BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BREVARD COUNTY SCHOOL BOARD, Petitioner, vs. **EMILY M. RANDALL,** Respondent.	Board Agenda Item No. F-37 March 15, 2016 DOAH Case No. 15-0051

FINAL ORDER

This case was referred to the Division of Administrative Hearing ("DOAH"). The assigned Administrative Law Judge ("ALJ") submitted a Recommended Order ("RO") to the Agency, Brevard County School Board ("School Board") finding that Respondent committed the following acts of misconduct; (1) serious violations of School Board policy; (2) willful absences without leave; (3) gross insubordination; (4) violations of the Principles of Professional Conduct for the Education Profession in Florida; and (5) appearing for a disciplinary meeting while intoxicated.

Based upon these findings the ALJ concluded that the School Board had just cause to discipline Respondent and recommended that Respondent's employment with the Brevard County School District be suspended until such time as Respondent can show that she has successfully completed continuing educational courses related to the ethical standards expected of her, that her salary be frozen at

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the level of compensation for the 2013-2014 school year, that she does not receive any back pay or other compensation for the duration of her suspension, and that she be placed on a professional improvement plan to assure monitoring and compliance with all requirements of her job.

Timely exceptions to the RO were filed by Petitioner and Respondent. Timely responses to the exceptions were also filed by Petitioner and 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)(l), 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.

RESPONDENT'S EXCEPTIONS

Respondent excepts in whole or in part to the findings of fact of the ALJ in paragraphs 6, 10, 11, 15, 16, 17, 18, 19, 20, 39, 40, 47, 48 and 50 of the RO.

Respondent excepts to the ALJ's conclusions of law in paragraphs 60, 61, 62, 63, 64 and 65 of the RO.

Respondent also excepts to the ALJ's recommended penalty on pages 22 and 23 of the RO.

PETITIONER'S EXCEPTION

Petitioner excepts to the ALJ's recommended penalty on pages 22 and 23 of the RO.

I. EXCEPTIONS OF RESPONDENT TO FINDINGS OF FACT.

A. In Exceptions No. 1, 3-5, 7-11 Respondent alleges that the ALJ's findings of fact in paragraphs 6, 11, 15, 16, 18, 19, 20, 39 and 40 of the RO should be stricken on the grounds that these findings are outside of the scope of the charging document and therefore irrelevant.

Respondent makes no allegation that these findings are not supported by competent substantial evidence and cites no authority that supports striking these findings from the RO as not complying with the essential requirements of law.

On the contrary, the findings are supported by competent substantial evidence in the record and are relevant to consideration of the appropriate penalty in this case. See Miami-Dade County School Board v. Newbold, 2004 WL 1814857, at 24 (Fla. Div. Admin. Hrgs - August 13, 2004). See also Elkouri & Elkouri: How Arbitration Works, 6th ed. Marlin M. Volz & Edward P. Goggin, BNA, 2003, Wash. D.C., p. 983 ("employees past record is a major factor in determination of proper penalty for the offense.")

Respondent's Exceptions No. 1, 3-5, 7-11 are denied.

B. In Exception No. 2 Respondent alleges that there was no evidence in the record to support the ALJ's finding of fact in paragraph 10 of the RO that the requirement for school psychologists to report their absences existed prior to Dr. Balado's appointment to the Psychological Services Coordinator position. Respondent is mistaken. Dr. Balado's testimony was corroborated by the undisputed testimony of Respondent's own witness, Dr. Joan Adamson that during her employment with the School Board if she was going to be absent from work she would notify the psychological services department secretary. Dr. Adamson's testimony confirmed Dr. Balado's testimony and constituted competent substantial evidence that school psychologists were required to inform the psychological services department of their absences before Dr. Balado became the Department Coordinator (Tr. 282: 16-25; 283: 1-2; 287: 25; 288: 1-10).

Respondent's Exception No. 2 is denied.

C. In Exception No. 6 Respondent alleges that the ALJ's finding of fact in paragraph 17 of the RO that Dr. Balado met with Dr. Beth Thedy to discuss concerns with Respondent's performance should be stricken as not based on competent substantial evidence and that the finding is outside the scope of the charges against Respondent. Respondent is incorrect as both Dr. Balado and Dr. Thedy's testimony supported this finding. (Tr. 74:3-24; 118: 12-15;

120: 10-20). Furthermore, findings of fact related to Respondent's past conduct are relevant in consideration of the proper penalty and demonstrates that Respondent was on notice of issues regarding her job performance.

Respondent's Exception No. 6 is denied.

D. In Exceptions No. 12-14 Respondent alleges that the ALJ's findings of fact that the School Board followed its Drug Free Workplace Policy and that Respondent was intoxicated while attending a school meeting on School Board property on November 21, 2014 are not supported by competent substantial evident and must be modified.

In paragraph 47 of the RO the ALJ found that the School Board employee that administered the breathalyzer test on Respondent was fully trained to administer the test and performed Respondent's examination in accordance with all testing guidelines and as routinely completed in the regular course of business for the Board.

In paragraph 48 of the RO the ALJ found that the final results of the breathalyzer test demonstrated that on November 21, 2014, at approximately 2:45 p.m. Respondent had an alcohol level of .104 which is above the legal level for driving in the State of Florida.

In paragraph 50 of the RO the ALJ found that, contrary to Respondent's assertion, on November 21, 2014, at approximately 2;45 p.m., while attending a school meeting on School Board property to

address her future employment, Respondent was under the influence of some alcoholic beverage or substance such that she was, in fact, impaired or intoxicated.

The ALJ's findings of fact in paragraphs 47, 48 and 50 of the RO are supported by competent substantial evidence in the record.

Respondent's Exceptions No. 12-14 are denied.

E. In Exceptions No. 15-16 Respondent alleges that the ALJ's conclusions of law in paragraphs 60 and 61 referencing the Code of Ethics of the Education Profession In Florida and the Principles of Professional Conduct for the Education Profession of Florida are irrelevant because they are outside the scope of the charging document. Respondent is again incorrect. The Principles of Professional Conduct of the Education Profession In Florida is specifically referenced in the Superintendent's December 9, 2014, letter to Respondent containing the charges against Respondent. (the charging document; Pet. 22).

Respondent's Exceptions No. 15-16 are denied.

F. In Exceptions No. 17-22 Respondent alleges that the ALJ's conclusions of law in paragraphs 62, 63, 64 and 65 should be stricken as devoid of legal analysis, were based upon findings that were not supported by competent substantial evidence or did not comply with the essential requirements of law.

Respondent's conclusory allegations are untenable on their face. The ALJ's findings of fact and conclusions of law in the RO

are supported by competent substantial evidence in the record and contain specific references to applicable administrative rules and state statutes.

Furthermore, Respondent's Exception No. 22 alleges that the penalty recommended by the ALJ contains "ambiguity" and should be modified. The ALJ's recommendation as to the penalty is not ambiguous as alleged by Respondent.

Respondent's Exceptions No. 17-22 are denied.

PETITIONER'S EXCEPTION

Petitioner excepts to the ALJ's recommended penalty at pages 22-23 of the RO.

Petitioner argues the School Board should modify the recommended penalty and terminate Respondent's employment due to Respondent's repeated and serious misconduct that has irrevocably destroyed the trust the School Board must have in a school psychologist who is responsible for assisting with the psychological needs of students within Brevard Public Schools and as an itinerant worker who works independently.

The School Board has the discretion to increase the penalty recommended by the ALJ. Criminal Justice Standards and Training Commission v. Bradley. 596 So.2d 661,664 (Fla. 1992). This is so even if the School Board accepts all of the ALJ's findings of fact and conclusions of law in the RO. Id.; Boulton v. Morgan, 643

So.2d 1103, 1005 (Fla. 4th DCA 1994).

The School Board may only increase a recommended penalty upon a review of the complete record and stating with particularity its reasons for increasing the penalty by citing the record. Section 120.57(1)(1), Fla. Stat.; Palm Beach County School Board v. Gayle, 1999 WL 1483856 (Fla. DOAH April 7, 1999).

In Bradley, the Florida Supreme Court explained:

> Although hearing officers are entitled to substantial deference, they are judicial generalists who are trained in the law but not necessarily in any specific profession. The various administrative boards have far greater expertise in their designated specialties and should be permitted to develop policy concerning penalties within their professions.

In this case the ALJ found in the RO that Respondent had committed the following acts of misconduct: (1) serious violations of School Board Policy; (2) willful absences without leave; (3) gross insubordination; (4) violations of the Principles of Professional Conduct for the Education Profession in Florida; and (5) appearing for a disciplinary meeting while intoxicated. The ALJ found that the School Board had just cause to discipline Respondent and made the following conclusions of law:

> 62. As to the specific charges of this case, Petitioner has established by a preponderance of the evidence that Respondent repeatedly failed to follow directives regarding reporting her absences on five occasions: December 17 and 19, 2013; January 6 and 7, 2014; and finally, October 30, 2014. Even after being counseled after the first four instances, Respondent failed to appropriately contact the Department on October 30, 2014. Reporting an absence was not an onerous burden for Respondent. A telephone call, a text message, or an e-mail would have sufficed. Instead, Respondent did

nothing. After the fact, Respondent claims that she was not in a state to comply with the required notification. Given the simplicity of the task required to timely notify the office that she would not be at work, this assertion is deemed without merit.

63. Petitioner has further established by a preponderance of the evidence that Respondent repeatedly lied to school personnel regarding her whereabouts on October 30, 2014. Employees, such as Respondent, are held to the highest standard of professional ethical conduct. Dishonesty in reporting basic information to your supervisor and others cannot meet the standard required of Respondent. Respondent offered no credible explanation for why she felt compelled to misrepresent (repeatedly) facts to school personnel. Had Respondent simply stated the truth (that she was at home and unable to work that day), disciplinary action would not be required. By failing to maintain a standard of honesty and integrity, Respondent brought disciplinary measures on herself.

64. Finally, with regard to Respondent's conduct of November 21, 2014, Petitioner has established by a preponderance of the evidence that Respondent presented to a meeting on School Board property under the influence of alcohol. How a school employee could blow a .104 on a breathalyzer test at 2:45 p.m. on a regular business day is troubling and demonstrates Respondent's extremely poor judgment. Common sense would suggest that one does not drink before an important meeting. Given the Respondent's conduct, appearance, and demeanor during the meeting of November 21, 2014, it is concluded Respondent was intoxicated and impaired. To suggest that Respondent was not so impaired as to be considered intoxicated is rejected as contrary to the facts of this case. An ordinarily prudent and cautious person would not act as Respondent did at the meeting. Respondent did not act professionally, she appeared disheveled with red watery eyes, and demonstrated mood swings consistent with an intoxicated person's behavior. Coupled with the odor emanating from Respondent's person and the results of the breathalyzer examination, there is adequate information to reach the conclusion that Respondent was intoxicated.

65. The ultimate issue to be resolved by this case is an appropriate penalty for Respondent's conduct. Wrestling with the employment future of a long-time Board employee is difficult. Had Respondent demonstrated sincere remorse for her behavior, leniency might be appropriate. Had Respondent

been credible in her explanation of the events of October 30, 2014, a lesser penalty might have been appropriate. In fact, the five-day suspension that was offered at the November 21, 2014, meeting, with the other restrictions proposed, would have addressed the matter fully. Instead, Respondent had a couple of wine spritzers (her explanation for the breathalyzer results) in anticipation of one of the most important meetings of her professional career and reported to the meeting under the influence of alcohol. Respondent's behavior went from bad to worse. Respondent's credibility descended with each misrepresentation of fact. Honesty is a cornerstone of ethical conduct, and Respondent demonstrated she failed to meet the ethical standards for employees of the Board on numerous occasions.

The School Board has substantive jurisdiction to increase the penalty recommended by the ALJ. The School Board should exercise its statutory authority and increase the recommended penalty and terminate Respondent's employment based upon the following findings and conclusions of law contained in the RO: (1) the ALJ's finding that Respondent repeatedly failed to follow directions regarding reporting her absences from work (RO ¶62; (2) the ALJ's finding that Respondent repeatedly lied (six times) to District officials regarding her whereabouts on October 30, 2014 (RO ¶¶ 26, 27, 29, 33, 34, 35, 63); (3) the ALJ's finding that Respondent appeared for a disciplinary meeting on November 21, 2014 while on paid administrative leave during her ordinary work hours on School Board property while intoxicated (RO ¶64); and (4) Respondent's repeated failure to meet the ethical standards for School Board employees (RO ¶ 65).

The School Board concludes that the penalty recommended by the ALJ in this case is too lenient to address the serious nature of

Respondent's misconduct. The facts of this case warrant the termination of Respondent's employment. As a school psychologist and instructional employee of the Brevard County School District, Respondent's dishonesty, appearing at a school meeting on School Board property while intoxicated, and lack of remorse demonstrate that the level of trust the School Board is entitled to expect from a certificated instructional employee has been irreparably destroyed. Furthermore, the repeated serious violations of School Board policies and ethical standards of the education profession by Respondent as set forth in the RO demand a more serious consequence than the penalty recommended by the ALJ. A more reasonable penalty for the serious acts of misconduct committed by Respondent is termination of employment and the cancellation of Respondent's professional service contract.

Petitioner's Exception is granted.

FINDINGS OF FACT

The School Board adopts the ALJ's Findings of Fact as set forth in the Recommended Order.

CONCLUSIONS OF LAW

The School Board adopts the ALJ's Conclusions of Law set forth in the Recommended Order.

PENALTY

The School Board rejects the penalty recommended by the ALJ in the Recommended Order and hereby increase the penalty to termination of Respondent's employment and cancellation of her Professional Service Contract.

IT IS THEREUPON ORDERED THAT:

Respondent's employment as an instructional employee of the Brevard County School District is terminated and her Professional Service Contract is cancelled effective December 16, 2014.

DONE AND ORDERED this 15th day of March, 2016, in Viera, Brevard County, Florida.

THE SCHOOL BOARD OF
BREVARD COUNTY, FLORIDA

By: ______________________________
ANDREW J. ZIEGLER, Chairman

Filed with the Clerk in the
Office of the Superintendent
this 17 day of March, 2016.

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 5 day of April, 2016.

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