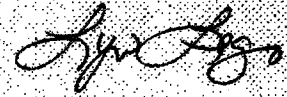


STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS



AGENCY CLERK
SCHOOL BOARD OF MANATEE COUNTY

SCHOOL BOARD OF
MANATEE COUNTY, FLORIDA,

Petitioner,

vs.

CASE NO.: 07-3924

TODD RAVEN,

Respondent.

FINAL ORDER

THIS CAUSE came before the School Board of Manatee County, Florida, on March 24, 2008 for final action on the RECOMMENDED ORDER of the Administrative Law Judge Daniel M. Kilbride dated February 5, 2008, and the Board, having reviewed and considered the entire record, considered the Exceptions filed and arguments of counsel, enters this its FINAL ORDER in this action.

The School Board hereby adopts pages 1 through 17 to and including paragraph 55 of the Conclusions of Law and paragraphs 64, 71 and 72 of the Conclusions of Law of the RECOMMENDED ORDER and incorporates same as part of this FINAL ORDER. Additionally, the School Board accepts the conclusions of law in paragraph 58 on page 18 of the RECOMMENDED ORDER to the effect that the petitioner (School Board) is the "agency" in this matter by definition in section 120.52(1)(b)7, Florida Statutes (2007) and that "Horne is the authorized representative of the agency for purposes of subsections 120.62 (1) and (2) Fla. Stat. (2007) "and incorporates same as part of this FINAL ORDER.

EXCEPTION NUMBER ONE

The School Board hereby approves of EXCEPTION NUMBER ONE filed by the Superintendent and hereby rejects the remainder of paragraphs 56 through 63 of the Conclusions of Law not otherwise accepted above for the reasons that they are irrelevant given the Findings of Fact, represent an erroneous interpretation of law and are contrary to legal precedent set by this Board, as more fully set forth below

in the following substituted Conclusions of Law that the School Board hereby finds are as reasonable or more reasonable than the rejected Conclusions of Law.

SUBSTITUTED CONCLUSIONS OF LAW

I. Relevancy

1. Raven was charged with violating School Board Policy 6.13, 4.A which provides that "All Board employees shall cooperate fully with OPS or other appropriate authorities who are conducting investigations." The basis of the violation is that Raven refused to attend an investigatory interview with OPS on April 17, 2007, as directed. The relevant facts are found in paragraphs 9 through 21 of the Findings of Fact in the Recommended Order.

2. Raven had been directed to report to OPS on April 13, 2007, for an investigatory interview with Deborah Horne, the OPS investigator. On that date Horne received a message from Raven's attorney Melissa Mihok, a specialist in labor and school law, requesting that the interview be postponed until April 17, 2007.

3. In the meantime, Raven and his attorney, James Dirmann, arrived at OPS for the interview with Horne. Horne requested that John Bowen, the Manatee County School Board Attorney, sit in on the discussion, since the employee's attorney was present. Bowen made it clear that the private attorney would not be allowed to be present during Horne's investigatory interview with Raven. Dirmann then advised Bowen and Horne that Raven would not be answering any questions because he was being denied representation and, also, that he was invoking his Fifth Amendment privilege against self-incrimination.

4. In response, Bowen advised Dirmann to seek the advice of a labor lawyer, because his advice to his client to not answer questions could result in the termination of Raven's employment. Mihok then participated in the discussion by telephone. Dirmann and Mihok expressed a desire to confer with their client prior to the interview and it was agreed that the investigatory interview would be postponed until April 17, 2007.

5. Prior to the meeting, Raven received legal advice from Mihok regarding his rights. Paragraph 17 finds that Raven "remained concerned that any information obtained by Horne, during the interview, would be shared with CAC and/or CPS, to his detriment." There is no finding that Raven remained concerned about having his attorney present during the interview.

6. On April 17, 2007, Dirmann informed Horne by telephone and by letter that Raven will not answer any questions regarding the investigation and Raven did not appear for the rescheduled interview. There is no finding of fact as to the reason that Raven failed to show for the interview. In fact, there is a specific finding in paragraph 20 that the letter "does not state that the reason Respondent would not submit to an interview was because he was not permitted to have an attorney present."

7. The School Board has the burden of proving a violation of its policy that would justify termination. While the Administrative Law Judge (ALJ) found that Raven did not appear for the rescheduled interview on April 17, 2007, he found that the failure to appear was excused because he was not allowed to have his attorney present as he was entitled to under section 120.62 (2), Florida Statutes (2007). The problem with that conclusion is that there is nothing in the findings of fact that establishes the reason that Raven refused to attend the April 17, 2007, interview was because he was not allowed to have his attorney present.

8. When the employee admits to the allegations of not showing up for the interview, but claims that he was legally justified in doing so, that is an affirmative defense. The burden is on the employee to establish facts that would support the affirmative defense. In this case, in order to sustain the conclusion of the ALJ, Raven needed to show that the reason he failed to show for the April 17, 2007, interview was because he was not allowed to have his attorney present. This he failed to do.

9. The facts do show that Raven showed up for the interview on April 13, 2007, with his attorney, Dirmann. At that time, Dirmann said Raven would not answer any questions because he was being denied representation and he was invoking the Fifth Amendment privilege against self-incrimination. The facts further show that before the April 17, 2007, rescheduled interview, Raven received legal advice and "remained concerned that any information obtained by Horne, during the

interview, would be shared with CAC and/or CPS, to his detriment." There were no similar findings about his previously stated concern on being denied legal representation during the interview.

10. In fact, there is a specific finding that the letter stating his refusal to answer questions does not state that the refusal was because he was not permitted to have an attorney present. Raven was represented by two attorneys, one of whom was a specialist in labor and school law. It was incumbent upon them to establish in the record the purported legal justification for not showing up for the April 17, 2007, interview. They could have done that easily by stating in the letter that their client will decline to answer any questions "unless he is allowed to have his attorney present." They failed to do that and thus gave the ALJ no basis to determine why Raven was refusing to answer any questions.

11. Since the ALJ made no finding as to the reasons for Raven not appearing for the April 17, 2007, interview, the entire discussion concerning whether or not he was entitled to an attorney is irrelevant and should be rejected.

II. Erroneous Interpretation of the Law

12. Notwithstanding the lack of relevancy of the question of whether or not Raven was entitled to be represented by an attorney at the April 17, 2007, interview, the ALJ misinterpreted section 120.62 (2), Florida Statutes (2007). He concluded that section 120.62 (2), Florida Statutes (2007) gave Raven the right to have an attorney present when questioned by Horne in the course of her investigation. This conclusion of law is clearly wrong and should be rejected by the School Board.

13. The key to his analysis should have been his conclusions of law in paragraph 58 that "Petitioner [the School Board] is the '**agency**' in this matter by definition" and that "Horne is the authorized **representative** of the agency for purposes of Subsections (sic) 120.62 (1) and (2), Fla. Stat. (2007)." The distinction between "agency" and "representative" of the agency is important in interpreting section 120.62 Florida Statutes (2007).

14. Section 120.62 (1) Florida Statutes (2007) reads as follows:

Every person who responds to a request or demand by any agency or representative thereof for written data or an oral statement shall be

entitled to a transcript or recording of his or her oral statement at no more than cost. (Emphasis added)

15. Since the ALJ correctly concluded that the School Board is the "agency" in this matter, that means if the School Board requested or demanded an individual appear before it to give an oral statement, that individual is entitled to a transcript or recording of the oral statement. Likewise, since the ALJ correctly concluded that Horne is the authorized representative of the agency, any person required to give her an oral statement is entitled to a transcript or recording of it.

16. Compare that with section 120.62 (2) Florida Statutes (2007) which reads as follows:

Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives.

17. Clearly, if the School Board were conducting its own investigation into something and called an employee before it to give information, that employee would be entitled to be represented by an attorney under paragraph (2). The Legislature must have meant something by leaving out of paragraph (2) the phrase "or representative thereof." The logical conclusion is that a person appearing before a "representative" of the agency in an investigation is not entitled to an attorney.

18. If the Legislature had intended for a person to have the right to an attorney when appearing before a representative of the agency in an investigation, it would have included that phrase "or representative thereof" in paragraph (2). Paragraph (2) would then read as follows:

Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency, **or representative thereof**, in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives. (Emphasis added)

19. If the Legislature had written paragraph (2) that way, then the ALJ would have been correct in his conclusion that Raven was entitled to an attorney in his interview with Horne as a representative of the agency. Since the Legislature chose not to include "or representative thereof" in paragraph (2), that is a clear expression of intent not to give the right to an attorney when a person appears before a representative of the agency and the ALJ's conclusions to the contrary should be rejected.

20. The ALJ attempts to circumvent the correct interpretation of section 120.62(2) Florida Statutes (2007), by interpreting School Board Policy 6.13 as a delegation by the School Board of "all of its investigatory powers, including its power to conduct investigatory interviews, to the OPS investigator." Based on that interpretation, the ALJ erroneously concludes that Horne is an "agent" of the School Board and, therefore, when an employee appears before her in an investigation, it is the same as appearing before the School Board in an investigation, thus giving that individual the right to an attorney under paragraph (2). See Conclusions of Law contained in paragraphs 58 and 59.

21. This of course ignores the correct interpretation of section 120.62 (2) Florida Statutes (2007), that the Legislature did not intend to give a person the right to an attorney when appearing before a "representative" of an agency in an investigation because it omitted the phrase "or representative thereof" in paragraph (2). Even if the ALJ were correct in his interpretation of School Board Policy 6.13 to the effect that the policy appointed OPS to act as the School Board's agent, that ignores the fact that an "agent" is a "representative." Black's Law Dictionary, Fifth Edition, defines "agent" as "one who represents and acts for another under the contract or relation of agency." There simply is no right to an attorney when appearing before an agent who is a representative of the agency.

22. The ALJ tries to distinguish an "agent" from a "representative" by claiming that the School Board cannot itself take actions, but must act through its agents and representatives. In paragraph 59 of the Conclusions of Law the ALJ states the following:

The School Board can act only through its agents or representatives. (Citations omitted) Agency principles dictate that any action taken by the "School Board" is actually conducted by representative of the School Board, such as one of the members of the School Board, the Superintendent, the School Board attorney, or other individuals vested with the authority to act on behalf of the School Board. The School Board, as a legal entity, cannot take any action without the assistance of individuals.

He reasons that if the School Board can only act through an agent, then the agent is not a "representative," but the agent stands in the place of the School Board when conducting an investigation. Thus, the ALJ concluded that when Raven is interviewed by Horne, that is the same as Raven appearing

before the School Board in an investigation and he is, therefore, entitled to an attorney under section 120.62(2) Florida Statutes (2007).

23. The ALJ's analysis is fatally flawed because obviously the School Board can, and does, take action on its own as a legal entity. For example, section 1012.22 (1) (f) Florida Statutes (2007), charges the School Board with the responsibility of suspending, dismissing, or returning to annual contract teachers and other school employees. The School Board makes these decisions as an entity by majority vote and not acting through an "agent" or "representative." When it does so, that constitutes "agency action" as defined in section 120.5 2(2) Florida Statutes (2007). That "agency action" is appealable by the employee to the District Court of Appeal as "final agency action" as provided in section 120.68(1) Florida Statutes (2007).

24. If the School Board were to adopt the ALJ's interpretation, that would mean when Horne concluded her investigation, that constitutes final agency action of the School Board. As final agency action of the School Board it would be appealable to the District Court of Appeal under section 120.6 8(1) Florida Statutes (2007). That clearly is not a reasonable interpretation of School Board Policy 6.13.

25. A more reasonable and correct interpretation of School Board Policy 6.13 is that it is not an appointment of OPS as the agent of the School Board to act on behalf of and in the place of the School Board as recommended by the ALJ. That policy merely represents the creation of a position to be filled as section 1012.22 (1) Florida Statutes (2007) requires the School Board to do. The purpose of the position is to conduct investigations so that the Superintendent may make recommendations to the School Board concerning employee discipline as he is required to do under sections 1012.27 and 1012.33, Florida Statutes (2007).

26. That interpretation is entirely consistent with the flow chart included as part of School Board Policy 6.13. Nowhere in that flow chart does it suggest that OPS is acting as the agent of the School Board. The OPS investigates and the results go to the Superintendent who then makes recommendations to the School Board. If OPS was the "agent" of the School Board acting in the place of the School Board as recommended by the ALJ, that would mean that the School Board is investigating

and providing a report to the Superintendent who then makes a recommendation to the School Board based on the School Board's investigation. That simply does not make any sense.

III. Contrary to Legal Precedent Set by the School Board

27. The final basis for approving EXCEPTION NUMBER ONE is that the ALJ was wrong not to follow the precedents established by the School Board in previous cases. Acting upon the advice of the School Board Attorney and the recommendation of the Superintendent, the School Board declared in the Mary Cropsey case that it was a violation of School Board Policy 6.13 to refuse to answer questions by invoking the Fifth Amendment. Likewise, in the Pthaline Daniels case the School Board declared that it was a violation of School Board Policy 6.13 to refuse to answer questions in an investigatory interview unless the employee was allowed to have her private attorney present. In both cases, the School Board imposed severe disciplinary sanctions on the employees.

28. The School Board's decisions in those cases are binding precedents that must be followed by the School Board. They cannot be ignored and must be followed by the School Board. The same requirement applies to the ALJ who is conducting the hearing on behalf of the School Board to render a recommended order to the School Board. The ALJ does not have jurisdiction to overrule the School Board's past precedents. Only the District Court of Appeal can do that when the employee appeals the School Board's final agency action. Currently, both the Cropsey and Daniels cases are on appeal to the Second District Court of Appeal.

EXCEPTION NUMBER TWO

The School Board hereby approves of EXCEPTION NUMBER TWO filed by the Superintendent and hereby rejects paragraph 65 of the Conclusions of Law as more fully set forth below in the following substituted Conclusions of Law that the School Board hereby finds is as reasonable or more reasonable than the rejected Conclusions of Law.

SUBSTITUTED CONCLUSIONS OF LAW

29. The School Board hereby rejects paragraph 65 of the Conclusions of Law as it represents an invalid interpretation of School Board Policy 6.13. In paragraph 65 the ALJ states that Raven "is only charged with refusal to attend an investigatory interview. He is not charged with failure to answer questions during an interview." The ALJ reasons that Raven could only be charged with a refusal to answer questions if the interview had taken place and Raven had "refused to answer questions posed by the OPS investigator. Only then could Respondent be charged with violating Petitioner's Policy 6.13 (4) and disciplinary sanctions sought." Such an interpretation is invalid.

30. School Board Policy 6.13 4. A. provides that "All Board employee shall cooperate fully with OPS or other appropriate authorities who are conducting investigations." That is the policy that Raven was charged with violating. "Cooperate fully" means just that. It is incorrect to say that the employee can refuse to come to the interview and cannot be charged with violating the policy because he has not refused to answer a question. "Cooperate fully" means that the employee will come to the interview and answer questions. Failure to do either will subject the employee to disciplinary sanctions.

EXCEPTION NUMBER THREE

The School Board hereby approves of EXCEPTION NUMBER THREE filed by the Superintendent and hereby rejects paragraphs 66 through 69 of the Conclusions of Law as more fully set forth below in the following substituted Conclusions of Law that the School Board hereby finds is as reasonable or more reasonable than the rejected Conclusions of Law.

SUBSTITUTED CONCLUSIONS OF LAW

31. The School Board concludes that Petitioner has established by a preponderance of evidence that Raven's actions constituted the violation of policies and rules indicated in paragraph 66 through 69 the Conclusions of Law of the RECOMMENDED ORDER.

EXCEPTION NUMBER FOUR

The School Board hereby approves of EXCEPTION NUMBER FOUR filed by the Superintendent and hereby rejects paragraph 70 of the Conclusions of Law as more fully set forth below in the following substituted Conclusions of Law that the School Board hereby finds is as reasonable or more reasonable than the rejected Conclusions of Law.

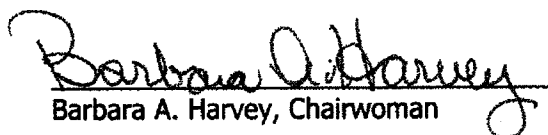
32. The School Board concludes that there is no violation of Raven's statutory right to have legal counsel present during the interview because there was no such statutory right based upon the above analysis.

EXCEPTION NUMBER FIVE

The School Board hereby approves of EXCEPTION NUMBER FIVE filed by the Superintendent and hereby rejects the RECOMMENDATION of the ALJ and for the reasons set forth above after a review of the complete record, the School Board hereby orders that Raven's employment for the period from April 24, 2007, until the expiration of his contract on May 25, 2007, is terminated for the reasons stated above.

33. Respondent's exception does not identify the legal basis for the exception and is therefore denied.

DONE AND ENTERED this 25th day of March, 2008, in Bradenton, Manatee County, Florida.


Barbara A. Harvey, Chairwoman

COPIES FURNISHED:

Dr. Roger Dearing, Superintendent
School Board of Manatee County
P.O. Box 9069
Bradenton, FL 34206

Melissa Mihok, Esquire
P.O. Box 75638
Tampa, FL 33675
Attorney for Respondent

Robert J. Shapiro, Esquire
Staff Attorney
School Board of Manatee County
P. O. Box 9069
Bradenton, Florida 34206-9069
Attorney for Petitioner

NOTICE

All parties have the right of judicial review of this Final Order in accordance with section 120.68, Florida Statutes. In order to appeal, a party must file a notice of appeal with Lyn Lego, the Agency Clerk of the Manatee County School Board, P.O. Box 9069, Bradenton, Florida 34206-9069, within thirty (30) days of the rendition of this order (which occurred on the date such Final Order was filed with the clerk as set forth above), and must also file a copy of the notice, accompanied by filing fees, with the Clerk of the Second District Court of Appeal, 1005 East Memorial Blvd., Lakeland, FL 33801, telephone number (863) 499-2290. Review proceedings shall be conducted in accordance with the Florida Appellate Rules, and specifically, Rule 9.110 of such Florida Appellate Rules.