BEFORE THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

ST. LUCIE COUNTY SCHOOL BOARD,
Petitioner,

v. DOAH Case No. 13-4956TTS

JAMES DAILEY,
Respondent.

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FINAL ORDER

THIS CAUSE came before The School Board of St. Lucie County, Florida ("School Board"), as governing body of the School District of St. Lucie County, Florida ("District"), for final agency action in accordance with Section 120.57(1)(k) and (1), Florida Statutes.

Appearances

For Petitioner: David Miklas, Esquire
Leslie Jennings Beuttell, Esquire
Richeson & Coke, P.A.
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Post Office Box 4048
Fort Pierce, Florida 34948-4048

For Respondent: Nicholas Anthony Caggia, Esquire
Law Office of Thomas L. Johnson, P.A.
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Introduction

The Respondent James Dailey is a teacher with a professional service contract employed by the Petitioner St. Lucie County School Board. In October 2013, the Petitioner, by and through the Superintendent of Schools, advised the Respondent that she planned to recommend placement on administrative leave without pay effective November 20, 2013, for excessive absenteeism. At its meeting held November 19, 2013, the School Board accepted the Superintendent's recommendation

and placed the Respondent on administrative leave without pay for the remainder of the 2013-2014 school year, effective November 20, 2013.

The Respondent requested a formal administrative hearing to contest the action. On December 19, 2013, the Superintendent issued a Statement of Charges asserting that the Respondent violated School Board policy and the Code of Ethics of the Education Profession in Florida by behavior and absenteeism that disrupted his students' learning environment. The matter was the subject of a hearing held on March 26 and 27, 2014, before an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings of the Florida Department of Administration. The hearing was conducted by videoconference with the ALJ in Tallahassee and the parties and witnesses in St. Lucie County.

On June 12, 2014, the ALJ entered a Recommended Order concluding that the Respondent's administrative leave without pay was in fact a "suspension" without pay that could only be imposed for just cause. R.O. pp. 24-25, ¶ 79. The ALJ then found that the Respondent:

- Engaged in a pattern of excessive and chronic unexcused absenteeism during the 2012-2013 and 2013-2014 school years that resulted in a variety of terminable offenses as described in School Board Policy 6.301(3)(b) (R.O. p. 25, ¶ 80);
- Is guilty of incompetency, as defined in Fla. Admin. Code Rule 6A-5.056(3)(a)5 (R.O. p. 25, ¶ 81), by virtue of his excessive absenteeism;
- Is guilty of gross insubordination by virtue of his failure to perform required duties, excessive absenteeism, and failure to return to work on a consistent and regular basis (R.O. p. 25, ¶ 82);

- Engaged in willful neglect of duty by failing regularly to report to work or properly to request time off from work or make arrangements to have lesson plans available for substitute teachers (R.O. p. 26, ¶ 83); and
- Engaged in misconduct in office by virtue of his violation of School Board policies and disrupting his students' learning environment by his chronic absenteeism (R.O. p. 26, ¶ 84).

The ALJ further determined that based upon such conduct, just cause existed to place the Respondent on leave without pay from November 20, 2013, through the end of the 2013-2014 school year in lieu of termination. R.O. p. 28, ¶ 92. The ALJ recommended that the School Board enter a final order upholding what the ALJ had determined to be the Respondent's "suspension" without pay from November 20, 2013, through the end of the 2013-2014 school year; denying back pay for the full period of the "suspension"; and reinstating the Respondent's employment as a teacher at the start of the 2014-2015 school year. R.O. p. 28.

The Respondent filed written exceptions to the Recommended Order ("Respondent's Exceptions") on July 14, 2014. *See* Section 120.57(1)(k), Fla. Stat.; Fla. Admin. Code Rule 28-106.217(1). The Petitioner filed a response to the exceptions ("Petitioner's Response") on July 24, 2014. *See* Fla. Admin. Code Rule 28-106.217(3). Both parties have also submitted proposed forms of final order.

The School Board met on August 19 and September 9, 2014, in Fort Pierce, St. Lucie County, Florida, to take final agency action. At the hearing on August 19, 2014, argument was presented by counsel for each of the parties. Upon consideration of the Recommended Order, the Respondent's Exceptions, the Petitioner's Response, the proposed forms of final order, and argument of

counsel to the parties, and upon a review of the complete record in this proceeding, the School Board finds and determines as follows:

Rulings on Exceptions

An agency may reject or modify an ALJ's finding of fact only if the finding is not supported by competent, substantial evidence, or the proceedings on which the finding was based did not comply with essential requirements of law. *See* Section 120.57(1)(1), Fla. Stat.; *Abrams v. Seminole County School Board*, 73 So. 3d 285, 294 (Fla. 5th D.C.A. 2011); *Schrimsher v. School Board of Palm Beach County*, 694 So. 2d 856, 860 (Fla. 4th D.C.A. 1997). The agency has no authority to reweigh conflicting evidence. *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, or the agency may reject or modify the conclusions of law over which it has substantive jurisdiction. *See* Section 120.57(1)(1), Fla. Stat. *See also State Contracting and Engineering Corporation v. Department of Transportation*, 709 So. 2d 607 (Fla. 1st D.C.A. 1998) (an agency is not required to defer to the ALJ on issues of law). The agency may accept the recommended penalty in a recommended order, but may not reduce or increase the penalty without review of the complete record and without stating with particularity its reasons in the final order, by citing to the record in justifying its action. *See* Section 120.57(1)(1), Fla. Stat.

The Respondent's Exceptions will be addressed in order.

Respondent's Exception No. 1. The Respondent excepts to the findings of fact in Paragraphs 53, 75, 78, and 79 of the Recommended Order, and to the conclusion of law in Paragraph 89, that he received all of the process to which he was entitled. *See* Respondent's Exceptions pp. 4-6. Noting that a non-probationary public employee has both pre-termination and post-termination due process rights under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d

494 [23 Ed. Law Rep. [473]] (1985), the Respondent contends that the determinations in the cited paragraphs of the Recommended Order are inconsistent, and that he did not receive all of the process that he was due under *Loudermill*. *Id.*

The Petitioner counters that the Respondent was afforded all of the due process to which he was entitled. *See* Petitioner's Response at pp. 2-4. Specifically, the Petitioner notes that, prior to the administrative leave without pay being presented for Board determination, the Respondent was offered an opportunity to present reasons why such action should not be taken, and following the administrative leave without pay he was provided a formal administrative hearing before a DOAH ALJ to review that action. *Id.* These pre- and post-administrative leave without pay processes, the Petitioner asserts, satisfy the *Loudermill* requirements. *Id.*

The Respondent's Exception No. 1 is rejected as the findings of fact in Paragraphs 53, 75, 78, and 79 of the Recommended Order are supported by competent substantial evidence, and the conclusions of law in Paragraph 89 are supported by competent legal authority.

Respondent's Exception No. 2. The Respondent excepts to the findings of fact in Paragraphs 7, 43, and 81 of the Recommended Order, and to the conclusion of law in Paragraph 89, that his absences caused harm to the students at his school. *See* Respondent's Exceptions pp. 6-8. Asserting that there is insufficient evidence to support such a finding, the Respondent maintains that:

- Testimony reflecting that a student had sought transfer to another classroom, as found in Paragraph 7, consisted entirely of hearsay.
- The ALJ relied upon limited evidence in making her findings in Paragraph 43 regarding the adverse effect of the Respondent's absences on his students, and disregarded the absence of supporting evidence.

- The Petitioner presented no evidence supporting the finding in Paragraph 81 (that the Respondent was guilty of incompetency), and the conclusions in Paragraph 89 (*inter alia*, that an essential function of the Respondent's position was regular attendance, and the District did everything possible to assist the Respondent with his need for time off and to return him to the classroom).

*Id.*

In response, the Petitioner contends that the Respondent has failed to identify specifically the portion of the Recommended Order that he disputes, or the legal basis for his exception, in contravention of Fla. Admin. Code Rule 28-106.217. *See* Petitioner's Response pp. 4-6. The Petitioner also states that, as to each of the alleged evidentiary insufficiencies presented by the Respondent, the record contains testimony and other evidence supporting the ALJ's findings. *Id.*

"Evidentiary matters such as credibility of witnesses and resolution of conflicting evidence are the prerogative the ALJ as the finder of fact in administrative proceedings." *Reily Enterprises, LLC v. Florida Department of Environmental Protection*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008). "In a fact-driven case such as this, where an employee's conduct is at issue, great weight is given to the findings of the [ALJ], who has the opportunity to hear the witnesses' testimony and evaluate their credibility." *Resnick v. Flagler County School Board*, 46 So. 3d 1110, 1112 (Fla. 5th D.C.A. 2010). *See also Siewert v. Casey*, 80 So. 3d 1114, 1116 (Fla. 4th D.C.A. 2012) (the finder of fact is to weigh the credibility of witnesses). "If there is competent substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, or make new findings." *Rogers v. Dept. of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005).

The Respondent's Exception No. 2 is rejected as the findings of fact in Paragraphs 7, 43, and 81 of the Recommended Order are supported by competent substantial evidence, and the conclusions of law in Paragraph 89 are supported by competent legal authority.

Respondent's Exception No. 3. The Respondent excepts to the findings of fact in Paragraphs 6, 16, and 18 of the Recommended Order that the administrators at his school and at the District attempted to engage him in an "interactive process" under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"). *See* 29 C.F.R. § 1630.2(o)(3). *See* Respondent's Exceptions pp. 8-11. Arguing that the evidence presented does not support such a conclusion, the Respondent contends that:

- The record does not support the finding in Paragraph 6 that school and District administrators sought to explore possible accommodations for the Respondent.
- A reasonable person could not find that the process initiated by the District and described in Paragraph 16 was "interactive" under the ADA.
- The Petitioner presented nothing demonstrating that the District's inquiries to the Respondent's physicians and described in Paragraph 18 were made pursuant to the ADA.

The Respondent also contends that the "administrative leave without pay" imposed on the Respondent was not an accommodation under the ADA but rather a disciplinary sanction, as determined by the ALJ in Paragraphs 75 and 78 of the Recommended Order. *Id.*

In reply, the Petitioner asserts that there is competent substantial evidence to support the ALJ's findings in each of the paragraphs challenged by the Respondent, citing testimony, stipulated facts, and documents from the hearing record. *See* Petitioner's Response pp. 6-9.

The Respondent's Exception No. 3 is rejected as the findings of fact in Paragraphs 6, 16, and 18 of the Recommended Order are supported by competent substantial evidence.

Respondent's Exception No. 4. The Respondent excepts to the findings of fact in Paragraphs 16, 80, 82, 83, and 84 of the Recommended Order, and to the conclusion of law in Paragraph 89, insisting that if the Petitioner was attempting to engage the Respondent in an "interactive process" under the ADA and then disciplined him for the disability that initiated the process, then the Petitioner engaged in discrimination by undertaking such disciplinary action. *See* Respondent's Exceptions pp. 11-13. Maintaining that the Petitioner characterized the "administrative leave without pay" as an accommodation while the ALJ found that such leave was essentially a suspension without pay warranted by excessive absenteeism, the Respondent argues that any suspension based on use of an accommodation would violate the ADA. *Id.* The Respondent also contends (*id.*) that because District administrators engaged in the "interactive process" under the ADA, then took adverse employment action against him, and because there was a causal connection between his absences and his suspension, the Petitioner is guilty of prohibited retaliation, citing *Evans v. Kansas City, Missouri School District*, 65 F.3d 98 [103 Ed. Law Rep. [76]] (8th Cir. 1995).

The Petitioner counters that neither the Respondent nor his doctor identified the Respondent as a qualified individual with a disability, and neither provided information demonstrating that the Respondent was disabled. *See* Petitioner's Response pp. 9-11. The Petitioner also points out that the District attempted to discuss with the Respondent his taking leave to avoid absences, but he failed to do so until placed on leave without pay, and that the District subsequently took no disciplinary action against the Respondent. *Id.* The Petitioner further notes (*id.*) that in *Evans*, the court held that "[a]n employee is not protected when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals." 65 F.3d at 102,

quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989). *See also Grant v. School Board of Miami-Dade County*, 2007 WL 3286762 *3 (S.D. Fla.). *Cf. Dulaney v. Miami-Dade County*, 785 F.Supp.2d 1343 (S.D. Fla. 2011) (no case for disability discrimination under ADA where reason for termination is job abandonment).

The Respondent's Exception No. 4 is rejected as the findings of fact in Paragraphs 16, 80, 82, 83, and 84 of the Recommended Order are supported by competent substantial evidence, and the conclusions of law in Paragraph 89 are supported by competent legal authority.

Respondent's Exception No. 5. The Respondent excepts to the findings of fact in Paragraphs 20 and 21 of the Recommended Order. Although the position stated in Exception No. 5 is not entirely clear, the Respondent appears to assert that no evidence supports the ALJ's finding that (as summarized by the Respondent) "the Petitioner engaged in two separate processes regarding the elimination of mold in different parts of" his school. *See* Respondent's Exceptions pp. 13-15. The Petitioner replies that the Respondent's Exception No. 5 is insufficient for failing to identify its legal basis, or to include citations to the record. *See* Petitioner's Response p. 11.

The Respondent's Exception No. 5 is rejected as the findings of fact in Paragraphs 20 and 21 of the Recommended Order are supported by competent substantial evidence.

## Findings of Fact

The School Board adopts the findings of fact set forth in Paragraphs 1 through 84 of the Recommended Order.

## Conclusions of Law

The School Board adopts the conclusions of law set forth in paragraphs 85 through 92 of the Recommended Order.

Determination

Although concluding that the Respondent's administrative leave without pay was in fact a "suspension" without pay that could only be imposed for just cause (R.O. pp. 24-25, ¶ 79), the ALJ also found that just cause existed to place the Respondent on leave without pay in lieu of termination (R.O. p. 28, ¶ 92). The School Board adopts the Recommendation set forth in the Recommended Order, and finds just cause to uphold action that the ALJ determined to be the Respondent's "suspension" (as an equivalent to administrative leave) without pay from November 20, 2013, through the end of the 2013-2014 school year; to deny the Respondent back pay for the full period of the "suspension"; and to reinstate the Respondent's employment as a teacher as of the beginning of the 2014-2015 school year.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Respondent James Dailey be, and he is hereby, suspended without pay from his employment with The School Board of St. Lucie County, Florida, for the period November 20, 2013, through the end of the 2013-2014 school year; that the Respondent shall not receive back pay for the period of the suspension; and that the Respondent shall be reinstated to his employment as a teacher as of the beginning of the 2014-2015 school year. This Final Order shall take effect upon filing with the Superintendent of Schools as Secretary of THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA.

A copy of this Final Order shall be provided to the Division of Administrative Hearings within 15 days of filing, as set forth in Section 120.57(1)(m), Fla. Stat.

* * *

DONE AND ORDERED this 9th day of September, 2014.

THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

By: Deborah A Hawley
DEBORAH A. HAWLEY, Chair

Attest:
GENELLE ZORATTI YOST, Superintendent and Ex-Officio Secretary to The School Board of St. Lucie County, Florida

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NOTICE OF RIGHT TO APPEAL

Any party adversely affected by this Final Order may seek judicial review pursuant to Section 120.68, Fla. Stat., and Fla. R. App. P. 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Fla. R. App. P. 9.110, with the Superintendent as Ex-Officio Secretary of The School Board of St. Lucie County, Florida, 4204 Okeechobee Road, Fort Pierce, Florida 34947. A second copy of the Notice of Appeal, together with the applicable filing fee, must be filed with the appropriate District Court of Appeal.

Attachment: Recommended Order

Copies furnished to:

Nicholas Anthony Caggia, Esquire
David Miklas, Esquire
Daniel B. Harrell, Esquire
Clerk, Division of Administrative Hearings