

BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BREVARD COUNTY SCHOOL BOARD, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
JAMES B. WILKINS, )  
 )  
Respondent. )

Board Agenda Item No.  
January 21, 2014

DOAH Case No. 12-390

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

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FILED

FINAL ORDER

This case was referred to the Division of Administrative Hearing ("DOAH"). 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 a final order dismissing all charges against the Respondent, James B. Wilkins, and reinstate Respondent with full back pay and benefits. The Recommended Order of November 1, 2013, entered herein is incorporated by reference. Timely exceptions to the Recommended Order were filed by Petitioner. Timely responses to the exceptions were filed by Respondent and a Motion to Strike Petitioner's Exceptions was also filed by Respondent.

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 "Tr" refers to the transcript of the final hearing and page number.

The notations "Pet"\_\_ and "Res"\_\_ refer to the number assigned to Petitioner's and Respondent's exhibits in the record respectively.

The merits of the exceptions will now be addressed.

#### PETITIONER'S EXCEPTIONS

Petitioner excepts in whole or in part to the findings of fact of the ALJ in paragraphs 3, 9, 11, 12-14, 15, 17, 18, 26, 29, 35, 36, 47, 63, 65, 68, 76, 77, 78, 79, 82, 83, 87, 89, 93, 99, 101,

102, 128, 129, 130(a), 130(b), 130(d), 130(e), and 133.

Petitioner also excepts to the ALJ's findings of fact as described in paragraph numbers 9, 20, 21, 37, 38 and 39 of Petitioner's exceptions citing specific citations to the record.

Petitioner also excepts to the ALJ's conclusion of law in paragraph 114 of the Recommended Order that the Superintendent of Schools is not free to amend charges at will without board approval citing Section 1012.22(1)(f), Florida Statutes.

Petitioner further objects to the ALJ's conclusion of law in paragraph 133 of the Recommended Order that prior disciplinary actions concerning Respondent by both the Petitioner and other school districts were not relevant to the charges brought in this proceeding.

**RESPONDENT'S MOTION TO STRIKE AND  
RESPONSE TO EXCEPTIONS**

Respondent filed a Motion To Strike Petitioner's Exceptions and/or a Response To The Exceptions.

Respondent's Motion to Strike alleges that Petitioner did not cite to the record as required by Rule 28-106.217, F.A.C. Respondent is mistaken. Petitioner's exceptions clearly identify the disputed portions of the Recommended order by paragraph and/or specific citations to the record. Section 120.57(1)(k), Florida Statutes. Respondent's Motion to Strike Petitioner's Exceptions is therefore denied.

RULING ON PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

The numbers of the following paragraphs correspond to the paragraph number of Petitioner's exceptions.

1.(2) The ALJ's finding of fact in paragraph 9 is supported by competent substantial evidence. (Tr 193: 3-25; Res.Ex. 3)

3. The ALJ's finding of fact in paragraph 11 is supported by competent substantial evidence. (Tr 204: 22-204:8)

4. The ALJ's findings of fact in paragraphs 12, 13 and 14 are supported by competent substantial evidence. (Tr 562: 10; 636: 5)

5. The ALJ's finding of fact in paragraph 14 is supported by competent substantial evidence. (Tr 221: 1-17)

6. The ALJ's finding of fact in paragraph 14 is supported by competent substantial evidence. (Tr 558-629).

7. The ALJ's finding of fact in paragraph 15 is supported by competent substantial evidence. (Tr 442: 18-25; 433: 1-14; 597: 2-24)

8. The ALJ's finding of fact in paragraph 47 is supported by competent substantial evidence. (Pet.Ex. 45)

9. Petitioner excepts to the ALJ's finding that the band parents organization was a cooperative organization. The ALJ's finding is supported by competent substantial evidence. (Pet. Ex. 45; Tr 558-636:7)

10. The ALJ's finding of fact in paragraph 63 is supported by competent substantial evidence. (Res.Ex. 9; Tr 562: 10; 636:7)

11. The ALJ's finding of fact in paragraph 65 is supported by competent substantial evidence. (Res.Ex. 8; Tr 558-636:7)

12. The ALJ's finding of fact in paragraph 68 and 69 are supported by competent substantial evidence. (Res.Ex. 11; Pet.Ex. 45)

13. The ALJ's finding of fact in paragraph 76 is supported by competent substantial evidence. (Res.Exs. 8-9; Tr 221:5-17)

14. The ALJ's finding of fact in paragraph 77 is supported by competent substantial evidence. (Pet.Ex. 45; Tr 558-636:7)

15. The ALJ's finding of fact in paragraph 78 is supported by competent substantial evidence. (Pet.Ex. 45)

16. The ALJ's finding of fact in paragraph 79 is supported by competent substantial evidence. (Pet.Ex. 45; Res.Exs. 8-9)

17. The ALJ's finding of fact in paragraph 82 is supported by competent substantial evidence. (Pet.Ex. 45; Res.Exs. 8-9; Tr 558-636:7).

18. The ALJ's findings of fact in paragraphs 83 and 89 is supported by competent substantial evidence. (Pet.Ex. 45; Res.Exs. 8-9; Tr 558-636:7)

19. The ALJ's finding of fact in paragraph 87 is supported by competent substantial evidence. (Tr 562: 10; 636:7)

20. The ALJ's findings of fact in paragraphs 93 and 99 are supported by competent substantial evidence. (Tr 454: 19-25; 455:1-20; 211: 14-25; 212:1-25; 213:1-25; 214:1-25; 215:1-5)

21. Petitioner excepts to the ALJ's finding that the band parents approved the payments to Wilkins out of the cash fund. The

ALJ's finding of fact is supported by competent substantial evidence. (Tr 604:10-25; 605:1-25; 606:1-23; 623:23-25; 624:1-14)

22. The ALJ's findings of fact in paragraphs 102 and 103 are supported by competent substantial evidence. (Tr 552:7-25)

23. Petitioner's exception in paragraph 23 citing 130(a) of the Recommended Order actually refers to paragraph 131(a) of the Recommended Order. In that paragraph the ALJ's finds that it was not proven that Wilkins improperly collected, receipted, held or disbursed funds from internal and external accounts. The ALJ's finding of fact in paragraph 131(a) of the Recommended Order is based on competent substantial evidence. (Tr 562:10; 558:1; 635:24)

24. Petitioner's exception in paragraph 24, citing paragraph 130(b) of the Recommended Order actually refers to paragraph 131(b) of the Recommended Order. In that paragraph the ALJ's finding that the cash fund was an external account of the band parents organization is supported by competent substantial evidence. (Pet. Ex. 45; Tr 562:10; 636:7)

25. Petitioner's exception in paragraph 25 citing paragraph 130(d) of the Recommended Order actually refers to paragraph 131(d) of the Recommended Order. The ALJ's conclusion that Petitioner failed to prove that Wilkins engaged in any misconduct by receiving payments from the petty cash fund is supported by competent substantial evidence.

26. Petitioner's exception in paragraph 26, citing paragraph 130(e) of the Recommended Order, actually refers to paragraph 131(e) of the Recommended Order. The ALJ's conclusion that

Petitioner failed to prove that money was missing or unaccounted for from the accounts is supported by competent substantial evidence.

27. The ALJ's finding of fact in paragraph 35 is supported by competent substantial evidence. (Tr 160:12-14; 345:25; 346:1-10)

28. The ALJ's finding of fact in paragraph 37 (mistakenly referred to as paragraph 36 of the Recommended Order) is supported by competent substantial evidence. (Tr 345:13-24; 475:3-12; 522:16-25; 523:1-14; 524:1-25; 525:1-25)

29. The ALJ's conclusion in paragraph 129 of the Recommended Order is supported by competent substantial evidence.

30. The ALJ's findings of fact in paragraph 37 of the Recommended Order are supported by competent substantial evidence. (Tr 345:16-24).

31. Petitioner excepts to the ALJ's findings of fact in paragraphs 31, 32, 33 and 34 of the Recommended Order. Clearly, the testimony of Respondent and witnesses T.S. and H.J. are conflicting concerning what Respondent said to these students concerning the saxophone playing band member. While reasonable people may disagree on the weight to give a witness's testimony or the credibility of each witness's testimony, the ALJ is entitled to rely on the testimony of a single witness, even it that testimony contradicts the testimony of other witnesses. Lantz v. Smith, 106 So.3rd 518 (Fla. 1st DCA 2013). It therefore follows that the ALJ's findings of fact in paragraphs 31, 32, 33 and 34 are supported by competent substantial evidence.

32. See paragraph 31 above.

33. See paragraph 31 above.

34. See paragraph 31 above.

35. Petitioner excepts to the ALJ's finding in paragraph 17 of the Recommended Order that neither Ms. Pace or Dr. Mullins "testified as to any complaints they were investigating". In the context of the discussion it appears the ALJ's meaning was that there was no testimony in the hearing by these witnesses concerning the specific factual allegations of the complaints they were investigating. The record does not support a basis for rejecting the ALJ's finding in paragraph 17 of the Recommended Order.

36. The ALJ's finding of fact in paragraph 133 is supported by competent substantial evidence.

37. Paragraph 37 of Petitioner's exceptions does not provide a legal basis for rejecting the Recommended Order.

38. Paragraph 38 of Petitioner's exceptions does not provide a legal basis for rejecting the Recommended Order.

39. Paragraph 39 of Petitioner's exceptions does not provide a legal basis for rejecting the Recommended Order.

40. The ALJ's finding of fact in paragraph 40 is supported by competent substantial evidence.

41. Petitioner excepts to paragraph 17 of the Recommended Order. The School Board may not reject or modify a finding of fact by the ALJ unless the finding of fact is not based on competent substantial evidence. As stated above, reasonable people may disagree on what the evidence shows or does not show. However, an



agency is bound by the findings of fact of unless review of the entire record reveals a total lack of substantial evidence to support them. Gruman v. State Dept. of Revenue, 379 So.2d 1313 (Fla. 1st DCA 1980). Therefore, the record does not support a basis for rejecting the ALJ's finding in paragraph 17 of the Recommended Order.

42. Petitioner's exception to the ALJ's ruling on Respondent's Motion In Limine does not provide a legal basis for rejecting the ALJ's findings of fact in the Recommended Order.

#### RULING ON PETITIONER'S EXCEPTIONS

A. Petitioner's exceptions to the ALJ's findings of fact in the Recommended Order are denied.

B. Petitioner's exceptions to the ALJ's conclusions of law in the Recommended Order are denied, with the exception that the School Board rejects the ALJ's conclusion of law contained in paragraph 114 of the Recommended Order that "Once the School Board has acted in approving charges, the Superintendent is not free to amend charges at will without Board approval" (citing Section 1012.22(1)(f), Florida Statutes).

Section 1012.22(1)(f), Florida Statutes, reads:

(f) Suspension, dismissal and return to annual contract status. The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher

or other members of the instructional staff may be discharged, removed, or returned to annual contract except as provided in this chapter.

Nowhere in Section 1012.22(1)(f) does it state that once a member of the instructional staff has been charged the Superintendent is not free to amend the charges based on newly discovered information during the administrative hearing process.

The ALJ's conclusion of law in paragraph 114 of the Recommended Order is contrary to rulings of other Administrative Law Judges in personnel termination cases brought by the Brevard County School Board and not supported by the language of Section 1012.22(1)(f).

The School Board finds that its conclusion of law is as or more reasonable than that of the ALJ.

The School Board's rejection of the ALJ's conclusion of law herein does not require a different outcome in this case because the ALJ found in paragraph 132 of the Recommended Order that Petitioner failed to prove the additional charge.

**IT IS THEREUPON ORDERED THAT:**

A. The Recommended Order is adopted as the Final Order of the School Board of Brevard County, except for the ALJ's conclusion of law in paragraph 114 of the Recommended Order which is rejected.

B. The School Board dismisses all charges against Respondent, James B. Wilkins.

C. Respondent, James B. Wilkins, is reinstated as a teacher with full back pay and benefits effective January 21, 2014.

DONE AND ORDERED this 21st day of January, 2014, in Viera, Brevard County, Florida.

THE SCHOOL BOARD OF  
BREVARD COUNTY, FLORIDA

By:   
KAREN HENDERSON, Chairman

Filed with the Clerk in the  
Office of the Superintendent  
this 21st day of January, 2014..

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the School Board of Brevard County, Florida and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, Fifth District, or with the District Court of Appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of this Final Order has been furnished by Electronic Mail to the persons named below on this 23 day of January, 2014.

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