STATE OF FLORIDA
DEPARTMENT OF EDUCATION

FACES PRIVATE SCHOOL (4809)
Petitioner

Petitioner,

vs.

DOAH Case No. 10-0845
DOE-2010-~~1983~~ 1998

DR. ERIC J. SMITH, as Commissioner of Education,

Respondent.
_____/

FINAL ORDER

Upon review of the record, the Commissioner of the Florida Department of Education hereby enters this Final Order pursuant to §§120.569 and 120.57(1), Fla. Stat. (2007).

PRELIMINARY STATEMENT

This cause arises from Respondent Department of Education's denial of the request of FACES private school for payment of the September 2009 warrants for students attending the school under the McKay Scholarship Program (MSP). Petitioner FACES filed a Petition for an Administrative Hearing prior to receiving the denial from the Department of Education and also filed a request for a formal hearing after receiving the denial.

An administrative hearing before Administrative Law Judge R. Bruce McKibben was begun on May 5, 2010, and concluded on July 15, 2010, in Melbourne, Florida.

The parties filed proposed Recommended Orders and on September 23, 2010, the Administrative Law Judge (ALJ) entered a Recommended Order (RO), which is incorporated by reference into this Final Order. The RO concluded that Petitioner had failed to properly and timely re-enroll students at FACES and was therefore not entitled to payment of the September 2009 warrants under the MSP.

Respondent filed timely exceptions to the RO pursuant to § 120.57(1)(k), Fla. Stat. (2007) and Fla. Admin. Code R. 28-106.217. Petitioner filed no response to Respondent's exceptions. A transcript of the hearing has been reviewed in the preparation of this Final Order, and references to it will be (T-).

STANDARD OF REVIEW

Standard of Review of Findings of Fact

The agency may not reject or modify a factual finding unless the agency reviews the entire record and states with particularity in the order that the finding was not based on competent substantial evidence or that the proceeding did not comply with the essential requirements of law. See, § 120.57(1), Fla. Stat. (2007). Under Florida law, "evidence relied upon to sustain the ultimate finding should be such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1975). The agency may not reweigh the evidence. Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985). Further, as the agency is not the trier of fact, it may not create or add to findings of fact. See, Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345, 1347-48 (Fla. 1st DCA 1987).

Standard of Review of Conclusions of Law

Unlike factual conclusions, an agency's review of conclusions of law and interpretations of administrative rules found within an RO is *de novo* where the statutes or rules interpreted fall within the substantive jurisdiction of the agency. See, Hoffman v. State, Dep't of Management Services, 964 So.2d 163 (Fla.1st DCA 2007). Thus, under §120.57(1), Fla. Stat. (2007), an agency may reject or modify an ALJ's conclusion of law and the interpretation of administrative rules over which the agency has substantive jurisdiction. In doing so, an agency must state with particularity its reasons for rejecting or modifying the conclusion of law or interpretation of rule and must find that its substituted conclusion of law is as reasonable, or more reasonable, than the one it rejects or modifies.

EXCEPTIONS

Respondent filed nine exceptions and four alternate exceptions. Respondent's exceptions referenced objections to both the ALJ's Findings of Fact and Conclusions of Law. Upon review of the entire record, the exceptions have either been granted or denied, with a specific explanation for the agency's determination. The agency accepts the Findings of Fact and Conclusion of Law set forth in the RO with the exceptions as articulated below.

FINDINGS OF FACT

Exception 1. In Finding of Fact 7, the RO states that when Petitioner clicked on the Update Fee Schedule Link on July 13, 2009, she was given only the option to update the 2008-2009 school year's enrollment, rather than the 2009-2010 school year's enrollment. Respondent contends that this finding is not based on competent substantial

evidence in that Petitioner's testimony was contradicted by department staff. Rather than issuing a finding regarding the credibility of the witnesses, the RO commits to the finding, yet issues a conclusion inconsistent with that finding. Although the agency may not weigh the evidence, it is clear that this finding does not support the conclusion reached, and thus cannot be considered competent substantial evidence. Therefore, Respondent's Exception 1 is GRANTED. The RO's Finding of Fact 7 is stricken and replaced with Findings of Fact 39-53 in Petitioner's Proposed Recommended Order.

Exception 2 Exception 2 requests that the Finding be stricken in its entirety. Finding of Fact 8 of the RO states that the Petitioner called an "undisclosed person" at the Department regarding difficulties she was experiencing with the system and was "presumably" told the system had a glitch and how to work around it. The RO acknowledges that this testimony was uncorroborated, and no records were presented as evidence that such a phone conversation even took place. In the same finding, the RO states that the Department presented contrary evidence reflecting that other schools did not experience any similar difficulties as the Petitioner claimed during the same time-frame. Despite these inconsistencies, the ALJ is free to rely on the testimony of one witness even if that testimony contradicts other testimony. Stinson v. Winn, 938 So. 2d 554, 555 (Fla. 1st DCA 2006). Respondent's Exception 2 is DENIED.

Exception 3 Although Respondent challenges Finding of Fact 8 *in toto*, Exception 3 addresses the following sentence in this Finding specifically: "One school had experienced some problems saving individual fee schedules for four students, but had not experienced problems re-enrolling students." The ALJ did not reference a date that the problem occurred, nor could he. (T-182, 2-5) Subsequent testimony (from the same

school to which the ALJ referred) indicated that no problems with the master fee schedule occurred. (T-183, 15-19) Thus, the record reflects contradictory testimony from the same witness. It appears the ALJ makes the determination regarding fee schedule problems based on an exhibit marked as, but not entered into, evidence (Petitioner's 20). The agency is cognizant that it cannot reject a finding based on competent substantial evidence, even if there is competent substantial evidence to support a contrary finding. Stinson at 555. In the instant scenario, however, this sentence, even alone cannot be the basis for Finding of Fact 8 as it is not based on competent substantial evidence. Exception 3 is GRANTED and the offending sentence is stricken.

Exception 4. Exception 4 is DENIED. The record supports the sentence in Finding of Fact 10 excepted to by Respondent. T-36, 17 through T-37, 8-15; T-361, 2-4, T-400, 14-25. The agency may not reweigh the evidence or assess the credibility of the witness. Stinson at 555.

Exception 5. Exception 5 is GRANTED. Respondent contends that the testimony regarding FACES' fire inspection and health certificate should be excluded as irrelevant and immaterial under §120.569(2)(g), Fla. Stat. Although the statute allows "all other evidence of a type commonly relied upon by reasonably prudent persons...whether or not such evidence would be admissible in a trial in the courts of Florida," the ALJ himself acknowledged that the "[e]vents [referenced in the Finding]...reflect unfavorably on the Department, but do not affect the outcome of this case. They are noted only because they were raised by Wilson as part of her case-in-chief." Thus, the Finding in its entirety is both irrelevant and immaterial to the case and therefore is STRICKEN.

Alternate Exceptions 5a, 5b, 5c and 5d. In light of Exception 5 being granted, it is not necessary to rule on the alternate exceptions.

Exception 6. Exception 6 to Finding of Fact 18 is GRANTED in part and DENIED in part. The Respondent correctly states that only the McKay warrants for September 2009 are the subject of agency action, not the "scholarships for the 2009-2010 school year" as stated in the Finding. The last sentence of the Finding is not based on competent substantial evidence (see T-7, 9-11) and is STRICKEN.

The Respondent also points out that even if that last sentence were corrected to be factually accurate, it is a Conclusion of Law rather than a Finding of Fact. As the sentence is stricken, no recategorization of the sentence is necessary.

Exception 7. Exception 7 to Finding of Fact 19 is DENIED. In the RO, the ALJ finds only that the Petitioner's testimony is "honest and sincere." As the Agency is not at liberty to assess the credibility of the witnesses, and the ALJ has determined that the Petitioner was "mistaken" as to the effect of her actions, the Agency has no basis on which to grant this Exception.

Exception 8. Exception 8 to Conclusion of Law 25 is DENIED in part and GRANTED in part. Respondent asks that the statement in the RO, "Although the Department's actions against FACES after the enrollment difficulties are suspect, those action do not cure the failure to timely enroll students" be replaced with, "The Department's actions did not cause FACES failure to timely enroll students." Having substantive jurisdiction over this part of Conclusion of Law 25, the agency rejects the sentence as written in the RO and modifies it to read, "FACES failed to meet the requirements of §1002.39(8), Fla. Stat."

Exception 9. In Conclusion of Law 25, the ALJ correctly, but parenthetically, asserts that, "[w]hether the Department has any discretion to grant the scholarships despite Wilson's failures is unknown." The ALJ is also correct that "[w]hatever action the Department may take as recompense for its erroneous behavior is outside the purview of this Recommended Order." This Conclusion, particularly in light of the final recommendation contained in the Recommended Order, is beyond the scope of the ALJ's role. Moreover, a Conclusion of Law should reflect the ALJ's application of a statute, rule or case law to the facts of the case rather than a parenthetical personal observation. §120.57(1)(l), Fla. Stat. Exception 9 to Conclusion of Law 25 is GRANTED and the parenthetical statements in the Conclusion are STRICKEN.

DISPOSITION

Upon review of the entire record, the foregoing Findings of Fact, Conclusions of Law, and rulings on Respondent's Exceptions, it is

ORDERED and ADJUDGED that Petitioner is not entitled to payments for September 2009 under the McKay Scholarship Program.

DONE AND ORDERED this 9th day of June 2011, in Tallahassee, Leon County, Florida.

Eric J. Smith
Commissioner of Education
State of Florida

CERTIFICATE OF SERVICE BY THE AGENCY CLERK

I HEREBY CERTIFY, that a true and correct copy of the foregoing Final Order has been furnished by United States mail to:

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Florida Administrative Law Reports

Honorable Eric J. Smith
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Department of Education
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this 9 day of June, 2011.

Agency Clerk

NOTICE OF APPEAL RIGHTS

This order is final agency action. Judicial review of final agency action may be had by filing notices of appeal in both the appellate district where the petitioner resides and with the clerk of the Department within 30 calendar days of the date this order is filed in the official records of the Department. §120.68, F.S.; Fla. R. App. P. 9.110. UNLESS A NOTICE OF APPEAL IS TIMELY FILED, NO FURTHER REVIEW IS PERMITTED.