BEFORE THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

PALM BEACH COUNTY SCHOOL BOARD
Petitioner,

DOAH Case No.: 10-0372
vs. **JUDGE Robert E. Meale**

JILL SHADOFF
Respondent.
_____/

FINAL ORDER

THIS CAUSE, came before the SCHOOL BOARD OF PALM BEACH COUNTY (hereinafter referred to as "SCHOOL BOARD") pursuant to Sections 120.569 and 120.57 Fla. Stat., on September 29, 2010, in West Palm Beach, Florida, for the purpose of reviewing the Recommended Order of the Administrative Law Judge and reviewing the Petitioner's exceptions to the Recommended Order.

The Administrative Law Judge's Recommended Order, entered on June 28, 2010, recommended the School Board enter a final order dismissing any and all charges against Respondent, reinstating Respondent, and awarding Respondent back salary for the period of her suspension. A copy of the Recommended Order is attached to as Exhibit A and made a part of this Order. Petitioner filed exceptions to the Recommended Order. A copy of the Petitioner's Exceptions to the Recommended Order is attached as Exhibit B and made a part of this Order. Respondent did not object or file a response to the Petitioner's Exceptions.

Present at the hearing for the Petitioner was counsel, Elizabeth T. McBride, Esq. Respondent's counsels were Matthew Hayes, Esq., and Jeffrey Sirmons, Esq., and Respondent, Jill Shadoff. Upon review of the Recommended Order and the Exceptions, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

Pursuant to Section 120.57(1), Fla. Stat., the School Board reviewed and considered the Exceptions filed on its behalf. The School Board hereby:

1. Accepts Petitioner's Exception No. 1 and reword Paragraph 24 of the Conclusions of Law of the Recommended Order to read as follows:

> "The remaining authority cited in the letter of November 9, 2009, which is the charging document, is irrelevant, as Petitioner disclaimed any reliance on such authority, including Rule 6B-1.001(3) at the start of the hearing."

2. Accepts Petitioner's Exception No. 2, eliminating Paragraphs 25 and 26 of the Conclusions of Law of the Recommended Order.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved, adopted and incorporated herein by reference in its entirety.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Fla. Stat. § 120.57(1).

2. The Board approves or adopts as its Conclusions of Law the Administrative Law Judge's Conclusions of Law, except for Paragraphs 24, 25 and 26 as modified by the Ruling on Exceptions contained in this Order.

WHEREFORE, IT IS ORDERED AND ADJUGED, that the Recommended Order, except as modified by the Ruling on Exceptions, from the Administrative Law Judge is hereby adopted and approved by the School Board and resolves all issues relating to the appeal of Jill Shadoff's recommended disciplinary action. Accordingly, the Board hereby issues a Final Order dismissing all

charges against Jill Shadoff. This Final Order shall take affect upon being filed with Clerk of the SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA.

DONE AND ORDERED this 29th day of September, 2010.

PALM BEACH COUNTY SCHOOL BOARD

ARTHUR C. JOHNSON, PH.D., SUPERINTENDENT

MONROE BENAIM, CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party who was adversely affected by this Final Order is entitled to judicial review pursuant to Fla. Stat. §120.68 Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the SCHOOL BOARD OF PALM BEACH COUNTY and a second copy, accompanied by filing fees prescribed by law, with the 4th District Court of Appeal or with the District Court of Appeal in the Appellate District, where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the Order to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert E. Meale, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Appalachee Parkway, Tallahassee, Florida 32399-3060; and by U.S. Mail to: Matthey Haynes and Jeffrey Sirmons, Johnson and Haynes, P.A., The Barrister's Building, 1615 Forum Place, Suite 500, West Palm Beach, Florida 33401, this 1st day of ~~September~~ October, 2010.

By: Elizabeth T. McBride

Elizabeth T. McBride, Esq.
Fla. Bar No.: 0438431

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

JILL SHADOFF,

Respondent.

Case No. 10-0372

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference at sites in West Palm Beach and Tallahassee, Florida, on April 26, 2010. The parties, attorneys for the parties, witnesses, and court reporter participated by videoconference in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Elizabeth T. McBride
Palm Beach County School Board
Post Office Box 19239
West Palm Beach, Florida 33416

For Respondent: Jeffrey Sirmons
Johnson and Haynes, P.A.
The Barrister's Building
1615 Forum Place, Suite 500
West Palm Beach, Florida 33401

Exhibit A

STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of immorality, in violation of Florida Administrative Code Rule 6B-4.009(2) and, if so, whether dismissal is too severe a penalty.

PRELIMINARY STATEMENT

By letter dated November 9, 2009, Petitioner's superintendent informed Respondent that he intended to recommend to the School Board that it terminate her employment as a teacher. The letter cites as grounds violations of School Board Policies 1.013 and 3.96(4), Florida Administrative Code Rules 6B-1.001(3) and 6B-4.009(2), and Article II, Section M(6) of the collective bargaining agreement. Although the letter omits mention of the factual bases for these alleged violations, it refers to an investigation that commenced on March 6, 2009. This investigation arose out of Respondent's arrest, on March 5, 2009, for violating Section 893.135, Florida Statutes, which prohibits drug trafficking.

The Joint Pre-Hearing Stipulation filed on April 16, 2010, identifies, as additional grounds for dismissal, the "failure to exercise best professional judgment" and the commission of a crime of moral turpitude. However, at the start of the hearing, the Administrative Law Judge asked Petitioner's counsel to identify the issues--including whether Petitioner was charging Respondent with a crime of moral turpitude--and counsel informed

the Administrative Law Judge that the sole issue was whether there was just cause to dismiss Respondent for a violation of Florida Administrative Code 6B-4.009(2), which defines immorality. The hearing proceeded accordingly.

At the hearing, Petitioner called three witnesses and offered into evidence: Petitioner Exhibits 4-6, 11-14, and 16-19. Respondent called three witnesses and offered into evidence: Respondent Exhibits 1, 5-6, 10, 14-15, and 17. All exhibits were admitted except Petitioner Exhibits 11 and 17 and Respondent Exhibit 17, which were proffered. Also, Petitioner Exhibit 4 was admitted only for the statements of Respondent.

The court reporter filed the Transcript on May 26, 2010. The parties filed Proposed Recommended Orders on June 25, 2010.

FINDINGS OF FACT

1. Respondent has taught in the Palm Beach County School District for 18 years. Most recently, Respondent was employed as a special language teacher and learning strategist at Tradewinds Middle School. In these capacities, Respondent co-taught inclusion classes, which mainstream special-education students with regular-education students. In recent years, Respondent has worked with students with emotional/behavioral disorders. Prior to her employment with Petitioner, Respondent had taught six years in the Boston public school system as a special education teacher.

2. Respondent was one of only three teachers at Tradewinds Middle School to have achieved national board certification. The present principal, as well as his predecessor, nominated Respondent for the Dwyer Award, which is given annually to the teacher who displays "above-and-beyond" commitment to her students and their education. Respondent has also obtained numerous grants for her school and program. According to the present principal, Respondent, who has never been disciplined, has enjoyed an excellent reputation as an educator at Tradewinds Middle School and has always maintained good rapport with her students and colleagues.

3. Respondent and her husband, with whom she has been married for 22 years, suffer from chronic pain that is treated by, among other things, prescription pain-killers, including OxyContin. Planning a motorcycle trip from West Palm Beach to Massachusetts, Mr. Shadoff did not want to carry with him more than a minimal number of OxyContin pills on the trip north. Therefore, he decided to send additional OxyContin pills, sufficient for the duration of his stay and return trip to Florida, to one of the persons with whom he would be staying in Massachusetts.

4. Mr. Shadoff attributes his reluctance to carry with him all of the OxyContin pills to a situation that arose several years ago in New Jersey, where Mr. Shadoff feels he was unfairly

treated by New Jersey police, who discovered OxyContin pills during a routine traffic stop. No evidence contradicts this claim.

5. After informing the Massachusetts friend of his plans, Mr. Shadoff wrapped, taped, and addressed a package of 30 80-mg OxyContin pills that he needed for his visit and return trip. Mr. Shadoff placed a fictitious return address on the package. Mr. Shadoff attributes his practice of placing fictitious return addresses on his mail to government surveillance in the 1930s of the mail of his father's aunt, who was a suspected Communist. No evidence contradicts this claim.

6. Mr. Shadoff asked his wife to take the package to a FedEx office. On February 21, 2009, Respondent delivered the package to a FedEx office for delivery to the friend in Massachusetts. A FedEx employee suspected that the package contained drugs and relayed his suspicion to a narcotics deputy of the Palm Beach County Sheriff's Office. Another FedEx employee opened the package and found the OxyContin pills, which were not in a properly labeled prescription container. Nothing in the record establishes what exactly Respondent did in violation of the drug laws; it appears the violation was her possessing her husband's prescription drugs not in a properly labeled container, her presenting the package containing her

husband's prescription drugs to FedEx for delivery to a third party, or both.

7. On February 25, 2009, two narcotics deputies visited the Shadoff home. Identifying themselves as deputies, the two men, who were not in uniform, confronted Respondent on the street just outside her home and asked about her "mailing" a package. Respondent denied doing so. She was rattled by being approached by these two men, one of whom wore an earring. It is possible that the deputies' use of "mailing," when applied to FedEx services, may have momentarily confused Respondent.

8. Respondent consented to the deputies' entering her house, where Respondent readily admitted that she had delivered the package to FedEx for delivery of her husband's OxyContin to the Massachusetts friend. She and her husband informed the deputies that her husband was taking a trip and intended to pick up his prescribed pills at the friend's house. Respondent or her husband produced a properly labeled prescription container for one of the deputies. Neither deputy asked why the pills were not in a prescription container within the FedEx package or attempted to contact the Massachusetts friend, who testified at the administrative hearing and confirmed the arrangement.

9. On March 5, 2009, Respondent was arrested for oxycodone trafficking in violation of Section 893.135(1)(c), Florida

Statutes. She spent twenty-four hours in jail. Respondent timely reported her arrest to Petitioner.

10. On August 29, 2009, in Palm Beach County circuit court, Respondent accepted a plea bargain and pleaded guilty to one count of attempted trafficking in oxycodone, a second-degree felony. The court adjudicated Respondent guilty and sentenced her to three years' probation, 100 hours' community service, a substance abuse evaluation, and random drug testing.

11. When entering the plea, Respondent and her criminal attorney believed that the disposition of the case would not affect Respondent's employment. At some point, Respondent learned that the adjudication of guilt for a second-degree drug felony rendered her ineligible for certification or employment with direct contact with students.

12. Respondent retained another lawyer and negotiated with the State Attorney's Office an agreement to vacate the earlier plea and judgment in return for a guilty plea to possession of oxycodone, a third-degree felony. By judgment entered December 7, 2009, the court vacated the August 29 plea and sentence and withheld adjudication, subject to completion of a substance abuse evaluation (with credit for the evaluation previously completed), random drug testing, payment of court costs, 100 hours' community service, and three years' probation.

13. Among the sources of public reaction to Respondent's offense of possession of her husband's lawfully prescribed OxyContin is the circuit judge, who vacated the earlier plea and sentence and allowed Respondent to plead to a lesser offense. The attorneys informed the judge that the basis for the charge and plea was Respondent's delivery of a mismarked package containing her husband's lawfully prescribed OxyContin to FedEx for forwarding to her husband on his trip. Uniquely aware and reflective of community values, as least regarding criminal justice matters, the judge expressed surprise that Respondent was prosecuted on these facts and clearly did not find Respondent's possession of her husband's lawfully prescribed OxyContin to be of such notoriety as to bring Respondent or the education profession into public disgrace or disrespect and impair Respondent's service in the community.

14. In fact, there is no evidence whatsoever that Respondent's possession of her husband's lawfully prescribed OxyContin was of such notoriety as to bring Respondent or the education profession into public disgrace or disrespect and impair Respondent's service in the community.

15. The principal of Tradewinds Middle School received two letters of support from teachers for Respondent. He was unable to characterize the general reaction of teachers as anything more than "curiosity and surprise." Due to Respondent's removal

from the classroom, the principal had to reassign a few teachers and students to different classrooms, but he received no objections from teachers, students, or parents. The assistant principal herself expressed disbelief at the incident, based on her knowledge of Respondent through working with her, and she too was unaware of any negative opinion that followed Respondent's arrest. After one meeting with Respondent, the drug abuse counselor determined that she was not in need of counseling.

16. However, on December 2, 2009, the superintendent recommended that Petitioner suspend and terminate Respondent. Petitioner subsequently adopted this recommendation, and Respondent has been suspended without pay since December 3, 2009.

17. Petitioner has failed to establish by clear and convincing evidence that Respondent has engaged in conduct that is inconsistent with the standards of public conscience and good morals. Undoubtedly, all drug offenses are serious matters, but, as the circuit judge implied, Respondent's offense is of a technical nature. There is no direct evidence that Respondent's possession--although unlawful--of her husband's lawfully prescribed medication is inconsistent with the standards of public conscience and good morals. Nor is there a sufficient

evidentiary basis to infer any violation of the public conscience and good morals.

18. Petitioner has failed to establish by clear and convincing evidence that Respondent has engaged in conduct sufficiently notorious to bring herself or the education profession into public disgrace or disrespect and impair her service in the community. There is no direct evidence of these matters, nor is there a sufficient evidentiary basis to infer these matters.

Conclusions of Law

19. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

20. Section 1012.33(1)(a), Florida Statutes, provides for the termination of an instructional employee for "just cause," which includes "immorality."

21. Florida Administrative Code Rule 6B-4.009(2) provides:

> Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

22. This definition sets forth two elements: conduct that is inconsistent with the standards of public conscience and good

morals and conduct that is sufficiently notorious to bring the individual or profession into public disgrace or disrespect and impair the individual's service in the community. Petitioner must prove both elements. McNeill v. Pinellas County School Board, 678 So. 2d 476, 477 (Fla. 1996). This Recommended Order will characterize the first element as the wrongful factor and the second element as the impairment factor.

23. Article II, Section M(1) of the applicable collective bargaining agreement, which acknowledges that discipline must be based on just cause, requires "clear and convincing evidence" in support of the discipline.

24. The remaining authority cited in the letter of November 9, 2009, which is the charging document, is irrelevant. First, Petitioner disclaimed any reliance on such authority at the start of the hearing. Second, the authority is otherwise unavailable as grounds for dismissal of a teacher.

25. School Board Policy 1.013 outlines the duties of the teacher, including providing leadership and guidance. Violating the law governing the possession of prescription drugs is not providing leadership and guidance, but this broad policy statement of teacher responsibilities does not supplant more specific policies and rules that predicate discipline upon certain prohibited acts or omissions. Even if this policy provided grounds for discipline, the record omits direct

evidence of the impact of this incident on Respondent's ability to discharge her leadership and guidance duties, and, given the standard of proof, there are insufficient grounds on which to infer such an inability.

26. School Board Policy 3.96(4) likewise provides no basis for discipline. The policy itself states that off-duty "involvement . . . with controlled substances" may subject an employee to discipline under Policies 3.12 and 3.13 and Florida Administrative Code Rules 6B-4.009(2) and (5), and the collective bargaining agreement.

27. Florida Administrative Code Rule 6B-1.001(3) provides:

> Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

Standing alone, Rule 6B-1.001(3) does not provide a basis for dismissing a teacher because it is aspirational in tone. Florida Administrative Code Rule 6B-4.009(3) provides the means for citing a violation of Rule 6B-1.001 as a ground for dismissal, but requires that the violation of Rule 6B-1.001 be "so serious as to impair the individual's effectiveness in the classroom." Petitioner has not attempted to plead a misconduct case.

28. Clear and convincing evidence requires:

> [T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts at issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

29. Petitioner has failed to prove by clear and convincing evidence that Respondent is guilty of immorality due to her unlawful possession of her husband's OxyContin.

30. The direct evidence fails to establish that this incident constitutes conduct that is inconsistent with the standards of public conscience and good morals. The direct evidence fails to establish that this incident is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

31. As noted in the Findings of Fact, the Administrative Law Judge has also declined, on these facts, to infer either of the two elements of immorality, the wrongful factor or the impairment factor.

32. Case law recognizes that the determination of whether Respondent's conduct violates the standards of public conscience and good morals, whether based on direct evidence or inference, is not a responsibility that the Administrative Law Judge shares with the agency. In Bush v. Brogan, 725 So. 2d 1237 (Fla. 2d DCA 1999), the Education Practices Commission entered a final order finding a teacher guilty of gross immorality and an act of moral turpitude, even though the Administrative Law Judge had found the evidence insufficient to establish either of these offenses. Reversing, the court cited with approval Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1st DCA), in which the court held that a deviation from a standard of conduct is an ultimate finding of fact within the realm of the hearing officer's factfinding discretion and is not a matter infused with policy considerations, so as to place it within the realm of the agency's discretion. 725 So. 2d at 1240.

33. In later cases, courts have tended to allocate exclusively to the Administrative Law Judge the responsibility of direct and inferential factfinding on the wrongful factor and to recognize agency discretion in inferential factfinding on the impairment factor. The reasoning is that factfinding on impairment involves policy considerations.

34. In Packer v. Orange County School Board, 881 So. 2d 1204 (Fla. 5th DCA 2004), the Administrative Law Judge found

that the teacher had not endangered the safety of his students. The school board reversed this finding and dismissed the teacher. Citing Greseth v. Department of Health and Rehabilitative Services, 573 So. 2d 1004 (Fla. 4th DCA 1991), the court noted: "Where reasonable people can differ about the facts, an agency is bound by a hearing officer's reasonable inference based on the conflicting inferences arising from the evidence." 881 So. 2d at 1207. Citing Tedder v. Florida Parole Commission, 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003), the court noted with approval that, as to factual issues not involving policy issues, it is the role of the Administrative Law Judge, not the agency, to resolve factual issues and draw permissible inferences. Id. Rejecting the school board's contention that it was merely resolving factual disputes concerning student-safety issues, the court noted that the cases cited by the school board involved agency factfinding on the impairment factor after the Administrative Law Judge had found facts establishing the wrongful factor. By contrast, in the case before it, the Administrative Law Judge had found the facts insufficient to establish the wrongful factor, and the court held that the agency lacked the authority to set aside this factfinding, even under a claim of factfinding infused with policy considerations, because the agency lacked the authority

to disturb the Administrative Law Judge's factfinding on the wrongful factor.

35. Among the cases cited by the Packer court is Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000), which is a case of misconduct in office under Florida Administrative Code Rule 6B-4.009(3). Similar to immorality, as mentioned above, misconduct in office comprises a wrongful factor, in terms of a violation of Rule 6B-1.001, and an impairment factor, in terms of impairment of effectiveness. In Purvis, the Administrative Law Judge found that the teacher had resisted arrest after a nightclub altercation and had lied under oath at his ensuing criminal trial, but found a lack of a preponderance of the evidence of impaired effectiveness. Based on the testimony of the superintendent and principal that the teacher lacked integrity and trustworthiness and thus lacked effectiveness in the school system, the school board concluded that it had proved impaired effectiveness and dismissed the teacher. Thus, the Administrative Law Judge had found the wrongful factor, but not the impairment factor. The agency overturned the Administrative Law Judge's findings on the impairment factor. The court sustained the school board's action, reasoning that impaired integrity and trustworthiness "are reasonable inferences" arising from the teacher's false testimony at trial. 766 So. 2d at 496. The court characterized

the school board's determination of the impairment factor as a legal conclusion within the expertise of the school board, not the Administrative Law Judge. 766 So. 2d at 498-99. See also Walker v. Highlands County School Board, 752 So. 2d 127 (Fla. 2d DCA 2000) (in misconduct case involving a standard of preponderance of the evidence, court sustained inference of loss of effectiveness due to teacher's in-classroom conduct), rev. denied 773 So. 2d 58 (Fla. 2000); Summers v. School Board of Marion County, 666 So. 2d 175 (Fla. 5th DCA 1995) (court inferred ineffectiveness in case in which order lacked a finding on same).

36. Lastly, it is impossible to impute the impairment factor based on the seriousness of the third-degree drug offense to which Respondent pleaded guilty. Enacted in 2008, Section 1012.315(1), Florida Statutes, renders a person "ineligible" for educator certification or employment as an administrator or instructor, if such administrator or instructor would have direct contact with students, upon conviction of any of 47 felonies or two misdemeanors. Even if Respondent had been convicted of possession of OxyContin, her offense is not among those listed in Section 1012.315(1) because it is merely a third-degree felony, so this statute does not apply directly to Respondent. § 1012.315(1)(qq), Fla. Stat. More importantly, this recent legislative enactment precludes imputing the

impairment factor due to the notion of the Administrative Law Judge or agency of the seriousness of Respondent's offense. To impute the impairment factor for an offense omitted from Section 1012.315(1) would violate the doctrine of expressio unius est exclusio alterius and frustrate the effort of the legislature to draw the distinction between criminal offenses whose seriousness preclude certification or employment in the education profession and less serious criminal offenses.

37. Section 1012.33(6)(a), Florida Statutes, provides that, if an employee is suspended without pay or dismissed for just cause and the charges are not sustained, Petitioner shall immediately reinstate the employee and restore her back salary.

RECOMMENDATION

It is

RECOMMENDED that the Palm Beach County School Board enter a final order dismissing any and all charges against Respondent, immediately reinstating her, and awarding her back salary for the period of her suspension, as provided in Section 1012.33(6)(a), Florida Statutes.

DONE AND ENTERED this 28th day of June, 2010, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of June, 2010.

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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.

BEFORE THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

SCHOOL BOARD OF PALM BEACH
COUNTY, FLORIDA,

Petitioner,

Case No. 10-0372
Honorable Robert E. Meale

vs.

JILL SHADOFF,

Respondent.
_____/

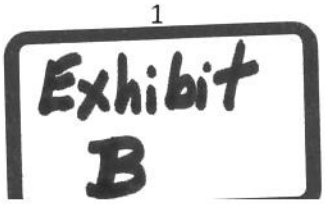
PETITIONER SCHOOL BOARD'S EXCEPTIONS TO RECOMMENDED ORDER

The Superintendent, Arthur Johnson, Ph.D., by and through undersigned counsel, files these Exceptions to the Recommended Order issued by Administrative Law Judge Robert E. Meale, on June 28, 2010, in the matter of *School Board of Palm Beach County v. Shadoff.*

I. INTRODUCTION

After an administrative hearing on April 26, 2010, the Administrative Law Judge (ALJ) recommended the Palm Beach County School Board (School Board) enter a final order dismissing charges against Respondent, immediately reinstating her, and awarding her back salary for the period of her suspension, as provided in 1012.33(6)(a), Florida Statutes. The School Board terminated Ms. Jill Shadoff, a teacher assigned to Tradewinds Middle School, after her arrest for attempted trafficking of Oxycontin.

The Superintendent files this Exception seeking to adopt the ALJ's findings of fact and conclusions of law, except to the extent set forth herein, and increasing the recommended penalty to termination.



II. THE LAW ON MODIFICATION OR REJECTION OF RECOMMENDED ORDER

Florida Statutes Section 120.57(1)(l) provides that "the agency may adopt the recommended order as the final order of the agency." Fla. Stat. §120.57(1)(l). However, the process for modifying or rejecting findings conclusions of law in a recommended order is outlined in this Statute, which provides that:

> The agency may adopt the recommended order as the final order of the agency. *The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.* Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

Fla. Stat. §120.57(1)(l) (*Emphasis Added.)*

III. PETITIONER'S STATEMENT OF EXCEPTIONS

The School Board, pursuant to its authority to modify conclusions of law over matters which it has substantive jurisdiction, as provided in Section 120.57(1)(l), Florida Statutes, makes the following exceptions to the Recommended Order entered on June 28, 2010. The Recommended Order contains interpretations of School Board policies in paragraphs 24, 25

and 26 of the Conclusions of Law; however, the School Board's discipline of the Respondent was not based on these policies. Thus, there is no need for an interpretation of the School Board policies in this matter.

Petitioner's Exception No. 1: Petitioner takes exception to the Conclusion of Law at paragraph 24, page 11 of the Recommended Order, as the School Board did not base its discipline of the Respondent on such policies. Thus, the School Board does not need to issue an interpretation of the policies in this matter.

Paragraph 24 reads: The remaining authority cited in the letter of November 9, 2009, which is the charging document, is irrelevant. First, Petitioner disclaimed any reliance on such authority at the start of the hearing. Second, the authority is otherwise unavailable as grounds for dismissal of a teacher.

Recommended the rewording of Paragraph 24 to read: The remaining authority cited in the letter of November 9, 2009, which is the charging document, is irrelevant, as Petitioner disclaimed any reliance on such authority (including Rule 6B-1.001(3)) at the start of the hearing.

Petitioner's Exception No. 2: Petitioner rejects the ALJ's Conclusion of Law as provided in paragraphs 25 and 26, on pages 11 and 12 of the Recommended Order, as the ALJ's discussion of Board Policies 3.96 and 1.013 in the Conclusions of Law in paragraphs 25 and 26 of the Recommended Order is unnecessary and irrelevant, as the Superintendent did not base the charges at the DOAH hearing upon School Board Policy 3.96 or 1.013. Furthermore, the Board finds that the ALJ's interpretation of the Board's Policies is overly broad, as it incorrectly implies that those Policies cannot serve as a basis for employee discipline. Therefore, the Board rejects the ALJ's Conclusions of Law 25 and 26, and

modifies Conclusion 24 to eliminate the references and implications regarding those Policies."

Petitioner, the School Board has discretion to reject the recommended Conclusion of Law of the Administrative Law Judge. Fla. Stat. §120.57(1)(l); *MacPherson v. School Board of Monroe County*, 505 So. 2d 682 (Fla. 3d DCA 1987). More importantly, the School Board may reject an Administrative Law Judge's Conclusions of Law as to the interpretation, intent and spirit of the School Board policies. *See* Jacob v. School Board of Lee County 519 So. 2d 1002, 1005 (Fla. 1st DCA 1987). An agency may reject conclusions of law without limitation. *Szniatkiewicz v. Unemployment Appeals Comm'n,* 864 So.2d 498, 502 (Fla. 4th DCA 2004).

IV. CONCLUSION

For the reasons enumerated above, the SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA, should enter a Final Order in this case modifying Paragraph 24 and rejecting Paragraphs 25 and 26, in the Conclusion of Law, of the Recommended Order entered on June 28, 2010.

CERTIFCATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email to Matthew Haynes, 1615 Forum Drive , Suite 500, West Palm Beach, Florida 33401 and Jeffrey Sirmons, Johnson & Haynes, 510 Vondenburg Dr., Suite 305, Brandon, FL 33511 this 13th day of July 2010.

/s/ signed electronically

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Fla. Bar No. 0438431

Jill Shadoff - 1010773

Mitigation for Back Pay - DOAH Case No. 10-0372

	FY 2010
Base Pay	$66,851.00
Paid through 6/30/10	$25,683.06
Balance due for FY10	$41,167.94
FRS Contributions (@ 9.85% for FY10)	$4,055.04
Less Unemployment Comp	$7,150.00
SUBTOTAL	$34,026.94
Interest (11% per statute)	$3,742.96
Gross Wages Due Shadoff	**$37, 769.90**
OTHER: COBRA PAYMENTS for months January to July 31, 2010	$2,796.05
TOTAL	**$40,565.95**