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June 24, 2009

The Honorable Robert S. Cohen
Director and Chief Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

FILED
2009 JUN 26 A 10:49
DIVISION OF
ADMINISTRATIVE
HEARINGS

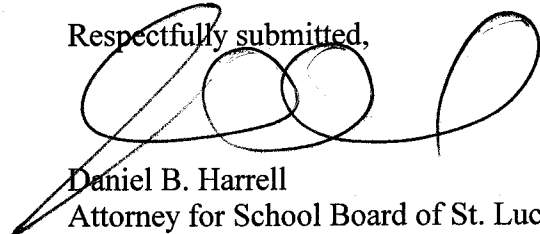
Re: St. Lucie County School Board v. Wendy Portillo, DOAH Case No. 08-5947

Our File No. 500-195

Dear Judge Cohen:

Enclosed in accordance with Section 120.57(1)(m), Florida Statutes, please find a copy of the Final Order entered by the School Board of St. Lucie County, Florida, in the above matter. Kindly acknowledge receipt by date stamping the enclosed copy of this letter and returning it to me in the stamped, self-addressed envelope provided for your convenience.

Respectfully submitted,



Daniel B. Harrell
Attorney for School Board of St. Lucie County

DBH/mm

Enclosures

cc: Mr. Michael J. Lannon
Elizabeth Coke, Esquire
Mr. David Walker, Esquire
Ms. Christine Harrison

BEFORE THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

FILED
2009 JUN 26 A 10:49
DIVISION OF
ADMINISTRATIVE
HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,
Petitioner,

v.

DOAH Case No. 08-5947

WENDY PORTILLO,
Respondent.

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
Leslie Jennings, Esquire
J. David Richeson, Esquire
Richeson & Coke, P.A.
317 South Second Street
Post Office Box 4048
Fort Pierce, Florida 34948-4048

For Respondent: David Walker, Esquire
David Walker, P.A.
2207 South Kanner Highway
Post Office Box 1829
Stuart, Florida 34995

Introduction

The Respondent Wendy Portillo is a teacher employed by the Petitioner St. Lucie County School Board. The Petitioner, by and through the Superintendent of Schools, sought to discipline the Respondent for just cause in accordance with Section 1012.33, Florida Statutes, and School Board Policy 6.301.

The Respondent requested a formal administrative hearing and one was held on February 2 and 3, 2009, before an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings of the Florida Department of Administration. On April 9, 2009, the ALJ entered an Amended Recommended Order finding that the Respondent was guilty of misconduct in office, a one-year suspension without pay is warranted, and there is good and sufficient reason for changing the Respondent's professional services contract to an annual contract. He recommended that the School Board enter a Final Order upholding the suspension without pay, and changing the Respondent's contract status from professional services to annual, contingent upon the availability of a position for which the Respondent is qualified and certified. The Amended 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.

The Respondent timely filed written exceptions to the Amended Recommended Order on April 10, 2009 ("Respondent's Exceptions"). Fla. Admin. Code Rule 28-106.217(1). The Superintendent as Petitioner timely filed a response to the exceptions and motion to adopt the Amended Recommended Order on April 23, 2009 ("Petitioner's Response"). Fla. Admin. Code Rule 28-106.217(3). Both parties have also submitted proposed forms of final order.

On June 5, 2009, the Respondent filed a motion to reject the Amended Recommended Order, and separately filed a response to the Petitioner's motion to adopt the Amended Recommended Order. The Petitioner filed a motion to strike the pleadings. By notice filed June 9, 2009, the Respondent withdrew the motions filed on June 5, 2009. The Respondent's motions filed on June 5, 2009, having been withdrawn, the Petitioner's motion to strike is denied as moot.

The School Board met on June 10 and 23, 2009, in Fort Pierce, St. Lucie County, Florida, to take final agency action. At the hearing on June 10, 2009, argument was presented by counsel for each of the parties. On that date, 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 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 Amended Recommended Order, the Respondent's Exceptions, the Petitioner's Response, the proposed forms of final order, 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; *Schrimsher v. School Board of Palm Beach County*, 694 So. 2d 856, 860 (Fla. 4th D.C.A. 1997). 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.

Exception No. 1. The Respondent's first exception is to the ALJ's recommendation that her contract status be changed from a professional services contract to an annual contract, "contingent upon availability of a position for which Respondent is qualified and certified." Amended Recommended Order at 25. She argues that the recommendation "goes far and beyond the [Board's] *decision* of November 18, 2008." Respondent's Exception No. 1, p. 1 (emphasis supplied). In essence, she contends that the "contingency" in the ALJ's recommendation would result in a penalty exceeding the Superintendent's original disciplinary recommendation.

In response, the Petitioner first points out that the Board's action on November 18, 2008, was simply to suspend the Respondent without pay pending conclusion of the hearing process, and that the Board has taken no action on the Superintendent's recommendation for discipline.¹ Petitioner's Response at pp. 1-2. The Petitioner further notes that the Superintendent's letter notifying the Respondent of his disciplinary recommendation stated that return to a position following the period of suspension was expressly dependent "on availability at that time and [the Respondent] being qualified and certified." Petitioner's Ex. YYY, p. 4; Amended Recommended Order at 6.

In the Respondent's proposed form of final order and at the hearing on June 10, 2009, she raises an argument not presented in her Exceptions. She contends that the Superintendent's recommendation to change her employment status from a professional services contract to an annual contract was expressly contingent upon the revocation and subsequent reinstatement of her teaching certificate. Respondent's Proposed Final Order at pp. 4-5. In support of her position, the Respondent quotes from the Superintendent's November 3, 2008, letter notice of disciplinary recommendation, which states in

¹ The Respondent has acknowledged the limited nature of the Board's action on November 18, 2008. Respondent's Proposed Final Order at 4.

part “that after the one year suspension and *when [the Respondent’s] certificate becomes reinstated,* that [she] be returned to annual contract status.” Petitioner’s Exhibit YYY, p. 4 (emphasis supplied).

At the June 10, 2009, hearing, the Petitioner noted that the Respondent did not present her new argument to the ALJ, nor timely file an exception to the Amended Recommended Order based upon this new position. The Petitioner contends that the new argument may not be considered by the School Board because it was neither presented to nor addressed by the ALJ.²

An agency may interpret the ultimate facts when applying its own rules in a particular proceeding, see, e.g., *Schrimsher, supra*, 694 So. 2d at 861-863, and therefore the School Board has considered the Respondent’s new argument. After a careful review of the record presented, the School Board determines that the Respondent’s position does not represent a fair reading of the Superintendent’s disciplinary recommendation, nor does it represent an accurate characterization of the case presented to and tried before the ALJ. The full context of the Superintendent’s disciplinary recommendation reveals that the purpose and intent of the phrase quoted by the Respondent was to acknowledge the potentiality that the State Board of Education might for some period of time revoke or suspend the Respondent’s teaching certificate, and that if the State Board took such action the Respondent’s return to the classroom would be dependent upon reinstatement of her certificate.³

² The Petitioner also raised this point in the motion to strike (at pp. 2-3).

³ The final paragraph of the Superintendent’s disciplinary recommendation reads:

I will also be recommending to the State Board of Education that they impose a one year revocation of your teaching certificate to be effective from the date of the State Board’s action. Finally, I recommend that after the one year suspension and when your certificate becomes reinstated, that you be returned to annual contract status. It is also my intention to not place you in any preschool or with elementary children but will place you in other grades, depending on availability at that time and your being qualified and certified.

Petitioner’s Exhibit YYY, p. 4.

The Respondent's Exception No. 1, including argument presented in her proposed form of final order, is rejected as the ALJ's Recommendation, as modified below, is supported by competent and substantial evidence and competent legal authority.

Exception No. 2. The Respondent's second exception is to the ALJ's Conclusions of Law in paragraph 54 of the Amended Recommended Order. The ALJ concluded that the evidence presented at the hearing "provides good and sufficient reason for the recommendation pertaining to the change in Respondent's contract status" (footnote omitted). The Respondent cites to a number of the ALJ's Findings of Fact regarding both her professional record prior to the incident giving rise to this proceeding, and other factors that might mitigate the penalty to be imposed. She asserts that, considering the financial consequence of the one year suspension without pay, changing her contract status would exceed a "required and measured punishment for the singular, unintentional misjudgment of May 21, 2008." Respondent's Exception No. 2, p. 4.

The Petitioner responds that the ALJ specifically found and determined the Respondent's conduct to constitute "misconduct in office," and that such misconduct in turn constitutes grounds for termination or suspension without pay. Amended Recommended Order at 40, ¶ 44. The burden of just cause to return an employee to annual status, the Petitioner notes, is less than that required to terminate or suspend without pay. The Petitioner concludes that because the burden of showing just cause for terminating and suspending the Respondent without pay has been met, then as a matter of law good cause has been shown for returning the Respondent to annual contract status. Petitioner's Response at pp. 3-4.

The Respondent's Exception No. 2 is rejected as the Conclusions of Law in paragraph 54 of the Amended Recommended Order are supported by competent and substantial evidence and compe-

tent legal authority. Nonetheless, considering the ALJ's Findings of Fact regarding the Respondent's professional record, and infusing policy in the application of the School Board's employee disciplinary rules, as discussed below, the Recommended Penalty is modified.

Findings of Fact

Neither party has filed any exception to the Findings of Fact set forth in the Amended Recommended Order. Petitioner's Response at pp. 4-5; Respondent's Proposed Final Order at p. 6; Respondent's Motion to Reject Amended Recommended Order at p. 4. A party who files no exceptions to the findings of fact contained in a recommended order thereby expresses agreement with, or at least waives any objection to, those findings of fact. *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st D.C.A. 1991). *See also Henderson v. Department of Health, Board of Nursing*, 954 So. 2d 77, 81 (Fla. 5th D.C.A. 2007); *Kantor v. School Board of Monroe County*, 648 So. 2d 1266, 1267 (Fla. 3d D.C.A. 1995).

The School Board adopts the Findings of Fact set forth in paragraph Nos. 1 through 47 of the Amended Recommended Order.

Conclusions of Law

The School Board adopts the Conclusions of Law set forth in paragraphs 48 through 54 of the Amended Recommended Order.

Penalty

In this proceeding, an infusion of policy is required to determine whether the Respondent's misconduct in office merits, under the circumstances presented, not only suspending her without pay for one year, but also changing her employment status from a professional services contract to an an-

nual contract. Compare *Purvis v. Marion County School Board*, 766 So. 2d 492 (Fla. 5th D.C.A. 2000). Here, the ALJ made the following Findings of Fact in the Amended Recommended Order:

- Except for the incident at issue, the Respondent has had a positive 12 year career as a teacher (paragraph 20).
- There was no evidence that the Respondent's conduct was malicious or intended to cause harm or embarrassment to the involved student (paragraph 22).
- The Respondent received positive annual evaluations from five principals over a 12 year period (paragraph 41).
- Except for the incident at issue, the Respondent has been an excellent, dedicated teacher, with the support of many employees and parents of former students (paragraph 42).

After a careful review of the entire record, and an infusion of policy in applying the Board's own rules, the School Board determines that amelioration of the justifiable penalty is appropriate under the circumstances presented, that the one year suspension without pay is a serious penalty, and that following the period of suspension the Respondent should be permitted to retain her employment status under a professional services contract.

The School Board modifies the penalty recommended by the ALJ; upholds the suspension without pay of the Respondent's employment for a period of one year from November 18, 2008; and maintains the Respondent's employment status under a professional services contract. As with all other certified employees holding a professional services contract, the Respondent's continued employment following the period of suspension will be contingent upon the her remaining qualified and certified as required by state law.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Respondent Wendy Portillo be, and she is hereby, suspended without pay from her employment with the School Board of St. Lucie County, Florida, for a period of one year from November 18, 2008; and her employment status be, and it is hereby, maintained under a professional services contract. This order shall take effect upon filing with the Superintendent of Schools as Secretary of the SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA.

A copy of this Final Order shall be provided to the Division of Administrative Hearings within 15 days of filing, as set forth in Section 120.57(1)(m), Florida Statutes.

* * *

DONE AND ORDERED this 23rd day of June, 2009, ~~none pro tunc June 23, 2009.~~

SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

By: Judith C. Miller
JUDITH C. MILLER, Chair

Attest: Michael J. Lannon
MICHAEL J. LANNON, Superintendent and Ex-Officio
Secretary to 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 applicable filing fee, must be filed with the appropriate District Court of Appeal.

Attachment: Recommended Order

Copies furnished to:

Elizabeth Coke, Esquire
David Walker, Esquire
Daniel B. Harrell, Esquire
Clerk, Division of Administrative Hearings