BEFORE THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

ST. LUCIE COUNTY SCHOOL BOARD,
Petitioner,

v. DOAH Case No. 16-5872TTS

JANNIFER THOMAS,
Respondent.

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

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For Respondent: Thomas L. Johnson, Jr., Esquire
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Introduction

The Respondent Jannifer Thomas is a teacher with a professional service contract employed by the Petitioner St. Lucie County School Board. In September 2013, the Petitioner, by and through the then-Superintendent of Schools, advised the Respondent that she planned to recommend termination of the Respondent's employment. At its meeting held November 12, 2013, the School Board

referred the matter to the Division of Administrative Hearings ("DOAH") of the Florida Department of Administration for hearing, and suspended the Respondent without pay.

The administrative proceedings before DOAH were stayed and ultimately closed without prejudice during the pendency of criminal charges against the Respondent. On April 27, 2016, the State Attorney entered a *nolle prosequi* as to all criminal charges against the Respondent. Thereafter, the Respondent renewed her request for an administrative hearing, and the School Board again referred the matter to DOAH.

On October 11, 2016, the Superintendent issued a Statement of Charges and Petition for Termination alleging various violations of School Board policies, state statutes, the Code of Ethics of the Education Profession, and the Principles of Professional Conduct for the Education Profession. The alleged violations resulted from the delay between the time the Respondent, a mandatory reporter, first became aware of potential sexual abuse of a minor student and the eventual reporting of that abuse; from the manner in which the reporting occurred; and from the Respondent's possible assistance to the abuser after the reporting but before the abuser's arrest. The matter was the subject of a hearing held in Port St. Lucie, Florida, on February 1, 2017, before an Administrative Law Judge ("ALJ") of DOAH.

On May 23, 2017, the ALJ entered a Recommended Order ("R.O.") concluding that the School Board had failed to prove, by a preponderance of the evidence, that the Respondent violated any of the rules and policies as charged, and that neither the ALJ nor the Board had jurisdiction to enforce the state statutes cited in the charges. R.O. pp. 28-30 and 32-34, ¶¶ 74-77, 83, 89, and 91-93. The ALJ recommended that the School Board enter a final order rescinding the Respondent's suspension without pay and (proposed) termination, and reinstating the Respondent with back pay and benefits. R.O. p. 34.

The Petitioner filed written exceptions to the Recommended Order ("Petitioner's Exceptions") on June 19, 2017. *See* Section 120.57(1)(k), Fla. Stat.; Fla. Admin. Code Rule 28-106.217(1). The Respondent filed a response to the exceptions ("Respondent's Response") on July 20, 2017. *See* Fla. Admin. Code Rule 28-106.217(3). Both parties have also submitted proposed forms of final order.

The School Board met on September 22 and October 10, 2017, in Fort Pierce, St. Lucie County, Florida, to take final agency action. At the hearing on September 22, 2017, argument was presented by counsel for each of the parties. Upon consideration of the Recommended Order, the Petitioner's Exceptions, the Respondent'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 re-weigh 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 Petitioner's Exceptions will be addressed in order.

Petitioner's Exception No. 1. The Petitioner excepts to the findings of fact in Paragraphs 54 and 55 of the Recommended Order that the Respondent complied with Policy 5.37(8)(a), and did not violate Policy 6.301(3)(b), when her Pastor, but not she, called 911 to report the sexual abuse that the Respondent had seen on video. See Petitioner's Exceptions pp. 5-10. The Petitioner first notes that administrative agencies are empowered to adopt and implement their own policies, and that an agency's interpretation of its own policies is entitled to substantial deference. Petitioner's Exceptions pp. 4-5. The Respondent was well aware of the School Board's interpretation, the Petitioner asserts, through dissemination of the agency's New Employee Handbook. Petitioner's Exceptions pp. 6-8. The Petitioner then contends that the "findings of fact" in Paragraphs 54 and 55 in actuality constitute conclusions of law that interpret School Board policies in a manner inconsistent with the agency's own interpretation. Petitioner's Exceptions pp. 5-8.

The Respondent counters that she ultimately reported what she had seen both to Sheriff's Deputies and to the School District. Respondent's Response pp.8-9. Although acknowledging that it was her pastor who called 911 and not she, the Respondent notes that once Deputies arrived, she reported what she had seen on the video. Respondent's Response p. 10. The Respondent also argues that neither the District's "New Employee Handbook" nor any other notice or document constitute a rule upon which discipline might be based. Respondent's Response pp. 11-14.

The ALJ's findings in Paragraphs 54 and 55 relate to a definitional issue involving a legal determination and therefore are not entitled to great deference. *See South Florida Water Management*

District v. Caluwe, 459 So.2d 390, 396 (Fla. 4th D.C.A. 1984). The Board's construction of its policy—reporting directly is a non-delegable responsibility that was violated by the Respondent—is wholly reasonable and should have been be accepted by the ALJ. *See Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815, 820 (Fla. 1983). Here, the ultimate facts are matters of opinion infused by policy considerations for which the Board has special responsibility. *See School Board of Leon Co. v. Hargis*, 400 So.2d 103, 107 (Fla. 1st D.C.A. 1981). *See also Baptist Hospital, Inc. v. Department of Health & Rehabilitative Services*, 500 So.2d 620, 623 (Fla. 1st D.C.A. 1986); *McDonald v. Department of Banking & Finance,* 346 So.2d 569, 579 (Fla. 1st D.C.A. 1977). To the extent there is a factual issue addressed in Paragraphs 54 and 55 of the Recommended Order, it is the meaning of the term "directly" as used in Policy 5.37(8)(a), a determination that is essentially a matter of opinion that necessarily must be infused by policy considerations for which the Board has special responsibility. *See Utilities, Inc. v. Florida Public Service Comm'n*, 420 So.2d 331, 333 (Fla. 1st D.C.A. 1982).

The Petitioner's Exception No. 1 is granted and paragraphs 54 and 55 of the Recommended Order are rejected and revised to read:

> 54. The persuasive and credible evidence adduced at hearing established that the Respondent violated Policy 5.37(8)(a). Pastor Sanders called 911 within four hours of the Respondent's view of the video. The Respondent, however, did not herself directly report her knowledge of Madison's abuse of K.M. as required by the policy.
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> 55. The persuasive and credible evidence adduced at hearing established that the Respondent violated Policy 6.301(3)(b). Although the Respondent was not shown to have violated Policy 6.301(3)(b)(vii) or (xxx), through evidence demonstrating her failure to report directly her knowledge of Madison's abuse of K.M., she was shown to have violated Policy 6.301(3)(b)(xix).

Petitioner's Exception No. 2. The Petitioner excepts to the conclusions of law in Paragraphs 77 through 82 of the Recommended Order, which generally interpreted Policy 5.37(8)(a) as permit-

ting an employee to delegate to another individual responsibility for reporting suspected abuse. See Petitioner's Exceptions pp. 10-14. The Petitioner maintains that the School Board's meaning and interpretation, that reporting suspected abuse is a non-delegable duty, were well known and understood. Petitioner's Exceptions pp. 10-11. The ALJ was simply incorrect, the Petitioner avers, in looking beyond the School Board's interpretation of its own policy while acknowledging that the Board's interpretation was supported by the sources upon which the ALJ relied in making his determination. Petitioner's Exceptions pp. 11-13. Because the Board's interpretation was not plainly erroneous or inconsistent with the regulation, the Petitioner declares, the ALJ should not have discarded that interpretation and essentially rewritten the policy. Petitioner's Exceptions pp. 13-14.

In response, the Respondent contends that determining whether an act constitutes a departure from the standard of conduct is a finding within the province of the ALJ. Respondent's Response at pp. 14-15. The Respondent also insists that the District's "New Employee Handbook" provides no support for the Petitioner's position regarding the correct interpretation or understanding of Policy 5.37(8)(a). Respondent's Response at pp. 15-17. Deference to an agency's interpretation, the Respondent argues, does not apply when the issue is whether an employee deviated from an applicable standard of behavior. Respondent's Response at pp. 17-18. The ALJ's use of dictionary definitions, strict construction of the relevant provision, and view to the end result of the abuse reporting, even if undertaken by another, the Respondent asserts, should not be rejected. Respondent's Response pp. 18-21.

For the reasons set forth in the discussion above regarding the Petitioner's Exception No. 1, the Petitioner's Exception No. 2 is granted and paragraphs 77 through 82 of the Recommended Order are rejected and revised to read:

> 77. The School Board proved by a preponderance of the evidence that the Respondent violated Policy 5.37(8)(a). Policy 5.37(8)(a) requires that suspected abuse be re-

ported "directly." The word "directly" within the context of the policy means that the Respondent had a non-delegable duty to report the abuse to 911, herself.

78. The meaning of the term "directly" as used in Policy 5.37(8)(a) is essentially a matter of opinion that necessarily must be infused by policy considerations for which the School Board has special responsibility.

79. The term "directly" may be used to relate to the intervention of something or someone (i.e., "in a direct manner; in immediate physical contact; in the manner of direct variation"), a definition that supports the School Board's position.

80. The School Board's interpretation of its Policy 5.37(8)(a) is wholly reasonable and therefore should be accorded deference.

81. Policy 5.37(8)(a) requires that School Board employees who know or have reasonable cause to suspect that a student has been abused must report the suspected abuse directly and may not delegate to another person responsibility for reporting.

82. In sum, the Respondent did not comply with Policy 5.37(8)(a) when Pastor Sanders called 911 on her behalf within four hours after the Respondent saw the video. The Respondent should have personally reported the abuse.

Endnote 3 to Paragraph 82 is deleted.

Petitioner's Exception No. 3. The Petitioner excepts to the conclusions of law in Paragraph 90 of the Recommended Order. See Petitioner's Exceptions pp. 14-15. The School Board has detailed its requirement in Policy 5.37(8)(a) that reporting suspected abuse may not be delegated, the Petitioner notes, and the ALJ found that the Respondent never herself made a report. Under the circumstances, the Petitioner argues, finding that the Respondent complied with the policy constitutes an unreasonable interpretation. In reply, the Respondent asserts that rules providing for terminating employment must be construed in favor of the employee.

For the reasons set forth in the discussion above regarding the Petitioner's Exception No. 1, the Petitioner's Exception No. 3 is granted and Paragraph 90 of the Recommended Order is rejected and revised to read:

90. The School Board may, of course, adopt its own rules containing certain requirements for suspected abuse of minor students, which it has done. In support of its termination of the Respondent, the School Board alleged that the Respondent violated Policy 5.37(8)(a). Here, the Respondent failed to comply with the requirements of Policy 5.37(8)(a) by failing to report the suspected abuse directly.

Consistent with the determinations regarding the Petitioner's Exceptions, Paragraph 93 of the Recommended Order is rejected and revised *sua sponte* to read:

93. In sum, and as detailed above, the School Board proved, by a preponderance of the evidence, that the Respondent violated Policy 5.37(8)(a) and Policy 6.301(3)(b)(xix) alleged in the Statement of Charges and Petition as bases for the Respondent's termination.

Findings of Fact

The School Board adopts the findings of fact set forth in Paragraphs 1 through 53, 56, and 57 of the Recommended Order, and rejects and revises Paragraphs 54 and 55, denominated by the ALJ as findings of fact, in the manner set forth above.

Conclusions of Law

The School Board adopts the conclusions of law set forth in paragraphs 58 through 76, 83 through 89, 91, and 92 of the Recommended Order, and rejects and revises the conclusions of law set forth in Paragraphs 77 through 82, 90, and 93 as set forth above.

Determination; Penalty

The School Board rejects the recommendation set forth in the Recommended Order, and finds just cause for termination.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Respondent Jannifer Thomas be, and she is hereby, terminated from her employment with The School Board of St. Lucie County, Florida, as of the effective date of this Final Order. 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 10th day of October, 2017.

THE SCHOOL BOARD OF ST. LUCIE COUNTY, FLORIDA

By: _____
TROY INGERSOLL, Chair

Attest: _____
E. WAYNE GENT, 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:

Glen J. Torcivia, Esquire
Johnathan A. Ferguson, Esquire
Thomas L. Johnson, Jr., Esquire
Daniel B. Harrell, Esquire
Clerk, Division of Administrative Hearings