

9-10-04

BEFORE THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

FILED

ST. LUCIE COUNTY SCHOOL BOARD,
Petitioner,

AP

2005 FEB -7 P 2:30

v.

DOAH Case No. 04-1322

JUDITH LEE HUETER,
Respondent.

FSR CLOS

FINAL ORDER

THIS CAUSE came before the School Board of St. Lucie County, Florida ("School Board"),
for final agency action in accordance with Section 120.57(1)(k) and (1), Florida Statutes.

Appearances

For Petitioner: Elizabeth Coke, Esquire
J. David Richeson & Associates, P.A.
Post Office Box 4048
Fort Pierce, FL 34948-4048

For Respondent: Catherine J. Chamblee, Esquire
Chamblee, Johnson & Haynes, P.A.
215 W. Verne Street, Suite D
Tampa, FL 33606

Introduction

The Respondent Judith Lee Hueter is a teacher employed by the Petitioner St. Lucie County School Board. The Petitioner, by and through the Superintendent of Schools, sought termination of the Respondent's employment for just cause in accordance with Section 1012.33, Florida Statutes), and School Board Policy 3.56.

The Respondent requested a formal administrative hearing and one was held on June 24 and 29, 2004, before an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings of the Florida Department of Administration. On September 10, 2004, the ALJ entered a Recommended Order (a) finding that the Respondent violated School Board Policy 3.56, (b)

dismissing charges that the Respondent violated Florida Administrative Code Rule 6B-1.001, (c) acknowledging that the violations proved warrant the discipline of suspension without pay from March 11, 2003, to and including the date of entry of a Final Order, and (d) denying the Respondent's claim for back pay and benefits. The Recommended Order has been forwarded to the School Board in accordance with Section 120.57(1), Florida Statutes, and is attached to and made a part of this Final Order.

Written exceptions to the Recommended Order and memorandum in support were filed by the Superintendent, as Petitioner, on October 4, 2004. The Respondent filed a reply to the exceptions on October 27, 2004, and both parties have submitted proposed forms of Final Order. The School Board has also received an electronic mail transmission and a letter from members of the public who are opposed to the proposed termination of the Respondent

The School Board met on December 14, 2004, and February 2, 2005, in Fort Pierce, St. Lucie County, Florida, to take final agency action. Argument was presented by counsel to each of the parties. Several members of the general public requested opportunities to address the School Board and all were permitted to do so. The record being closed, the School Board has considered the electronic mail transmission and letter from and the oral statements of members of the public, not to supplement the record, but solely as additional argument on behalf of the Respondent.

Upon consideration of the Recommended Order, the exceptions of the Petitioner, the reply of the Respondent, argument of counsel to the parties, and the additional argument on behalf of the Respondent, and upon a review of the complete record in this proceeding, the School Board finds and determines as follows:

Rulings on Exceptions

An agency may reject or modify an ALJ's finding of fact only if the finding is not supported by competent, substantial evidence, or the proceedings on which the finding was based did not comply

with essential requirements of law. Section 120.57 (1) (1), Florida Statutes. The agency has no authority to reweigh conflicting evidence. See, e.g. Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). The agency may adopt the ALJ's findings of fact and conclusions of law in a recommended order, or the agency may reject or modify the conclusions of law over which it has substantive jurisdiction. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase the penalty without review of the complete record and without stating with particularity its reasons in the final order, by citing to the record in justifying its action. Section 120.57 (1) (1), Florida Statutes.

1. The Petitioner first excepts to the ALJ's statement that the issue presented in this proceeding is "whether [the School Board] should terminate [the Respondent] following her second conviction for Driving Under the Influence (DUI)." The parties agreed in the Joint Pre-Hearing Stipulation that among the issues for determination is "whether [the School Board] had just cause to terminate [the] Respondent's employment." The Petitioner's Exception No. 1 is accepted to the extent that the issue presented is rephrased as "whether there is just cause to terminate the employment of the Respondent as a result of her second conviction for DUI."

2. The Petitioner's second exception is to the ALJ's determination that evidence relating to the Respondent's professional competence, and evidence concerning her history of alcoholism and related treatment, are relevant to certain of the alleged violations. The ALJ limited consideration of such evidence to those provisions of the Code of Ethics of the Education Profession in Florida (Florida Administrative Code Rule 6B-1.001) and in the School Board's Employee Standards of Conduct (Policy 3.56) that relate to professionalism and for which a violation was alleged. The Petitioner's Exception No. 2 is rejected as the determination of the ALJ is supported by competent legal authority.

3. The Petitioner's Exception No. 3 is rejected as the Findings of Fact in paragraph Nos. 7 and 8 are supported by competent and substantial evidence.

4. The Petitioner's Exception No. 4 is rejected as the Findings of Fact in paragraph No. 10 are supported by competent and substantial evidence.

5. The Petitioner's Exception No. 5 is rejected as the Findings of Fact in paragraph No. 17 are supported by competent and substantial evidence.

6. The Petitioner's Exception No. 6 is rejected as the Findings of Fact in paragraph No. 20 are supported by competent and substantial evidence. (The Petitioner's reference in the exception was to paragraph No. 21, but the Petitioner clearly intended to challenge the findings of fact in paragraph No. 20.)

7. The Petitioner's Exception No. 7 is accepted and the findings of fact in paragraph No. 26 are revised to reflect that the request for back pay and benefits was that of the Respondent.

8. The Petitioner's eighth exception is to the Conclusions of Law in paragraph No. 32. The ALJ determined that although the Respondent violated various provisions of School Board Policy 3.56 and that discipline is warranted, the violations "do not amount to just cause for termination under the circumstances of this case," and that, alternatively, "the School Board's progressive discipline policy militates in favor of a penalty less than termination for this second offense." For the reasons set forth below, the Petitioner's Exception No. 8 is accepted.

In this proceeding, an infusion of policy is required to make a conclusion of law whether the Respondent's conduct in violating School Board policy 3.56 merits termination under the circumstances presented. See Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1235 (Fla. 5th DCA 1992); Johnson v. School Board of Dade County, 578 So. 2d 387 (Fla. 3rd DCA 1991). The ALJ concluded that the Respondent violated School Board policy proscribing conviction of a criminal act that constitutes a misdemeanor (Conclusions of Law in paragraph No. 36), violated

the Education Practices Commission (“EPC”) order proscribing the consumption of alcohol during the period of probation resulting from her first DUI conviction (Conclusions of Law in paragraph No. 39), and violated School Board policy proscribing alcohol-related offenses (Conclusions of Law paragraph No. 52). The School Board therefore rejects the ALJ’s conclusion that the violations do not warrant termination. The School Board finds that on the factual record presented, and after an infusion of policy considerations in applying the Board’s own rules, the Respondent’s conduct constitutes just cause for termination.

9. The Petitioner’s Exception No. 9 is rejected as the Conclusions of Law in paragraph No. 34 are supported by competent legal authority.

10. The Petitioner’s Exception No. 10 is to the Conclusions of Law in paragraph No. 51. The ALJ concluded that because no evidence was presented that the Respondent’s off-duty conduct adversely affected the public’s attitude toward the School District, the Petitioner had failed to prove a violation of School Board Policy proscribing contact or conduct that had such an effect. For the reasons set forth above in the discussion of Petitioner’s exception No. 8, the ALJ’s conclusion is rejected; the misconduct of the Respondent clearly “speaks for itself,” and after a careful review of the record presented, and an infusion of policy in applying the Board’s own rule, the School Board determines that such misconduct is violative of the rule. Compare Purvis v. Marion County School Board, 766 So. 2d 422 (Fla. 5th DCA 2000).

11. The Petitioner’s eleventh exception is to the Conclusions of Law in paragraph No. 54, wherein the ALJ found that termination for a second DUI is inconsistent with the School Board’s progressive discipline policy. An infusion of policy is required to make such a conclusion of law, and the School Board rejects the reasoning of the ALJ. Here, the progression in discipline was from a two-day suspension without pay for the first offense to termination following the second offense,

which occurred while the Respondent remained under probation from the EPC for the first offense. The Petitioner's exception is accepted.

12. The Petitioner's Exception No. 12 is to the Conclusions of Law in paragraph No. 56, wherein the ALJ concluded that just cause is lacking for the "harsh" discipline of termination. For the reasons set forth above in the discussion of Petitioner's Exception Nos. 8, 10, and 11, the ALJ's conclusion is rejected and the Petitioner's exception is accepted.

13. The Petitioner's Exception No. 13 is rejected as the Conclusions of Law in paragraph No. 57 are supported by competent legal authority.

14. The Petitioner's Exception No. 14 is to the Conclusions of Law in paragraph No. 58. The ALJ found that there was "nothing to gain" by terminating the Respondent. For the reasons set forth in the discussion of Petitioner's Exception Nos. 8, 10, and 11, the ALJ's conclusion is rejected and the Petitioner's exception is accepted.

15. The Petitioner's Exception No. 15 is rejected as the Findings of Fact in paragraph 59 (albeit denominated as Conclusions of Law) are supported by competent and substantial evidence.

16. The Petitioner's Exception No. 16 is to the Conclusions of Law in paragraph No. 61. To the extent that the ALJ speculated regarding how the School Board might have responded to a second violation of the drug-free workplace policy, the ALJ's conclusion is rejected and the Petitioner's exception is accepted.

17. The Petitioner's Exception No. 17 is to the Conclusions of Law in paragraph 62. The ALJ concluded that the School Board should take into account the mitigating circumstances of the principals' opinions, the well-being of the Respondent, and the students who will benefit from her experience. After considering all of the factors cited by the ALJ, and upon an infusion of policy, and consideration of the matters described above in the discussion of Petitioner's Exception Nos. 8, 10, and 11, the ALJ's conclusion is rejected and the Petitioner's exception is accepted.

18. & 19. The Petitioner's Exception Nos. 18 and 19 are rejected as the Conclusions of Law in paragraph 64 are supported by competent legal authority, except to the extent such conclusions are inconsistent with the penalty as determined below.

20. Petitioner's Exception No. 20 is to the ALJ's Recommendation. For the reasons set forth above in the discussion of Petitioner's exception Nos. 8, 10, 11, and 17, and as set forth below regarding the penalty, the Petitioner's exception is accepted.

21. The Petitioner's Exception No. 21 is accepted and the Recommendation is revised to reflect that the second date should read March 11, 2004.

Findings of Fact

The School Board adopts the findings of fact set forth in paragraph Nos. 1 through 26 of the Recommended Order, subject to the revision of paragraph 26 in accordance with the Petitioner's Exception No. 7 as set forth above.

Conclusions of Law

The School Board adopts the Conclusions of Law in paragraphs 27 through 64 of the Recommended Order, except that (a) the Conclusions of Law set forth in paragraphs 32, 51, 54, 56, 58, 61, and 62, are rejected for the reasons set forth above, (b) the Conclusions of Law set forth in paragraph 64 are rejected to the extent inconsistent with the penalty as determined below, and (c) the Conclusions of Law set forth in paragraphs 47 and 63 are rejected, for the reasons set forth below.

In paragraph 47 of the Recommended Order, the ALJ concluded that she was "unable to locate any case, statute, rule or other authority to support the notion that either or both DUIs constitute, under the facts and circumstances of this case, a lapse in professional ethics as a teacher." The EPC Order entered against the Respondent following her first DUI conviction, however, which Order was made a part of the record in this proceeding, adopted and incorporated by reference the Conclusions of Law set forth in the Administrative Complaint that had initiated the EPC action. Those Conclusions of

Law, in turn, included specific determinations, adopted by the EPC, that the Respondent's first DUI conviction constituted violations of Section 231.2615(1)(c) and (e), Fla. Stat. (subsequently recodified as Section 1012.795(1)(c) and (e), Fla. Stat.). The Conclusions of Law in paragraph 47 are rejected.

In paragraph 63 of the Recommended Order, the ALJ entered a Conclusion of Law finding that "It is entirely appropriate to impose conditions upon the exercise of discretion in favor of [the Respondent's] continued employment, including putting her on formal notice that any future DUI arrest will result in immediate termination." The School Board finds no authority for the imposition, nor any means of enforcement, of a "formal notice" as described by the ALJ. The inability to comply with this recommendation is further ground for determining that the penalty as recommended by the ALJ is simply inappropriate under the facts presented. See Allen v. School Board of Dade County, 571 So. 2d 568, 569 Fla. 3rd DCA 1990).

Penalty

The School Board rejects the penalty recommended by the ALJ, finds that termination of the Respondent's employment is the correct and appropriate penalty based upon the facts of this proceeding and the Board's application of policy considerations, and therefore increases the penalty to termination of employment for the following reasons:

- (a) The Respondent's misconduct constituted a second offense for the same type of misconduct for which the Respondent was previously disciplined both by the School Board and by the EPC.
- (b) The Respondent's misconduct occurred during the period of probation under the terms of the EPC order entered following her first offense.
- (c) The Respondent was fully aware that the second offense placed her in jeopardy of termination, and notwithstanding that awareness the Respondent again engaged in the proscribed activity.

- (d) There is no effective means by which the School Board can condition the Respondent's further employment to prevent a third offense in the absence of a knowing, free, and voluntary agreement by the Respondent to accept reinstatement on a probationary basis.

Notwithstanding the foregoing, the School Board finds and determines that if the Respondent executes a Last Chance Agreement in the form attached as Exhibit A, termination should be held in abeyance, and the Respondent reinstated to her employment as a teacher, on a probationary basis, under the terms and conditions set forth in the Last Chance Agreement.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Respondent Judith Lee Hueter be, and she is hereby, terminated from her employment with the School Board of St. Lucie County, Florida, provided, however, that if the Respondent executes and delivers to the Superintendent of Schools a Last Chance Agreement in that form attached as Exhibit A, this Final Order shall be held in abeyance, and the Respondent shall be reinstated to her employment as a teacher, on a probationary basis, under the terms and conditions set forth in the Last Chance Agreement. The Respondent shall not be entitled to back pay or benefits for the period from March 11, 2004, to and including the date of probationary reinstatement under the Last Chance Agreement. If the Respondent violates any term or condition of the Last Chance Agreement at any time during her employment by the School Board, the probationary reinstatement provided in this Final Order shall be rescinded effective immediately upon the date of such violation. This order shall take effect upon filing with the Superintendent of Schools as Secretary of the SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA.

NOTICE OF RIGHT TO APPEAL

Any party adversely affected by this Final Order may seek judicial review pursuant to Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030 (b) (1) (C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Florida Rule of Appellate Procedure 9.110, with the Superintendent as Secretary of the School Board of St. Lucie County, 4204 Okeechobee Road, Fort Pierce, Florida 34947. A second copy of the Notice of Appeal, together with the filing fee, must be filed with the appropriate District Court of Appeal.

Attachment: Recommended Order

Copies furnished to:

Elizabeth Coke, Esquire
Catherine J. Chamblee, Esquire
Daniel B. Harrell, Esquire
Clerk, Division of Administrative Hearings

EXHIBIT A TO FINAL ORDER
LAST CHANCE AGREEMENT

STATE OF FLORIDA
COUNTY OF ST. LUCIE

JUDITH LEE HUETER, being first duly sworn, deposes and states as follows:

A. This Last Chance Agreement (“Agreement”) is given in consideration of the willingness of the School Board of St. Lucie County (“School Board”) to reinstate me, on a probationary basis, to my position as a teacher, as provided in the Final Order of the School Board entered in DOAH Case No. 04-1322 (“Final Order”).

B. I agree:

1. To cooperate in up to six (6) unannounced tests of my breath, blood, or urine for evidence of alcohol use during the twelve (12) months following the first date of reinstatement to my employment with the School Board, and to pay the expense of all such testing.

2. To continue my participation in treatment for alcohol dependency until I successfully complete a state-licensed substance abuse program of treatment, and to demonstrate my successful completion of such program by (a) obtaining a discharge report that has been prepared by a licensed health care professional and (b) providing the discharge report to the School Board.

3. Until not less than ninety (90) days after receipt by the School Board of the discharge report referenced in paragraph B.2 above, to authorize persons involved in counseling, diagnosing, and treating me for my alcohol dependency to disclose to the School Board my progress and cooperation and any danger such persons may perceive in connection with the performance of my job duties.

C. I understand and agree that if I violate any term or condition of this Agreement at any time during my employment by the School Board, my probationary reinstatement shall be rescinded effective immediately upon the date of such violation.

D. Furthermore, I understand and agree that a conviction, plea of guilty, plea of no contest, or plea of nolo contendere to a third Driving Under the Influence citation will constitute a violation of this Agreement, and will result in rescission of my probationary reinstatement and immediate termination from my employment without recourse or opportunity for further hearing under Section 120.57, Florida Statutes, or any other provision.

E. I acknowledge that any determination by the School Board that I have violated any term or condition of this Agreement is an administratively final decision subject to review only as provided in Section 120.68, Florida Statutes.

F. I further acknowledge that my attorney has reviewed this Agreement with me; that I am entering into this Agreement by my own knowing, free, and voluntary act; and that I accept the terms and conditions of this Agreement without duress, coercion, or undue influence.

G. I further acknowledge that I received this Agreement on or before January 28, 2005, and that I have been afforded not less than thirty (30) days (until the last date to file an appeal of the Final Order) in which to seek further review by my attorney and to revoke this Agreement. I understand and agree that I may revoke this Agreement by timely filing an appeal of the Final Order.

H. Unless revoked by me in the manner provided in paragraph G above, this Agreement, and my probationary reinstatement, shall become effective on the first business day following the later of (1) the date I deliver to the Superintendent an executed original of this Agreement or (2) the last date to file an appeal of the Final Order.

DATED this ___ day of February, 2005.

JUDITH LEE HUETER

Sworn to and subscribed before me this ___ day of February, 2005, by JUDITH LEE HUETER, who is personally known to me or has produced _____ as identification.

[Notary Seal]

Notary Public

Print Name: _____

My Commission Expires: _____