STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1254
	)	
LURANA HILLARD,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

The instant case is before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), who, pursuant to the request of the parties, issues this Recommended Order based upon stipulated facts in lieu of conducting an evidentiary hearing.

APPEARANCES

For Petitioner: Elizabeth Coke, Esquire
Richeson and Coke, P.A.
317 South 2nd Street
Post Office Box 4048
Fort Pierce, Florida 34950

For Respondent: Mark F. Kelly, Esquire
Kelly and McKee, P.A.
1718 East 7th Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

STATEMENT OF THE ISSUE

Whether Petitioner had a contractual obligation, which it breached, to employ Respondent during the 2009-2010 school year, and, if so, what damages should be awarded.

PRELIMINARY STATEMENT

Lurana Hillard was formerly employed by the St. Lucie County School Board (School Board) as a Program Specialist for School Psychology and School Psychologists. Following the termination of her employment, she filed suit in St. Lucie County Circuit Court alleging that the School Board had breached its employment contract with her. The action was dismissed for failure to exhaust administrative remedies. Ms. Hillard appealed to the Fourth District Court of Appeal, which affirmed, issuing (on January 12, 2012), the following opinion:

> We affirm the circuit court's dismissal of this action for failure to exhaust administrative remedies, on the authority of Sch. Bd. of Flagler Cnty. v. Hauser, 293 So. 2d 681 (Fla. 1974). Like the teacher in Hauser, appellant claimed that she had a continuing contract of employment in the school district, while the appellee school board claimed that she was retained on an annual contract, to which she was not reappointed. Also similar to Hauser, appellant sought declaratory relief in the circuit court on the basis of her claim to a continuing contract. In Hauser, our supreme court held that, under these circumstances, the teacher was required to exhaust administrative remedies by seeking a hearing

> under the Administrative Procedures Act. 293 So. 2d at 683. We are bound by this precedent. However, as in Hauser, our affirmance is without prejudice to appellant seeking the administrative hearing to which she was entitled.

The appellate court's mandate issued on January 27, 2012.

On or about February 7, 2012, Ms. Hillard filed with the School Board a Petition for Administrative Hearing (Petition), which read as follows:

> Petitioner, LURANA C. HILLARD, pursuant to § 120.569, Fla. Stat., Rule 28-106.201, Fla. Admin. Code, and the attached Order of the District Court of Appeal, Fourth District, State of Florida, petitions the School Board of St. Lucie County, Florida (hereinafter "School Board"), for an administrative hearing. In support of this Petition, the School Board is shown.
>
> 1. The Petition affects the School Board of St. Lucie County, Florida, whose address is 4204 Okeechobee Road, Ft. Pierce, Florida.
>
> 2. The Petitioner's address is . . .; and whose telephone number is . . . Contact information for the Petitioner's representative is shown in the signature block below. Petitioner's substantial interests are affected in that she believes that, by virtue of the facts alleged below, she was entitled to employment as a contract educator through the 2009-2010 school year, and that the determination by the School Board's administration that her employment should end at the conclusion of the 2008-2009 school year is contrary to the applicable Florida statutes. Petitioner contends that she is entitled to the monetary value of the salary and benefits she would have earned during the 2009-2010 school year, along with

retirement contributions and any other applicable benefits, less interim earnings.

3. Petitioner's representative received a copy of the Order of the Court of Appeal[] on January 13, 2012, and received the Mandate on January 30, 2012.

4. Petitioner was employ[ed] by the School Board as a Program Specialist for School Psychology and School Psychologist[s]. She was a participant in the Florida Retirement System (FRS) and its "Deferred Retirement Option Program" (hereinafter "DROP").

5. Petitioner was given prior written confirmation of her employment with the School Board for the 2009-2010 school year in School Board documents dated January 12 and January 16, 2007, copies of which are attached as Exhibits A and B. Each document is signed by an agent of the School Board and was transmitted to FRS pursuant to § 121.091(13), Fla. Stat. The FRS confirmed Petitioner's employment and DROP participation through the end of the 2009-2010 school year in a document dated January 17, 2007, a true copy of which is attached as Exhibit C. Petitioner executed a binding letter of resignation from the School Board effective June 30, 2010, pursuant to the statute.

6. In March 2009, Petitioner was notified by the School District administrators that her employment with the School Board would end at the conclusion [of] the 2008-2009 school year, despite the agreements and documentation described in paragraph 5, above. The Superintendent of Schools, Michael J. Lannon, asserted that he is authorized by § 121.091(13), Fla. Stat. to summarily terminate the employment of the Petitioner, notwithstanding the prior written confirmation of her continued employment for the 2009-2010 school year.

> 7. The Petitioner believes that the documentation in paragraph 5, above, created an express or implied contract and a reasonable expectation of continued employment through the 2009-2010 school year, rights [that] are consistent with the provisions of § 121.091(13). Moreover, the provisions of § 121.091(13) relied on by the Superintendent do not supplant the contractual protections enjoyed by the Petitioner under § 1012.33(8), which appears to make annual contracts for the term-eligible teachers permissible but not mandatory.
>
> 8. The Petitioner has been damaged in the form of lost salary and benefits for the 2009-2010 school year and reasonably relied on the School Board's promise of continued employment to her detriment.

The School Board referred the Petition to DOAH on April 11, 2012.

On May 22, 2012, the School Board filed a Motion for Summary Recommendation, arguing that the material facts in the instant case "are undisputed and the application of the law to those facts support a Summary Recommendation to the School Board that Respondent was employed under an annual contract which expired, and therefore, no damages are due." Ms. Hillard timely filed a Memorandum in Opposition to Petitioner's Motion for Summary Recommendation. A hearing on the Motion for Summary Recommendation was held on May 31, 2012, during which the parties jointly requested the undersigned to cancel the final hearing scheduled in this case and issue a recommended order based on stipulated facts and legal arguments presented by the parties.

By Order issued June 1, 2012, the undersigned granted the request; cancelled the final hearing in this case scheduled for June 8, 2012; ordered the parties to file their stipulation of facts and proposed recommended orders no later than June 8, 2012, and June 20, 2012, respectively; and advised the parties that oral argument on the legal issues presented in this case would be held by telephone conference call on June 27, 2012, starting at 10:30 a.m.

The parties timely filed their Joint Stipulation of Facts on June 8, 2012, and their Proposed Recommended Orders on June 20, 2012. Oral argument was heard on June 27, 2012, as scheduled

FINDINGS OF FACT

1. The following is a verbatim recital of the Joint Stipulation of Facts filed by the parties on June 8, 2012:

> 1. Lurana Hillard (Respondent) was employed by the St. Lucie County School District (Petitioner) as a Program Specialist for School Psychology and School Psychologists beginning in the 2005/2006 school year.
>
> 2. Respondent was a participant in the Florida Retirement System ("FRS") and its Deferred Retirement Option Program (hereinafter "DROP").
>
> 3. Respondent's initial 60-month period of DROP was from July 1, 2002 through June 30, 2007.
>
> 4. In January 2007, Respondent signed a document requesting to extend her participation in DROP beyond the initial 60-

month period. A true and correct copy of the Form is attached as Exhibit B.[1/]

5. Barbara Casteen is the Director of Student Services and Respondent's supervisor.
6. On January 12, 2007, Barbara Casteen sent Steve Valencia, Director of FTE/Position Control, an email with a copy to Respondent regarding DROP extension. A true and correct copy of that email is attached as Exhibit A.[2/]

7. On January 16, 2007, DROP Extension forms [sic] prescribed by the Florida Retirement System were executed by Respondent and Steve Valencia. A true and correct copy of the Form is attached as Exhibit B.

8. Mr. Valencia had the authority, as the Superintendent's designee, to execute the form advising that that the School Board stipulates that the Respondent was eligible to participate in DROP beyond the initial 60-months.

9. On January 23, 2007, at a regularly scheduled School Board meeting, the Board approved the Personnel Agenda which included DROP extension for Respondent.[3/] Attached is a true and correct copy of the Personnel Agenda for the January 23, 2007 meeting and minutes from the same.[4/] The Board has taken no subsequent formal action regarding Respondent's DROP status.

10. On May 26, 2009, Barbara Casteen sent Respondent a letter advising that she would not recommend her for reappointment for the 2009-2010 school year. A true and correct copy of this letter is attached as Exhibit C.

11. On June 30, 2009, Respondent signed a Notification of Separation from Employment Form. A true and correct copy of that Form is attached as Exhibit D.

12. On July 29, 2009, the School Board approved Respondent's retirement. A true and correct copy of a letter from Shelby Baker, Personnel Records Specialist and Employer Notification of Employment Termination are attached as Exhibit E.

13. Respondent initially submitted a letter of resignation pursuant to the DROP statute dated June 30, 2007.

14. Based on request to extend DROP, Respondent submitted another letter of resignation dated June 30, 2010 pursuant to the DROP statute.

15. Respondent received from FRS a Revised Notification of DROP Extension Benefits which is attached as Exhibit F.

16. Attached is a true and correct copy of the FRS DROP Termination Notification as Exhibit G.

17. Apart from the documents referred to herein, Respondent was issued no documents by the St. Lucie County School Board reflecting her employment status during the period of her DROP extension.

2. The body of the January 12, 2007, email from Ms. Casteen to Mr. Valencia attached to the parties' Joint Stipulation of Facts as Exhibit A (1/12/07 Email) read as follows:

> I am approving the DROP extension for Lurana Hillard for 3 years from 7/1/07 to 6/30/10.
>
> If you need any further information, please feel free to contact me.

3. The "Form" attached to the parties' Joint Stipulation of Facts as Exhibit B is a completed Department of Management Services, Division of Retirement (Division) form--Form DP-EXT

(05/05) (DROP Extension Form)--signed in January 2007, by Ms. Hillard and by Mr. Valencia, as the Superintendent's "designee".[5/] On this completed and signed DROP Extension Form (Executed Extension Form or Form), Ms. Hillard indicated that her "DROP begin date" was July 1, 2002; that her "DROP termination and resignation date" was June 30, 2007; and that she was "requesting to extend [her] DROP participation through 6/30/10 with the approval of [her] employer." The "Employer Certification" section of the Form contained the following statement made to the Division by Mr. Valencia, as the Superintendent's designee:

> This is to certify that the St. Lucie County School Board (agency name) has rescinded the resignation of the above named member whose position meets the definition of an instructional position. The agency has approved a new termination date of 6/30/10. This agency stipulates that this member is eligible to participate in the DROP beyond 60 months and the member will continue working in a regularly established position as a School Psychologist.[6/]

CONCLUSIONS OF LAW

4. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to chapter 120, Florida Statutes.[7/]

5. District school boards (such as the School Board) are creatures, not of statute, but of the Florida Constitution, specifically article IX, section 4, thereof. See McCalister v.

Sch. Bd. of Bay Cnty., 971 So. 2d 1020, 1023 (Fla. 1st DCA 2008)("Article IX, section 4(b) of the constitution creates [district] school boards . . . .'"); and Dunbar Electric Supply v. Sch. Bd. of Dade Cnty., 690 So. 2d 1339, 1340 (Fla. 3d DCA 1997)("School boards are constitutional entities created by Article IX, Section 4 of the Florida Constitution. School boards do not fall within the executive branch of the state government.").

6. "In accordance with the provisions of s. 4(b) of [a]rt. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2). Such authority extends to personnel matters and includes the power to hire, suspend, and dismiss employees. § 1001.42(5).

7. "Any person employed as a [school psychologist or other] member of the instructional staff in any district school system[8/] . . . [must] receive a written contract." § 1012.33(1)(a). The employment contract must be provided by the employing district school board itself. See McCalister, 971 So. 2d at 1026 (citing with approval, Sch. Bd. of Leon Cnty. v. Goodson, 335 So. 2d 308, 310 (Fla. 1st DCA 1976))("'Under the statutory scheme devised by the legislature, the exclusive

contracting agent for a District School System is the School Board.'"); and § 1012.22(1)(d) ("The district school board shall provide written contracts for all regular members of the instructional staff."). "While the superintendent is endowed with the authority to nominate an employee for a certain position, . . . it is the [district] school board [alone] that retains the contracting authority for the school districts." McCalister, 971 So. 2d at 1027; see also Witgenstein v. Sch. Bd. of Leon Cnty., 347 So. 2d 1069, 1073 (Fla. 1st DCA 1977)("[T]he ultimate responsibility for the decision to employ or not to employ a teacher rests with the District School Board, not with the superintendent."); Hart v. Sch. Bd. of Wakulla Cnty., 340 So. 2d 121, 122 (Fla. 1st DCA 1976)("[A] teacher's contract is with the School Board, not with the principal or superintendent."); and § 1012.27(1)(b) ("The district school superintendent . . . shall perform the following: . . . nominate in writing persons to fill such positions [needed to be filled]."). A district school board cannot be bound by an alleged employment contract it has not expressly approved. See Goodson, 335 So. 2d at 310-311 ("Neither a superintendent nor a principal, acting individually or collectively, may enter into a contractual agreement with a teacher without the express approval of the School Board. . . . In the absence of a showing that the School Board approved the

agreement in question, there can be no finding that the agreement had a binding effect upon the Board.").

8. At all times material to the instant case, district school boards were "statutorily authorized [by section 1012.33] to utilize one of three types of written contracts to employ [an instructional staff member][:] . . . a continuing contract, a professional service contract, or an annual contract." Lee Cnty. Sch. Bd. v. Silveus, Case No. 04-4096, 2005 Fla. Div. Adm. Hear. LEXIS 904 *17 (Fla. DOAH Mar. 16, 2005), adopted in pertinent part, Case No. 05-0003 (Lee Cnty. Sch. Bd. June 14, 2005). "Continuing and professional service contracts include the right to continuing employment [from year to year], but annual contracts [which are subject to optional renewal each year] do not." Id. at *18; see also Orange Cnty. Sch. Bd. v. Rachman, 87 So. 3d 48, 49 n.1 (Fla. 5th DCA 2012)("Whereas an annual contract must be renewed every year, a professional service contract is a continuous contract which renews automatically, and can only be terminated for just cause pursuant to section 1012.33, Florida Statutes, or based upon uncorrected performance deficiencies pursuant to section 1012.34, Florida Statutes."); Buckner v. Sch. Bd. of Glades Cnty., 718 So. 2d 862, 866 (Fla. 2d DCA 1998)("[I]instructional staff employed under annual probationary contracts have no right to future employment after their annual contract expires."); Palm Beach Cnty. Sch. Bd. v. Stuglik, Case

No. 10-1526, 2010 Fla. Div. Adm. Hear. LEXIS 69 *19 (Fla. DOAH Aug. 2, 2010; Palm Bch Cnty. Sch. Bd. Oct. 19, 2010)("An annual contract teacher employed by a district school board has no right to continued employment beyond the term of the contract."); Achtchi v. Wakulla Cnty. Sch. Bd., Case No. 88-2808, 1988 Fla. Div. Adm. Hear. LEXIS 4536 *14 (Fla. DOAH Dec. 23, 1988; Wakulla Cnty. Sch. Bd. Mar. 20, 1989)("[A] professional service contract is equivalent to a continuing contract, insofar as conferring tenure, absent charges of unsatisfactory performance [or other cause]."); and Educ. Practices Comm'n v. Dixon, Case No. 82-408, 1984 Fla. Div. Adm. Hear. LEXIS 4641 *12 (Fla. DOAH June 20, 1984)(Recommended Order)("Th[e] School Board has the clear option of renewing or not renewing Respondent's annual contract as it sees fit."). Continuing contract and professional services contract employees recommended for dismissal or non-renewal at the end of the school year are entitled to an administrative hearing prior to the termination of their employment, whereas annual contract employees not nominated for contract renewal have no comparable administrative hearing right. See Williams v. Bd. of Pub. Instruction of Dade Cnty., 311 So. 2d 812, 814 (Fla. 3d DCA 1975)("A teacher under continuing contract is given the right to notice and a hearing prior to dismissal; but where the School Board determines not to renew the contract of a teacher on probationary status (annual contract), the right to a hearing is

not granted, unless the teacher is either dismissed during the school year or suspended.").[9/]

9. "A continuing contract applies only to instructional staff [who] attain[ed] their contract status before July 1984." Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217, 218 (Fla. 2d DCA 1994)(Blue, J., specially concurring). "[C]ontinuing contracts were replaced by professional service contracts after July 1, 1984."[10/] See D'Allessandro v. Dailey, Case No 96-0936, 1996 Fla. Div. Adm. Hear. LEXIS 3256 *129 (Fla. DOAH June 28, 1996; Lee Cnty. Sch. Bd. Sept. 18, 1996). Since September 9, 1984, Florida Administrative Code Rule 6A-1.064(1) has provided as follows with respect to the "forms" to be used by district school boards when issuing professional service contracts, as well as annual contracts:

> Forms of contract for annual contracts and for professional service contracts entered into by school boards and instructional and professional administrative personnel as provided by law shall be prescribed by the State Board of Education. Contents of contract forms shall comply with all pertinent provisions of law and State Board Rules. No contract form shall indicate, or be altered to show, any uncertainty with reference to the amount of salary for the contract period of service, or the duration of the period of service, except as the rank, contract status, and qualifications of the teacher may change, or pursuant to a duly adopted collective bargaining agreement, or where membership in a school or program is so unstable that it might be necessary to discontinue classes because of lack of

> pupils, in which latter case the contract may be stated to be effective at the option of the board conditional on a minimum number of pupils. Any clause inserted in a contract form purporting to provide that the contract salary will be paid only if funds are available shall be null and void.

10. Whether employed under a continuing contract, a professional service contract, or an annual contract, instructional staff members in regularly established positions are required to participate in the Florida Retirement System (see Fla. Admin. Code R. 60S-1.004(1)(a)), a feature of which is the Deferred Retirement Option Program (DROP) described in section 121.091(13). At all times material to the instant case, section 121.091(13) provided, in pertinent part, as follows:

> DEFERRED RETIREMENT OPTION PROGRAM. --In general, and subject to the provisions of this section, the Deferred Retirement Option Program, hereinafter referred to as the DROP, is a program under which an eligible member of the Florida Retirement System may elect to participate, deferring receipt of retirement benefits while continuing employment with his or her Florida Retirement System employer. The deferred monthly benefits shall accrue in the System Trust Fund on behalf of the participant, plus interest compounded monthly, for the specified period of the DROP participation, as provided in paragraph (c). Upon termination of employment, the participant shall receive the total DROP benefits and begin to receive the previously determined normal retirement benefits. Participation in the DROP does not guarantee employment for the specified period of DROP. Participation in the DROP by an eligible member beyond the initial 60-month period as authorized in this subsection shall be on an

annual contractual basis for all participants.

* * *

(a) Eligibility of member to participate in the DROP.--All active Florida Retirement System members in a regularly established position, . . . are eligible to elect participation in the DROP provided that:

* * *

2. . . . . The member shall advise his or her employer and the division in writing of the date on which the DROP shall begin. . . .

3. The employer of a member electing to participate in the DROP . . . shall acknowledge in writing to the division the date the member's participation in the DROP begins and the date the member's employment and DROP participation will terminate.

(b) Participation in the DROP.

1. An eligible member may elect to participate in the DROP for a period not to exceed a maximum of 60 calendar months or, with respect to members . . . who are instructional personnel as defined in s. 1012.01(2)(a)-(d) in grades K-12 and who have received authorization by the district school superintendent to participate in the DROP beyond 60 calendar months,[11/] 96 calendar months immediately following the date on which the member first reaches his or her normal retirement date or the date to which he or she is eligible to defer his or her election to participate as provided in subparagraph (a)2.[12/] However, a member who has reached normal retirement date prior to the effective date of the DROP shall be eligible to participate in the DROP for a period of time not to exceed 60 calendar months or, with respect to members . . . who are instructional personnel as defined in s.

1012.01(2)(a)-(d) in grades K-12 and who have received authorization by the district school superintendent to participate in the DROP beyond 60 calendar months, 96 calendar months immediately following the effective date of the DROP, ...

2. Upon deciding to participate in the DROP, the member shall submit, on forms required by the division:

* * *

b. Selection of the DROP participation and termination dates, which satisfy the limitations stated in paragraph (a) and subparagraph 1. Such termination date shall be in a binding letter of resignation with the employer, establishing a deferred termination date. The member may change the termination date within the limitations of subparagraph 1., but only with the written approval of his or her employer;

* * *

3. The DROP participant shall be a retiree under the Florida Retirement System for all purposes, except for paragraph (5)(f) and subsection (9) and ss. 112.3173, 112.363, 121.053, and 121.122. However, participation in the DROP does not alter the participant's employment status and such employee shall not be deemed retired from employment until his or her deferred resignation is effective and termination occurs as provided in s. 121.021(39).[13/]

* * *

(c) Benefits payable under the DROP.--

* * *

3. The effective date of DROP participation and the effective date of retirement of a DROP participant shall be the first day of

> the month selected by the member to begin participation in the DROP, provided such date is properly established, with the written confirmation of the employer, and the approval of the division, on forms required by the division.
>
> 4. Normal retirement benefits and interest thereon shall continue to accrue in the DROP until the established termination date of the DROP, or until the participant terminates employment or dies prior to such date. . . .[14/]
>
> 5. At the conclusion of the participant's DROP, the division shall distribute the participant's total accumulated DROP benefits, subject to the following provisions:
>
> a. The division shall receive verification by the participant's employer or employers that such participant has terminated employment as provided in s. 121.021(39)(b).

11. The Division has been delegated the authority "to adopt rules as are necessary for the effective and efficient administration of [the Florida Retirement] [S]ystem." § 121.031. Among the rules the Division has adopted pursuant to this authority are Florida Administrative Code Rules 60S-11.001 (providing "definitions"), 60S-11.004 (dealing with "[b]enefits"} and 60S-9.001 (prescribing "[a]pporoved forms"). At all times material to the instant case, these rules provided, in pertinent part, as follows:

> 60S-11.001 Definitions
>
> * * *

(8) DROP END DATE – means the date DROP participation ceases and shall be the date termination of all employment occurs as defined in subsection 60S-6.001(63), F.A.C. . . . The DROP end date shall be effective as of the date of the participant's designated deferred resignation, as stated on Form DP-ELE, or earlier if the participant terminates prior to the designated resignation date. The participant may cease participation in DROP prior to the designated resignation date only by satisfying the definition of termination as provided in subsection 60S-6.001(63), F.A.C.

* * *

(63) TERMINATION – Termination occurs when a member of the Florida Retirement System . . . ceases all employment relationships with all covered employers, provided that the member shall not be reemployed by any such employer within the next calendar month. . . .

60S-11.004 Benefits

* * *

(5) Employment During DROP Participation.

(a) A DROP participant is considered a retiree as defined in subsection 60S-6.001(53), F.A.C. However, participation in DROP does not alter the participant's employment status. Terms and conditions of employment, including, but not limited to, salary, insurance coverage, leave accrual, and seniority status, do not change as a result of DROP participation. However, employment is not guaranteed during the DROP participation period.

(b) Employment continues during participation in DROP through the date the member preselected to stop participation in DROP . . . .

60S-9.001 Approved Forms

The following is a list of the forms utilized by the Division of Retirement in its dealings with the public, which are hereby incorporated by reference into these rules. . . .

* * *

(3) Bureau of Benefit Payments.

* * *

(rr) DP-EXT (5/05) Deferred Retirement Option Program (DROP) for Specified K-12 Instructional Personnel – a one-page form.

12. Form DP-EXT (05/05), which was incorporated by reference in rule 60S-9.001, read as follows:

Florida Retirement System Pension Plan
Extension of Deferred Retirement Option Program (DROP)
For Specified K-12 Instructional Personnel

P O Box 9000
Tallahassee FL 32315-9000
850 488-6491 Toll Free 888 738-2252

Member Name	_____	Member SSN	_____
Position Title	_____	Birthdate	_____
Home Phone	_____	Work Phone	_____
Home Mailing Address		Present FRS Employer(s)	
_____		_____	

Section 121.091(13), F.S., allows individuals who are employed in a K-12 instructional position as defined in s. 1012(2)(a)-(d), F.S., with a district school board, Florida School for the Deaf and Blind or a developmental research school to participate in DROP beyond 60 months (up to a total of 96 months). Any participant who is eligible to participate for more than 60 months must receive authorization from the employer and

be employed on an annual contractual basis for each year of participation, after the initial 60-month period. The individual must be employed in an eligible position at the end of his/her initial DROP period in order to be considered eligible for DROP extension

and must remain in an eligible position during the period of extension.

The dates of my DROP participation for my initial 60-month participation period are:

DROP begin date: _____ DROP termination and resignation date: _____

I am requesting to extend my DROP participation through _____ with the approval of my employer.

Member Signature: (sign in the presence of a Notary) _____

Notary: State of Florida, County of _____ The above named person has sworn to and subscribed before me this __ day of _____ 20__ and is personally known __ or produced _____ as identification.

_____
Signature of Notary Public- State of Florida

_____
Print, Type or Stamp Commissioned Name of Notary Public

Employer Certification:

This is to certify that the _____ (agency name) has rescinded the resignation of the above named member whose position meets the definition of an instructional position. The agency has approved a new termination date of __/___/__. This agency stipulates that this member is eligible to participate in the DROP beyond 60 months and the member will continue working in a regularly established position as a _____.

Superintendent or Designee
Signature _____ Agency Number _____

Agency Phone _____ SUNCOM_____ Date _____

As noted above, the Executed Extension Form was a completed Form DP-EXT (05/05) signed by Ms. Hillard and Mr. Valencia.

13. In the instant case, through her Petition, Ms. Hillard is claiming that "she was entitled to employment as a contract educator through the 2009-2010 school year, and that the determination by the School Board's administration that her employment should end at the conclusion of the 2008-2009 school year [was] contrary to the applicable Florida statutes." The underlying premise of this claim is that she had a contract of a continuing nature until June 30, 2010, her extended DROP termination date, not an expired annual contract, at the time her employment was terminated. According to Ms. Hillard, the 1/12/07 Email and the Executed Extension Form created such a contract and thus obligated the School Board to continue to employ her until the last day of the 2009-2010 school year, June 30, 2010.

14. Ms. Hillard bears the burden of establishing that she had such a contract with the School Board and is thus entitled to the relief she is seeking herein--"the monetary value of the salary and benefits she would have earned during the 2009-2010 school year, along with retirement contributions and any other applicable benefits, less interim earnings." See Graham v. Estuary Props., Inc., 399 So. 2d 1374, 1379 (Fla. 1981)("[It is] the established rule of administrative law that one seeking

relief carries the burden of proof."); Knowles v. C. I. T. Corp., 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977)("It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach."); and Deen v. Sch. Bd. of Hernando Cnty., Case No. 85-1342, 1985 Fla. Div. Adm. Hear. LEXIS 4927 *11 (Fla. DOAH Nov. 5, 1985; Hernando Cnty. Sch. Bd. Dec. 17, 1985)("The burden is on the Petitioner, to establish by a preponderance of evidence, the existence of a continuing contract as principal between him and the Respondent, School Board of Hernando County.").

15. "[T]o have a contract, there must be reciprocal assent to certain and definite propositions." Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses, Inc., 125 So. 2d 903, 905 (Fla. 3d DCA 1961); see also State v. Family Bank of Hallandale, 623 So. 2d 474, 479-480 (Fla. 1993)("In order to form a binding contract there must be a common or mutual intention of the parties. Mutual assent is an absolute condition precedent to the formation of a contract. Absent mutual assent, neither the contract nor any of its provisions come into existence. . . . Without a meeting of the minds on . . . an essential element there can be no enforceable contract."); and Suggs v. Defranco's, Inc., 626 So. 2d 1100, 1100-1101 (Fla. 1st DCA 1993)("To be

enforceable, an agreement must be sufficiently specific, and reflect assent by the parties to all essential terms. Where essential terms of an agreement remain open, subject to future negotiation, there can be no enforceable contract.")(citation omitted). More than a unilateral statement made by one of the alleged contracting parties, unsupported by mutually-agreed on consideration, is required. See Quaker Oats Co. v. Jewell, 818 So. 2d 574, 578 (Fla. 5th DCA 2002)("[P]olicy statements contained in employment manuals do not give rise to enforceable contract rights in Florida."); Linafelt v. Bev, Inc., 662 So. 2d 986, 989 (Fla. 1st DCA 1995)("Although Linafelt maintains Beverly Enterprises' policies and procedures amounted to an employment contract with him, unilateral policy statements cannot, without more, give rise to an enforceable contract."); and McConnell v. Eastern Air Lines, Inc., 499 So. 2d 68, 69 (Fla. 3d DCA 1986)("[U]nilateral policy statements cannot, without more, give rise to enforceable contract rights."); see also Chase Fed. Sav. & Loan Ass'n v. Schreiber, 479 So. 2d 90, 101 (Fla. 1985)("[C]onsideration is required to support contractual undertakings of any kind whether characterized as contracts, covenants, promises, agreements, or the like."). Moreover, it is not enough that the party asserting the existence of a contract subjectively believes that the alleged deal was struck. An objective manifestation of the purported agreement is required.

See Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957)("The rule is probably best expressed by the late Justice Holmes in 'The Path of the Law,' 10 Harvard Law Review 457, where it was stated in part that, 'The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs - not on the parties having meant the same thing but on their having said the same thing.'"); Clearwater v. Bekker, 526 So. 2d 961, 964-965 (Fla. 2d DCA 1988)("Mere expectations by the appellees [based on a memorandum issued by the city manager unilaterally extending to them sick leave conversion benefits] are insufficient to create a binding contract requiring the city to provide this sick leave [conversion] benefit to the appellees on a continuing basis for any definite period of time."); Bryant v. Shands Teaching Hosp. & Clinics, Inc., 479 So. 2d 165, 168 (Fla. 1st DCA 1985)("[T]he circuit court was entitled to find, as it implicitly did, that appellants' assertions that the alleged personnel policies were part of their contract of employment with the new Shands were mere unilateral expectations, rather than the explicit mutual promises necessary to create a binding contractual term."); and Berrian v. Nat'l R.R. Passenger Corp., 429 So. 2d 1381, 1383 (Fla. 2d DCA 1983)("Only if there were a contract for a particular term would Berrian's employment not be terminable at will. He has not alleged that the parties had a mutual

understanding, whether written or oral, formal or informal, that his employment would be continued for any particular term. In the final analysis, the complaint alleges, at best, a unilateral expectation on the part of Berrian which is insufficient to create a property right.").

16. An examination of the two documents upon which Ms. Hillard relies in support of her claim that she had an employment contract with the School Board that expired June 30, 2010--the 1/12/07 Email and the Executed Extension Form--reveals that neither document constitutes an objective manifestation of mutual assent on the part of Ms. Hillard and the School Board to Ms. Hillard's continuing employment with the School Board through the 2009-2010 school year.

17. The 1/12/07 Email is merely informational correspondence from one School Board employee (Ms. Casteen, the School Board's Director of Student Services and Respondent's supervisor) to another School Board employee (Mr. Valencia, the School Board's Director of FTE/Position Control) concerning the former's "approving the DROP extension for [Ms.] Hillard for 3 years from 7/01/07 to 6/30/10." See Wood v. Pasco Cnty., Case No. 8:09-cv-6-T-30MAP, 2009 U.S. Dist. LEXIS 62050 *7 (M.D. Fla. July 8, 2009)("'Plaintiffs seem to rely on an 'Interoffice Memorandum,' attached as Exhibit A to the complaint to assert that it is a contract and/or license from Defendant to

Plaintiffs. The Interoffice Memorandum is clearly not a contract between the parties, but rather an administrative document that formally communicates whether Defendant should approve Plaintiffs' variance request and preliminary site plan for the motorcycle track.").

18. The Executed Extension Form is a completed DROP Extension Form through which Ms. Hillard "request[ed] to extend [her] DROP participation through 6/30/10 with the approval of her employer." It includes an "Employer Certification" section completed by Mr. Valencia as the Superintendent's designee, wherein he unilaterally certified to the Division that the "agency" had approved an extension of Ms. Hillard's "DROP participation through 6/30/10" and that the "agency stipulate[d] that [Ms. Hillard was] eligible to participate in the DROP beyond 60 months and she [would] continue working [for an unspecified period of time] in a regularly established position as a School Psychologist." Like the 1/12/07 Email, the Executed Extension Form is devoid of any expression of mutual agreement between Ms. Hillard and the School Board (the entity possessing the exclusive "contracting authority for the school district") that Ms. Hillard would be entitled to continuing employment with the School Board until June 30, 2010, her newly approved "DROP termination and resignation date." See Guerrero v. Brickman Grp., LLC, Case No. 05-CV-00357, 2007 U.S. Dist. LEXIS 60605 **8-

9 (W.D. Mich. Aug. 17, 2007)("Plaintiffs contend that their breach of contract claim is predicated upon terms in the federal application for alien certification, known as ETA form 750 ('ETA-750') . . . .

ETA-750 . . . is a form submitted by employers to the federal government, and not a contract in the traditional sense between and employer and employee.").

19. In any event, any such mutual agreement, had it existed, would have been invalid and unenforceable as contrary to section 121.091(13), which (as noted above) provided, in pertinent part, that:

> Participation in the DROP does not guarantee employment for the specified period of DROP. Participation in the DROP by an eligible member beyond the initial 60-month period as authorized in this subsection shall be on an annual contractual basis for all participants.

See Wechsler v. Novak, 26 So. 2d 884, 887 (Fla. 1946)("The general right to contract is subject to the limitation that the agreement must not violate . . . state statutes . . . ."); and Bond v. Koscot Interplanetary, Inc., 246 So. 2d 631, 634 (Fla. 4th DCA 1971)("[A]n agreement which violates a statute . . . is illegal, void and unenforceable as between the parties."). Beyond her "initial 60-month [DROP] participation period," Ms. Hillard could have lawfully been employed, pursuant to

section 121.091(13), only "on an annual contractual basis" (as the Executed Extension Form itself clearly indicated).

20. The approval of Ms. Hillard's request "to extend [her] DROP participation through 6/30/10" allowed, but did not obligate, the School Board to employ Ms. Hillard an additional 36 months (or three school years), from July 1, 2007, until June 30, 2010 (a period consisting of the 2007-2008, 2008-2009, and 2009-2010 school years). Any such employment was statutorily required to be "on an annual contractual basis" for each of the three additional school years of employment, with no guarantee that Ms. Hillard's annual contract would be renewed from one year to the next, renewal being the prerogative of school district officials. See Buckner, 718 So. 2d at 866; and Davis v. Sch. Bd. of Gadsen Cnty., 646 So. 2d 766, 768 (Fla. 1st DCA 1994)("School boards and school superintendents have well-recognized prerogatives in hiring and firing school personnel who are on annual contracts, and in declining to renew such contracts."). Ms. Hillard's substantial interests therefore were not affected by her non-reappointment for the 2009-2010 school year, and she thus suffered no administratively compensable damages as a result of such non-reappointment. See Toth v. S. Fla. Water Mgmt. Dist., 895 So. 2d 482, 483 (Fla. 4th DCA 2005)(citing with approval, Fertally v. Miami-Dade Cmty. Coll., 651 So. 2d 1283 (Fla. 3d DCA 1995))("[In Fertally] it was held that the

petitioner, whose annual contract had not been renewed, could be dismissed without cause and was therefore without a substantial interest."); and Bernard v. Paul, Case No. 03-3167, 2004 Fla. Div. Adm. Hear. LEXIS 1677 *13 (Fla. DOAH June 9, 2004; Sch. Bd. of Escambia Cnty. July 7, 2004)("[T]he contract period ended under the contract's terms. Thus, Mr. Bernard could not really show that he had a substantial interest in his employment as the district's risk manager that was adversely affected by the non-renewal of his contract because his substantial interest in that employment ended when the contract ended, under the above-referenced facts and legal authority.").

21. In view of the foregoing, the School Board should reject Ms. Hillard's contention that "she was entitled to employment as a contract educator through the 2009-2010 school year, and that the determination by the School Board's administration that her employment should end at the conclusion of the 2008-2009 school year [was] contrary to the applicable Florida statutes," and it should, accordingly, decline to award her the relief she is seeking.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of St. Lucie County issue a Final Order declining to award Ms. Hillard the relief requested in her Petition.

DONE AND ENTERED this 18th day of July, 2012, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of July, 2012.

ENDNOTES

[1/] A copy of this document was also attached to the Petition as Exhibit B.

[2/] A copy of this document was also attached to the Petition as Exhibit A.

[3/] The School Board's approval of "DROP extension for [Ms. Hillard]" was a legally meaningless act since, as will be explained later, the Superintendent, not the School Board, was vested with the statutory authority to grant such an extension.

[4/] The parties inadvertently failed to append this "Personnel Agenda" to their Joint Stipulation of Facts; however, they subsequently, on June 28, 2012, provided the document to the undersigned.

[5/] Ms Hillard signed one section of the Form (on January 8, 2007), and Mr. Valencia later (on January 16, 2007) signed another section of the Form (the "Employer Certification" section).

[6/] The underlined language represents what Mr. Valencia wrote on

the blank spaces of the "Employer Certification" section to add to what was already printed on the form.

[7/] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to that version of Florida Statutes in effect at the time of the occurrence of the particular event or action being discussed.

[8/] School psychologists are "instructional personnel," as that term is used in chapter 1012. See § 1012.01(2)(b).

[9/] An annual contract employee may be dismissed during the school year in which the contract is in effect only for "just cause." § 1012.33(1)(a) and 6(a).

[10/] Pursuant to chapter 2011-1, Laws of Florida, "as of July 1, 2011, a district school board can no longer issue professional service contracts." Rachman, 87 So. 3d at 49 n.1.

[11/] While it was the district school superintendent who, under section 121.091(13)(b)1., had to authorize "participat[ion] in the DROP beyond 60 calendar months," the district school board possessed the exclusive "contracting authority for the school district[]." McCalister, 971 So. 2d at 1027. That "contracting authority," it is significant to note, was limited (by the introductory paragraph of section 121.091(13)) to providing instructional personnel, following "the initial 60-month [DROP] period," with no more than an annual contract (which, upon its expiration, the district school board was under no obligation to renew).

[12/] This 96-month period was referred to elsewhere in the statute as the "96-month maximum participation period." § 121.091(13)(a)2. and 6.

[13/] See also § 121.091(9)(b), which provided, in pertinent part, that "a DROP participant shall continue employment and receive a salary during the period of participation in the Deferred Retirement Option Program, as provided in subsection (13)." By operation of section 121.091(9)(b) and (13)(b)3., Ms. Hillard remained employed and was not "deemed retired from employment" during the period of her DROP participation. Section 1012.33(8), upon which she relied in her Petition, therefore, had no application to her situation, since it dealt only with "retired" FRS members "interrupt[ing] retirement" to "be reemployed."

[14/] The statute thus clearly contemplated that a DROP participant's employment could be terminated prior to the "termination date of the DROP" established in the participant's "binding letter of resignation" (which simply fixed the date beyond which the participant's employment and participation in DROP could not continue).

COPIES FURNISHED:

Elizabeth Coke, Esquire
Richeson and Coke, P.A.
317 South 2nd Street
Post Office Box 4048
Fort Pierce, Florida 34950

Mark F. Kelly, Esquire
Kelly and McKee, P.A.
1718 East 7th Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

Michael Lannon
St. Lucie County Public Schools
Superintendent of Schools
4204 Okeechobee Road
Fort Pierce, Florida 34947

Charles M. Deal, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Gerard Robinson, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.