STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

VALMYR VILBRUN,

Petitioner,

v.

COUNTY OF OSCEOLA SCHOOL BOARD,

Respondent.
_____/

EEOC Case No. 846200954071

FCHR Case No. 2010-00697

DOAH Case No. 10-7209

FCHR Order No. 11-079

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Valmyr Vilbrun filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2008), alleging that Respondent County of Osceola School Board committed unlawful employment practices on the basis of Petitioner's race (Black) in the manner in which Petitioner was subjected to discipline, in the manner in which Petitioner was subjected to different terms and conditions of employment than similarly situated non-Black employees, and in Respondent's failure to renew Petitioner's teaching contract. Petitioner also alleged that Respondent unlawfully retaliated against Petitioner for complaining about the discrimination to which he had been subjected.

The allegations set forth in the complaint were investigated, and, on July 2, 2010, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Kissimmee, Florida, on June 3, 2011, before Administrative Law Judge R. Bruce McKibben.

Judge McKibben issued a Recommended Order of dismissal, dated July 27, 2011.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled "Petitioner's Response to the Administrative Law Judge's Proposed Recommended Order."

Petitioner's exceptions document contains 15 numbered exceptions paragraphs.

In each instance, the exceptions paragraphs take issue with facts found (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15), suggest facts not found (2), take issue with inferences drawn from the evidence presented (1, 3, 6, 7, 8, 9), take issue with credibility determinations of the Administrative Law Judge (4),and / or contain explanation or argument as to the significance or meaning of the fact found (5, 11, 12, 13, 14).

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005).

Further, it has been stated, "The ultimate question of the existence of discrimination is a question of fact." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1st DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010).

Noting that we have above found the facts as found by the Administrative Law Judge to be supported by competent substantial evidence and the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter, Petitioner's exceptions are rejected.

Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days

of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 6th day of October, 2011.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Mario M. Valle, Panel Chairperson;
Commissioner Watson Haynes, II; and
Commissioner Lizzette Romano

Filed this 6th day of October, 2011,
in Tallahassee, Florida.

Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

Valmyr Vilbrun
c/o Candance N. Vilbrun, Qualified Representative
Post Office Box 701975
St. Cloud, FL 34772

County of Osceola School Board
c/o Gary M. Glassman, Esq.
Brown, Garganese, Weiss
& D'Agresta, P.A.
111 North Orange Avenue, Suite 2000
Orlando, FL 32801

R. Bruce McKibben, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 6th day of October, 2011.

By: Violet Crawford
Clerk of the Commission
Florida Commission on Human Relations

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VALMYR VILBRUN,
Case No. 10-7209
Petitioner, 2010-00697
846200954071

v.

COUNTY OF OSCEOLA SCHOOL BOARD,
Respondent,
_____/

PETITIONER'S RESPONSE TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED RECOMMENDED ORDER

Petitioner, **VALMYR VILBRUN** pursuant to 120.57(1), Florida Statutes (F.S.) and Florida Administrative Code (FAC,) rule 28-106.217(1), hereby respectfully submits his exceptions to Administrative Law Judge (ALJ) R.B. McKibben's Recommended Order (RO) in the above captioned matter dated June 3, 2011.

Both 12057, F.S. and Rule 28-106.217, FAC. provide for the filing of exceptions to any RO of an ALJ.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

120.57(1)(b), F.S.

> Exceptions and Responses.
> (I) Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order except in proceedings conducted pursuant to Section 120.57(3), F.S. Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

Florida Administrative Rule 28-106.217(1).

In making its final decision and in considering and ruling on exceptions made to the ALJ's RO:

> (I) 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 not reject or modify the findings of facts unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

120.57(1)(1), F.S.

Petitioners **Exception #**1:

On page 4, paragraph 3, of the RO, the ALJ concludes and finds that Mrs. Tapley, the school principal's reasoning for non-renewing Petitioner's contract

was 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. Petitioner takes exception to this ALJ's finding to this fact. Petitioner testified that Mrs. Tapley only visited his classroom once in 1 ½ years for approximately 3-5 minutes. Petitioner argues that his performance evaluations showed that he was improving and that there were no issues with his performance. Petitioner submitted his Exhibits 12 and 13 to reflect his performance (P. 71, lines 14-22). Mrs. Tapley also testified that she never put Petitioner on a Performance Improvement Plan (PIP) per his teaching contract (P. 73, lines 2-25). Also, when asked why teachers were required to have two teaching observations per year, Mrs. Tapley could not articulate a reason as to why (P. 68, lines 20-25; P. 69, lines 1-24). According to the Final Transcript (P. 92, line 25; P. 93, lines 1-2; P. 93, lines 15-20) and Petitioner's Exhibit 21, Mrs. Tapley's initial reasoning for non-renewing Petitioner's contract was performance, attendance and punctuality, disciplinary issues, and staffing needs. Petitioner and Respondent's entered into a stipulated agreement on April 1, 2011 after Petitioner requested the attendance records for all teachers in the ESE Department at St. Cloud High School. Respondent's did not want to provide the records and instead withdrew their attendance claim against Petitioner. They instead stated that Petitioner had punctuality issues but again could not provide records of Petitioner's punctuality. Mrs. Tapley testified that she was not aware of any details regarding Petitioner's punctuality (P. 80, lines 13-14; lines15-25; P. 81, lines 1-12). So to conclude that Petitioner had punctuality issues is a misrepresentation of the facts presented in

this case. As far as any discipline issues, there was one complaint brought against Petitioner by a Caucasian teacher, Mrs. Jennifer Reyes. Mrs. Reyes accused Petitioner of inappropriately interacting with her. Petitioner vehemently denies every interacting inappropriately with Mrs. Reyes, he instead argued that Mrs. Reyes acted inappropriately with him and that he complained about it and was told to "beware of a scorned woman". The only evidence submitted was a statement from Mrs. Reyes and testimony that was inconsistent and full of contradictions (P.126-145).

Petitioners **Exception #** 2:

On page 4, paragraph 4, of the RO, the ALJ concludes that the only circumstantial evidence submitted by Petitioner was based on three incidents alone. Petitioner argues that not only did he provide testimony about three incidences that he encountered while employed at St. Cloud High School, he also had the following witnesses testify to their personal encounters while working at St. Cloud High School. Ms. Mable Sweeney, an African-American teacher in the (EBD unit) testified that she felt discriminated against and that she reported it to Mrs. Pam Tapley. Ms. Sweeney further testified that she wrote a letter to the principal addressing her concerns of feeling harassed and her belief that she was working in a hostile environment (P. 24, lines 9-25; P. 25, lines 1-25; P.26, lines 4-22). Ms. Sweeney also testified that Mr. Vilbrun told her that he was feeling discriminated against and that he reported it to Mrs. Tapley. According to her testimony, Ms. Sweeney tried to get the other African-American

teachers in the ESE Department to bring forth their concerns to Mrs. Tapley as well (P.34, lines 1-10). She also testified about staying on campus late to fix up her classroom, just to have it destroyed at the request of Mrs. Andrea Beckel, ESE Dean of Students (P.20, lines10-25; P.21, lines 1-25; P. 22, lines 1 -24). Secondly, Mrs. Linda Moore-Short, an African-American female and past teacher in the Emotional Behavioral Department (EBD unit) at St. Cloud High School who had never met Petitioner, testified about her experience while working at St. Cloud High School. Mrs. Short testified that her classroom was destroyed after she set it up for the first day of classes (P. 6, lines 10-25; P. 7, lines1-9). She also testified to feeling alienated (P.11, lines 6-7). Lastly, a Caucasian teacher by the name of Mrs. Debra Zeller, testified that she was late sometimes once a week and was never written up for it. According to her, her situation was understood and accommodated (P. 50, lines 7-21). She also testified that Petitioner had a very good rapport with his students (P.51, lines 22-25; P. 52, lines 1-11). She also testified about the inappropriate interaction with a colleague write-up that Petitioner received. She testified that she was with Petitioner's accuser moments before the allegation was filed (P. 44, lines 4-15; P. 44, lines 16-18).

Petitioners **Exception #** 3:

On page 5, paragraph 5, of the RO, the ALJ adopts the entire testimony of Mrs. Jennifer Reyes as fact. Petitioner takes exception to the ALJ's findings and conclusions here. Mrs. Reyes's allegations against Petitioner were never

investigated and never proven to be true. There was no testimony provided that suggested that Mrs. Reyes ever did Petitioner's IEP's for any amount of time. Mr. Vilbrun has maintained that his IEP's were completed by him and him alone.

Petitioners **Exception #** 4:

On page 6, paragraph 7, of the RO, the ALJ again adopts the entire testimony of Mrs. Jennifer Reyes as fact. Mrs. Reyes's testimony was inconsistent and contradicting. Petitioner argues that he never confronted Mrs. Reyes in any classroom, he maintains that he was not upset, yet he wanted to know what happened. There is no factual evidence to show that an argument pursued and neither was there any testimony to suggest that. The ALJ is referring to a woman who stood taller than him, as a "small woman". This comment paints a picture that is not realistic of the facts. Petitioner testified that he never acted unprofessionally with Mrs. Reyes in any aspect. Petitioner did not do or say anything that would make his testimony less credible than that of Mrs. Reyes yet her testimony is somehow given weight over Petitioner's despite there being no evidence to back it up (P. 126-143).

Petitioners **Exception #** 5:

On page 6, paragraph 8, of the RO, the ALJ again adopts the entire testimony of Mrs. Jennifer Reyes as fact. Petitioner argues that it was not a "coincidence" that Mrs. Reyes filed two complaints against him two days in a row, he maintains that it was calculated. Mrs. Debra Zeller testified that when Mrs.

Jennifer Reyes made complaints, administrators listened and took them serious (P. 58, lines 1-25; P.59, lines 1-25; P.60, lines 1-4)

Petitioners **Exception #** 6:

On page 7, paragraph 9, of the RO, the ALJ concludes and finds that Mrs. Tapley conducted an investigation into the allegations made against Petitioner despite Mrs. Tapley testifying that she was not sure if an investigation had ever been conducted (P. 76, lines 2-25; P. 77, lines 1-3). Petitioner maintains that there was never an investigation done into the allegations that were made against him and he strongly denies each of them.

Petitioners **Exception #** 7:

On page 7, paragraph 10, of the RO, the ALJ concludes and finds that allegations against Petitioner having a fundraiser were true, even though Petitioner testified that it was an approved class project on sales for his career prep students. Again, the ALJ is finding it to be a fact that an investigation was conducted even though the evidence and testimony does not support that. Mrs. Jennifer Reyes even testified and wrote in her statement that the fundraising chairperson told her that it was a class project and not a fundraiser (P. 127, lines 17-25; P. 128, lines 1-25; P. 129. lines 1-4).

Petitioners **Exception #** 8:

On page 8, paragraph 11, of the RO, the ALJ concludes and finds that the reason for Petitioner's and Mrs. Beckel's strained relationship was unknown or unstated and that Petitioner believed that Mrs. Andrea Beckel was not adequately performing her role. Mr. Vilbrun never testified about Mrs. Beckel's role, he testified that she continuously confronted him in his classroom in front of his students which he saw as continued harassment (Petitioner's Exhibits 16,17). He argued that she would help the Caucasian teachers with discipline issues while leaving him to deal with threatening students.

Petitioners **Exception #** 9:

On page 8, paragraph 12, of the RO, the ALJ concludes and finds that the Petitioner's comment in his complaint letter to Mrs. Tapley about Mrs. Beckel's behavior to be "outright discriminative" as not supported by evidence is without merit. The Petitioner argues that the constant classroom encounters and the negative emails that were sent to him were discriminative and argumentative (Petitioner's Exhibits 11a, 11b, 11c, 11d). He further states that several of The African-American teachers were having similar issues with Mrs. Andrea Beckel.

Petitioners **Exception #** 10:

On page 9, paragraph 16, of the RO, the ALJ finds that Mrs. Tapley, generated the complaint letters of attendance that was filed against four African-American teachers in the ESE department, even though, she never wrote any of

the letters. The 9.02 letters were written by two separate administrators on the same day. The allegations against the teachers were unfounded.

Petitioners **Exception #** 11:

On page 10, paragraph 20, of the RO, the ALJ concludes and finds that almost every teacher, except for Petitioner, testified that Tapley was acting responsibly. Petitioner argues that not every teacher testified about Mrs. Tapley acting responsible. The only person that testified about Mrs. Tapley was Mrs. Minor who displayed selective memory throughout the course of her testimony. Mrs. Tapley was asked if African-American teachers reported discrimination to her during the 2008-2009 school years and her answer was yes (P. 103, lines 20-24). A responsibly acting principal does not take claims of racial discrimination and do nothing to address them. Mrs. Tapley's demeanor on the day of the hearing should not hold any bearing as to the decisions that she made during the school years 08-09. Petitioner also displayed a calm demeanor at the hearing but that is somehow irrelevant to his state of mind.

Petitioners **Exception #** 12:

On page 11, paragraph 24, of the RO, the ALJ concludes and finds Mrs. Tapley's testimony about Petitioner's performance to be more credible than the physical evidence, his teaching observations. Petitioner was observed by one administrator only and that was Mr. Glidden Nieves, there was nothing submitted into evidence to show any different. Mr. Nieves rated Mr. Vilbrun as "Highly

Performing" in most categories. Mrs. Tapley now states that she does not agree with Mr. Nieve's teaching observations of Petitioner but failed to conduct her own official observation. It is impossible to disagree with an observation that you were not present for. Petitioner argues that it is convenient for Ms. Tapley to now state that she disagrees with the observations when she never mentioned in the past that she felt that Mr. Nieves was incapable of conducting them.

Petitioners **Exception #** 13:

On page 12, paragraph 25, of the RO, the ALJ concludes and finds that Mrs. Tapley's testimony about the staff she hired to be factual. Petitioner argues that he had 4 years of teaching experience and that 5 of the new hires had never taught before. Mrs. Tapley states that she considers qualifications over experience but when it comes to Petitioner's record, he not only held more state certifications than the new hires but also had more years of teaching experience (Petitioner's Exhibit 47).

Petitioners **Exception #** 14:

On page 12, paragraph 26, of the RO, the ALJ concludes and finds that Petitioner was not timely with his claim of retaliation. Petitioner argues that he has never stated or written anything to suggest that his claim of retaliation was launched after he filed his complaint with the Commission. Petitioner has always contended that the Respondent's began retaliating against him in early April 2009. The ALJ's finding of fact is not supported by any evidence of record. The

employee reference form provided by Mrs. Tapley (Petitioner's Exhibit 19) and the break in protocol to provide the Petitioner with a job reference (Petitioner's Exhibit 18) (P. 105, lines 10-25; P. 106, lines 1-22; P. 107, lines 10-25; P. 108, lines 1-25; P. 109, lines 1-3) and the 30+ jobs that the Petitioner has applied for shows a clear sign of retaliation (Petitioner's Exhibit 49).

Petitioners **Exception #** 15:

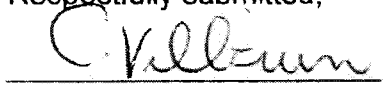
On page 15, paragraph 35, of the RO, the ALJ concludes and finds that the school district articulated legitimate non-discriminatory reasons for Petitioner's non-renewal. Petitioner's argues that the reasons were not legitimate and that no factual evidence was shown to support them. The board failed to produce any documentation to refute Petitioner's claim. The Petitioner proved that his performance was more than proficient. He stated that he didn't have a tardiness issue and Mrs. Tapley testified about it and agreed that no records were kept to suggest it. As far as Petitioner's interactions with a colleague, again there was no evidence to show that Mr. Vilbrun ever acted inappropriately with anyone and no investigation was ever conducted to prove or disprove the allegations that were made against.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Petitioner, Valmyr Vilbrun, respectfully requests that the Florida Commission on Human Relations, review the ALJ's

recommended decision and issue a final decision consistent with Petitioner's exceptions stated herein.

Respectfully submitted,



Candance Vilbrun

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Certified Mail this 22 day of August, 2011, to Brown, Garganese, Weiss & D'Agresta, P.A., 111 N. Orange Avenue Suite 200, Orlando, Florida 32801.

Candance Vilbrun
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Date: *August 31, 2011*

To: *Florida Commission on Human Relations*

Fax: *(850) 488-5291*

From: *Nicole Turcotte, Paralegal to Gary M. Glassman, Esq.*

Pages: *16 (including cover page)*

File: *Valmyr Vilbrun v. Osceola County School District*
Case No.: 10-7209
2010-00697
846200954071
Our File No.: 62-488

If there are any questions regarding this fax, please call Nicole at 407/425-9566, ext. 167.

COMMENTS: ***Please see the attached RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS PURSUANT TO RULE 28-106.217(3), regarding the above-referenced matter. Please advise whether we should file our response with FCHR in any manner other than by facsimile. Thank you!***

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VALMYR VILBRUN,

Petitioner,

Case No. 10-7209
2010-00697
846200954071

v.

COUNTY OF OSCEOLA SCHOOL BOARD,

Respondent,
_____/

RESPONDENT, COUNTY OF OSCEOLA SCHOOL BOARD'S, RESPONSE TO PETITIONER'S EXCEPTIONS PURSUANT TO RULE 28-106.217(3)

Respondent, **COUNTY OF OSCEOLA SCHOOL BOARD**, by and through its undersigned attorneys, hereby files this Response to the Petitioner's Exceptions Pursuant to Rule 28-106.217(3), and states as follows:

I. INTRODUCTION

This is an action brought by the Petitioner, **VALMYR VILBRUN** ("Petitioner"), against the Respondent, **COUNTY OF OSCEOLA SCHOOL BOARD** ("Respondent"), alleging racial discrimination and retaliation pursuant to the Florida Civil Rights Act, as amended, Chapter 760, Fla. Stat. A Final Hearing in this matter was held on June 3, 2011, and the parties filed Proposed Recommended Orders on or about July 11, 2011.

A Recommended Order was filed by the Administrative Law Judge R. Bruce McKibben) on July 27, 2011. The Recommended Order recommended that a final order be entered by the Florida Commission on Human Relations ("FCHR") dismissing the

Petitioner's Petition in its entirety. The Petitioner filed a Response to the Administrative Law Judge's Proposed (sic) Recommended Order on August 22, 2011. This Response is filed in opposition thereto.

II. STANDARD OF REVIEW

Rule 28-106.217(1) states, in part: "Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record."

In reviewing the record, the agency may not re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired conclusion. *Haines v. Department of Children and Families*, 983 So.2d 602, 607 (Fla. 5th DCA 2008). The factual findings made by the Administrative Law Judge ("ALJ") may only be rejected if they are not supported by competent, substantial evidence. *Id.*; *N.W. v. Department of Children and Family Services*, 981 So.2d 599, 601 (Fla. 3rd DCA 2008). The agency does not have the authority to build a new case and make new findings. *N.W.*, *Id.*

III. ARGUMENT

The Respondent hereby responds to each of the Petitioner's Exceptions as follows:

Petitioner's Exception #1:

First, Petitioner contends that Pamela Tapley, the principal at St. Cloud High School ("Tapley"), evaluated the Petitioner solely on one in-class visit to the Petitioner's class room. There is competent, substantial evidence that Tapley evaluated the Petitioner on more than just one in-class visit.

Tapley testified she evaluated teachers by observing them in the classroom and

listening to classroom activities in the halls next to the classroom (P.111, lines 10-21).[1] She also relied upon her administrative team for input about teacher performance (P.111, lines 10-12). During the 2008-2009 school year, Tapley testified she conducted classroom visits and hall monitoring visits of the Petitioner (P.113, lines 1-6; P.123, lines 3-22).

Towards the end of the 2008-2009 school year, Tapley determined that she would not recommend renewal of the Petitioner's contract (P.114, lines 3-9). The primary reasons for her recommendation of non-renewal were the lack of instruction provided by the Petitioner in the classroom, his lack of preparation, the socializing by his students, and the failure to stay on task (P.114, lines 10-19; Res. Exh.12). Tapley had conversations with the Petitioner concerning his lesson plans and lack of instruction (P.130, lines 15-18; Res. Exh. 12). Tapley did not take into account the Petitioner's race when she made the recommendation not to renew his contract (P.114, lines 20-22; P.118, lines 12-15).

Second, Petitioner contends that the performance evaluations demonstrated that Petitioner was improving, and that there were no issues with his performance. There is substantial, competent evidence demonstrating that Tapley did not rely upon the Petitioner's performance evaluations.

Tapley testified that she did not always agree with evaluations completed by Nieves (P.178, lines 9-25). Specifically, Tapley testified that she disagreed with the Petitioner's evaluations in respect to "lack of planning," "delivery of instruction," and "student engagement" (P.180, lines 11-25). Tapley did not think the Petitioner deserved "high performings" for those categories (P.180, lines 18-25).

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[1] References herein are made to the page and line number(s) of the Transcript of the Final Hearing, to the Exhibits admitted into evidence, or other Pleadings filed in this case.

Third, Petitioner contends he did not have punctuality issues.[2] There is substantial, competent evidence that the Petitioner did have an issue concerning punctuality.

Jennifer Reyes, a teacher at St. Cloud High School ("Reyes") testified that Petitioner was late in getting to school, and that she was compelled to collect his students, and keep them under her supervision until he arrived at school (P.205, lines 19-25, P.206, lines 1-9). Reyes conveyed this information to Tapley (Resp. Exh.7).

Finally, Petitioner contends that he did not act inappropriately towards Reyes, but that Reyes acted inappropriately towards him. There is substantial, competent evidence that a confrontation between the Petitioner and Reyes occurred.

Reyes testified at length at the final hearing, and explained in detail the confrontation between herself and the Petitioner (P.198-200; P.210-227). Further, Reyes provided a detailed written statement concerning the confrontation to Tapley (Resp. Exh.6). The ALJ made a credibility determination concerning the testimony, and that determination cannot be overturned by the FCHR. *Haines v. Department of Children and Families*, 983 So.2d 602, 607 (Fla. 5th DCA 2008).

There is competent, substantial evidence in the record to support the findings made by the ALJ that Tapley made a non-discriminatory recommendation not to renew the Petitioner, that Petitioner had an issue concerning punctuality, and that Reyes testified credibly concerning the confrontation between herself and the Petitioner.

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[2]The Petitioner states that the parties entered into a stipulation concerning the Petitioner's attendance (not punctuality) because the "Respondent's (sic) did not want to provide the [attendance] records." This is a misrepresentation by the Petitioner. The Respondent entered into the stipulation not because it did not want to provide the attendance records, but because no such records existed. Had the records existed, the Respondent would have provided same.

Petitioner's Exception #2:

Petitioner contends that Mabel Sweeney, a former teacher at St. Cloud High School and currently a teacher at Pleasant Hill Elementary School in the Osceola County School District ("Sweeney"), presented evidence of discrimination concerning herself, not the Petitioner. Petitioner cites to P.24, lines 9-25; P.25, lines 1-25; P.26, lines 4-22. However, in the Respondent's copy of the transcript, this is not the testimony of Sweeney, but of Linda Moore-Short, former teacher at St. Cloud High School ("Moore-Short"). In any event, the cited testimony does not support the contention that either Sweeney or Moore-Short wrote a letter to Tapley concerning feelings of being racially harassed or working in a racially hostile environment.

Sweeney, an African American female, was an ESE teacher at St. Cloud High School during the 2008-2009 school year (P.34, lines 18-19). Sweeney did not have much interaction with the Petitioner (P.35, lines 16-18).

Sweeney testified that in her first meeting with Tapley, there was nothing to indicate that Tapley had a racial bias or racial prejudice (P.60, lines 4-17). On October 10, 2008, Sweeney responded to a letter dated September 17, 2008 concerning various issues with respect to her performance (Pet. Exh. 37; P.60, lines 18-25). Sweeney testified that Tapley encouraged her to respond to the September 17, 2008 letter (P.61, lines 12-22). Further, Sweeney stated that Tapley was not trying to destroy her career, nor trying to create a hostile environment (P.62, lines 1-13).

Sweeney's unit at school was closed because her students were getting into trouble, and they were sent to other schools (P.63, lines 1-13). With the assistance of Tapley, Sweeney was transferred to another school, Pleasant Hill Elementary (P.63, lines 14-25;

P.64, lines 1-8). Sweeney has continuously been and is currently employed by the Respondent (P.62, lines 14-17).

Moore-Short, an African American female, was an ESE teacher at St. Cloud High School (P.18, lines 6-12). Moore-Short testified that she did not find the atmosphere to be as conducive as she had hoped, and that people were not responding to her (P.18, lines 13-21). She resigned her position after two months (P.25, lines 24-25; P.32, lines 10-17).

Moore-Short could not conclude that her alienation at the school was due to racism (P.22, lines 1-4). Further, she testified that St. Cloud High School was "an excellent school" (P.29, lines 3-9).[3]

Deborah Zeller, a Caucasian female, was an ESE teacher at St. Cloud High School during the 2008-2009 school year ("Zeller") (P.73, lines 20-22). She had little interaction with the Petitioner (P.74, lines 16-21).

Zeller testified that in her experience ESE teachers were often the "low man," and that they had to fight to get what they needed (P.80, lines 1-5). Any discrimination against ESE teachers was not based on race, but on the fact they were ESE teachers (P.81, lines 2-11, lines 19-25; P.82, lines 9-15; P.98, lines 8-12; P.105, lines 1-3).

There was competent, substantial evidence in the record to support the finding that the testimony of Sweeney, Moore-Short, and Zeller did not support the allegations of racism against Tapley.

Petitioner's Exception #3:

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[3]The Petitioner alleges that Sweeney's classroom was destroyed "at the request of" Dean of Students, Andrea Beckel ("Beckel"). There is no testimony or evidence that Beckel requested anyone to destroy a teacher's classroom.

The Petitioner contends that the ALJ adopted the testimony of Reyes "as fact." The ALJ, as the fact finder, is permitted to make credibility determinations concerning the testimony of the witnesses. *Goss v. District School Board of St. Johns County*, 601 So.2d 1232, 1233 (Fla. 5th DCA 1992). The ALJ heard the testimony of Reyes, and found her testimony credible. The credibility determination may not be overturned by the FCHR. *Haines v. Department of Children and Families*, 983 So.2d 602, 607 (Fla. 5th DCA 2008).

Petitioner's Exception #4:

The Petitioner contends that the ALJ adopted the testimony of Reyes "as fact." The ALJ, as the fact finder, is permitted to make credibility determinations concerning the testimony of the witnesses. *Goss v. District School Board of St. Johns County*, 601 So.2d 1232, 1233 (Fla. 5th DCA 1992). The ALJ heard the testimony of Reyes, and found her testimony credible. The credibility determination may not be overturned by the FCHR. *Haines v. Department of Children and Families*, 983 So.2d 602, 607 (Fla. 5th DCA 2008).

Petitioner's Exception #5:

The Petitioner contends that the ALJ adopted the testimony of Reyes "as fact." The ALJ, as the fact finder, is permitted to make credibility determinations concerning the testimony of the witnesses. *Goss v. District School Board of St. Johns County*, 601 So.2d 1232, 1233 (Fla. 5th DCA 1992). The ALJ heard the testimony of Reyes, and found her testimony credible. The credibility determination may not be overturned by the FCHR. *Haines v. Department of Children and Families*, 983 So.2d 602, 607 (Fla. 5th DCA 2008).

Petitioner's Exception #6:

The Petitioner contends that Tapley did not conduct an investigation into allegations

made against him (presumably by Reyes).[4] There is substantial, competent evidence that Tapley did conduct an investigation to the extent she was required by the school board policy and union contract.

Reyes reported the incident to Tapley (P.200, lines 23-25). Further, Reyes wrote a statement concerning the incident dated December 5, 2008, and gave it to Tapley for her review (P.202, lines 23-25, Resp. Exh. 6). Further, the letter dated January 14, 2009 to the Petitioner (Pet. Exh. 8) states that Petitioner was notified of the complaints against him concerning selling items without approval, and an inappropriate interaction with a colleague. It further states that a meeting was held on December 8 to review the complaint and receive the Petitioner's written response to the allegations. Lastly, the letter provides that the "investigation has concluded" and directs the Petitioner to abide by certain conditions. The letter does not sanction or penalize the Petitioner.

There is substantial, competent evidence that Tapley conducted an investigation into the incident Reyes.

Petitioner's Exception #7:

Petitioner contends that the ALJ found that Petitioner's classroom activity was a fund raiser, not a class project. The ALJ did not find Petitioner's classroom activity was a fund raiser, but only quoted from the letter dated January 14, 2009 (Pet. Exh. 8) that Tapley directed Petitioner to follow procedures for all fund raising.

[4]The Petitioner does not state to which allegations he is referring. If the Petitioner is referring to the allegations concerning punctuality, Tapley testified that she did not remember whether an investigation had occurred (P.134, lines 5-23).

Petitioner's Exception #8:

Petitioner contends that Beckel helped Caucasian teachers with discipline issues while not providing the same assistance to the Petitioner. There is substantial, competent evidence that Beckel treated all teachers the same. Zeller testified that in her experience ESE teachers were often the "low man," and that they had to fight to get what they needed (P.80, lines 1-5). Any discrimination against ESE teachers was not based on race, but on the fact they were ESE teachers (P.81, lines 2-11, lines 19-25; P.82, lines 9-15; P.98, lines 8-12; P.105, lines 1-3).

On or about April 10, 2009, Petitioner submitted a memorandum to Tapley addressing his concern about his relationship with Beckel (Pet. Exh.17; P.297, lines 19-25). Petitioner testified that the memorandum did not state that Beckel was discriminating against the Petitioner on account of his race (P.298, lines1-8). There is no evidence that Beckel discriminated against the Petitioner because of his race, or that Beckel ever discussed the Petitioner with Tapley. Further, there is no evidence Tapley discriminated against the Petitioner because of his relationship with Beckel, or that Beckel was treated in some way more favorably than the Petitioner.

Petitioner's Exception #9:

Petitioner contends that his memorandum to Tapley demonstrates that he complained about racial discrimination. The ALJ found that the memorandum discussed professional differences between the Petitioner and Beckel, and that the one comment, "outright discriminative" did not substantiate racial discrimination.

There is substantial, competent evidence to support the finding of the ALJ. The memorandum only discussed professional differences, and did not address racial discrimination. Moreover, Petitioner testified that the memorandum did not state that Beckel was discriminating against the Petitioner on account of his race (P.298, lines1-8). Further, Petitioner testified that Beckel did not use racially defamatory language in his presence (P.294, lines 11-17), did not wear clothes or other items that were racially offensive (P.295, lines 13-17), and could not say for certain that Beckel's alleged lack of support was racially motivated (P.296, lines 15-20; P.297, lines 2-5).

Petitioner's Exception #10:

Petitioner contends that the "9.02 letters" to the African-American teachers were not written by Tapley, but were written by two other administrators, and that the charges against the teachers were unfounded.

A "9.02 letter" dated December 4, 2008 was issued to three African American teachers, Petitioner (Pet. Exh.2), Shawn Lacey ("Lacey") (P.140, lines 23-24), and Latisha Harrell ("Harrell") (P.140, lines 17-21) concerning attendance and punctuality.[5] The "9.02 letter" issued to the Petitioner was signed by Glidden Nieves ("Nieves"), Assistant Principal of St. Cloud High School, not Tapley.

A "9.02 letter" does establish "fault," it only notifies a teacher of a complaint, and requests that the teacher submit a written response and schedule an appointment with the

[5]Allegedly, a "9.02 letter" dated December 4, 2008 was issued to Sweeney for the same offenses. However, there is no evidence that a 9.02 letter was actually issued to Sweeney, or if one was issued, who signed it. Sweeney testified that she was called into Tapley's office to discuss tardiness issues (P.48, lines 22-25).

letter's sender to review the complaint.[6] Lacey and Harrell did not testify at the final hearing, and there is no evidence whether the charges against them were founded or unfounded. There is substantial, competent evidence to support the finding of the ALJ.

Petitioner's Exception #11:

Petitioner contends that only Patricia Minor, a teacher at St. Cloud High School and the union representative for St. Cloud High School ("Minor"), testified that Tapley acted responsibly. However, in addition to Minor, Moore-Short testified that her alienation at the school was not due to racism (P.22, lines 1-4), and that St. Cloud High School was "an excellent school" (P.29, lines 3-9).

Sweeney testified that in her first meeting with Tapley, there was nothing to indicate that Tapley had a racial bias or racial prejudice (P.60, lines 4-17). On October 10, 2008, Sweeney responded to a letter dated September 17, 2008 concerning various issues with respect to her performance (Pet. Exh. 37; P.60, lines 18-25). Sweeney testified that Tapley encouraged her to respond to the September 17, 2008 letter (P.61, lines 12-22). Further, Sweeney stated that Tapley was not trying to destroy her career, nor trying to create a hostile environment (P.62, lines 1-13).

Sweeney's unit at school was closed because her students were getting into trouble, and they were sent to other schools (P.63, lines 1-13). With the assistance of Tapley, Sweeney was transferred to another school, Pleasant Hill Elementary (P.63, lines 14-25; P.64, lines 1-8).

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[6]The "9.02 letter" clearly states as follows: "Without determining in advance that the complaint is in any way founded or correct, or that any discipline of any kind is necessary or warranted..." Therefore, until an investigation is completed and a final determination made, there is no action taken against the employee.

Even the Petitioner testified he could not point to any direct evidence to demonstrate that Tapley's decision not to recommend renewal of his annual contract was based upon his race (P.276, lines 13-25; P.277, lines 1-17).

There is substantial, competent evidence to support the finding of the ALJ.

Petitioner's Exception #12:

Petitioner contends that Tapley did not conduct a review of the Petitioner's performance, and that the ALJ should have relied upon his performance evaluations only.

The evidence demonstrated that Tapley evaluated teachers by observing them in the classroom and listening to classroom activities in the halls (P.111, lines 10-21). She also relied upon her administrative team for input about teacher performance (P.111, lines 10-12). During the 2008-2009 school year, Tapley conducted classroom visits and hall monitoring of the Petitioner (P.113, lines 1-6).

Towards the end of the 2008-2009 school year, Tapley determined that she would not recommend renewal of the Petitioner's contract (P.114, lines 3-9). The primary reasons for her recommendation of nonrenewal were the lack of instruction provided by the Petitioner in the classroom, his lack of preparation, the socializing by his students, and the failure to stay on task (P.114, lines 10-19; Res. Exh.12). Tapley had conversations with the Petitioner concerning his lesson plans and lack of instruction (P.130, lines 15-18; Res. Exh. 12). Tapley did not take into account the Petitioner's race when she made the recommendation not to renew his contract (P.114, lines 20-22; P.118, lines 12-15).

There is substantial, competent evidence to support the finding of the ALJ.

Petitioner's Exception #13:

Petitioner contends that because he had more teaching experience, the finding that Tapley hired teachers who had less teaching experience than the Petitioner was not supported by competent, substantial evidence.

Tapley testified that she considered qualifications more than experience. There is no evidence that in doing so, Tapley used qualifications as a pretext to discriminate against the Petitioner. Tapley was entitled to base her decision on whatever factors she chose so long as she did not discriminate against the Petitioner on the basis of his race. There is substantial, competent evidence to support the ALJ's finding.

Petitioner's Exception #14:

Petitioner contends that he was retaliated against when the Respondent failed to give him a new job or a job reference. The ALJ essentially found that the Petitioner did not make a claim of racial discrimination until December, 2009 when he filed a complaint with the FCHR, and that the alleged acts of discrimination occurred in May, 2009.

To establish a *prima facie* case of retaliation, a plaintiff must prove the following elements: (1) participation in protected activity; (2) an adverse employment action; and (3) a causal connection between the participation in the protected activity and the adverse employment decision. *Meeks v. Computer Associates International*, 15 F.3d 1013, 1021 (11th Cir. 1994).

In a retaliation claim, an employee must first participate in protected activity, and then the employer must retaliate against the employee for participating in the protected activity. In the present case, the Petitioner did not participate in any protected activity until

after the alleged acts of discrimination. Therefore, Petitioner was not retaliated against by the Respondent.

Petitioner's Exception #15:

Petitioner contends that there is no evidence to demonstrate that the Respondent had a legitimate, non-discriminatory reason for not renewing the Petitioner's contract. There is substantial, competent evidence to support the ALJ's finding that the Respondent had a legitimate, non-discriminatory reason not to renew the Petitioner's contract.[7]

The Respondent's burden is "exceedingly light." *Walker v. Nations Bank*, 53 F.3d 1548, 1556 (11th Cir. 1995). Towards the end of the 2008-2009 school year, Tapley determined that she would not recommend renewal of the Petitioner's contract (P.114, lines 3-9). The primary reasons for her recommendation of nonrenewal were the lack of instruction provided by the Petitioner in the classroom, his lack of preparation, the socializing by his students, and the failure to stay on task (P.114, lines 10-19; Res. Exh.12). The Respondent's reason for not renewing the Petitioner's contract is a legitimate, non-discriminatory reason, and therefore, the Respondent has met its burden of production. The ALJ had substantial, competent evidence to support the finding.

WHEREFORE, the Respondent, **COUNTY OF OSCEOLA SCHOOL BOARD**, respectfully requests that the FCHR deny the Petitioner's Exceptions, and adopt the Recommended Order of the ALJ in its entirety, and for such further relief the FCHR deems just and proper.

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[7]It should be noted that the ALJ first found that the Petitioner did not even establish a *prima facie* case of discrimination (Recommended Order, P.15, par.33).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail to Valmyr Vilbrun c/o/ Candance Vilbrun, 3596 Yellow Bird Court, St. Cloud, Florida 34772 (candance1978@yahoo.com), on this 31st day of August, 2011.

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