

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FSR-CLOS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs. **Case No. 00-2608**

BARRY HILL,

Respondent.

_____/

FINAL ORDER

THIS MATTER, came to be heard by the **SCHOOL BOARD OF PALM BEACH COUNTY,** Florida, for the purpose of adopting the Final Order in the above-styled cause. In consideration of the Recommendation of the Division of Administrative Hearings' ("DOAH") Administrative Law Judge, as set forth in the attached Recommended Order (Exhibit A), the Exceptions of the Superintendent (Exhibit "B")(to which the Respondent did not file a Response), the Argument of Counsel for the Petitioner and the Respondent at the Exception Hearing held on September 17, 2001, our review of the complete record, and upon the advice of **SCHOOL BOARD** counsel at the exception hearing, the **SCHOOL BOARD** finds as follows:

BACKGROUND

By letter dated June 6, 2000, Palm Beach County Interim Superintendent of Schools H. Benjamin Marlin notified Respondent that he would be recommending that the SCHOOL

BOARD terminate Respondent's employment based on an incident that took place on or about December 16, 1999, involving Respondent's arrest for Driving under the Influence (DUI) and possession of Cocaine. The District's independent investigation revealed, conclusively, that Respondent was, in fact, DUI and in possession of the illegal drug, Cocaine. Accordingly, on June 14, 2000, the SCHOOL BOARD of Palm Beach County voted to terminate the employment of Respondent, who had been employed by the Petitioner as a teacher on assignment (as an assistant principal).

At the time of the SCHOOL BOARD vote, Petitioner Superintendent believed that the amount of Cocaine found on Mr. HILL's person was 7.4 grams. Respondent and his counsel were aware that the amount alleged was actually .18 grams. However, the difference in the amount of weight was never presented to the BOARD, or raised as a concern with the administration handling the discipline procedures. There is no legal significance between the two weights as to the employment of Respondent. When the evidence at the Due Process Hearing revealed the amount was .18 grams, Petitioner Superintendent requested, and was permitted, to amend the Administrative Complaint to charge Respondent with possession of cocaine without specifying an amount.

Pursuant to Sections 231.29 and 231.36, Florida Statutes and Article II, Section G, of the Collective Bargaining Agreement between the Palm Beach County Classroom Teachers Association and the School District of Palm Beach County, Florida, Respondent timely requested an administrative hearing, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the hearing, January 10 and 11, 2001, before Administrative Law Judge Florence Snyder Rivas, the Petitioner presented the testimony of nine (9) witnesses: Respondent presented the

testimony of four (4) witnesses, including Respondent.

On June 13, 2001, the Administrative Law Judge entered a Recommended Order finding that the Petitioner failed to prove by clear and convincing evidence that Mr. HILL was in possession of any Cocaine and recommended the SCHOOL BOARD reinstate Mr. HILL with back pay and benefits retroactive to the date of termination.

On Monday, September 17, 2001, the PALM BEACH COUNTY SCHOOL BOARD heard the Petitioner's Exceptions to the Recommended Order entered June 13, 2001, by Administrative Law Judge Rivas. The BOARD, pursuant to F.S. 120.57, having reviewed the complete record, including exhibits and testimony contained in the hearing transcript, and having heard argument of counsel on each of the exceptions, hereby enters the following Order:[1]

STANDARD OF REVIEW

The evidentiary standard to have been applied by the Administrative Law Judge was the clear and convincing evidence. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue. *Fl. Standard Jury Instruction*, 26 FL. L. Wkly. S 443.

The Board may not re-weigh evidence submitted to the ALJ, resolve conflicts in the

[1]As set forth in the July 11, 2001 and October 12, 2001, letters from Mr. Haynes, counsel for Mr. Hill to Ms. Pincus, counsel for the School District, Mr. Hill has agreed to an extension of time within which the September 17, 2001, exceptions hearing was to be held and waived any timeliness objections as to the rescheduling of the School Board's October 17, 2001, meeting for purposes of considering adopting the Final Order.

evidence, judge the credibility of witnesses or otherwise interpret the evidence anew. *Bay County Bd. v. Bryan*, 679 So.2d 1246 (Fla. 1st DCA 1996); *Heifitz v. Dept. of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). This is so because weighing the evidence, resolving evidentiary conflicts and making credibility assessments was within the province of the ALJ.

The Board, if it finds it appropriate to do so, may adopt the Administrative Law Judge's Recommended Order as its own final order. Fla. Stat. § 120.57(1)(I) (1999).

The Board in its final order may, alternatively, reject or modify the conclusions of law and interpretation of administrative rules in the recommended order over which the School Board has substantive jurisdiction, provided that "When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule, and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." Fla. Stat. § 120.57(1)(I). To do so would be within the Board's discretion. *MacPherson v. School Board of Monroe County*, 505 So.2d 682 (Fla. 3d DCA 1987).

The Board may not reject or modify the findings of fact in the ALJ's Recommended Order, unless it first determines from a review of the complete record, and states with particularity in its Final Order, that the findings of fact reached by the ALJ were not based upon competent substantial evidence in the entire record or that the proceedings on which the findings were based did not comply with essential requirements of law. Fla. Stat. § 120.57(1)(I). "Competent substantial evidence" is "such evidence as will establish a substantial basis of fact from which the fact can be reasonably inferred...such relevant evidence as a reasonable mind would accept as adequate to

support a conclusion". *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957);*McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997).

The Board may not make supplemental findings of fact on issues for which the ALJ made no findings, *Florida Power & Light Co. v. State*, 693 So.2d 1025 (Fla. 1st DCA 1997), unless the ultimate facts are increasingly matters of opinion and the opinions are increasingly infused by policy considerations for which the School Board has special responsibility. *McDonald v. Dept. of Banking Finance*, 346 So.2d 569 (Fla. 1st DCA 1977).

The Board may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, and by citing to the record in justifying the action. Fla. Stat. § 120.57(1)(l). *Criminal Justice Standards & Training Comm'n v. Bradley*, 596 So.2d 661 (Fla. 1992).

FINDINGS OF FACT

Exception Number 1: Finding of Facts 11 and 21

The Administrative Law Judge's findings of fact in Paragraphs 11 and 21 are not supported by competent substantial evidence. The Administrative Law Judge found that the police claimed to have found a baggie weighing 7.4 ounces and containing Cocaine. However, there was clear and convincing evidence to support the finding that the police found a baggie containing Cocaine.

Delray Beach Police Office Scott McGuire testified that he found a "dime bag of cocaine" on Mr. HILL'S person. This testimony is consistent with the Probable Cause

Affidavit prepared and attested to by Officer McGuire following Mr. HILL's arrest. Specifically, the Affidavit stated "While at the Palm Beach County Jail, a small baggie with a white powder substance was in the defendant's pocket tucked between lottery tickets. ... The substance was Cocaine." (Petitioner's Exhibit 8, page 41).

When completing the evidence/property receipt, Officer McGuire listed "1 Baggie Cocaine (APRXTW 7.4g)" (Petitioner's Exhibit 8, page 42). Senior Forensic Scientist Gina Evanzia reviewed this property receipt and testified that the 7.4 ounces referred to was the approximate total weight, which pertains to the weight of the entire packaging including the outside package and the inner package and the substance inside. (Transcript Vol. 2, page 18, lines 12-17).

The Superintendent recommended that the SCHOOL BOARD accept Exception Number 1 and amend the Administrative Law Judge's findings of fact in Paragraphs 11 and 21 to omit the reference to 7.4 grams.

The SCHOOL BOARD hereby determines that the Administrative Law Judge's findings of facts in Paragraphs 11 and 21 of the Recommended Order were not supported by competent substantial evidence. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957);*McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997). Accordingly, as to Exception Number 1, the SCHOOL BOARD accepts the exception of the Superintendent as to findings of fact 11 and 21.

Exception Number 2: Finding of Fact 13 and Conclusion of Law 32

The Administrative Law Judge's finding of fact in Paragraph 13 and conclusion of law

in Paragraph 32 are not supported by substantial competent evidence. The Administrative Law Judge concluded "McGuire's testimony fell short of clear and convincing evidence that HILL did in fact possess a dime bag, a baggie, 7.4 grams of cocaine, or 7.4 grams of a substance containing cocaine." However, Office McGuire's unrefuted testimony clearly and convincingly established that Mr. HILL possessed a "dime bag" or a "small baggie" of cocaine.

There was no evidence presented to contradict Officer McGuire's clear and convincing testimony that he found a "dime bag of cocaine" on Mr. HILL'S person. (Transcript, Vol. 1, page 43, lines 8-9). This testimony is consistent with the Probable Cause Affidavit prepared and attested to by Officer McGuire following Mr. HILL's arrest. Specifically, the Affidavit stated "While at the Palm Beach County Jail, a small baggie with a white powder substance was in the defendant's pocket tucked between lottery tickets. ... The substance was Cocaine." (Petitioner's Exhibit 8, page 41). According to McGuire's testimony, a "dime bag" is street terminology for a small baggie that is easily concealed. (Transcript, Vol. 1, page 40, line 20 – page 41- line 1).

Officer McGuire further testified that he personally conducted a field test on the contents of the baggie found in Mr. HILL's possession and that the field test determined the presence of Cocaine. (Transcript Vol. 1, page 57, lines 2-9). No evidence was ever presented to contradict this testimony. In other words, there was no evidence presented by Mr. HILL to refute Officer McGuire's testimony that the baggie found on Mr. HILL's person contained Cocaine. To the contrary, the subsequent Crime Lab Report confirmed that the baggie found on Mr. HILL contained Cocaine. (Petitioner's Exhibit 42). The presence of Cocaine was never refuted by Mr. HILL. To the contrary, Mr. HILL voluntarily admitted guilt to Cocaine

possession. (Petitioner's Exhibits 29 -32). Therefore, the unrefuted, clear and convincing evidence demonstrated that Mr. HILL was in possession of Cocaine and the Administrative Law Judge's finding and conclusion to the contrary was not supported by competent substantial evidence.

The Superintendent recommended that the SCHOOL BOARD accept Exception Number 2 and hold that the Administrative Law Judge's finding of fact in Paragraph 13 and conclusion of law in Paragraph 32 are not supported by competent substantial evidence. The Superintendent further recommended that the SCHOOL BOARD enter a final order concluding that Mr. HILL was in possession of Cocaine and that his employment be terminated.

The SCHOOL BOARD hereby determines that the Administrative Law Judge's findings of fact in ¶ 13 and her Conclusions of Law in ¶ 32 were not supported by competent substantial evidence. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957); *McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997). **("...the issue of whether *Schrimsher's* actions constituted misconduct or incompetence sufficient to warrant discharge is a matter of opinion infused by policy considerations for which the agency has special responsibility.")**

The SCHOOL BOARD accepts the Superintendent's exceptions as to findings of fact in Paragraph 13 and conclusion of law in Paragraph 32.

Exception Number 3: Finding of Fact 14

The Administrative Law Judge's finding of fact in Paragraph 14 is not supported by

competent substantial evidence. The Administrative Law Judge found that the SCHOOL BOARD failed to establish by clear and convincing evidence that the contents of HILL's pockets—and only the contents of HILL's pockets—were at all times accounted for and handled in a manner adequate to assure that no items were removed or added.

There was no evidence presented to support the Administrative Law Judge's finding that items may have been added or removed from the contents in HILL's pockets.

The Administrative Law Judge's conclusion is inconsistent with Delray Beach Police Officer McGuire's testimony that he was present in the room when Mr. HILL placed all items from his pockets into a brown paper bag and that Officer McGuire took possession of the bag and did not lose possession of that bag when it was subsequently emptied. (Transcript Vol. 1, page 42, lines 18-25). Officer McGuire further testified that he personally conducted a field test on the contents of the baggie found in Mr. HILL'S possessions and that the field test determined the presence of Cocaine. (Transcript Vol. 1, page 57, lines 2-9). This evidence was never challenged. In other words, there was absolutely no evidence presented by Mr. HILL to refute Officer McGuire's testimony that the baggie found on Mr. HILL'S person contained Cocaine. There was also no evidence presented to rebut Officer McGuire's testimony or the accompanying police documents, all which consistently demonstrated that Mr. HILL was in possession of Cocaine and that the contents of Mr. HILL'S pockets were at all times accounted for.

The Superintendent recommended that the SCHOOL BOARD accept Exception Number 3 and hold that the Administrative Law Judge's finding of fact in Paragraph 14 is not supported by competent substantial evidence. The Superintendent further recommended that

the SCHOOL BOARD enter a final order concluding that Mr. HILL was in possession of Cocaine and that his employment be terminated.

The SCHOOL BOARD hereby determines that the Administrative Law Judge's findings of fact in Paragraph 14 of the Recommended Order were not supported by competent substantial evidence. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957);*McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997). **Accordingly, the SCHOOL BOARD accepts the Superintendent's exception as to findings of fact in Paragraph 14.**

Exception Number 4: Finding of Fact 16

The Administrative Law Judge's finding of fact in Paragraph 16 is not supported by competent substantial evidence. The Judge found that Senior Forensic Scientist Gina Evanzia was the only SCHOOL BOARD witness with personal knowledge of the actual baggie alleged to have been found among HILL's possessions. This finding is in direct conflict with Officer McGuire's unrefuted testimony.

The Administrative Law Judge's conclusion is inconsistent with Delray Beach Police Officer McGuire's testimony that he was present in the room when Mr. HILL placed all items from his pockets into a brown paper bag and that Officer McGuire took possession of the bag and did not lose possession of that bag when it was subsequently emptied. (Transcript Vol. 1, page 42, lines 18-25). Officer McGuire further testified that he personally conducted a field test on the contents of the baggie found in Mr. HILL's possessions and that the field test determined the presence of Cocaine. (Transcript Vol. 1, page 57, lines 2-9). No evidence was

presented to rebut the results of the field test. No question was ever raised by Mr. HILL regarding Officer McGuire's credibility or veracity with regards to his involvement in this case. The Administrative Law Judge's finding that Senior Forensic Scientist Gina Evanzia was the only SCHOOL BOARD witness with personal knowledge of the actual baggie alleged to have been found among HILL's possessions is not supported by competent substantial evidence.

The SCHOOL BOARD hereby determines that the Administrative Law Judge's findings of fact in Paragraph16 of the Recommended Order was not supported by competent substantial evidence. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957); *McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997). Accordingly, the SCHOOL BOARD accepts the Superintendent's exception as to findings of fact in Paragraph 16 of the Recommended Order..

Exception Number 5: Findings of Fact 18 and 20

The Administrative Law Judge's findings of fact in Paragraphs 18 and 20 are not supported by competent substantial evidence. The Administrative Law Judge concluded that "the gaps in Officer McGuire's testimony coupled with the unexplained discrepancies between the 7.4 gram baggie alleged to have been found in HILL's possession and the much smaller baggie about which [Senior Forensic Scientist Gina] Evanzia testified makes it impossible to determine what, if any contraband was found on HILL's person."

The "discrepancies" that the Administrative Law Judge referred to are variations solely in the amount of Cocaine actually contained within the package, are immaterial to the

SCHOOL BOARD's authority to terminate Mr. HILL, and are not supported by substantial competent evidence. The Judge concluded that the "unexplained discrepancies" made it impossible to determine what, if any contraband was found on HILL's person. In reaching this conclusion, the Judge ignored the material evidence presented by Senior Forensic Scientist Gina Evanzia.

The 7.4 grams of Cocaine initially alleged came from the Delray Beach Police Department Evidence/Property Receipt that listed "1 Baggie Cocaine (Aprxtw 7.4g)" (Petitioner's Exhibit 8). This amount was initially interpreted by Petitioner as 7.4 grams of Cocaine. Upon receipt of the toxicologist report, it was discovered that the actual amount of Cocaine tested was .18 grams of Cocaine. (Petitioner's Exhibit 42). The difference between 7.4 grams and .18 grams created the so-called "discrepancy" referred to by the Administrative Law Judge.

Senior Forensic Scientist Gina Evanzia testified that the property receipt's listing of "aprxtw 7.4 g" referred to an approximate total weight. (Transcript Vol. 2, page 17, line 17 – page 18, line 17). Evanzia further testified that total weight actually coincides with the weight of the entire packaging including the outside package and the inner package and the substance inside. (Transcript Vol. 2, page 18, lines 12-17). The .18 grams listed on the toxicologist report was the actual net weight of the substance without any of the associated packaging. (Transcript Vol. 2, page 13, lines 19 – 22). Evanzia also explained that is it "very common" for the weight listed on property receipts to differ considerably from the net weights listed on property reports. (Vol. 2, page 13, lines 7 – 14). Thus, the Administrative Law Judge's finding that there was an "unexplained discrepancy" is not supported by substantial competent

evidence.

There is no legal significance between .18 grams and 7.4 grams of Cocaine for purposes of School Board discipline. See: *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997) **("...the issue of whether *Schrimsher's* actions constituted misconduct or incompetence sufficient to warrant discharge is a matter of opinion infused by policy considerations for which the agency has special responsibility."). Possession of either amount constitutes a felony drug offense of the third degree pursuant to FLA. STAT. § 893.13(6)(a). Both amounts also subject an employee to termination of employment pursuant to Chapter 435, FLA. STAT., FLA. STAT. § 230.23; FLA. STAT. § 230.33; FLA. STAT. § 120.569; FLA. STAT. § 120.57; FLA. STAT. § 231.36; State Board of Education Administrative Rules Chapter 6B-1 and Chapter 6B-4; Palm Beach County School Board Policies 3.12 and 3.27; Palm Beach County School Board Directive 3.27; and the Collective Bargaining Agreement between Palm Beach County Classroom Teachers Association and The School District of Palm Beach County, Florida, Article II, Section M.**

There is also no competent substantial evidence to support the Administrative Law Judge's finding that the discrepancy makes it impossible to determine what, if any, contraband was found on HILL's person. The unrefuted evidence clearly indicated that Mr. HILL was in possession of Cocaine. Delray Beach Police Officer McGuire testified he was present in the room when Mr. HILL placed all items from his pockets into a brown paper bag and that Officer McGuire took possession of the bag and did not lose possession of that bag when it was subsequently emptied (Transcript, Vol. 1, page 42, line 18 – page 43, line 9). Officer McGuire further testified that he personally conducted a field test on the contents of the baggie found in

Mr. HILL's possessions and that the field test determined the presence of Cocaine. (Transcript, Vol. 1, page 44, lines 20-21). This testimony was never challenged or rebutted on cross-examination. There was no evidence presented by either party to refute Officer McGuire's testimony that the baggie found on Mr. HILL contained some amount of Cocaine. The Crime Laboratory Report confirmed the presence of Cocaine, regardless of the amount. (Petitioner's Exhibit 42).

Based on the testimony of Officer McGuire, coupled with the documents contained in Petitioner's Exhibit 8, Petitioner did establish by clear and convincing evidence that Mr. HILL was in possession of Cocaine. The Administrative Law Judge's finding that Mr. HILL was not in possession of any Cocaine is not supported by competent substantial evidence.

The Superintendent recommended that the SCHOOL BOARD accept Exception Number 5 and hold that the Administrative Law Judge's findings of fact in Paragraphs 18 and 20 are not supported by competent substantial evidence. The Superintendent further recommended that the SCHOOL BOARD enter a final order concluding that Mr. HILL was in possession of Cocaine and that his employment be terminated.

The SCHOOL BOARD hereby determines that the Administrative Law Jude's findings of fact in Paragraphs 18 and 20 of the Recommended Order were not supported by competent substantial evidence. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957);*McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997). **Accordingly, the SCHOOL BOARD accepts the Superintendent's recommendation as to findings of fact in Paragraphs 18 and 20 of the Recommended Order.**

Exception Number 6: Finding of Fact 25

The Administrative Law Judge's finding of fact in Paragraph 25 is not supported by competent substantial evidence. The Administrative Law Judge found that HILL had substantial and legitimate defenses to the criminal charges filed against him. However, there was no competent substantial evidence presented to support this finding.

Mr. HILL presented no competent substantial evidence regarding any defense of the criminal charges filed against him. The record did not support the Administrative Law Judge's finding that there were substantial or legitimate defenses to the criminal charges. To the contrary, State Attorney Craig Lawson testified that the State had a fairly strong case against Mr. HILL. (Transcript, Vol. 1, page 97, lines 12-13). Mr. HILL voluntarily pled guilty to the DUI charge and voluntarily admitted guilt to Cocaine possession. (Petitioner's Exhibits 29, 30). No evidence was presented to rebut these admissions. The record contains no competent substantial evidence that Mr. HILL ever disputed the DUI or Cocaine possession. Mr. HILL did not deny the allegations or offer an explanation regarding the charges brought against him. Consequently, Mr. HILL's admission constitutes unrebutted evidence of guilt.

The Superintendent recommended that the SCHOOL BOARD accept Exception Number 6 and hold that the Administrative Law Judge's finding of fact in Paragraph 25 is not supported by competent substantial evidence. The Superintendent further recommended that the SCHOOL BOARD enter a final order concluding that Mr. HILL was in possession of Cocaine and that his employment be terminated.

The SCHOOL BOARD hereby determines that the Administrative Law Judge's findings of fact in Paragraph 25 of the Recommended Order were not supported by competent substantial

evidence. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957); *McDonald v. Dept. of Banking and Finance*, 346 So.2d 569, 577-579 (1st DCA 1977) *rev. den.* 368 So.2d 1370 (Fla 1979); *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997). Accordingly, the SCHOOL BOARD accepts the Superintendent's exception number 6 as to findings of fact in Paragraph 25 of the Recommended Order.

Exception Number 7: Back Pay and Benefits

The Administrative Law Judge recommended the SCHOOL BOARD enter a Final Order reinstating HILL's employment with the SCHOOL BOARD with back pay and benefits retroactive to the date of termination. However, the Administrative Law Judge did not specifically reference the amount of back pay and benefits owed to Mr. HILL, and any offset due to Mr. HILL's employment since June 14, 2000.

As set forth above, Mr. HILL was in possession of Cocaine. (Petitioner's Ex. 8, Pgs. 41-42; transcript Vo. I, Pgs. 40-43, 57; Vol. II Pgs. 17-18; Petitioner's Ex. 29-32, 42). Possession of Cocaine **subjects an employee to termination of employment pursuant to Chapter 435, FLA. STAT., FLA. STAT. § 230.23; FLA. STAT. § 230.33; FLA. STAT. § 120.569; FLA. STAT. § 120.57; FLA. STAT. § 231.36; State Board of Education Administrative Rules Chapter 6B-1 and Chapter 6B-4; Palm Beach County School Board Policies 3.12 and 3.27; Palm Beach County School Board Directive 3.27; and the Collective Bargaining Agreement between Palm Beach County Classroom Teachers Association and The School District of Palm Beach County, Florida, Article II, Section M.**

As the court wrote in *Schrimsher v. School Board of Palm Beach County*, 694 So.2d 856, 861 (4th DCA 1997) *rev. den.* 703 So.2d 477 (Fla. 1997), **"...the issue of whether *Schrimsher's* actions**

constituted misconduct or incompetence sufficient to warrant discharge is a matter of opinion infused by policy considerations for which the agency has special responsibility." We find that, upon a review of the complete record, that the penalty imposed by the hearing officer is not appropriate. Members of the instructional staff, particularly in the role of Mr. HILL, (acting as an assistant principal at a high school), see: Findings of Fact ¶ 1-3, should not be in possession of Cocaine. Accordingly, as held above, Mr. HILL's employment should be terminated and he is not entitled to back pay or benefits. However, in light of the Administrative Law Judge's determination as to Mr. HILL's, "previously unblemished career," his "compliance with all of the terms of the PTI agreement," his "contrition", his "commitment to public service" and his rehabilitation (as set forth in the Administrative Law Judge's Findings of Fact ¶¶ 5, 27 and 28), we have determined that Mr. HILL should be provided a second chance. Accordingly, we determine that he should be reinstated by the Superintendent.

Accordingly, the SCHOOL BOARD accepts that portion of the exception presented by the Superintendent as to back pay and benefits, and declines to award Respondent HILL any back pay or benefits. As noted in this Order, as to Exceptions 2, 3, 5 & 6, the SCHOOL BOARD accepted the Superintendent's recommendation to terminate the employment of Mr. HILL. However, the SCHOOL BOARD denies the Superintendent's exception number 7 as to reinstatement, and hereby orders that Respondent BARRY HILL shall be reinstated to employment with the SCHOOL DISTRICT.

CONCLUSIONS OF LAW

1. **SCHOOL BOARD OF PALM BEACH COUNTY**, Florida, has jurisdiction over the

subject matter and the parties hereto.

2. **SCHOOL BOARD** finds that the Administrative Law Judge's Conclusions of Law are correct as a matter of law, except as to Conclusion of Law 32. The SCHOOL BOARD further finds that the proceedings upon which the Conclusions of Law are based complied with the essential requirements of the law.

3. **SCHOOL BOARD** grants those exceptions filed by the Superintendent to the recommended Conclusion of Law 32 set forth in the Recommended Order issued by the Administrative Law Judge, pursuant to Section 120.57, Florida Statutes.

4. **SCHOOL BOARD** hereby adopts the Administrative Law Judge's Conclusions of Law, except Conclusion of Law 32, as prescribed in Section 120.57(1)(j) Florida Statutes. As to Conclusion of Law 32, the SCHOOL BOARD concludes that Mr. HILL was in possession of Cocaine.

IT IS THEREFORE ORDERED AND ADJUDGED that the Administrative Law Judge's Recommended Order be adopted and incorporated by reference in this Final Order of the SCHOOL BOARD, as modified herein. The employment of the Respondent, BARRY HILL, is terminated effective June 14, 2000. However, Mr. HILL shall be reinstated to employment forthwith. Mr. HILL shall not be entitled to, or awarded, any back pay or benefits.

An appeal of this order must be made pursuant to Section 120.68, Florida Statute, by filing a Notice of Appeal with the **SCHOOL BOARD** and the Fourth District Court of Appeals within thirty (30) days of the date of this order.

DONE AND ORDERED, this _____ day of _____, 2001.

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

BY: _____
Thomas Lynch, Chairman

(SEAL)

Attest: _____
Arthur C. Johnson, Secretary

Filed with the Clerk of the School Board
this 28th day of November, 2001.

Alicia Palmer
Alicia Palmer, Clerk

COPIES FURNISHED on this 29th day of November, 2001:

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STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

AP

JDP-Clos

DEERBROOKE INVESTMENTS, INC.,	)	
	)	
Petitioner,	)	
	)	
Vs.	)	DOR CASE NO. 01-5-FOF
	)	DOAH CASE NO. 00-3114
FLORIDA DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

FINAL ORDER

This cause came before the Department of Revenue for the purpose of issuing a final order. The Administrative Law Judge assigned by the Division of Administrative Hearings issued a Recommended Order, sustaining the Department's assessment. A copy of the Recommended Order is attached to this Final Order. Petitioner timely filed exceptions to the Recommended Order and a copy of that filing is attached to this Final Order. For the reasons expressed herein, the Department adopts the Administrative Law Judge recommendations and specifically incorporates the Recommended Order except for Finding of Facts 46 and 92, which are modified as reflected below. Rulings on Petitioner's exceptions are also set forth below.

Petitioner's Exception to Finding of Fact 17

Petitioner asserts that it is a misrepresentation that its ship, the Palm Beach Princess (the Vessel), travels "just far enough" to engage in gambling activities without