

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD, )  
)  
Petitioner, )  
)  
vs. ) Case No. 04-1256  
)  
LEOPOLDO MUTIS, )  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing in Miami, Florida, on October 7 and 8, 2004.

APPEARANCES

For Petitioner: Madelyn P. Schere, Esquire  
Miami-Dade County School Board  
1450 Northeast Second Avenue, Suite 400  
Miami, Florida 33132

For Respondent: Leopoldo Mutis, pro se  
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent satisfactorily corrected specified performance deficiencies within the 90-day probation period prescribed by Section 1012.34(3)(d), Florida Statutes, and, if not, whether Respondent's employment should be terminated.

PRELIMINARY STATEMENT

By letter dated March 31, 2004, the Superintendent of Schools in Miami-Dade County notified Respondent Leopoldo Mutis that he intended to recommend to the School Board of Miami-Dade County at its meeting on April 14, 2004, that Mr. Mutis's employment as a teacher be terminated due to unsatisfactory job performance.

By letter dated April 8, 2004, Mr. Mutis timely requested a formal hearing. On April 12, 2004, the matter was referred to the Division of Administrative Hearings, where it was assigned to an Administrative Law Judge.

The undersigned convened the final hearing, as scheduled following two continuances, on October 8, 2004, in Miami, Florida. Petitioner presented the following witnesses during its case-in-chief: Dr. Ana M. Rasco; Dr. Blanca Herrera-Torres; Cathy Williams; Leonard Ruan; Eneida Yanes; Janet Roy; Eugene Butler; Ruth Perez O'Halloran (via deposition); and Darlene Mooney (via deposition). Petitioner also offered Petitioner's Exhibits 1 through 31 and 33, which were received in evidence.

Respondent testified on his own behalf and offered Respondent's Exhibits 1, which was admitted.

The final hearing transcript, comprising two volumes, was filed on November 10, 2004. Petitioner timely filed a Proposed

Recommended Order on November 22, 2004, which was the established deadline.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

#### FINDINGS OF FACT

##### A.

1. One of the statutory duties of Petitioner Miami-Dade County School Board ("Board") is to evaluate the performance of every teacher employed in the Miami-Dade County School District ("District"), at least once per year. To accomplish this, the Board uses a personnel assessment system known as "PACES," which is an acronym for Professional Assessment and Comprehensive Evaluation System. PACES is the product of collective bargaining between the Board and the teachers' union, and it has been duly approved by the Florida Department of Education.

2. The Board's evaluation procedure begins with an observation of the subject teacher, conducted by an administrator trained in the use of PACES. On a score sheet called the Observation Form for Annual Evaluation ("OFAE"), the evaluator rates the teacher's performance on 44 independently dispositive "indicators." The only grades assignable to the respective indicators are "acceptable" and "unacceptable"; thus, the evaluator's decision, for each indicator, is binary: yes or no, thumbs up or thumbs down.<sup>1</sup> A negative mark on any one of the

44 indicators results in an overall performance evaluation of "unsatisfactory." For the teacher under observation, therefore, each indicator constitutes, in effect, a pass/fail test, with his or her job hanging in the balance.

3. If the teacher passes all 44 of the independently dispositive indicators, then the teacher's performance is rated "satisfactory" and the evaluative process is complete. If, on the other hand, the teacher is given a failing grade on one or more of the 44 indicators and hence adjudged an unsatisfactory performer, then the initial observation is deemed to be "not of record" (i.e. inoperative) and a follow-up, "for the record" evaluation is scheduled to occur, upon notice to the affected teacher, about one month later.

4. In the meantime, the teacher is offered the assistance of a Professional Growth Team ("PGT"), a group of peers who, having received special training in PACES, are in a position to help the affected teacher correct performance deficiencies in advance of the follow-up evaluation.

5. The follow-up evaluation is conducted in the same manner as the initial "not of record" evaluation. If the teacher passes all 44 indicators, then his performance is deemed satisfactory and the evaluative process is complete. If he fails one or more of the indicators, however, then the teacher is placed on probation for a period of 90 calendar days

(excluding vacations and holidays). The probation period is preceded by a formal Conference-for-the-Record ("CFR"), at which notice of the specific performance deficiencies is provided to the teacher. As well, the teacher is provided a PGT and given a Professional Improvement Plan ("PIP"), wherein particular remedial tasks, intended to help the teacher correct the noted performance deficiencies, are assigned.

6. During the performance probation, the teacher must be formally observed at least twice, by an evaluator using the OFAE. If, on any of these probationary observations, the teacher fails at least one indicator, then another PIP is prepared and offered.

7. The performance probation could end early, before 90 days have passed. This occurs when, during probation, the teacher is deemed to have mastered all the required indicators. At that point, should it come, the teacher receives a satisfactory performance rating, and the evaluative process is terminated.

8. Within 14 days after the end of probation, assuming the process has not ended sooner as just described, a "confirmatory evaluation" is conducted, using the OFAE. The purpose of the confirmatory evaluation is to determine whether the noted performance deficiencies were corrected. If they were, then the teacher's performance is rated "satisfactory." If not, the

principal then makes a recommendation to the superintendent whether to continue or terminate the teacher's employment.

9. As mentioned above, a PACES evaluation takes account of 44 crucial indicators. The indicators are organized under "components." The 44 outcome determinative indicators fall within 21 components, which are identified on the OFAE. These components are organized, in turn, under "domains," of which six are identified on the OFAE.

10. Each domain has been assigned a Roman numeral identifier: I through VI. The components are distinguished alphabetically: A, B, C, etc. The indicators are numbered using Arabic numerals. Each specific indicator is named according to the Roman numeral of its domain, the letter of its component, and its own Arabic number. Thus, for example, the first indicator under Component A of Domain I is referred to as "I.A.1."

11. Notwithstanding the PACES taxonomy, the classifications of "domain" and "component" are useful only as a means of organizing the indicators. This is because a teacher does not pass or fail a performance evaluation at the domain level or at the component level; rather, he passes or fails at the indicator level, for, again, each of the 44 indicators is independently dispositive under PACES.<sup>2</sup> Thus, each of the

determinative 44 indicators is of precisely equal weight. None is more important or less important than another.<sup>3</sup>

B.

12. At all times material to this case, Respondent Leopoldo Mutis ("Mutis") was a teacher in the District. From 1999 until April 2004, when the Board suspended him pending termination of employment, Mutis taught middle school Spanish and ESOL at Key Biscayne K-8 Center ("Key Biscayne").

13. During the 2003-04 school year, an evaluator observed Mutis in his classroom on five separate occasions, each time using the OFAE. The dates of these evaluations were, and the names of the respective evaluators are, as follows:

<u>Evaluation Date</u>	<u>Evaluator</u>
October 23, 2003	Ana Maria Rasco, Principal, Key Biscayne
November 17, 2003	Ms. Rasco
January 13, 2004	Blanca Herrera-Torres, Assistant Principal, Key Biscayne
February 18, 2004	Cathy Williams, Assistant Principal, Key Biscayne
March 15, 2004	Ms. Rasco

14. The Board contends that Mutis failed all five evaluations; the first, however, was deemed "not of record" and thus is relevant only insofar as it opened the door to the

process that followed. The following table shows, for each evaluation for the record, the indicators that the respective evaluators thought Mutis had failed:

	IA1	IA2	IB1	IB3	IE3	IF1	IF2	IJA1	IIA3	ITB2	IB4
11-17-03											
01-13-04											
02-18-04									X		
03-15-04								X	X		

	IID1	IID3	IID4	IIE1	IIE2	IIE5	IIIA1	IIIA3	IIIB1	IIIB3	IIIB4
11-17-03											
01-13-04											
02-18-04		X						X			
03-15-04		X	X		X						X

	IVA3	IVA5	IVA6	IVB1	IVB2	IVB3	IVC2	IVD1	IVD3	IVD6	IVE2
11-17-03	X	X									
01-13-04		X		X				X			
02-18-04		X									
03-15-04		⊗								X	

	IVE4	VA1	VA4	VB1	VB2	VC1	VIA2	VIB1	VIB3	VIC2	VIC4
11-17-03					X					X	X
01-13-04		X	X	X	X			X			
02-18-04											
03-15-04		X			⊗	X	X				⊗

15. Because Ms. Rasco identified five performance deficiencies on November 17, 2003, Mutis was placed on 90-day performance probation, effective November 26, 2003, pursuant to the procedure described in detail above. Ms. Rasco held a CFR on November 25, 2003, to review with Mutis the identified deficiencies and explain the procedures relating to the 90-day probation. Following the CFR, Mutis was given written notice of unsatisfactory performance, in the form of a "Summary of



Conference-For-The-Record And Professional Improvement Plan (PIP)," dated November 26, 2003 ("Summary"). In the Summary, Ms. Rasco charged Mutis with failure to satisfactorily perform the following PACES indicators: IV.A.3, IV.A.5, IV.B.2, VI.C.2, and VI.C.4. (These five indicators are highlighted vertically in the table above.) At the same time, Mutis was given a PIP, and a PGT was assembled to provide assistance.

16. Following the confirmatory evaluation on March 15, 2004, based on which Ms. Rasco identified 13 deficiencies as shown in the table above, Ms. Rasco notified the superintendent that Mutis had failed to correct noted performance deficiencies during a 90-day probation and recommended that Mutis's employment be terminated. The superintendent accepted Ms. Rasco's recommendation and notified Mutis, by letter dated March 31, 2004, of his decision to recommend that the Board terminate Mutis's employment contract. On April 14, 2004, the Board voted to do just that.

C.

17. In general terms, the ultimate issue in this case, according to Section 1012.33(3)(d)2.b., Florida Statutes, is whether Mutis corrected noted performance deficiencies as of the two-week period after the close of the 90 calendar days' probation. In view of the issue, the initial "of record" evaluation of November 17, 2003, is primarily relevant because

it established the five "noted performance deficiencies" that Mutis needed to correct.<sup>4</sup> Indeed, the Board cannot terminate Mutis's employment based on other deficiencies allegedly found during probation or at the confirmatory evaluation, but rather must focus exclusively on those five particular deficiencies which Mutis was given 90 calendar days to correct, for reasons that will be discussed below in the Conclusions of Law. Stated more precisely, then, the ultimate question in this case is whether any of the five specific deficiencies identified in the Summary provided to Mutis on November 26, 2003, persisted after the 90-day probation.

18. The two evaluations that were conducted during Mutis's probation (on January 13, 2004, and February 18, 2004) are of present interest mainly because they show Mutis making steady progress toward eliminating the noted deficiencies. By January 13, 2004, according to Ms. Herrera-Torres, Mutis had corrected three of the five noted deficiencies (Indicators IV.A.3, VI.C.2, and VI.C.4), leaving just two (Indicators IV.A.5 and V.B.2). When Ms. Williams evaluated Mutis on February 18, 2004, she found that the teacher had corrected four of the five noted performance deficiencies, failing him only on Indicator IV.A.5.

19. The evidence presented at hearing is insufficient, however, to support findings that Mutis was, in fact, deficient

with respect to (a) Indicators IV.A.5 and V.B.2 as determined by Ms. Herrera-Torres or (b) Indicator IV.A.5 as determined by Ms. Williams. As for the evaluation of January 13, 2004, it is found that the purpose of the learning task observed by Ms. Herrera-Torres that day was obviously to teach students rules relating to gender identification in the Spanish language. Thus, Indicator IV.A.5, which requires that the purpose or importance of learning tasks be clear to learners, was met. Regarding Indicator V.B.2, which requires that wait time be used as appropriate to enhance the development of thinking skills, Ms. Herrera-Torres gave no testimony at hearing; and, her contemporaneous written summary of Mutis's alleged deficiency in this area merely states, in conclusory fashion, that Mutis afforded students insufficient "wait time to think and develop answers to questions." A subjective opinion, devoid of facts, is not enough to justify an ultimate determination of insufficient performance in this regard.

20. As for the evaluation of February 18, 2004, it is found that Mutis informed the class observed by Ms. Williams that he intended to review a previous lesson or lessons. Having told his students that the purpose of the learning task was review, Mutis satisfied Indicator IV.A.5.

21. Thus, based on the evidence presented, it is found that Mutis's performance probation in connection with the five

noted deficiencies should have been terminated on January 14, 2004, or February 18, 2004, at the latest.<sup>5</sup>

22. As it happened, however, Mutis's probation was not prematurely terminated, and Ms. Rasco performed a confirmatory evaluation on March 15, 2004. She found that Mutis had corrected two of the five noted performance deficiencies, giving Mutis a passing grade on Indicators IV.A.3 and VI.C.2. The remaining three deficiencies upon which termination could legally be based are identified in the table above with the "⊗" symbol. It is to these three allegedly uncorrected deficiencies that our attention now must turn.

23. The Board contends, based on Ms. Rasco's confirmatory evaluation of March 15, 2004, that Mutis was still, as of that date, failing satisfactorily to perform the following PACES indicators:

IV.A.5: The purpose or importance of learning tasks is clear to learners.

V.B.2: Wait time is used as appropriate to enhance the development of thinking skills.

VI.C.4: Learners receive specific feedback when learning tasks and/or learning outcomes are completed.

24. The only descriptive evidence in the record regarding Mutis's performance on March 15, 2004—and hence the only evidence of historical fact upon which the undersigned can decide whether Mutis failed adequately to perform the three

indicators just mentioned—consists of Ms. Rasco's testimony, together with a memorandum dated March 15, 2004, that Ms. Rasco prepared for Assistant Superintendent Essie Pace.

25. At the final hearing, Ms. Rasco recounted what she had seen on March 14, 2004, when she observed Mutis in the classroom for 50 minutes:

[1] This lesson—this lesson was atrocious.

[2] First of all, Mr. Mutis walked into class three minutes late, the children were already seated in class.

[3] When he walked in late, and I found this particularly offensive to the students because Mr. Mutis had been free for the two periods prior, this was fourth period, he had been free during second and third period so for him to have come in late was very difficult for me to understand.

[4] Secondly, he was unprepared. He did not have his lesson plans readily available. He had to rummage through the stacks of papers on his desk to find his lesson plans.

[5] This was a Monday morning, he had been out Friday, and he had proceeded to teach the lesson that the children had already done on Friday with the substitute.

[6] Several students started to complain they could not understand why they had to repeat the lesson that they had already done on Friday, he was asking them to read some pages from a story, and they kept on explaining to him that they had already done it. He didn't explain to the children his rationale for doing—for having them do it again, he just went through the lesson.

[7] There was an inordinate amount of off-task behavior. There was one student—and in this class there were maybe seven or eight students, this was a small class, there was one student who spent a long time catapulting a pen. There was another student who had birthday balloons attached to the back of her chair, and she was playing with the birthday balloons, fidgeting with the balloons for an extended period of time.

[8] There was another student who was doing his writing assignment on a little, must have been a little five, maybe, a five by eight sheet of paper even though he told the students at the beginning of the lesson to take out their folders, this child was writing on a small piece of paper, and he didn't address it.

[9] Q. Did he address any of that off-task behavior?

[10] A. He did not address any of these behaviors, he did not redirect the students at any point and time.

[11] Again, the questioning techniques, he was asking questions without, again, any regard to the student responses, without probing.

[12] Some students, I think, were speaking in Spanish, and, again, this was an English lesson, and yet they were never redirected to the English language. This one was just—

[13] Q. They were in his class to learn English?

[14] A. This was an English class. Students were not given any feedback. Sometimes he asked questions, if he didn't get a response he would answer, he would

answer the question himself and go to the next question.

[15] Q. Could you tell whether he appeared to care about the class?

[16] A. No, it's like he had given up.

[17] Q. Do children react to that?

[18] A. Children were definitely reacting to that.

[19] Q. His children were?

[20] A. Yes, I mean, he was not getting any cooperation or engagement from the children.

Final Hearing Transcript at 74-76 (numbering added).

26. In her contemporaneous memorandum of March 15, 2004, which supplements and explains the foregoing testimony, Ms. Rasco stated in relevant part as follows:

A chronology of observations and results for the above employee is provided for your review. Data indicate that this employee has not demonstrated corrective action. Of particular concern during the confirmatory observation in Seventh/Eighth Grades Language Arts Through ESOL was:

II.A.1 The teacher entered the classroom three minutes after the bell signaling the beginning of fourth period had rung. The learners had already entered the classroom. The teacher did not have his lesson plans readily available and had to take time to locate them. There was no rationale for not being prepared since the teacher did not have students in his class during second or third period.

III.B.4 At the beginning of the lesson when the teacher instructed the learners to turn to pages 162-163, three different learners told the teacher they had already read those pages with the substitute teacher on Friday. The learners did not understand why they had to repeat the assignment and the teacher did not give them any reason for repeating the lesson.

V.A.1 When learners attempted to develop associations using their own experiences, the teacher curtailed this experience by allowing interruptions from other learners and letting several learners speak at the same time.

V.C.1 No concepts that required critical analysis or problem-solving were developed. For example, the teacher asked, "Why is it important to learn about people who have difficulties in life?" He did not get a response and proceeded to ask, "Should everyone learn sign language?"

VI.A.2 Learner engagement was not monitored. There were numerous instances of off-task behavior throughout the lesson which the teacher did not address. One learner was catapulting a pen, second learner was daydreaming and not following along as others read orally, a third learner was fidgeting with her birthday balloons, and a fourth learner was writing on a 3"x8" sheet of paper instead of her notebook as the teacher had initially instructed. The teacher never re-directed the off-task behaviors during the lesson.

VI.C.4 At various points throughout the lesson, several learners made comments and responded to questions in Spanish. At no time did the teacher redirect the responses to English, assist the learners in making their comments in English, or provide feedback.



27. To repeat for emphasis, any findings of historical fact concerning Mutis's performance during the confirmatory evaluation must be based on the foregoing evidence, for that is all the proof there is on the subject.<sup>6</sup>

28. Ms. Rasco did not explain how she had applied the PACES indicators to her classroom observations of Mutis to determine that the teacher's performance was not up to standards.

D.

29. The three indicators at issue in this case, it will be seen upon close examination, are not so much standards upon which to base a judgment as factual conditions ("indicator-conditions") for which the evaluator is supposed to look. If a particular indicator-condition (e.g. the purpose of learning tasks is clear to learners) is found to exist, then the evaluator should award the teacher a passing grade of "acceptable" for that indicator (in this example, Indicator IV.A.5); if not, the grade should be "unacceptable."

30. But the indicator-conditions are not objective facts, equally perceivable by all observers; they are, rather, subjective facts, which come into being only when the evaluator puts historical (or observed) facts against external standards, using reason and logic to make qualitative judgments about what occurred. Subjective facts of this nature are sometimes called

"ultimate" facts, the answers to "mixed questions" of law and fact.

31. To illustrate this point, imagine that the class Ms. Rasco observed on March 15, 2004, had been videotaped from several different camera angles. The resulting tapes would constitute an accurate audio-visual record of what transpired in Mutis's class that day. Anyone later viewing the tapes would be able to make detailed and accurate findings of objective historical fact, including words spoken, actions taken, time spent on particular tasks, etc. But, without more than the videotapes themselves could provide, a viewer would be unable fairly to determine whether, for example, the purpose of learning tasks was "clear" to the students (Indicator IV.A.5),<sup>7</sup> or whether "wait time" was used appropriately to enhance "thinking skills" (Indicator V.B.2).<sup>8</sup> This is because to make such determinations fairly, consistently, and in accordance with the rule of law requires the use of standards of decision, yardsticks against which to measure the perceptible reality captured on film.

32. Another term for standards of decision is "neutral principles." A neutral principle prescribes normative conduct in a way that permits fair judgments to be made consistently—that is, in this context, enables the reaching of similar results with respect to similarly performing teachers most of

the time. A neutral principle must not be either political or results oriented. It must be capable of being applied across-the-board, to all teachers in all evaluations.

33. In the unique milieu of PACES, neutral principles could take a variety of forms. One obvious form would be standards of teacher conduct. Such standards might be defined, for example, with reference to the average competent teacher in the District (or school, or state, etc.). In an adjudicative proceeding such as this one, expert testimony might then be necessary to establish what the average competent teacher does, for example, to provide specific feedback upon the conclusion of learning tasks (Indicator VI.C.4) or to enhance the development of thinking skills through appropriate use of wait time (Indicator V.B.2).<sup>9</sup>

34. Other standards might be definitional. For example, definitions of terms such as "wait time" and "thinking skills" would facilitate the application of Indicator V.B.2. Still other standards might be framed as tests, e.g. a test for determining whether wait time enhances the development of thinking skills.

35. However the neutral principles are framed, at bottom there must be standards that describe what "satisfactory" performance of the indicators looks like, so that different people can agree, most of the time, that the indicator-

conditions are present or absent in a given situation—and in other, similar situations. Without neutral principles to discipline the decision-maker, the indicators can be used as cover for almost any conclusion an evaluator (or Administrative Law Judge) might want to make.

36. In this case, the record is devoid of any persuasive evidence of neutral principles for use in determining, as a matter of ultimate fact, whether the conditions described in the three relevant indicators were extant in Mutis's classroom on March 15, 2004, or not.

E.

37. In this de novo proceeding, the undersigned fact-finder is charged with the responsibility of determining independently, as a matter of ultimate fact, whether, as of the two-week period following probation, Mutis had corrected all of the performance deficiencies of which he was notified at the outset of probation. As mentioned, the only evidence of Mutis's post-probation teaching performance consists of Ms. Rasco's testimony about her observation of Mutis for 50 minutes on March 15, 2004, which was quoted above, along with her contemporaneous memorandum to Ms. Pace.

38. Ms. Rasco's contemporaneous memorandum sheds light on her testimony by clarifying which of the indicators was implicated by particular observations. Not much of this

evidence, as will be shown below, is relevant to Mutis's performance in relation to the three indicators on which termination could be based. (The discussion that follows refers to the numbered answers as quoted in paragraph 25 supra.)

39. Answers 2, 3, and 4 pertain to purported deficiencies with regard to Indicator II.A.1.<sup>10</sup> Having been rated unsatisfactory in this area for the first time on March 15, 2004, Mutis cannot be fired for these alleged deficiencies. This testimony, therefore, is irrelevant.

40. Answers 5 and 6 relate to alleged deficiencies with respect to Indicator III.B.4.<sup>11</sup> Having been rated unsatisfactory in this area for the first time on March 15, 2004, Mutis cannot be fired for these alleged deficiencies. This testimony, therefore, is irrelevant.

41. Answers 7, 8, and 10 relate to alleged deficiencies pertaining to Indicator VI.A.2.<sup>12</sup> Having been rated unsatisfactory in this area for the first time on March 15, 2004, Mutis cannot be fired for these alleged deficiencies. This testimony, therefore, is irrelevant.

42. Answers 16, 18, and 20 were not clearly associated with any particular deficiency. The undersigned finds this testimony unhelpful in determining whether Mutis was unsatisfactorily performing in the areas of Indicators IV.A.5, V.B.2, or VI.C.4.

43. Answer 1 is simply a conclusion, which the undersigned finds unhelpful as a basis for independent fact-finding.

44. This leaves Answers 12 and 14, which relate to alleged deficiencies in Indicator VI.C.4, which is a noted performance deficiency upon which termination could be based. The thrust of this testimony is that Mutis addressed some students in Spanish, rather than English. Even if Mutis did this, however, such does not implicate the Indicator in question, which is concerned with the provision of specific feedback upon the completion of learning tasks or outcomes, because Indicator VI.C.4 is silent as to the means of communication. Beyond that, Ms. Rasco offered the naked conclusion that Mutis failed to provide feedback, which merely tells the undersigned how to rule and hence is unhelpful.

45. In sum, the evidence is insufficient for the undersigned to find, as a matter of ultimate fact, that Mutis's performance on March 15, 2004, was deficient with regard to Indicators IV.A.5, V.B.2, and VI.C.4.

46. As important as the paucity of evidence establishing the objective historical facts concerning Mutis's performance on March 15, 2004, is the failure of proof regarding neutral principles for use in determining the existence or nonexistence of the relevant indicator-conditions. Even if the undersigned had a clear picture of what actually occurred in Mutis's

classroom that day, he has been provided no standards against which to measure Mutis's performance, to determine whether the indicator-conditions were met or not.

47. The absence of evidence of such standards is fatal to the Board's case. To make ultimate factual determinations without proof of neutral principles, the undersigned would need to apply standards of his own devising. Whatever merit such standards might have, they would not be the standards used to judge other teachers, and thus it would be unfair to apply them to Mutis.

#### CONCLUSIONS OF LAW

##### A.

48. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, 120.57(1), and 1012.34(3)(d)2.b.(II), Florida Statutes.

49. When a teacher contests a superintendent's recommendation of dismissal, as here, the ensuing hearing must be conducted "in accordance with chapter 120." See § 1012.34(3)(d)2.b.(II), Fla. Stat. A "chapter 120 proceeding [entails] a hearing de novo intended to 'formulate final agency action, not to review action taken earlier and preliminarily.'" Young v. Department of Community Affairs, 625 So. 2d 831, 833 (Fla. 1993) (quoting McDonald v. Department of Banking & Fin.,

346 So. 2d 569, 584 (Fla. 1st DCA 1977)). Thus, the Board's burden in this case was not merely to persuade the undersigned that the evaluators sincerely believed, after conducting a legally sufficient assessment, that Mutis's performance was deficient, nor even to persuade the undersigned that the evaluators' judgment was factually and legally tenable. Rather, the Board's burden was to persuade the undersigned himself to find, independently, that Mutis's performance was deficient.

50. Because this case is a proceeding to terminate a teacher's employment and does not involve the loss of a license or certification, the Board was required to prove the alleged grounds for Mutis's dismissal by a preponderance of the evidence. McNeill v. Pinellas County School Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Bd. of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Bd. of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

B.

51. Section 1012.34, Florida Statutes, which governs the process for evaluating teachers, provides in full as follows:

1012.34 Assessment procedures and criteria.--

(1) For the purpose of improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures for assessing the performance of duties and responsibilities of all instructional,



administrative, and supervisory personnel employed by the school district. The Department of Education must approve each district's instructional personnel assessment system.

- (2) The following conditions must be considered in the design of the district's instructional personnel assessment system:
  - (a) The system must be designed to support district and school level improvement plans.
  - (b) The system must provide appropriate instruments, procedures, and criteria for continuous quality improvement of the professional skills of instructional personnel.
  - (c) The system must include a mechanism to give parents an opportunity to provide input into employee performance assessments when appropriate.
  - (d) In addition to addressing generic teaching competencies, districts must determine those teaching fields for which special procedures and criteria will be developed.
  - (e) Each district school board may establish a peer assistance process. The plan may provide a mechanism for assistance of persons who are placed on performance probation as well as offer assistance to other employees who request it.
  - (f) The district school board shall provide training programs that are based upon guidelines provided by the Department of Education to ensure that all individuals with evaluation responsibilities understand the proper use of the assessment criteria and procedures.

(3) The assessment procedure for instructional personnel and school administrators must be primarily based on the performance of students assigned to their classrooms or schools, as appropriate. Pursuant to this section, a school district's performance assessment is not limited to basing unsatisfactory performance of instructional personnel and school administrators upon student performance, but

may include other criteria approved to assess instructional personnel and school administrators' performance, or any combination of student performance and other approved criteria. The procedures must comply with, but are not limited to, the following requirements:

(a) An assessment must be conducted for each employee at least once a year. The assessment must be based upon sound educational principles and contemporary research in effective educational practices. The assessment must primarily use data and indicators of improvement in student performance assessed annually as specified in s. 1008.22 and may consider results of peer reviews in evaluating the employee's performance. Student performance must be measured by state assessments required under s. 1008.22 and by local assessments for subjects and grade levels not measured by the state assessment program. The assessment criteria must include, but are not limited to, indicators that relate to the following:

1. Performance of students.
2. Ability to maintain appropriate discipline.
3. Knowledge of subject matter. The district school board shall make special provisions for evaluating teachers who are assigned to teach out-of-field.
4. Ability to plan and deliver instruction, including implementation of the rigorous reading requirement pursuant to s. 1003.415, when applicable, and the use of technology in the classroom.
5. Ability to evaluate instructional needs.
6. Ability to establish and maintain a positive collaborative relationship with students' families to increase student achievement.
7. Other professional competencies, responsibilities, and requirements as established by rules of the State Board of Education and policies of the district school board.

(b) All personnel must be fully informed of the criteria and procedures associated with the assessment process before the assessment takes place.

(c) The individual responsible for supervising the employee must assess the employee's performance. The evaluator must submit a written report of the assessment to the district school superintendent for the purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the assessment takes place. The evaluator must discuss the written report of assessment with the employee. The employee shall have the right to initiate a written response to the assessment, and the response shall become a permanent attachment to his or her personnel file.

(d) If an employee is not performing his or her duties in a satisfactory manner, the evaluator shall notify the employee in writing of such determination. The notice must describe such unsatisfactory performance and include notice of the following procedural requirements:

1. Upon delivery of a notice of unsatisfactory performance, the evaluator must confer with the employee, make recommendations with respect to specific areas of unsatisfactory performance, and provide assistance in helping to correct deficiencies within a prescribed period of time.

- 2.a. If the employee holds a professional service contract as provided in s. 1012.33, the employee shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of

progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, a transfer does not extend the period for correcting performance deficiencies.

b. Within 14 days after the close of the 90 calendar days, the evaluator must assess whether the performance deficiencies have been corrected and forward a recommendation to the district school superintendent. Within 14 days after receiving the evaluator's recommendation, the district school superintendent must notify the employee who holds a professional service contract in writing whether the performance deficiencies have been satisfactorily corrected and whether the district school superintendent will recommend that the district school board continue or terminate his or her employment contract. If the employee wishes to contest the district school superintendent's recommendation, the employee must, within 15 days after receipt of the district school superintendent's recommendation, submit a written request for a hearing. The hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

(I) A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of ss. 120.569 and 120.57. A majority vote of the membership of the district school board shall be required to sustain the district school superintendent's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment; or

(II) A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

(4) The district school superintendent shall notify the department of any instructional personnel who receive two consecutive unsatisfactory evaluations and who have been given written notice by the district that their employment is being terminated or is not being renewed or that the district school board intends to terminate, or not renew, their employment. The department shall conduct an investigation to determine whether action shall be taken against the certificateholder pursuant to s. 1012.795(1)(b).

(5) The district school superintendent shall develop a mechanism for evaluating the effective use of assessment criteria and evaluation procedures by administrators who are assigned responsibility for evaluating the performance of instructional personnel. The use of the assessment and evaluation procedures shall be considered as part of the annual assessment of the administrator's performance. The system must include a mechanism to give parents and teachers an opportunity to provide input into the administrator's performance assessment, when appropriate.

(6) Nothing in this section shall be construed to grant a probationary employee a right to continued employment beyond the term of his or her contract.

(7) The district school board shall establish a procedure annually reviewing instructional personnel assessment systems to determine compliance with this section. All substantial revisions to an approved system must be reviewed and approved by the district school board before being used to assess instructional personnel. Upon request by a school district, the department shall provide assistance in developing, improving, or reviewing an assessment system.

(8) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54, that establish uniform guidelines for the submission, review, and approval of district procedures for the annual assessment of instructional personnel and that include criteria for evaluating professional performance.

(Underlining and italics added).

52. Under Section 1012.34(3), school districts must establish a primarily student performance-based procedure (or system) for assessing the performance of teachers. In other words, the method of accomplishing the assessment must be tailored to meet the goal of forming evaluative judgments about teachers' performance based mainly on the performance of their students.

53. In clear terms, the legislature has announced that the primary (though not exclusive)<sup>13</sup> indicator of whether a teacher is doing a good job is the performance of his students. If a teacher's students are succeeding, then, whatever he is doing, the teacher is likely (though not necessarily) performing his

duties satisfactorily. It is plainly the legislature's belief that if we do not know how the teacher's students are performing, then we cannot make a valid judgment as to whether the teacher is performing his duties satisfactorily.<sup>14</sup>

54. The statute further mandates that, in assessing teachers, indicators of student performance—which performance is assessed annually as specified in Section 1008.22—must be the primarily-used data. (In contrast, evaluators are permitted, but not required, to make use of peer reviews in assessing teacher performance.)

55. Section 1008.22, which is referenced specifically in Section 1012.34(3)(a), requires that school districts participate in a statewide assessment program, the centerpiece of which is the Florida Comprehensive Assessment Test ("FCAT"). See § 1008.22(3), Fla. Stat. The FCAT is a standardized test that is administered annually to students in grades three through 10. Id.

56. Section 1008.22 is not concerned only with the FCAT, however. Subsection (7), for example, provides as follows:

(7) LOCAL ASSESSMENTS.--Measurement of the learning gains of students in all subjects and grade levels other than subjects and grade levels required for the state student achievement testing program is the responsibility of the school districts.

Thus, school districts are charged with developing their own local assessment tools, to fill in the gaps left open by the statewide FCAT testing program. Section 1008.22(5) provides additionally that "[s]tudent performance data shall be used in . . . evaluation of instructional personnel[.]"

57. Section 1012.34(3)(a) prescribes two and only two permissible measures of student performance for use in evaluating teachers: (a) the statewide FCAT assessments and (b) the gap-filling local assessments, both of which measures are required under Section 1008.22. It is clear that Sections 1012.34(3) and 1008.22 have at least one subject in common, namely, student performance-based assessment of teachers. Being in pari materia in this regard, Sections 1012.34 and 1008.22 must be construed so as to further the common goal. See, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993) (separate statutory provisions that are in pari materia should be construed to express a unified legislative purpose); Lincoln v. Florida Parole Com'n, 643 So. 2d 668, 671 (Fla. 1st DCA 1994) (statutes on same subject and having same general purpose should be construed in pari materia).

58. When the requirements of Section 1012.34(3) are read together with Section 1008.22, several conclusions are inescapable. First, FCAT scores must be the primary source of information used in evaluating any teacher who teaches an FCAT-



covered subject to students in grades three through 10. Second, school districts must develop, and annually administer, local assessments for subjects and grade levels not measured by the FCAT. Third, student performance data derived from local assessments must be the primary source of information used in evaluating teachers whose subjects are not covered on the FCAT and/or whose students do not take the FCAT.

59. The absence of evidence in the record concerning the performance of Mutis's students either on the FCAT or on local assessments, as appropriate, see endnote 6, supra, deprives the undersigned of information that the legislature has deemed essential to the evaluation of a teacher's performance. Having neither state nor local assessments to review, the undersigned cannot find that Mutis's performance was deficient in the first place, much less whether he corrected the alleged performance deficiencies in accordance with Section 1012.34(3)(d). Without such findings, the Board cannot dismiss Mutis for failure to correct noted performance deficiencies.

C.

60. It was stated in the Findings of Fact above that the Board can terminate Mutis's employment only if, based on an assessment of his performance as of the two-week period following the 90 calendar days of probation, the teacher had failed to correct the particular performance deficiencies of

which he had been formally notified in writing prior to probation; other alleged deficiencies, whether observed during probation or thereafter, cannot be relied upon in support of a decision to dismiss Mutis. Standing behind this observation is Section 1012.34(3)(d), Florida Statutes.

61. The pertinent statutory language instructs that a teacher whose performance has been deemed unsatisfactory must be provided a written "notice of unsatisfactory performance," which notice shall include a description of "such unsatisfactory performance" plus recommendations for improvement in the "specific areas of unsatisfactory performance." The statute then specifies that the teacher must be allowed 90 calendar days "following the receipt of the notice of unsatisfactory performance" to correct "the noted performance deficiencies." Clearly, the "noted performance deficiencies" are the specific areas of unsatisfactory performance described in the notice of unsatisfactory performance. Finally, the statute mandates that the teacher shall be assessed within two weeks after the end of probation to determine whether "the performance deficiencies" have been corrected. It is clear, again, that "the performance deficiencies" are "the noted performance deficiencies" described in the written notice of unsatisfactory performance. See § 1012.34(3)(d)1. & 2.a., Fla. Stat. (emphasis added).

62. The reason why a decision to terminate a poorly performing teacher must be based solely on the specific performance deficiencies described in the pre-probation notice of unsatisfactory performance is plain: allowing the school district to rely on subsequently observed deficiencies would defeat the teacher's unambiguous statutory right to have 90 post-notice calendar days in which to correct the noted performance deficiencies that triggered probation in the first place.

63. This case highlights the problem posed by post-notice deficiencies. The notice of unsatisfactory performance (the Summary) that gave rise to Mutis's probation, which was based on Ms. Rasco's evaluation of November 17, 2003, charged the teacher with five specific performance deficiencies. By February 18, 2004, when Ms. Williams formally observed Mutis for the last time before the end of probation, Mutis had corrected all but one (Indicator IV.A.5) of the noted performance deficiencies—suggesting that he had made significant improvement.

64. Unfortunately for Mutis, however, Ms. Williams believed that the teacher had exhibited three deficiencies besides the noted performance deficiencies, with the net result that, near the end of probation, Mutis still had four deficiencies. Yet not one of the three new deficiencies (Indicators II.A.3, II.D.3, and III.A.3) had been recorded on an

"of record" evaluation before February 18, 2004. Obviously, Mutis was not given 90 days to correct these three alleged deficiencies.

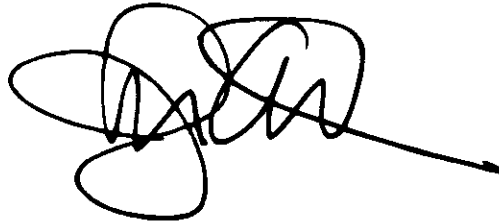
65. This problem becomes even more glaring when the confirmatory evaluation is examined. On March 15, 2004, Ms. Rasco found 13 deficiencies in Mutis's performance—by far his worst showing of the entire process. Of these 13, seven (Indicators II.A.1, II.D.4, II.E.2, III.B.4, IV.D.6, V.C.1, and VI.A.2) had not previously been reported on an "of record" evaluation; in other words, Mutis was informed of these deficiencies for the first time after his probation had ended, when he had no chance to correct them.<sup>15</sup> Two others had only recently been reported by Ms. Williams following her evaluation of Mutis on February 18, 2004.

66. For the above reasons, when assessing whether, in fact, Mutis had corrected the noted performance deficiencies as of the two-week period following probation, the undersigned focused, as he was required to do, exclusively on the five deficiencies described in the Summary, three of which were alleged not to have been timely corrected. Having determined as a matter of fact that the evidence was insufficient to prove these three alleged deficiencies existed or persisted, it must be concluded that the Board has failed to carry its burden of establishing the alleged factual grounds for dismissal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order: (a) exonerating Mutis of all charges brought against him in this proceeding; (b) providing that Mutis be immediately reinstated to the position from which he was suspended; and (c) awarding Mutis back salary, plus benefits, to the extent these accrued during the suspension period, together with interest thereon at the statutory rate.

DONE AND ENTERED this 15th day of December, 2004, in Tallahassee, Leon County, Florida.

A handwritten signature in black ink, appearing to read 'J. Van Laningham', with a long horizontal stroke extending to the right.

---

JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of December, 2004.

## ENDNOTES

<sup>1/</sup> The evaluator indicates unacceptable performance of an indicator by circling the indicator's name on the OFAE. (See paragraph 10, infra in the text, for a description of how the indicators are named.)

<sup>2/</sup> Put another way, PACES evaluators do not rate teachers at the domain level or the component level. That is, when an evaluator determines that a teacher has failed a particular indicator, say II.E.5 (quickly and reasonably manages unacceptable behavior), the evaluator does not then make a qualitative determination whether the teacher failed the broader Component E (monitoring and maintaining learner behavior). Such a determination would require that the teacher's failure to manage unacceptable behavior (however that failure was manifested in a given observation) be considered in context with his satisfactory performance of the other indicators relating to monitoring and maintaining learner behavior, to assess whether, on the whole, the teacher was adequately monitoring and maintaining learner behavior. Under PACES, such a determination is not necessary because failing the indicator automatically results (without need for further deliberation or consideration of other indicators, components, or domains) in the conclusion of overall unsatisfactory performance. Likewise, and for the very same reasons, the evaluator, upon finding a teacher's performance of indicator II.E.5 deficient, does not then make a qualitative determination whether the teacher failed the overarching Domain II (managing the learning environment), which would require that the teacher's failure to manage unacceptable behavior (however that failure was manifested in a given observation) be considered in context with his performance of (a) the other indicators relating to Component E and (b) the indicators relating to the rest of the components under Domain II, to assess whether, on the whole, the teacher was adequately managing the learning environment.

<sup>3/</sup> The 44 indicators are not equally apportioned between the six domains. There are 12 indicators under Domain IV and 10 under Domain II; seven under Domain I; and five apiece under Domains III, V, and VI. Therefore, all indicators being equal (and they are), a teacher is more likely to fail an observation on an indicator falling under Domains II or IV than, say, V or VI. In this statistical sense, then, it could be said that Domains II and IV are more important than the others. But this would be somewhat misleading, because passing Domain IV is of no greater

benefit to the teacher than passing Domain V, or any other. In the final analysis, all that truly matters is whether or not the teacher passed each and every indicator.

<sup>4/</sup> In this proceeding, Mutis might have challenged the propriety of being placed on probation in the first place, but he did not.

<sup>5/</sup> To be sure, Ms. Herrera-Torres and Ms. Williams found other alleged deficiencies besides the five noted deficiencies, which other deficiencies the undersigned has not addressed above. These other deficiencies might have formed the basis for another 90-day performance probation, or perhaps given cause to extend the then-ongoing probation, but the Board elected not to proceed in either fashion. Since Mutis was not given 90 days to correct these other alleged deficiencies, they cannot be the basis of a recommendation for dismissal.

<sup>6/</sup> There is no evidence in the record regarding the performance of Mutis's students as measured by state and/or local assessments. Because of this, it is impossible for the undersigned to make de novo findings based primarily on student performance as to whether, ultimately, Mutis's performance was satisfactory.

<sup>7/</sup> To look for this indicator-condition, one needs to know whether the clarity of the lesson's purpose or importance must be determined subjectively, from the standpoint of the individual learners, or objectively, based on a "reasonable learner" test. In making the findings set forth in paragraphs 19 and 20 of the text, the undersigned effectively used a "reasonable learner" test, although, he acknowledges, there is no evidence in the record on which a "reasonable learner" standard can be articulated; hence the fairness of these findings (which are not dispositive in any event) is open to debate. None of the students themselves testified about whether they clearly understood the purpose or importance of the lesson in question; thus, it would be impossible to make findings about matters that were in the minds of the students.

<sup>8/</sup> A viewer could make such determinations, of course, but he would necessarily make them based upon personal standards of his own choosing, for the cameras would not have recorded decisional standards. Determinations founded upon personal preferences are not fair (or consistent with the rule of law) because they inevitably produce inconsistent results, each decision-maker

doing what is right in his or her own eyes, seeing similar situations differently.

A real-life example of this phenomenon is provided by a news story that received wide coverage shortly before this Recommended Order was written. The story involved a U.S. Marine who, during the liberation of Fallujah, Iraq, shot and killed a wounded enemy combatant, which latter might—or might not—have posed a present danger. The incident happened to have been caught on film by an embedded reporter. Once the video was broadcast on television, the question arose: Was this a murder, or a justified killing in battle? The matter not settled as of this writing, but opinions on both sides of the issue have been expressed in the media by experts, pundits, and others. The point here is this: A viewer watching the videotape cannot fairly determine, without more than the film shows, whether a war crime was committed, for that determination requires that the historical facts be compared to external standards (known as law), using reason and logic to arrive at an ultimate determination of guilt or innocence. The question of guilt or innocence cannot be settled fairly, consistent with the rule of law, unless the fact-finder is provided with (and disciplined by) neutral standards of decision against which the historical facts as captured on the film and established through other evidence can be measured.

<sup>9/</sup> Such expert testimony, designed to assist the fact-finder in understanding the applicable standard of conduct, must be distinguished from testimony, offered in the guise of expert opinion, which is calculated merely to instruct the fact-finder how to decide the case, without helping the fact-finder make an independent determination about what occurred. Testimony that simply tells the fact-finder how to decide the case is impermissible and generally inadmissible. See, e.g., Schneer v. Allstate Indem. Co., 767 So. 2d 485, 488-89 (Fla. 3d DCA 2000) (no error in excluding proffered expert testimony that plaintiffs had not committed insurance fraud); Fino v. Nodine, 646 So. 2d 746, 749 (Fla. 4th DCA 1994) (opinion testimony that accident was "unavoidable" should not have been admitted); 3-M Corp.—McGhan Medical Reports Div. v. Brown, 475 So. 2d 994, 997 (Fla. 1st DCA 1985) (opinion that product was "defective" was inadmissible).

Much of the evaluators' testimony in this case about Mutis's allegedly unsatisfactory performance largely had the effect of advising the undersigned how to decide the case, as



opposed to supplying evidence about what specifically occurred in the classroom and what standards should be used to judge such performance. In other words, much of the testimony amounted to little more than witnesses opining that Mutis's performance was "unsatisfactory"—an ultimate determination that the undersigned independently must make. The undersigned, exercising his prerogative as the fact-finder, has given little weight to such testimony, which probably would have been excluded in a civil trial.

<sup>10/</sup> The record does not contain a description of Indicator II.A.1.

<sup>11/</sup> The record does not contain a description of Indicator III.B.4.

<sup>12/</sup> The record does not contain a description of Indicator VI.A.2.

<sup>13/</sup> In 2004 the legislature added a sentence to § 1012.34(3), effective June 10, 2004, the language of which is shown in italics in the quotation of the statute in paragraph 51 of the text. See Ch. 2004-295, § 11, Laws of Fla. This recent amendment makes clearer what was already reasonably apparent from the statute's preexisting language, namely, that student performance is not the only factor to consider in evaluating a teacher. Rather, as the amendment underscores, unsatisfactory performance can be found to exist even if the student performance data are acceptable, where the teacher's performance, as measured against other approved criteria, is so poor as to outweigh the favorable indicators of student performance. As a clarifier, the amendment does not change the statutory directive that teacher evaluations be based primarily on student performance as measured by the FCAT and other standardized tests. Thus, in short, while a teacher's performance might be deemed unsatisfactory for reasons other than student performance, student performance on standardized tests cannot be ignored (or given short shrift) in a teacher's evaluation, for an assessment that gives little or no weight to students' test scores obviously is not one "primarily based on the performance of students" "as measured by [specific] state [and local] assessments" under any reasonable understanding of those unambiguous words.

<sup>14/</sup> Whatever its shortcomings, the prescribed approach leans heavily on objective factors (test scores), thereby minimizing

the subjectivity (and potential unfairness) inherent in other methods of evaluation.

<sup>15/</sup> Four of these seven (Indicators II.A.1, III.B.4, V.C.1, and VI.A.2) were among the six "most glaring" deficiencies that Ms. Rasco deemed of "particular concern" in her March 13, 2004, memorandum to Ms. Pace.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.