

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNITED FACULTY OF FLORIDA,

Petitioner,

vs.

Case No. 13-2373RX

FLORIDA STATE BOARD OF
EDUCATION,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, an oral argument on pending legal issues was held in this case on September 11, 2013, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Anthony D. Demma, Esquire
Thomas W. Brooks, Esquire
Meyers, Brooks, Demma, and Blohm, P.A.
Post Office Box 1547
Tallahassee, Florida 32302

For Respondent: Mathew Carson, Esquire
David L. Jordan, Esquire
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 33399

STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 6A-14.0411 ("challenged rule") is an "invalid exercise of delegated legislative authority" for the reasons alleged in the Amended Petition to Invalidate Rule ("Amended Petition") filed by Petitioner.

PRELIMINARY STATEMENT

On June 20, 2013, United Faculty of Florida ("Petitioner" or "UFF") filed with Division of Administrative Hearings ("DOAH") a Petition to Invalidate Rule ("Petition") seeking the entry of a final order determining that Florida Administrative Code Rule 6A-14.0411, a rule provision of the Florida State Board of Education ("State Board" or "Respondent"), is an invalid exercise of delegated legislative authority within the meaning of section 120.52(8)(b), (c), and/or (d), Florida Statutes.

On July 1, 2013, the undersigned scheduled a hearing on the Petition for August 21, 2013. On that same date, the undersigned granted the Motion for Leave to Amend Petition and issued an Order of Pre-hearing Instructions, which directed the parties to, among other things, file a prehearing stipulation.

On July 23, 2013, the undersigned amended the notice of hearing and rescheduled the hearing for August 20, 2013.

On August 14, 2013, the parties filed their Prehearing Stipulation and a Joint Motion to Cancel Hearing and Set Post-hearing Submittal Schedule ("Motion").

On August 16, 2013, the undersigned conducted a hearing on the Motion, at which counsel for both parties appeared by telephone. During the hearing, the parties agreed that an evidentiary hearing would not be necessary because the grounds upon which Petitioner bases the contention that rule 6A-14.0411 is invalid do not raise any disputed issues of material fact but rather present questions of law. The parties presented differing positions concerning an appropriate briefing schedule. Concurring with the party's assessment, the undersigned directed that, in lieu of an evidentiary hearing, the parties would present their respective oral argument, which would serve as the final hearing, and file proposed final orders.

Then, pursuant to notice, an oral argument was held on September 11, 2013. Joint Exhibits 1 through 9 were offered and received into evidence.

At the conclusion of hearing, the undersigned announced, on the record, the following extended deadline, to which the parties had stipulated: proposed final orders to be filed no later than October 21, 2013.

The hearing was recorded but was not transcribed.

Petitioner and the State Board both timely filed their Proposed Final Orders on October 21, 2013. The undersigned has considered both parties' Proposed Final Orders, as well as the arguments presented at hearing in the preparation of this Final Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2012 Florida Statutes.

FINDINGS OF FACT

The Parties agreed to the following findings of facts in the Prehearing Stipulation:

1. Petitioner, United Faculty of Florida, is structurally a voluntary, unincorporated association. The UFF is the registered employee organization under section 447.305, and is the certified collective bargaining agent under section 447.307, for several bargaining units of public employees employed by the college district boards of trustees regulated by the challenged rule. UFF is legally obligated to represent the members of these bargaining units with respect to the determination of their wages, hours, and terms and conditions of employment pursuant to section 447.309(1).

2. The State Board is the chief implementing and coordinating body of public education in Florida, and is required to focus on high-level policy decisions. The State Board has the authority to adopt rules to implement the

provisions of law conferring duties upon it for the improvement of the state system to the extent compliant with the rulemaking authority standards set forth in the Florida Administrative Procedure Act.

3. The Florida College System comprises the Florida College institutions, which are each governed by a local Board of Trustees. Each Board of Trustees is responsible for cost-effective policy decisions appropriate to the Florida College System institution's mission, and the implementation of high-quality education programs within law and the rules of the State Board. Each Board of Trustees may adopt rules to supplement those prescribed by the State Board, and is specifically authorized to adopt rules and policies related to governance, personnel, conditions of employment, recruitment and selection, standards for performance and conduct, evaluation, promotion, assignment, demotion, and transfer, subject to the rulemaking authority standards set forth in the Florida Administrative Procedure Act.

4. A "continuing contract" is a contract between a Florida college and a member of the college's faculty which entitles the faculty member to continue in his or her respective full-time faculty position at the college without the necessity for annual nomination or reappointment. A faculty member who does not have a continuing contract has no assurance that he or she will be

employed by the college in the next academic year. A continuing contract is similar to tenure, and is viewed by some as a form of tenure.

5. A predecessor of the continuing contract rule has existed since at least 1979. The 1979 edition of the rule was amended in 2004; and the 2004 edition was not changed until April 23, 2013.

6. There were no changes to Florida Statutes enacted since the adoption of the 2004 edition of the rule which mandated an increase from three to five years of satisfactory service for college instructors to qualify for a continuing contract; mandate that colleges develop criteria to measure students' success; mandate the creation of full-time college faculty positions that are not eligible for continuing-contract status; or mention the creation of full-time college faculty positions that are not eligible for continuing contract status.

7. On April 27, 2012, the State Board published a Notice of Development of Rulemaking for the Rule, which scheduled a rule development workshop for June 5, 2012. The Notice stated that, "[t]he purpose of this rule development is to review the current process of issuing contracts to determine necessary changes. The effect will be a rule aligned with Florida Statutes."

8. On August 17, 2012, the State Board published a second Notice of Development of Rulemaking for the Rule. The second Notice stated, "[t]he purpose and effect of the rule change is to update the current process of issuing continuing contracts. The effect will be a rule aligned with Florida Statutes." The Notice scheduled a rule-development workshop for August 31, 2012, but that workshop was cancelled.

9. On November 13, 2012, the State Board published a third Notice of Development of Rulemaking, which included proposed language to amend the Rule. The third Notice stated: "[t]he purpose and effect of the rule change is to update the current process of issuing continuing contracts. The effect will be a rule aligned with Florida Statutes." The State board held a rule-development workshop on November 29, 2012, at Seminole State College of Florida.

10. On February 21, 2013, the State Board published a Notice of Proposed Rule to amend the Rule. The "Purpose and effect" section of Notice stated:

The purpose of the rule development is to revise the current process and criteria for issuing continuing contracts. In addition, criteria for post-award performance reviews are added, and grounds for termination of continuing contracts are revised to include failure to meet the post-award performance criteria. The effect will be a rule aligned with Florida Statutes.

11. The 2004 version of the rule did not have to be changed in 2013 in order to be aligned with any particular statute(s).

12. The State Board held a rule adoption hearing on March 19, 2013, in Tallahassee, Florida. At the March 19, 2013, State Board meeting, the State Board unanimously adopted the proposed amendments to the Rule. The amended version of the rule became effective on April 23, 2013.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 120.56(3), Florida Statutes (2013).

14. Section 120.56(1)(a) provides that "any person substantially affected by a rule may seek an administrative determination of its invalidity."

15. The parties stipulated that Petitioner is substantially affected by rule 6A-14.0411 and has associational standing to challenge the rule in this matter.

16. The challenged rule became effective before the Petition was filed. Hence, this proceeding is a challenge to an existing rule. In a challenge to an existing rule, the "petitioner has [the] burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of

delegated legislative authority as to the objections raised.”
See § 120.56(3) (a), Fla. Stat. An administrative law judge is without authority to declare an existing rule invalid on any other basis.^{1/}

17. Rule 6A-14.0411 states:

6A-14.0411 Employment Contracts for Full-Time Faculty.

(1) Each District Board of Trustees shall develop, maintain and distribute a policy governing the issuance of continuing contracts and other employment contracts for employees serving in a full-time faculty capacity as determined by the college. Such policy shall be consistent with this rule.

(2) In order to be eligible for a continuing contract, full-time faculty shall meet the following minimum requirements:

(a) Complete at least five (5) years of satisfactory service, based on the criteria set forth in subsection (3) below, in the same college, except as provided below, during a period not in excess of seven (7) years. In all cases, such service shall be continuous except for leave duly authorized and granted. The policy established by the district board of trustees may also consider satisfactory service in other institutions of higher learning for purposes of this section.

(b) Receive the recommendation of the president and approval by the board for a continuing contract based on successful performance of duties, demonstration of professional competence pursuant to policy adopted by the board in accordance with subsection (3) of this rule and the needs of the college.

(3) Each board of trustees, after receiving a recommendation from the president and ensuring that input has been received from the faculty, shall establish criteria which must be met by a full-time

faculty member before a continuing contract may be awarded.

(a) Such criteria, shall include:

1. Quantifiable measured effectiveness in the performance of faculty duties;
2. Continuing professional development;
3. Currency and scope of subject matter knowledge;
4. Relevant feedback from students, faculty and employers of students;
5. Service to the department, college, and community; and,
6. Criteria determined by the board under subsection (8) of this rule.

(b) Such criteria may include:

1. Educational qualifications, efficiency, compatability, student learning outcomes, character;
2. Capacity to meet the educational needs of the community;
3. The length of time the duties and responsibility of this position are expected to be needed; and
4. Such other criteria as shall be included by the board.

(4) Each board may establish full-time faculty positions that are not eligible for continuing contract. Faculty hired in these positions may be awarded multiple year contracts, annual contracts, or contracts of less than one (1) year. Notwithstanding any provision in Rule 6A-14.041, F.A.C., no multiple year contracts may exceed three (3) years. Each board shall adopt policies addressing such positions and contracts.

(5) Each employee issued a continuing contract shall be entitled to continue in his or her respective full-time faculty position at the college without the necessity for annual nomination or reappointment until the individual resigns from employment, except as provided in subsection (7) of this rule.

(6) In order to contribute to the continual growth and development of faculty, each board shall adopt policy requiring periodic post-award performance reviews for

faculty under continuing contract. Periodic reviews of continuing contract faculty shall use the criteria under subsection (3) of this rule.

(7) (a) Each district board of trustees may, upon recommendation of the president, terminate a full-time faculty employee under continuing contract, or return the employee to an annual contract, for failure to meet post-award performance criteria, or, for cause in accordance with college policies and procedures upon recommendation by the president and approval by the board. The president or designee shall notify the full-time faculty employee in writing of the recommendation and shall afford the full-time faculty employee the right to formally challenge the action in accordance with the policies and procedures of the college. As an alternative to the hearing rights provided by college policies and procedures, the employee may request an administrative hearing in accordance with Chapter 120, F.S., by filing a petition with the board within twenty-one (21) days of receipt of the recommendation of the president.

(b) Upon recommendation of the president, the board may terminate a full-time faculty employee under continuing contract upon consolidation, reduction, or elimination of an institution's program, or restriction of the required duties of a position by the board. The board shall determine on the basis of the criteria set forth in subsections (2) and (3) of this rule, which full-time faculty employees to retain on a continuing contract and which shall be dismissed or returned to an annual contract. The decision of the board shall not be controlled by any previous contractual relationship. In the evaluation of these factors, the decision of the board shall be final.

(8) In addition, each district board of trustees, after receiving a recommendation from the president and ensuring that input has been received from the faculty, shall

develop appropriate criteria to measure student success, which may include the following factors, as appropriate:

- (a) Demonstrated or documented learning gains;
- (b) Course completion rates;
- (c) Graduation and/or certification rates;
- (d) Continued success in subsequent and additional courses or educational pursuits;
- (e) Job placements in the appropriate field; and,
- (f) Other criteria as may be included in the policy approved by the board.

Such criteria shall be used, as appropriate, for the particular field of learning and the individual faculty member, as consideration in determining whether to grant a continuing contract pursuant to subsection (3) above. Such factors shall also be used, as relevant and appropriate to individual faculty members, in the review set forth in subsection (6) above.

(9) Any full-time faculty employee holding a continuing contract who accepts an offer of annual employment in a capacity other than that in which the continuing contract was awarded may be granted an administrative leave of absence pursuant to the college's administrative rules.

(10) In order to provide for a transition period for full-time faculty in the process of being considered for continuing contracts, each board may provide an exemption from the time requirements set forth in paragraph (2)(a) of this rule for full-time faculty being considered for an award of a continuing contract during the 2012-13, 2013-14 and the 2014-15 fiscal years. In addition, each board may provide credit for prior satisfactory years of service for purposes of determining eligibility for a continuing contract. In order to provide adequate time for boards of trustees to develop the criteria described in this Rule, the criteria set forth in

subsections (3) and (6) of this rule shall apply beginning in the 2013-14 fiscal year.

18. The starting point for determining whether an existing rule is invalid is section 120.52(8), in which the legislature defined the term "invalid exercise of delegated legislative authority." Pertinent to this case are the following provisions Petitioner alleges were deficiencies in the Amended Petition:

A proposed or existing rule is an invalid exercise of delegated legislative authority of any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

§ 120.52(8), Fla. Stat.

19. Petitioner voluntarily dismissed the challenge to 120.52(8)(e) in the Prehearing Stipulation, section F, paragraph 5.

20. As used in section 120.52(8), the term "rulemaking authority means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term

'rule.'" § 120.52(17), Fla. Stat. The term "law implemented" is defined to mean "the language of the enabling statute being carried out or interpreted by an agency through rulemaking." § 120.52(9), Fla. Stat.

21. Also included in section 120.52(8), is the modern Administrative Procedure Act ("APA") concluding paragraph commonly called the "flush-left paragraph" -- in which the legislature expressed a clear intent to restrict agency rulemaking authority:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

The legislature enacted the very same restrictions on rulemaking authority in section 120.536(1).

22. Rule 6A-14.0411 identifies as specific authority sections 1001.02(1), (6), 1012.83, and 1012.855.

23. Section 1001.02 states:

1001.02 General powers of State Board of Education.—

(1) The State Board of Education is the chief implementing and coordinating body of public education in Florida except for the State University System, and it shall focus on high-level policy decisions. It has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it for the improvement of the state system of K-20 public education except for the State University System. Except as otherwise provided herein, it may, as it finds appropriate, delegate its general powers to the Commissioner of Education or the directors of the divisions of the department.

* * *

(6) The State Board of Education shall prescribe minimum standards, definitions, and guidelines for Florida College System institutions that will ensure the quality of education, coordination among the Florida College System institutions and state universities, and efficient progress toward accomplishing the Florida College System institution mission. At a minimum, these rules must address:

(a) Personnel.

(b) Contracting.

(c) Program offerings and classification, including college-level communication and computation skills associated with successful performance in college and with tests and other assessment procedures that measure student achievement of those skills. The performance measures must provide that students moving from one level of education to the next acquire the necessary competencies for that level.

(d) Provisions for curriculum development, graduation requirements, college calendars,

and program service areas. These provisions must include rules that:

1. Provide for the award of an associate in arts degree to a student who successfully completes 60 semester credit hours at the Florida College System institution.
2. Require all of the credits accepted for the associate in arts degree to be in the statewide course numbering system as credits toward a baccalaureate degree offered by a state university or a Florida College System institution.
3. Beginning with students initially entering a Florida College System institution in 2014-2015 and thereafter, require no more than 30 semester credit hours in general education courses in the subject areas of communication, mathematics, social sciences, humanities, and natural sciences.

The rules should encourage Florida College System institutions to enter into agreements with state universities that allow Florida College System institution students to complete upper-division-level courses at a Florida College System institution. An agreement may provide for concurrent enrollment at the Florida College System institution and the state university and may authorize the Florida College System institution to offer an upper-division-level course or distance learning.

- (e) Student admissions, conduct and discipline, nonclassroom activities, and fees.
- (f) Budgeting.
- (g) Business and financial matters.
- (h) Student services.
- (i) Reports, surveys, and information systems, including forms and dates of submission.

Section 1012.83 states:

1012.83 Contracts with administrative and instructional staff.—

(1) Each person employed in an administrative or instructional capacity in a Florida College System institution shall be entitled to a contract as provided by rules of the State Board of Education.

(2) Each contract or employment agreement, or renewal or renegotiation of an existing contract or employment agreement, containing a provision for severance pay with an officer, agent, employee, or contractor must include the provisions required in s. 215.425.

Section 1012.855 states:

1012.855 Employment of Florida College System institution personnel; discrimination in granting salary prohibited.—

(1)(a) Employment of all personnel in each Florida College System institution shall be upon recommendation of the president, subject to rejection for cause by the Florida College System institution board of trustees; to the rules of the State Board of Education relative to certification, tenure, leaves of absence of all types, including sabbaticals, remuneration, and such other conditions of employment as the State Board of Education deems necessary and proper; and to policies of the Florida College System institution board of trustees not inconsistent with law.

(b) Any internal auditor employed by a Florida College System institution shall be hired by the Florida College System institution board of trustees and shall report directly to the board.

(2) Each Florida College System institution board of trustees shall undertake a program to eradicate any discrimination on the basis of gender, race, or physical handicap in the granting of salaries to employees.

24. After the Petition to Invalidate Rule was filed on June 20, 2013, the State Board made a technical change on

August 15, 2013,^{2/} and the "Law Implemented" sections of the challenged rule expanded and became sections 1001.64(4), (18), 1012.83, and 1012.855.

25. Section 1001.64 provides:

* * *

(4) (a) The board of trustees, after considering recommendations submitted by the Florida College System institution president, may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it. These rules may supplement those prescribed by the State Board of Education if they will contribute to the more orderly and efficient operation of Florida College System institutions.

(b) Each board of trustees is specifically authorized to adopt rules, procedures, and policies, consistent with law and rules of the State Board of Education, related to its mission and responsibilities as set forth in s. 1004.65, its governance, personnel, budget and finance, administration, programs, curriculum and instruction, buildings and grounds, travel and purchasing, technology, students, contracts and grants, or college property.

* * *

(18) Each board of trustees shall establish the personnel program for all employees of the Florida College System institution, including the president, pursuant to the provisions of chapter 1012 and rules and guidelines of the State Board of Education, including: compensation and other conditions of employment; recruitment and selection; nonreappointment; standards for performance and conduct; evaluation; benefits and hours of work; leave policies; recognition;

inventions and work products; travel;
learning opportunities; exchange programs;
academic freedom and responsibility;
promotion; assignment; demotion; transfer;
ethical obligations and conflict of
interest; restrictive covenants;
disciplinary actions; complaints; appeals
and grievance procedures; and separation and
termination from employment.

26. The undersigned recognizes that the strategy of the Petitioner in this matter could have been dramatically different had the technical change that added section 1001.64 as law implemented been in place when the rule was challenged in June 2013. However, rule 1-1.012 fails to prohibit such a technical change after a rule has been challenged.

27. In this proceeding, the Parties stipulated that the rule comports with chapter 120 processes and that there have been no changes to Florida Statutes enacted since the adoption of the 2004 edition of the rule. Additionally, the parties also stipulated that the 2004 version of the rule did not have to be changed in 2013. In this case, even though the enabling statutes were not amended, no demonstration that the State Board lacked authority to amend the rule at the time it did was proven.

Whether the State Board Exceeded Its Authority

28. The First District set the standard for determining if a rule is authorized or not in Southwest Florida Water Management District v. Save the Manatee Club, Inc. 773 So. 2d

594 (Fla. 1st DCA 2000) (cases cited therein). In Save the Manatee, the court affirmed a decision invalidating portions of rule 40D-4.051, because the exemptions from permitting requirements created within the rule had no specific statutory authority. Ultimately, the First District determined that the question to be answered is "whether the statute contains a specific grant of authority for the rule, not whether the grant is specific enough. Either the enabling statute authorizes the rule at issue or it does not." Id. at 599.

29. The Legislature set up a structure for personnel rules to be promulgated in the college system where the State Board, the high-level policy decision maker, and Board of Trustees are both mandated separate duties to establish rules regarding personnel.

30. Even though section 1001.02(6) might seem, on first reading, to be a general grant of authority, it is a specific grant of rulemaking authority as required by section 120.52(8), because it explicitly directs that the State Board "shall prescribe minimum standards, definitions, and guidelines for Florida College System institutions" by rule. The statute further sets the categories that at a minimum the rules shall address, including personnel, contracting, and program offerings. Such a legislative directive requires the State Board to establish the guidelines allowed for personnel and

contracting. If the legislature had intended that the rules for personnel and contracting be detailed, "minimum" would not have been the adjective used in the statute. Therefore, section 1001.02(6) provides rulemaking authority for the challenged rule by meeting the "specific grant of authority" test set forth in Save the Manatee, supra.

31. Respondent agrees in its Proposed Final Order paragraph 36 that section 1001.02(1) provides a grant of general rulemaking authority to the State Board.

32. Petitioner's contention that sections 1012.83 and 1012.855 are not sources of specific authority for the State Board to promulgate the challenged rule is persuasive. Section 1012.83 fails to impose a duty on the State Board and simply requires the Florida College System institutions employ all administrative and instructional employees in the context of contractual relationships. Section 1012.855 also does not delineate any power to the State Board but only subjects employment to rules of the State Board. Accordingly, neither section 1012.83 nor 1012.855 is a specific grant of rulemaking authority within the meaning of the APA for the challenged rule.

33. Petitioner further maintains that rule 6A-14.0411(9), which grants colleges the authority to provide an administrative leave of absence to a continuing contract instructor who accepts annual employment in another capacity exceeds the State Board's

grant of rulemaking authority or improperly delegates authority not possessed by the State Board to the Board of Trustees. The undersigned rejects such a contention in that section 1001.02(6) provides the State Board adequate authority to promulgate personnel rules and section 1012.855(1)(a) provides a specific grant of rulemaking authority by authorizing the State Board to adopt rules for personnel relative to "leave of absence of all types." The Board of Trustees' responsibilities are to supplement the State Board's rules regarding "leave policies." Therefore, the challenged rule is not an improper delegation but a minimum standard for the Board of Trustees to follow regarding leave.

34. Petitioner also challenges rule 6A-14.0411(10), which authorizes the individual Board of Trustees to provide an exemption to time requirements in subsection(2) for certain tenure track faculty, and contends the rule improperly delegates authority not possessed by the State Board to the Board of Trustees. Petitioner's contention is unsubstantiated since establishing the personnel rule as mandated by section 1001.02(6)(a) requires the State Board to delineate how the rule is implemented. Implementation would include acknowledging the start up for the time requirements as well as timeline for it.

Whether the challenged Rule Lacks Adequate Enabling Legislation

35. Petitioner also maintains that none of the statutory provisions cited as law implemented are adequate enabling legislation to support the challenged rule. The starting point for determining the applicability of section 1001.64 is the title, "Florida College System institution board of trustees; powers and duties," which sets the parameters for the statute and dedicates the section to the College System Institutions, not the State Board. Additionally, all three sections cited by the State Board as law implemented, section 1001.64(4)(a), (4)(b), and (18), each expressly identify responsibilities for the Board of Trustees, not the State Board. Specifically, section 1001.64(4)(a) states "The board of trustees . . ."; 1001.64(b) states "Each board of trustees is specifically authorized to adopt rules . . ."; and 1001.64(18) states "Each board of trustees shall establish the personnel program for all employees of the Florida College System institution." It is clear that the State Board neither has specific powers and duties conferred to it regarding continuing contracts in section 1001.64 nor has any enabling language within the statute to set parameters for college instructors continuing contracts. Therefore, it is concluded that there is simply no language in section 1001.64 to make it a valid enabling statute for the challenged rule.

36. Contrary to the position of the Petitioner, sections 1012.83 and 1012.855 both contain adequate legislative guidance to constitute enabling law to implement or interpret by the State Board. Section 1012.83 provides direction for the State Board to structure both administrative and instructional contracts. Section 1012.855 provides guidance "relative to certification, tenure, leaves of absence of all types, including sabbaticals, remuneration, and such other conditions of employment as the State Board of Education deems necessary and proper," which allows the challenged rule to set parameters for employment consistent with the specific authority in section 1001.02(6).

37. Petitioner's assertion that rule 6A-14.0411(8) enlarges and/or modifies or contravenes the provisions of law implemented, impermissibly delegates authority to the Boards of Trustees, and/or violates the requirements of section 120.52(8)(d) is unfounded. Rule 6A-14.0411(8) requires each Board of Trustees to develop appropriate measures of student success, which will be used as part of the criteria for granting continuing contracts and periodic performance reviews. Rule promulgation for evaluations is a responsibility of the Board of Trustees pursuant to section 1001.64(18). However, the State Board is mandated by its specific authority, section 1001.02(6)(c), to establish a rule to address program offerings

"with tests and other assessment procedures that measure student achievement." In order to measure progression, criteria to measure student success would be within the parameters of the specific authority and the challenged rule is the appropriate tool to make sure each student is achieving. Since the State Board and Board of Trustees have separate legislative responsibilities, no impermissible delegated authority exists. Additionally, sections 1012.83 and 1012.855 provide valid law implemented.

Is the Challenged Rule Vague

38. Petitioner further contends in Prehearing Stipulation section H paragraphs 2, 3, 4, 5, 6, and 9 that the challenged rule is vague. It has already been established that the State Board prescribes minimum standard personnel rules that each Board of Trustees supplements with its individual promulgated rules. The legislature provided broad powers to the State Board as a policy maker to make minimum standard rules. Furthermore, the legislature provided detailed duties to the Board of Trustees that make the Board of Trustees both subordinate and independent of the State Board. Specifically, the legislature mandated the Board of Trustees promulgate the following personnel program rules with a list of specific categories in section 1001.64(18): "compensation and other conditions of employment; recruitment and selection; nonreappointment;

standards for performance and conduct; evaluation; benefits and hours of work; leave policies; recognition; inventions and work products; travel; learning opportunities; exchange programs; academic freedom and responsibility; promotion; assignment; demotion; transfer; ethical obligations and conflict of interest; restrictive covenants; disciplinary actions; complaints; appeals and grievance procedures; and separation and termination from employment."

39. Even though, section 1001.64 is not the law implemented in this proceeding and the Board of Trustees' responsibilities are not at issue, section 1001.64 helps define the parameters for the State Board's rulemaking authority as opposed to the Board of Trustees. Therefore, the following references in the challenged rule: "optional criteria" for policies; "such other criteria as shall be included by the Board"; "other criteria as may be included in the policy approved by the board"; and "each board shall adopt a policy requiring periodic post-award reviews" all establish adequate standards for each Board of Trustees subordinatedly and independently to promulgate rules regarding the aforementioned criteria in the challenged rule for personnel and contracting since each Board of Trustees have further specific direction under section 1001.64(18). Therefore, the challenged sections are not vague in violation of section 120.52(8)(d).

40. For the reasons stated, the State Board has adequate rulemaking authority and has complied with its statutory directive under section 1001.02(6) to focus on high-level policy decisions for personnel and contracting guidelines. The challenged rule in this matter is not vague in that it sets the required minimum standards to be considered by each Board of Trustees in promulgating personnel program rules for its institution. Accordingly, because Petitioner has failed to show that rule 6A-14.0411 constitutes an "invalid exercise of delegated legislative authority," within the meaning of section 120.52(8)(b), (c) and (d), as alleged, the rule challenge cannot be sustained.

RECOMMENDATION

Based on the foregoing, it is therefore

ORDERED THAT:

The Petition filed by Petitioner pursuant to section 120.56(3) seeking an administrative determination that Florida Administrative Code Rule 6A-14.0411 is an "invalid exercise of delegated legislative authority," as defined in section 120.52(8) is hereby DISMISSED.

DONE AND ORDERED this 23rd day of December, 2013, in
Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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 23rd day of December, 2013.

ENDNOTES

^{1/} For example, an administrative law judge may not invalidate an existing rule simply because, in the judge's opinion, it does not represent the wisest or best policy choice. See Bd of Trs. Of the Int. Imp. Trust Fund v. Levy, 656 So 2d 1359, 1364 (Fla. 1st DCA 1995) ("The issue before the hearing officer in this [rule challenge] case was not whether the Trustees made the best choice in limiting the lengths of the docks within the preserve, or whether their choice is one that the appellee finds desirable for his particular location.").

^{2/} Pursuant to rule 1-1.012(4), by letter dated August 15, 2013, the State Board requested the Florida Department of State, Bureau of Administrative Code, add sections 1001.64(4) and (18) as the law implemented for rule 6A-14.0411.

Rule 1-1.012(4) provides the following:

The rulemaking authority, law implemented, and history notes shall be corrected or modified by writing a letter to the Administrative Code and Weekly Section. Such a change does not require notification in the Florida Administrative Weekly.

COPIES FURNISHED:

Anthony D. Demma, Esquire
Meyer, Brooks, Demma and Blohm, P.A.
Post Office Box 1547
131 North Gadsden Street
Tallahassee, Florida 32302

David L. Jordan, Esquire
Department of Education
Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Gary Chartrand, Chairman
State Board of Education
Turlington Building, Suite 1520
325 West Gaines Street
Tallahassee, Florida 32399-0400

Pam Stewart
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Mr. Ken Plante, Coordinator
Joint Administrative Procedure Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Liz Cloud, Program Administrator
Administrative Code
Department of State
R.A. Gray Building, Suite 101
Tallahassee, Florida 32399
(eServed)

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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.