

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-5494TTS
	)	
JOSEPH FAYED,	)	
	)	
Respondent.	)	
_____	)	
	)	
BREVARD COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-5495TTS
	)	
WALT PETERS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, the formal hearing was conducted on May 1 through 3, 2012, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings, in Viera, Florida.

APPEARANCES

For Petitioner: Joseph R. Lowicky, Esquire  
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For Respondents: Mark S. Levine, Esquire  
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### STATEMENT OF THE ISSUES

DOAH Case No. 11-5494TTS: The issue is whether Respondent, Joseph Fayed (Fayed), committed the violations alleged, and, if so, what penalty should be imposed.

DOAH Case No. 11-5495TTS: The issue is whether Respondent, Walt Petters (Petters), committed the violations alleged, and, if so, what penalty should be imposed.

### PRELIMINARY STATEMENT

On October 27, 2011, the School Board of Brevard County, Florida (Petitioner, Board, or School District), forwarded two cases to the Division of Administrative Hearings (DOAH) for formal proceedings. Both cases described alleged violations committed by non-instructional personnel employed by the School District. Both cases arose as a result of an audit of activities and business practices of the Board's Plant Operations and Maintenance Department. In each of these cases, Board personnel were identified who allegedly committed misconduct in office, willful neglect of duties, or incompetence in the performance of their duties. All of the alleged violations dealt with activities of the Plant Operations and Maintenance Department (Maintenance).

In the case of Fayed (DOAH Case No. 11-5494TTS), it is alleged Respondent used his position as the supervisor of Central Services to unfairly promote his friend's painting business by allowing the circumvention of conventional bidding

practices intended to protect the School District's interests. Additionally, Petitioner alleged Fayed favored his friend by allowing use of Board equipment and fuel to the disadvantage of other potential bidders. Finally, Petitioner alleged that Fayed used his Board vehicle for personal business unrelated to his School District duties.

In the case of Petters (DOAH Case No. 11-5495TTS), it is alleged that as Director of Maintenance, Respondent used his position to favor his friend's painting business allowing the circumvention of conventional bidding practices intended to protect the School District's interests. Further, Petitioner maintains Respondent allowed vendors to overcharge the School District. Petitioner argues that if Petters knew of the improprieties he is guilty of misconduct, and, if he did not know of the improprieties but should have, Petters is guilty of willful neglect of duties or incompetency.

Petters and Fayed retained the same lawyer to represent them in this cause. For economy of litigation and efficiency, the cases were consolidated for formal hearing. The documentary evidence and testimony presented by the parties were applicable to both cases. In anticipation of the hearing, the parties filed a Joint Pre-hearing Stipulation that has been used in the preparation of this Recommended Order. The testimony and exhibits entered are identified and designated in the Transcript of the proceedings filed on June 4, 2012. The parties requested

two extensions of time within which to file their proposed recommended orders. Those requests were granted. The parties timely filed proposals on July 25, 2012. This Recommended Order is entered to resolve all outstanding issues in the cases.

#### FINDINGS OF FACT

##### The Parties

1. Petitioner is a district school board created by Article IX, section 4, of the Florida Constitution. As such, Petitioner's authority and responsibilities extend to personnel matters, and include the power to hire, suspend, and dismiss Board employees.

2. At all times material to these cases, Petitioner's organizational structure designated Maintenance as the department responsible for repairs and upkeep to all School District property. Maintenance was charged to budget for and complete repairs and improvements to hundreds of school sites and other Board properties.

3. At all times material to these cases, Petitioner kept a list of vendors who could be called upon by Maintenance to complete work that could not be performed by Board personnel. Maintenance's system allowed it to assign work previously approved or contemplated by the budget to a vendor and then submit a purchase order to the Board's purchasing department so that the vendor would be paid at the conclusion of the work.

4. At all times material to the allegations of this matter, Respondent Fayed was employed by the Board on an annual contract and served as supervisor of central services in the Maintenance Department. Fayed oversaw maintenance work performed within his service area. It is undisputed that the annual contract held by Fayed could be non-renewed without cause. Therefore, at the conclusion of the 2011-2012 school year (presuming his contract ended concurrent with the school year), Petitioner was not obligated to retain Fayed.

5. By history, Fayed worked for Petitioner for well over 30 years, completed his DROP time, and separated from the School District. After remaining out of the system for some period of time, Fayed returned to work for the School District and continued to do much of the same type of work he had done prior to retirement.

6. At all times material to the allegations of this matter, Respondent Petters was employed by Petitioner on an annual contract. Petters was the director of Maintenance. His responsibilities required him to supervise all employees within the School District's Maintenance Department. Fayed served under Petters' supervision.

7. As director of Maintenance, Petters oversaw all of the geographical service areas for the School District. All outside vendors who performed maintenance work for School District properties were directly tied to Petters' department.

## The Controversy

8. Prior to August 15, 2011, Board employees raised concerns of improprieties committed by Petters and Fayed in connection with the performance of their duties in the Board's Maintenance Department. An internal investigation of the School District's maintenance department suggested that there were 25 separate instances of improper activity. Based upon the investigation, Petitioner procured an independent audit to be performed by RSM McGladrey, Inc. (McGladrey). McGladrey was tasked to review the 25 claims, review all pertinent records of the Maintenance Department, and present a detailed report to the School District's Superintendent. That report, dated September 23, 2011, formed the basis for the charges against Petters and Fayed.

9. The McGladrey report was attached to letters from the Superintendent dated October 5, 2011, that advised Petters and Fayed that their employment with the School District would be recommended for termination at the Board's October 11, 2011, meeting. At that meeting, Petters and Fayed were terminated subject to their administrative rights to contest the action. Respondents timely sought a formal administrative hearing in connection with the charges of misconduct, willful neglect of duty, and/or being incompetent.

The Vendors

SMG

10. SMG Coatings, Inc. (SMG), is a painting company operated by Tim Tillotson (Mr. Tillotson). Although, technically owned by Mrs. Tillotson, the company's day-to-day field operations are directed and supervised by Mr. Tillotson.

11. At all times material to the allegations of these cases, SMG routinely bid on contracts for the School District. It also competed for the "primary contractor" designation.

12. Petitioner used two methods of procurement for maintenance work to be performed by outside vendors. One method, "primary contractor," was for minor projects that did not exceed \$5,000.00, in value. Vendors designated as the "primary contractor" were utilized to do these minor jobs without additional bidding. When a job exceeded \$5,000.00, all vendors on a list of approved vendors were allowed to bid on the project. These vendors are known as "continuing contract" holders in this record. Vendors on the "continuing contract" approved list were to receive notice of the job and be given an opportunity to successfully bid the work. Although the threshold amount was later raised, and the method of evaluating contractors was later changed from an hourly rate to a unit measure for the type of painting work, the underlying concerns regarding how SMG received the Board's work remain the same.

13. At all times material to these cases, SMG was a "primary contractor" on the approved "continuing contract" vendor list.

14. The allegations of these cases aver SMG received preferential treatment not afforded other vendors doing business with the School District.

#### Sena-Tech

15. Sena-Tech, LLC (Sena-Tech), is an electrical contractor that first became authorized to do School District work during 2008. Steve Terry (Mr. Terry) is the president of Sena-Tech.

16. The allegations of these cases aver Sena-Tech received preferential treatment not afforded other electrical vendors doing business with the School District.

#### The Relationships

17. Petters and Fayed are long-term employees of the School District, who have forged friendships with each other and with vendors doing business with the Board.

18. Specific to these cases are the friendships between Petters, Mr. Tillotson, and Mr. Terry. It is undisputed that at all times relevant to the allegations of these cases, Petters and Mr. Tillotson ate lunch together many times a month. Petters vacationed with Mr. Tillotson on one or more occasions. Petters and Mr. Tillotson made no effort to hide their close friendship.



19. Similarly, Fayed is friends with Mr. Tillotson. Although they are not as close as Petters and Tillotson, it is undisputed that Fayed also lunched with Mr. Tillotson on a regular basis. Given his work history, Fayed is familiar with painting contractors doing business in the school district. There is no evidence that Fayed made any effort to encourage other painting vendors to compete with SMG for the Board's business.

20. Fayed has also known Steve Terry for years. Mr. Terry has been to Fayed's home in the past and considers Fayed a friend. Petters and Mr. Terry are also well known to one another. Mr. Terry has joined Fayed and Petters for lunch.

21. Neither Fayed nor Petters acknowledged that forging friendships with vendors doing business with the School District gave the appearance of impropriety to persons looking at the situation from outside of the Maintenance Department.

#### The Jobs

#### Sena-Tech

22. Prior to 2008, Sena-Tech did not have standing as a "continuing contractor" or vendor approved to do work for the School District.

23. Nevertheless, Sena-Tech received jobs and was paid for work done prior to its inclusion on the list. Purchase Orders (POs) were approved by Petters for payment to Sena-Tech in

connection with nine specific jobs. Petters was required to sign-off on jobs and to submit POs so that the vendor would be paid.

24. A purchase order is the written document formalizing the transaction between the Board and the vendor. In this case, all POs were initiated by Maintenance and paid by Petitioner's Purchasing Department.

25. The weight of the credible evidence confirms that nine jobs given to Sena-Tech prior to 2008 were electrical in nature and should have gone to a contractor on the approved list or, if not technically "electrical" due to the voltage of the work, should have been given to a vendor that successfully bid the jobs. In either instance without competent supporting documentation, Sena-Tech would not have automatically received the work.

26. There is inadequate evidence that the work performed by Sena-Tech resulted in a higher cost to the Board, however, because the process, by which work should have been distributed to vendors, was circumvented in connection with the nine Sena-Tech POs approved by Petters.

27. There is no evidence that Petters personally benefitted from the work given to Sena-Tech.

28. There is insufficient evidence to establish that Fayed was personally involved in the disputed Sena-Tech POs, or that

he participated in the selection of that company for the disputed work.

29. There is no evidence that Fayed personally benefitted from the work given to Sena-Tech.

SMG

30. The weight of the credible evidence established that SMG circumvented the Board's bidding process by submitting false information. SMG obtained work based upon unrealistically low hourly rates. To calculate the labor cost for a job required a simple formula: hourly rate multiplied by the number of hours to complete the job. Theoretically, all vendors would take the same amount of time to complete a job. Because the hourly rate would be multiplied by the number of hours the job required, the job labor cost would be correct. In these cases, that did not happen.

31. Instead, SMG inflated the number of hours for the job and thereby assured itself a payment greater than its hourly rate would have afforded had the rate been applied to the actual hours worked for the job. In some instances, SMG billed the job at a higher hourly rate than its contract allowed. According to Fayed and Petters, so long as the bottom line (the ultimate cost to the School District) was reasonable, the process was adequate and had long been in place. Fayed and Petters did not acknowledge that the method used by SMG might have resulted in a higher cost to the Board. Based upon their professional

experience in the Maintenance Department, both Respondents claimed that the amounts charged by SMG and paid for by Petitioner were appropriate.

32. In truth, the process was not appropriate because vendors who bid actual (as opposed to illusory) hourly rates did not have the opportunity to obtain jobs. Vendors who bid the hourly rates that would be applied to the real hours of work could not compete with SMG's unrealistically low rate. SMG was assured of "primary contractor" status without meaningful competition so long as its hourly rate was less than its competitors. At all times material to these cases, SMG was the preferred painting vendor.

33. Fayed and Petters knew the system was flawed. In fact, Petters claimed that he told superiors that the system should be changed. When the threshold amount of jobs was increased from \$5,000.00, to \$20,000.00, the hourly rate method was still used. More important, neither Petters nor Fayed required SMG to bill only its actual hours for a job.

34. There are a number of ways to track time on a given painting job. Outside vendors could be required to sign in and out at a job location. A site supervisor could verify the daily hours worked at a given location. No reasonable effort to verify the actual hours spent on a job was used when it came to SMG. Petters and Fayed knew or should have known that the hours submitted by SMG were false.

35. Whether the Board could have or should have paid less for the SMG jobs is unknown. Another vendor working fewer hours at a higher rate might have cost the School District the same amount. Because the hours billed by SMG were false, it is impossible to calculate what the jobs should have cost. For the jobs that SMG billed a higher hourly rate than their contract allowed, it would be possible for the Board to calculate an overpayment.

36. At the heart of this matter is the indifference displayed by Fayed and Petters to hold SMG accountable for the actual hours worked. The dispute might have been avoided if SMG had either bid fair hourly rates or billed actual hours worked. SMG did neither. Petters knew what was going on and did not intervene to stop the fiction.

37. Recapping Board payments made to SMG, pursuant to the 2004-2005 paint contract, shows that of the \$772,467.13, spent for painting jobs, only \$8,200.00, went to a vendor other than SMG. Of the projects that exceeded \$5,000.00, \$276,614.68 went to SMG without meaningful bids from other vendors on the approved list. All approved paint vendors were entitled to submit proposals for the projects that exceeded \$5,000.00. Of the ten projects that met the \$5,000.00 threshold, a competing vendor was able to submit a proposal on only three of the jobs.

38. When the threshold was raised to \$20,000.00 in 2008, SMG's competition had fewer opportunities to obtain work from

the School District. As the primary vendor (again using a false hourly rate), SMG was able to capture more jobs because the Maintenance Department did not have to offer work to another vendor unless the amount exceeded \$20,000.00. Fayed and Petters supported the higher threshold and Fayed lobbied for its approval.

39. Board payments made during the 2008 paint contract requested by the Maintenance Department totaled \$1,246,184.37. The entire amount went to SMG. Whether the Board could have obtained the work for a lesser amount is unknown.

40. A review of the 2008 paint jobs established that no bids were obtained for work that exceeded the \$20,000.00 threshold. No serious effort was made to secure outside bids or vendors to compete against SMG. Had Petters or Fayed brought the lack of competition to the Board's attention (or to any supervisor in the school system), it is unknown whether SMG would have obtained the volume of work it was paid for during this time.

#### The Other Claims

41. SMG was allowed to use Board equipment and fuel without cost. It is unknown whether other vendors could have saved these expenses when presenting their bids for School District work. Arguably, Petters and Fayed would have let other successful vendors use Petitioner's equipment and fuel. As SMG secured the work, the question cannot be resolved.

42. Petitioner's policy allows personnel to use School District transportation when their work duties require travel to more than one work-site. Fayed's duties required travel to job sites throughout the central area. Vehicles provided for official business may not be used for personal activities. The weight of the credible evidence established 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. See Policy 8651.

43. Petitioner's ethics policy is designed to create a culture of honesty and integrity. See Policy 4210. Fayed and Petters ignored the reality that their close friendship with a vendor caused the honesty and integrity of the Maintenance Department to be brought into question. Petters defiantly insisted that SMG retain "primary contractor" status when another company prevailed on the 2010 paint contract.

#### CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.57(1) and 1012.22, Fla. Stat. (2011).

45. Section 1012.22, Florida Statutes, authorizes a school board to suspend and/or terminate the employment of school district personnel.

46. Section 1012.27, Florida Statutes, authorizes the school district's superintendent to recommend discipline against

non-instructional personnel of the School District. In this instance, the recommendation and action of the Board is to terminate Respondents' employment effective October 11, 2011.

47. Section 1001.32, Florida Statutes, authorizes district school boards to operate, control, and supervise all free public schools in their respective districts and to exercise any power except as expressly prohibited by the State Constitution or general law.

48. In this matter, notices of the specific charges were provided to Respondents prior to the Board's action of October 11, 2011. In this instance, it is concluded that the Superintendent's letters dated October 5, 2012, together with the attached McGladrey report, although not set forth in a technical, formal manner, were sufficient to describe the conduct complained of and the violations resulting from that conduct. Respondents had ample and sufficient notice of the underlying claims.

49. Petitioner must establish by a preponderance of the evidence that just cause exists to terminate Respondents' employment. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

50. In this matter, Petitioner bears the burden of proof to establish that Respondents engaged in conduct constituting misconduct, neglect of duty, and/or incompetence. If so, the Board has just cause to terminate the employment.



51. The preponderance of the evidence standard requires proof by the greater weight of the evidence, or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276 (Fla. 2000). Thus, the resolution of these cases requires answers to these questions: is it more likely than not that Respondents acted as alleged, and, if so, do those acts constitute misconduct, neglect of duty, and/or incompetence? If so, the Board has just cause to terminate Respondents' employment.

52. Florida has a long-standing tradition of seeking fair and open competition. Competition in the procurement of goods and services for the public is a basic tenet of fairness. Competition reduces the appearance of favoritism or bias and inspires public confidence that public funds are being expended for a public purpose at a fairly determined price. See § 287.001, Fla. Stat.

53. In this matter, Petitioner also has a long-standing requirement that competitive bidding define the procurement of supplies, materials, equipment, and services, such as those at issue. Avoiding the appearance of favoritism or bias must stand as the cornerstone of the bidding process.

54. Based upon their actions in securing payments to SMG and Sena-Tech, Fayed and Petters undermined public confidence in the bidding process. Fayed and Petters authorized payments based upon inflated hours. Petters authorized payment to Sena-

Tech before that company was on the approved vendor list. Since the work was done for the Maintenance Department, they are 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, POs were approved and their friends were paid. To attempt to blame the Purchasing Department for making the payments (based upon the POs submitted) belies the fact that only Fayed and Petters could have known the hours were inflated.

55. In hindsight, there is no way to determine whether Petitioner obtained the lowest price available for the work that was performed. Competition was not fostered by Petters or Fayed.

56. At all times material to this cause, "misconduct in office" was defined as:

. . . a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

57. As referenced in the foregoing code provisions, a school district employee 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.

58. As to Respondent Fayed, the greater weight of the credible evidence established that Fayed used his School District vehicle while on Petitioner's clock for personal convenience and transportation, and that Fayed approved POs for work performed by SMG that had inflated hours. Accordingly, Fayed is guilty of misconduct in office. Such misconduct constitutes just cause for termination.

59. As to Respondent Petters, the greater weight of the credible evidence established that Petters approved POs for SMG that had inflated hours, and approved payments to Sena-Tech before that company was on the approved vendor list. Petters failed to take action when he knew that the approval of SMG as the "primary vendor" was based upon a false and misleading hourly rate. Petters failed to take action when he knew or should have known that SMG routinely submitted claims for payment that included inflated hours. Finally, Petters failed to require competition and bids from vendors who could have challenged SMG for painting jobs. Based upon the foregoing, Petters is guilty of misconduct in office. The gravity of such misconduct constitutes just cause for termination.

60. In reviewing this matter, conflicting statements have been reviewed in a manner most favorable to Respondents.

Findings have not been made that would have suggested Fayed falsified his time records or facilitated a subordinate to do so. At the end of the day, 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. No issue was made as to whether the work was necessary. No issue was made as to whether the work was performed in a satisfactory manner. The bottom line is, 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. Public trust and confidence in employees who controlled approval of work was broken.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter Final Orders as follows:

1. As to DOAH Case No. 11-5494TTS, finding there is just cause to terminate the employment of Joseph Fayed effective October 11, 2011.

2. As to DOAH Case No. 11-5495TTS, finding there is just cause to terminate the employment of Walt Petters effective October 11, 2011.

DONE AND ENTERED this 6th day of September, 2012, in  
Tallahassee, Leon County, Florida.



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J. D. PARRISH  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 6th day of September, 2012.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.