STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| VALMYR VILBRUN, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 10-7209 |
| | ) | |
| COUNTY OF OSCEOLA SCHOOL BOARD, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on June 3, 2011, in Kissimmee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Candance N. Vilbrun,
Qualified Representative
Post Office Box 701975
St. Cloud, Florida 34770

For Respondent: Gary M. Glassman, Esquire
Brown, Garganese, Weiss
& D'Agresta, P.A.
111 North Orange Avenue, Suite 2000
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues in this case are:

1. Whether Respondent, County of Osceola School Board (the "Board"), discriminated against Petitioner, Valmyr Vilbrun

("Vilbrun"), on the basis of his race (African-American) in violation of the Florida Civil Rights Act; and

2. Whether the Board retaliated against Vilbrun when he filed a discrimination claim.

## PRELIMINARY STATEMENT

Vilbrun filed a Complaint of Discrimination with the Florida Commission on Human Relations (the "Commission") on December 7, 2009. A Determination: No Cause was entered by the Commission on July 2, 2010. Vilbrun filed a Petition for Relief with the Commission on or about August 3, 2010. A copy of the Petition was forwarded to the Division of Administrative Hearings ("DOAH") on August 6, 2010. The undersigned Administrative Law Judge was assigned to the case, and the final hearing was held on the date set forth above.

At the final hearing, Vilbrun testified on his own behalf and called three other witnesses: Linda Moore-Short; Mabel Sweeney, and Debra Zeller; all former teachers at St. Cloud High School (the "School"). Vilbrun's Exhibits 2, 4, 7, 8, 11 through 13, 16 through 19, 21, 36, 37, 41, 42, 44, 47 and 49, were admitted into evidence. The Board called three witnesses: Pamela Tapley, principal at the School; Jennifer Reyes, teacher; and Patricia Minor, teacher and union representative at the School. The Board's Exhibits 6, 7, 12, and 17 through 20 were admitted into evidence.

The parties advised that a transcript of the final hearing would be ordered. By rule, parties are allowed ten days to submit proposed recommended orders (PROs) following filing of the transcript at DOAH. The Transcript was filed on June 27, 2011. The parties filed two agreed motions to extend the time for filing PROs, and each was granted. PROs were ultimately deemed to be due on July 11, 2011. The Board filed its PRO on July 11, 2011, at 4:07 p.m.; Vilbrun attempted to file its PRO via fax beginning at 3:59 p.m., but it did not fully arrive until 5:41 p.m. However, there is no prejudice to the Board for Vilbrun's tardiness relating to that PRO.

Vilbrun, thereafter, called the Administrative Law Judge's office, asking permission to amend the PRO because the Recommendation section had been erroneously omitted when it was filed. Permission was granted to make the minor amendment. However, when the amended PRO arrived on July 14, 2011, it had been changed considerably from the original. The Board moved to strike the amended PRO. Thereafter, Vilbrun filed a motion seeking leave to file the amended PRO (which had already been filed). The Board objected to the amended PRO. An Order was entered denying Vilbrun's motion to file an amended PRO. Vilbrun's original PRO and the Recommendation section of the amended PRO, along with the Board's PRO, were duly considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Vilbrun is an African-American male who, at all times relevant hereto, was teaching an exceptional student education (ESE) class at the School. Vilbrun is currently employed at Alternatives Unlimited, a school in Polk County, Florida. He also works as a dispatcher for the St. Cloud Police Department, a position he has held for several years.

2. The Board is the agency responsible for hiring and supervising all teachers in Osceola County, including those employed at the School. The Board is further responsible for determining whether teachers working under annual contracts are to be renewed at the end of their contract term.

3. Vilbrun was a teacher at the School during the 2008-2009 school year. He was working under an annual contract for that school year only. Vilbrun had been hired by Tapley to teach an ESE class at the School. At the end of the school year, Tapley recommended non-renewal of Vilbrun's contract based, in large part, upon her evaluation of Vilbrun's teaching skills, her concerns about his tardiness, and his negative interaction with a fellow teacher.

4. Vilbrun maintains that the reason for the recommendation of non-renewal was racial discrimination. While citing no direct evidence of discrimination by anyone at the School or the Board, Vilbrun provided circumstantial evidence as

to three incidents that had occurred in furtherance of his claim:

- Vilbrun had a confrontation with a Caucasian, female teacher (Reyes) at the School;
- Vilbrun had a negative relationship with the dean of students (Andrea Beckel); and
- There was an issuance of disciplinary letters to four African-American teachers on the same day.

Each of those incidents will be discussed more fully below.

Incident Involving Fellow Teacher

5. When Vilbrun began teaching at the School, he approached Reyes, a fellow ESE teacher, to help him prepare Individual Education Plans ("IEPs") for his students. IEPs are an integral part of the ESE program, and each teacher is expected to develop IEPs for their students. After a period of assistance from Reyes, Vilbrun began preparing the IEPs for his students by himself. Reyes remembers telling Vilbrun that it was time for him to do the IEPs on his own. Vilbrun remembers deciding to do the IEPs independently after seeing that the extra time spent with Reyes might be misconstrued by others as improper. Reyes is a young, Caucasian woman.

6. In December 2008, about halfway through the school year, one of Reyes' students approached her and asked if she wanted to buy some items that he was selling "for Mr. V's

class." Reyes was taken aback because her class was in the midst of a fundraiser at that time, and the School only allows limited fundraisers to be going on at any one time. Reyes telephoned Vilbrun to inquire about his fundraiser, but he did not answer the call. Reyes then emailed the person responsible for coordinating fundraisers at the School to make sure that she (Reyes) was not violating the policy by carrying out her class's fundraiser at that time. She was advised that her fundraiser was authorized. The fundraising coordinator apparently then went to Vilbrun to inquire about his fundraising project.

7. A day or two later, Vilbrun approached Reyes in another teacher's classroom and said, "I can't believe it's in your character to do that." Vilbrun was upset that Reyes had contacted the School office about his alleged fundraiser. He told Reyes that it was not a fundraiser per se and that "the money was going to someone else." The conversation escalated into an argument, and Reyes, a small woman, became uncomfortable and intimidated by Vilbrun's behavior. Reyes was also concerned that because her child and Vilbrun's child both attended the same day care, she would potentially have to confront Vilbrun away from the School grounds.

8. Reyes was upset enough by the incident to contact the principal to discuss her version of what had transpired. The principal spoke with Reyes and asked for a written statement,

which Reyes submitted. Coincidentally, Reyes had submitted a typed letter to the office that very morning complaining about another issue she had with Vilbrun, namely, that he was often late to class and that she would have to monitor his students until he arrived. Her hand-written statement about the fundraiser incident was submitted in the afternoon of the day she sent in the tardiness letter.

9. Tapley then issued a letter to Vilbrun advising him that a complaint had been filed against him by another teacher. The letter did not make a determination of whether the complaint was founded, and Vilbrun was given the opportunity to submit a written response prior to meeting with the principal. There is no evidence that a written response was prepared by Vilbrun. Tapley then conducted an investigation to determine whether there were grounds for discipline against either of the teachers involved.

10. As a result of Tapley's investigation into the matter, Tapley verbally advised Vilbrun to keep his distance from Reyes. Tapley then issued a letter of guidance to Vilbrun directing him to follow procedures for all fundraising activities. The letter also addressed Vilbrun's failure to report to work on time. The letter did not provide any sanction or direction concerning interaction with Reyes or other colleagues. As far as Vilbrun knew, no action was taken against Reyes.

Relationship With Dean of Students

11. For unknown or unstated reasons, Vilbrun did not have a good working relationship with Beckel, the dean of students at the School. Vilbrun believed Beckel was not adequately performing her role, that she was not able to handle unruly or disruptive students, and that she failed to provide Vilbrun with sufficient support.

12. In April 2009, Vilbrun submitted a memorandum to Tapley addressing his concerns about the relationship between him and Beckel. The memorandum discussed Vilbrun's perception of his interactions with Beckel, but without benefit of Beckel's version of the facts, it is impossible to make a finding as to the exact nature of the relationship between the two individuals. However, the gist of Vilbrun's complaint against Beckel is professional in nature and relates to differences between the two concerning the handling of student discipline. There is one peripheral comment about an "outright discriminative" email received from Beckel in the memorandum. However, the emails presented into evidence by Vilbrun do not substantiate that claim.

13. As a matter of fact, Vilbrun, when asked whether race was a motivating factor for the way Beckel interacted with him, stated, "I can't speculate on that" and "As far as what was causing that, I can't really say." [Transcript, pp. 296-297.]

Vilbrun had a general perception that Caucasian teachers did not seem to have the same difficulties with Beckel that he was experiencing.

Adverse Action Towards Four African-American Teachers

14. On the day before he received the letter from Tapley concerning the Reyes matter, Vilbrun was the recipient of a letter from Tapley concerning his attendance and punctuality. In fact, all four ESE teachers, all of whom are African-American, received letters on that same day, March 10, 2009. Vilbrun views that fact as evidence of discrimination against him and the other African-American teachers.

15. Tapley generated each of the letters, but states they were based on alleged violations by each teacher and were not based on reference to the recipient's race. Tapley's testimony in this regard is credible.

16. The letters are known as "9.02 letters," based on the section of the Union Agreement in which such letters are described. The 9.02 letters advise teachers of perceived or alleged violations that have been reported and give the teacher an opportunity to respond before further action is taken by administration. The letters are not final and do not establish fault. Rather, they are merely a preliminary step that may either result in a sanction or may be dismissed entirely.

17. One of the recipients of one of the four 9.02 letters, Sweeney, adamantly defended Tapley as non-racist. In fact, Tapley assisted Sweeney and helped her find a new position when Sweeney's class at the School had to be eliminated due to loss of students.

18. Other than the fact that each of the four recipients of a 9.02 letter from Tapley on that date was African-American, there is no evidence that race had anything to do with the letters. A former ESE teacher at the School testified that ESE teachers were sometimes discriminated against as a group, i.e., as ESE teachers, but there was no racial discrimination at the School to her knowledge.

Other Factors for Consideration

19. At the end of the 2008-2009 school year, Tapley made a recommendation to the Board for non-renewal of the annual contracts for 17 teachers from the School. Of that group, 11 were Caucasian, three were African-American, and three were Hispanic.

20. Tapley was described by almost every teacher, except Vilbrun, as acting responsibly and without regard to race when dealing with issues at the School. There is no evidence that Tapley engaged in any racist behavior. To the contrary, her demeanor and fairly universal support from staff indicates just the opposite.

21. Andrea Beckel, with whom Vilbrun alleges a strained relationship and who Vilbrun suggests made statements with racist undertones, did not testify. It is impossible to make a finding of fact concerning her behavior or demeanor.

22. The union representative at the School, Patty Minor, described Tapley as decidedly non-racist. Vilbrun never went to Minor with a complaint about Tapley acting in a discriminatory fashion based on race or anything else.

23. One of Tapley's "hot buttons" for her teachers was timely arrival at school. Vilbrun had some issues with timeliness during his tenure at the School. Reyes testified that she had to cover Vilbrun's students on many occasions. Minor, as the union representative, counseled Vilbrun about the necessity for timely arrival. No documentary evidence was presented, however, to substantiate that Vilbrun was habitually tardy.

24. During the 2008-2009 school year, Vilbrun received two "annual" reviews, performed by assistant principal Neves. The reviews indicate satisfactory performance of most of his required tasks and that improvements were being made. However, Vilbrun was viewed by his principal and other administrators as deficient in the classroom. His students were observed to be unfocused and lacking in clear direction as to their studies. Vilbrun rejects those allegations on the basis that Tapley was

not his direct supervisor and did not perform regular reviews of his classroom. Tapley, however, viewed Vilbrun on numerous occasions and relied upon reports from other teachers and administrators as the basis for her actions.

25. Of the six teachers hired for the ESE department at the School for the 2009-2010 school year, five had less experience than Vilbrun. However, Tapley testified that she considers qualifications, rather than experience, as the deciding factor for hiring teachers.

26. Vilbrun claims retaliation by the School and/or the Board because of his complaint to the Commission. One of the purported retaliatory actions was a phone reference check form evidencing that Tapley told Ana Smith, a Board employee, she would not rehire Vilbrun or recommend him for employment. Vilbrun also applied for numerous jobs, and he believes that someone at the School or Board was sabotaging his applications or blackballing him in some fashion because he could not get any interviews. However, the phone call and Vilbrun's applications occurred in May 2009; his complaint to the Commission was filed in December of that year.

## CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida

Statutes (2010). Unless specifically indicated otherwise herein, all references to Florida Statutes will be to the 2010 codification.

28. The Florida Civil Rights Act (the "Act") is codified in sections 760.01 through 760.11 and 509.092, Florida Statutes. The Act makes it unlawful to discriminate against any individual with respect to the compensation, terms, conditions or privileges of employment on the basis of race. Vilbrun is claiming violation of the Act by the Board, particularly with respect to actions taken by the principal at the School.

29. The U.S. Supreme Court has established an analytical framework within which courts should examine claims of discrimination, including racial discrimination. In cases alleging discriminatory treatment, a petitioner has the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).

30. Vilbrun can establish a prima facie case of discrimination in one of three ways: (1) by producing direct evidence of discriminatory intent; (2) by circumstantial evidence under the framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); or (3) by establishing statistical proof of a pattern of discriminatory conduct. Carter v. City of

Miami, 870 F.2d 578 (11th Cir. 1989). Failure to establish a prima facie case will require entry of a decision in favor of the employer. Earley v. Champion Int'l Corp., 907 F.2d 1077 (11th Cir. 1990).

31. To establish a prima facie case of discrimination, Vilbrun must show: that he is a member of a protected class; that he suffered an adverse employment action; that he received disparate treatment from other similarly-situated individuals in a non-protected class; and that there is sufficient evidence of disparate treatment. Andrade v. Morse Operations, Inc., 946 F. Supp. 979 (M.D. Fla. 1996).

32. Vilbrun addressed his prima facie case by showing that due to his race (African-American), he is a member of a protected class and that he suffered an adverse employment action, i.e., his contract for employment was non-renewed. Vilbrun says that his treatment in the Reyes affair was disparate from how the other Caucasian party was treated. However, there is insufficient evidence of disparate treatment or that any difference in how Vilbrun and Reyes were treated was based on race. There is no discriminatory basis for the strained relationship between Vilbrun and Beckel. The letters issued to four African-American teachers on the same day is not de facto evidence of racial discrimination.

33. Other than his testimony regarding his belief that he had been discriminated against based on his race, Vilbrun offered no persuasive evidence--direct, circumstantial, or statistical--of the alleged discrimination. His prima facie case of discrimination is not supported by the evidence.

34. If Vilbrun had satisfied his burden of establishing a prima facie case of discrimination, an inference would have arisen that the adverse employment action was motivated by a discriminatory intent. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, supra. The burden would have then shifted to the Board to articulate a legitimate, non-discriminatory reason for its action.

35. In the present case, the Board articulated sufficient non-discriminatory reasons for non-renewal of Vilbrun's contract, including his tardiness, his interactions with fellow employees, and his lack of proficient teaching skills.

36. Once the Board articulated the aforementioned reasons for its action, the burden would then shift back to Vilbrun to show that the proffered reasons were a mere pretext for unlawful discrimination. To do so, Vilbrun must provide sufficient evidence to allow a reasonable fact-finder to conclude that the proffered reasons were not the actual motivation for the adverse employment action. Standard v. A.B.E.L. Serv., Inc., 161 F.3d 1318 (11th Cir. 1998).

37. Vilbrun would need to show that the Board's articulated reason is a pretext by showing that the non-discriminatory reasons should not be believed; or by showing that in light of all the evidence, discriminatory reasons more likely motivated the decision than the proffered reason. Id. Vilbrun did cast some doubt on some of the Board's reasons by questioning whether there was sufficient written documentation to substantiate the claims of tardiness or poor classroom management. However, the testimony of Tapley and others was credible and sufficiently proved the existence of non-discriminatory reasons for the Board's action. And it is abundantly clear from the evidence that race was not the basis for the Board's actions (especially as those actions were carried out by the School's principal).

38. In addition, other than his speculation and belief, Vilbrun provided no evidence to support his contention that the Board acted on the basis of racial discrimination. Mere speculation or self-serving belief on the part of a complainant concerning motives of a respondent is insufficient, standing alone, to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d. Cir. 2001) ("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.").

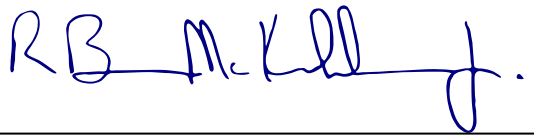
39. As to Vilbrun's claim of retaliation, there was no evidence presented, persuasive or otherwise, that the Board took any action whatsoever that would support the claim. None of the evidence presented could reasonably be inferred to substantiate a claim of retaliation.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief filed by Petitioner, Valmyr Vilbrun, in its entirety.

DONE AND ENTERED this 27th day of July, 2011, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2011.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Gary M. Glassman, Esquire
Brown, Garganese, Weiss
& D'Agresta, P.A.
111 North Orange Avenue, Suite 2000
Orlando, Florida 32801

Candance N. Vilbrun
Post Office Box 701975
St. Cloud, Florida 34770

## 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.