

BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

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BOARD AGENDA ITEM NO. F-44

12 NOV 29 AM 11:03 November 20, 2012

BREVARD COUNTY SCHOOL BOARD,)

Petitioner,)

vs.)

JOSEPH FAYED,)

Respondent.)

BREVARD COUNTY SCHOOL BOARD,)

Petitioner,)

vs.)

WALT PETTERS,)

Respondent.)

DIVISION OF
ADMINISTRATIVE
HEARINGS

DOAH CASE NO. 11-5494TTS

DOAH CASE NO. 11-5495TTS

FINAL ORDER

These cases were referred to the Division of Administrative Hearings and consolidated for hearing by the Administrative Law Judge. The assigned Administrative Law Judge ("ALJ") submitted a Recommended Order to the Agency, Brevard County School Board ("School Board"), recommending that the School Board enter final orders terminating the employment of Respondents, Joseph Fayed and Walt Petters, for misconduct in office. The Recommended Order of September 6, 2012, entered herein is incorporated by reference. Timely exceptions were filed by Respondents. Timely responses to the exceptions were filed by the Petitioner.

In a Section 120.57(1) proceeding an agency's Final Order is entered after a hearing is held, evidence is received, and the ALJ has submitted a Recommended Order. It is the ALJ's function to consider the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. Goss v. District School Board of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992). The general rule of deference to the ALJ's findings of fact is that an agency may reject or modify a finding of fact only if the finding is not supported by competent, substantial evidence. The agency has no authority to reweigh conflicting evidence. Section 120.57(1)(I), Florida Statutes. See e.g. Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). The agency may adopt the ALJ's findings of fact and conclusions of law in a recommended order. The agency may reject or modify the ALJ's conclusions of law over which it has substantive jurisdiction. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase the penalty without a review of the complete record and without stating with particularity its reasons therefore in the final order, by citing to the record in justifying its action. Section 120.57(1), Florida Statutes.

The notation "T_" refers to the transcript of the final hearing and page number.

The notation "P_" refers to the number assigned to Petitioner's exhibit in the record.

The merits of the exceptions will now be addressed.

RESPONDENTS' EXCEPTIONS

Respondents except in whole or in part to the findings of fact of the ALJ in paragraphs 7, 18, 19, 22, 23, 25, 26, 37, 40, 41 and 42 of the Recommended Order. Respondents except to the conclusions of law in paragraphs 54, 56, 58 and 59 of the Recommended Order. Respondents also except to the ALJ's recommended penalty to terminate the employment of both Petters and Fayed as unjustified.

A. Exceptions of Respondents to Findings of Fact.

Paragraph 7: The Respondents except to the finding of the ALJ that "all outside vendors who performed maintenance work for School District properties were tied to Petters' department". The continuing contracts that are relevant to the charges in this matter, Painting Contractors - Maintenance and Electrical Contractors - Maintenance, were all Maintenance Department contracts signed off by and recommended to the School Board by Respondent, Walt Petters, as Director of Maintenance. (See P-9, P-10, P-37 and P-44) The finding of the ALJ is supported by competent substantial evidence and the exception is denied.

Paragraph 18: Respondents except to the ALJ's finding that Petters and Tillotson lunched together many times a month and that they vacationed together on one or more occasions. It is undisputed that both Petters and Fayed were personal friends of vendors Tim Tillotson of SMG and Steve Terry of Sena-Tech. This fact was admitted by each of them at the final hearing. The ALJ's

finding that these relationships between Petters and Fayed, as Maintenance Department officials, and Tillotson and Terry, as vendors doing business with the School District, gave the appearance of impropriety to persons outside of the Maintenance Department is supported by competent substantial evidence. Additionally, as noted in Petitioner's Response to the exceptions, the proceeding conducted by the ALJ is de novo. Section 120.57(1)(k), Fla. Stat. The exception is denied.

Paragraph 19: Respondents except to the ALJ's finding in paragraph 19 of the Recommended Order that "there is no evidence that Fayed made any effort to encourage other painting vendors to compete with SMG for the Board's business". This finding is supported by competent substantial evidence that on numerous occasions Fayed failed to solicit bids for painting work, the cost of which was over the threshold as required by School District policy. The exception is denied.

Paragraphs 22-23, 25-26: Respondents except to the ALJ's finding of fact that prior to 2008 Sena-Tech received jobs and was paid for work prior to being a continuing contractor or approved vendor to do work for the School District. This finding is supported by competent substantial evidence in the record, as is the ALJ's finding that the work involved should have been awarded to one of the electrical contractors on the approved list or bid out. (See the Audit Report P-6; testimony of Dane Theodore, T 494-550) The exception is denied.

Paragraph 37: Respondents except to the ALJ's finding that under the 2004-2005 paint contract that of the \$772,467.13 spent for painting jobs, only \$8,200.00 went to a vendor other than SMG and of the projects that exceeded \$5,000.00, \$276,614.68 went to SMG without meaningful bids from other vendors on the approved list, and of ten projects that met the \$5,000.00 threshold, a competing vendor was able to submit a proposal on only three of the jobs. The ALJ's findings in paragraph 37 are supported by competent substantial evidence. (See P-9; Audit Report P-6; T-158; T-908) The exception is denied.

Paragraph 40: Respondents except to the ALJ's finding that "a review of the 2008 painting jobs established that no bids were obtained for work that exceeded the \$20,000.00 threshold". While the record shows that bids were received on a few painting jobs over the \$20,000.00 threshold, no bids were received other than SMG's bid for \$372,000.00 for roof painting jobs at Jupiter, Atlantis and Meadowlane Schools and no bid other than SMG's was solicited on the \$76,500.00 roof painting job at Central Middle School. (Audit Report P-6; T 416-417) The exception is granted in part and denied in part.

Paragraph 41: Respondents except to the ALJ's finding that "SMG was allowed to use Board equipment and fuel without cost", and "it is unknown if other vendors could have saved those expenses when presenting their bids for School District work". It is undisputed that SMG was allowed to use School District property. The record evidence also shows that Petters approved SMG's use of

the equipment and fuel even though the use of the District's high reach, fuel and scissors lift were not included in the scope of work prepared by the Maintenance Department and sent to the painting vendors for bids. (P 20 and 21; T 418-19) The exception is denied.

Paragraph 42: Respondents except to the ALJ's finding that Fayed used his School District vehicle to attend to personal matters such as doctor visits, stops at his personal residence, and a trip to Patrick Air Force Base. Respondents do not dispute that Fayed used his District vehicle for stops at his personal residence and Patrick Air Force Base but assert he was entitled to visit the doctors on School Board time due to workers' compensation claims. Fayed's testimony regarding his alleged workers compensation claims was refuted by the School Board's Director of Risk Management, Mark Langdorf, who testified that none of Fayed's worker's compensation claims were open in 2010 and that all of Fayed's five workers' compensation claim files had been closed since 2002 and Fayed's last workers' compensation related medical treatment was in 1999. (T 635-36; 842-43) The ALJ's findings in paragraph 42 and conclusion of law in paragraph 58 that Fayed used his School District vehicle while on the School Board's clock for personal convenience and transportation is supported by competent substantial evidence. The exception is denied.

B. **Exceptions of Respondents To Conclusions of Law**

Paragraph 54: Respondents' exception is essentially that it was the Purchasing Department's fault that Petters and Fayed authorized payments based upon inflated hours and that Petters authorized payments to Sena-Tech before that company was on the approved vendor list. The ALJ specifically held that the evidence showed that since the work was done for the Maintenance Department, Petters and Fayed were the only persons who could have stopped the payments and required accurate accounting of the hours worked or a verification that payment could be made to Sena-Tech. Instead, the ALJ found that the purchase orders were approved and their friends paid and to attempt to blame the Purchasing Department for making the payments (based upon the purchase orders submitted) belies the fact that only Fayed and Petters could have known the hours were inflated. (T 494-95; 508-09; 84-86) The ALJ's conclusion of law in paragraph 54 is correct and supported in the record. The exception is denied.

Paragraph 56: Respondents admit that ALJ correctly stated the definition of "misconduct in office". The exception is denied.

Paragraph 58 and 59: Respondents except to the ALJ's conclusions of law in paragraphs 58 and 59 that Petters and Fayed are guilty of misconduct in office claiming there is no finding that Fayed and Petters' effectiveness as employees in the school system had been impaired. On the contrary, the ALJ found that under the Code of Ethics of the Education Profession and The

Principles of Professional Conduct of The for Education Profession In Florida, school district employees must strive to achieve and sustain the highest degree of ethical conduct, must maintain honesty in all professional dealings, and must not submit fraudulent information on any document in connection with professional activities.

As to Respondent Fayed, the ALJ found that he used his School District vehicle while on the District's clock for personal convenience and transportation, and that Fayed approved purchase orders for work performed by SMG that had inflated hours. The ALJ concluded that Fayed is therefore guilty of misconduct in office constituting just cause for termination of his employment.

As to Respondent Petters, the ALJ found that he approved purchase orders for SMG that had inflated hours, and approved payments to Sena-Tech before that company was on the approved vendor list. The ALJ also found that Petters failed to take action when he knew that the approval of SMG as a "primary vendor" was based on a false and misleading hourly rate and that he failed to take action when he knew or should have known that SMG routinely submitted claims for payment that included inflated hours and failed to require competition and bids from vendors who could have challenged SMG for painting jobs. The ALJ found as a conclusion of law that Petters is guilty of misconduct in office and the gravity of such misconduct constitutes just cause for termination of employment.

As to both Petters and Fayed, the ALJ found that the basic problem was Petters' and Fayed's indifference to the public interest in securing fair, realistic, and competitive bids for the work they authorized. The ALJ further found that because Petters and Fayed perpetuated a system they knew was flawed, the public will never know if it paid too much for the work performed and the public trust and confidence in employees who controlled the approved work was broken. Furthermore, both Petters and Fayed were notified on April 25, 2012, that the Superintendent of Schools would not be nominating them for re-appointment to an administrative annual contract. (P 7,8)

Clearly, the ALJ found from the evidence that Petters' and Fayed's actions of misconduct was so serious as to impair their effectiveness in the school system. See, Summers v. School Board of Marion County, 666 So.2d 175 (Fla. 5th DCA 1995) (Teacher's impaired effectiveness could be inferred from nature of the violation); Walker v. Highland County School Board, 752 So.2d 127 (Fla. 2nd DCA 2000) (No evidence of impaired effectiveness necessary because misconduct speaks for itself) Accord, Purvis v. Marion County School Board, 766 So.2d 492 (Fla. 5th DCA 2000).

The ALJ's conclusions of law are correct and supported in the record. Respondents' exceptions to paragraphs 58 and 59 are denied.

RESPONDENTS' EXCEPTION TO RECOMMENDATION OF TERMINATION:

Respondents except to the ALJ's recommendations that the School Board enter Final Orders finding that there is just cause to terminate the employment of Petters and Fayed effective October 11, 2012, as unjustified. The ALJ's recommendation for termination is correct and reasonable due to the egregious misconduct in office found by the ALJ, the effect of such misconduct on the trust and confidence of the public, and Petters' and Fayed's indifference to the public interest. The ALJ's recommendation to terminate Petters' and Fayed's employment effective October 11, 2011, is correct and supported in the record. The exception is denied.

RULING ON RESPONDENTS' EXCEPTIONS

A. Respondents' exception to findings of fact in paragraphs 7, 18, 19, 22, 23, 25, 26, 37, 41 and 42 of the Recommended Order are denied. Respondents' exception to the ALJ's finding of fact in paragraph 40 is granted in part and denied in part.

B. Respondents' exceptions to the Conclusions of Law in paragraphs 54, 56, 58 and 59 of the Recommended Order are denied.

C. Respondents' exceptions to the Administrative Law Judge's recommended penalty of termination of Respondents' employment are denied.

FINDINGS OF FACT

The School Board adopts the ALJ's Findings of Fact set forth in the Recommended Order as modified by the granting of the

exception in part as to paragraph 40.

CONCLUSIONS OF LAW

The School Board adopts the Conclusions of Law set forth in the Recommended Order.

It is Thereupon Ordered that:

A. The Recommended Order is adopted as the Final Order of the School Board of Brevard County.

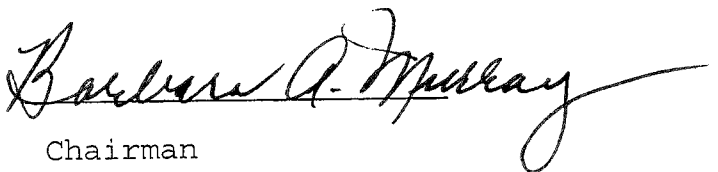
B. Respondent, Wes Fayed's employment with the School Board of Brevard County is terminated effective October 11, 2011, for misconduct in office.

C. Respondent, Walt Petters' employment with the School Board of Brevard County is terminated effective October 11, 2011, for misconduct in office.

DONE AND ORDERED this 20th day of November, 2012, in Viera, Brevard County, Florida.

THE SCHOOL BOARD OF
BREVARD COUNTY, FLORIDA

By:



Chairman

NOTICE OF RIGHT TO JUDICIAL REVIEW

Parties to this Final Agency Action are hereby advised of their right to seek judicial review of this Final Agency Action pursuant to Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Florida Rules of Appellate Procedure 9.110, with the Clerk of the School Board of Brevard County, 2700 Judge Fran Jamieson Way, Viera, Florida 32940. The second copy of the Notice of Appeal, together with the filing fee, must be filed with the appropriate District Court of Appeal.

Filed with the Clerk in the
Office of the Superintendent
this 20th day of November, 2012.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U. S. Mail to the persons named below on this 21 day of November, 2012.

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