STATE OF FLORIDA
DEPARTMENT OF EDUCATION

JULIE McCUE,

Petitioner,

v.

DOE Case No. 2016-3396
DOAH Case No. 17-0423

PAM STEWART, as Commissioner of Education,

Respondent.
_____/

FINAL ORDER

This matter comes before Pam Stewart, Commissioner of Education, in her role as head of the Florida Department of Education, for consideration of the Recommended Order in the above-styled case, entered by Administrative Law Judge Elizabeth W. McArthur (hereinafter "the ALJ") of the Division of Administrative Hearings and herein incorporated by reference. Having considered the entirety of the record, the Commissioner makes her findings as follows.

PRELIMINARY STATEMENT

This matter arises from Petitioner's challenge to the failing score she received on the essay section of the Florida Educational Leadership Examination (FELE), which she took in September 2016. Petitioner underwent the score verification process prescribed by statute and rule, and by letter dated November 22, 2016, the Department determined that Petitioner's essay had been scored correctly. Petitioner timely requested an administrative hearing to review the Department's determination, and the matter was referred to DOAH. Final hearing was held on June 13, 2017, and the ALJ issued her Recommended Order on October 13, 2017, therein recommending that a final order be entered rejecting Petitioner's challenge. On or about October 26, 2017, Petitioner submitted her exceptions to the Recommended Order.

STANDARD OF REVIEW

The Administrative Procedure Act contemplates that an agency will adopt an administrative law judge's recommended order as the agency's final order in most proceedings. To this end, the Commissioner has been granted only limited authority under which to reject or modify findings of fact in the ALJ's Recommended Order.

An agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and so states with particularity, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Fla. Stat. § 120.57(1)(l).

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent, substantial evidence from which the findings could reasonably be inferred." Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) (citations omitted). In determining whether challenged findings are supported by the record in accord with this standard, the Commissioner may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the ALJ as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

Additionally, an agency may reject or modify only those conclusions of law over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law or interpretation of an administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation, and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Fla. Stat. §120.57(1)(l).

RULINGS ON EXCEPTIONS

Petitioner's thirteen exceptions address sixteen paragraphs of the various findings and conclusions contained in the Recommended Order. The Commissioner will address each exception in the order pleaded. References will be made by document and page number.

Exception 1: Findings of Fact, Paragraph 4

In her first exception, Petitioner takes issue with the findings of paragraph 4, insofar as it finds that Petitioner's master's degree, obtained at Concordia University, is not geared toward Florida's educational leadership standards. Petitioner asserts that the finding is not supported by competent substantial evidence.

In reviewing the disputed material, it is apparent that the identified paragraph contains no substantive finding regarding the quality of Petitioner's education or its relationship to Florida's educational leadership standards. Rather, the paragraph 4 makes findings as to Petitioner's qualifications for a raise in pay upon receiving a master's degree and Department certification in educational leadership. In an apparent afterthought, the footnote referenced therein *does* infer that Petitioner's degree is not necessarily tailored to Florida's educational leadership standards.

Having reviewed the record in full, including Petitioner's exception and the material it disputes, the Commissioner must conclude that Petitioner's first exception has no bearing on the substantive findings of paragraph 4, nor any bearing on the substantive resolution of this matter. As such, Petitioner's first exception is hereby rejected as immaterial.[1]

Exception 2: Findings of Fact, Paragraph 22

In her second exception, Petitioner takes issue with the findings of paragraph 22, insofar as the paragraph describes "an intensive two-day training program". Petitioner asserts that the

[1] "[A]n agency head is not required to make explicit rulings on subordinate, cumulative, immaterial or unnecessary proposed facts. Those proposed findings which fall in such a category may be rejected by a simple statement that they are immaterial or irrelevant." Forrester v. Career Serv. Comm'n, 361 So. 2d 220, 220–21 (Fla. 1st DCA 1978).

finding is not supported by competent substantial evidence.

Having reviewed the record in full, several witnesses testified as to the quality of the identified training program, and Dr. Christopher Small testified unequivocally that the program was "very intense" and "a very rigorous process". Transcript, 117-118. While Dr. Small described a training which lasted three days, Drs. Michael Grogan and Kelly Pelletier testified that the requisite training lasted two days. Transcript, 118, 206-207, 283. Accordingly, it is clear that the ALJ's findings in paragraph 22 are supported by competent substantial evidence. As such, Petitioner's second exception is hereby rejected.

Exception 3: Findings of Fact, Paragraph 33

In her third exception, Petitioner takes issue with the findings of paragraph 33, to the extent that it finds that "it would not be appropriate for DOE, as the testing agency, to prepare individuals to pass its tests, or coach individuals on how to perform better on tests they do not pass." Petitioner asserts that the finding is not supported by competent substantial evidence.

Having reviewed the record in full, insofar as the contested finding can be considered a finding of fact, the Commissioner presented at least one witness who testified to this effect. Accordingly, the record shows that Phil Canto testified that standards from the American Educational Research Association, the American Psychological Association and the National Council of Measurement Education would all suggest that it would not be appropriate for a testing agency to prepare individual candidates to take a test. Transcript, 238. As such, it is clear that the ALJ's findings in paragraph 33 are supported by competent substantial evidence.

Furthermore, insofar as the contested material might be considered a conclusion of law,[2] in order to overturn such a conclusion, an agency must make a finding that the substituted

[2] The label assigned to a statement in the recommended order is not dispositive as to whether that statement is a conclusion of law or a finding of fact. See: Department of Labor and Employment Sec. v. Little, 588 So. 2d 281 (Fla. 1st DCA 1991); Gross v. Dep't of Health, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002).

conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Fla. Stat. §120.57(1)(l). As Petitioner has provided no argument to this effect, nor an alternative with which to replace the contested language, the Commissioner must conclude that Petitioner's proposed exception is not as reasonable as the ALJ's original conclusion, nor is it more reasonable. In either case, Petitioner's exception is hereby rejected.

Exception 4: Findings of Fact, Paragraph 34

In her fourth exception, Petitioner takes issue with the findings of paragraph 34, to the extent the paragraph finds the information made available by the Department is sufficient "to allow an examinee to know what to expect in a prompt and what is expected of the examinee in a response." Petitioner asserts that the finding is not supported by competent substantial evidence.

Having reviewed the record in full, the Commissioner presented at least one witness who testified as to the contested material. Accordingly, the record shows that Phil Canto testified that the Department website provides prospective test takers with retired test prompts, along with the general and specific rubrics used to grade them. Transcript, 235-237. Mr. Canto further testified that the Department provides a test information guide at no cost, which guide explains the contents of the test and competencies tested, and includes an annotated bibliography referencing resources used to develop the test. Transcript, 234, 236. As such, it is clear that the ALJ's findings in paragraph 34 are supported by competent substantial evidence. Accordingly, Petitioner's exception is hereby rejected.

Exception 5: Findings of Fact, Paragraph 36

In her fifth exception, Petitioner takes issue with the findings of paragraph 36, to the extent the paragraph finds that "it would be unreasonable for examinees to expect more from a testing agency (than) what DOE makes available." Petitioner asserts that the finding is not

supported by competent substantial evidence.

Having reviewed the record in full, the Commissioner presented at least one witness who testified as to what examinees can and should reasonably expect from a testing agency. As contemplated in the prior dispositions of Petitioner's third and fourth exceptions, the record shows that Phil Canto testified as to the preparatory materials which the Department makes available, alongside generally accepted standards and practices set by testing agencies. Transcript, 234-238. As such, it is clear that the ALJ's findings in paragraph 36 are supported by competent substantial evidence.

Furthermore, insofar as the contested material might be considered a conclusion of law, in order to overturn such a conclusion, an agency must make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Fla. Stat. §120.57(1)(l). As Petitioner has provided no argument to this effect, nor an alternative with which to replace the contested language, the Commissioner must conclude that Petitioner's proposed exception is not as reasonable as the ALJ's original conclusion, nor is it more reasonable. In either case, Petitioner's exception is hereby rejected.

Exception 6: Findings of Fact, Paragraph 39

In her sixth exception, Petitioner takes issue with the findings of paragraph 39, to the extent the paragraph finds that "prospective chief reviewers undergo the same rater training holistic scoring process as do all other raters," and to the extent that it finds that "chief reviewers are given training for the chief reviewer role [of] conducting review and scoring of essays when scores have been contested." Petitioner asserts that neither portion is supported by competent substantial evidence.

Having reviewed the record in full, several witnesses testified as to the training for chief

reviewers, confirming the finding that chief reviewers undergo the rater training holistic scoring process and additional training on scoring of essays when scores have been contested. Specifically, Dr. Michael Grogan testified that chief reviewers are required to undergo training as raters before undergoing additional training as chief reviewers. Transcript, 206-207. Additionally, Dr. Christopher Small described a chief reviewer training in which trainees were trained to conduct review and scoring of essays with contested scores. Transcript, 117-118. Accordingly, it is clear that the ALJ's findings in paragraph 39 are supported by competent substantial evidence. As such, Petitioner's sixth exception is hereby rejected.

Exception 7: Findings of Fact, Paragraph 53

In her seventh exception, Petitioner takes issue with the findings of paragraph 53, to the extent that it finds that the assigned chief reviewer was qualified by Pearson Training in the holistic scoring method and in conducting score verification reviews. Petitioner asserts that the finding is not supported by competent substantial evidence.

Having reviewed the record in full, several witnesses testified as to the training for chief reviewers, confirming the finding that chief reviewers undergo the rater training holistic scoring process and additional training on scoring of essays when scores have been contested. Specifically, Dr. Michael Grogan testified that chief reviewers are required to undergo training as raters before undergoing additional training as chief reviewers. Transcript, 206-207. Additionally, Dr. Christopher Small described a chief reviewer training in which trainees were trained to conduct review and scoring of essays with contested scores. Transcript, 117-118. Accordingly, it is clear that the ALJ's findings in paragraph 53 are supported by competent substantial evidence. As such, Petitioner's seventh exception is hereby rejected.

Exception 8: Findings of Fact, Paragraph 55

In her eighth exception, Petitioner takes issue with the findings of paragraph 55. Petitioner does not identify which part or parts of the paragraph she disputes, nor does she propose substitute language. Petitioner simply asserts that the findings therein are not supported by competent substantial evidence.

Having reviewed the record in full, the contents of paragraph 55 are supported in both fact and law. Petitioner argues in her proposed recommended order that her rebuttal statement should have been provided to the assigned chief reviewer. Petitioner's PRO, 5. The 'FELE rule' dictates only that rebuttal statements be provided to the Department. Rule 6A-4.00821, Florida Administrative Code. A review of the record reveals neither evidence nor testimony proving that the Department did not consider Petitioner's rebuttal statement, and if such evidence was presented, Petitioner has failed to indicate where it might be found. Finding no portion of paragraph 55 unsupported, the Commissioner must conclude the findings therein are supported by competent substantial evidence. As such, Petitioner's eighth exception is hereby rejected.

Exception 9: Findings of Fact, Paragraph 67

In her ninth exception, Petitioner takes issue with the findings of paragraph 67, to the extent that it finds that Petitioner's essay contained one or more errors of grammar, syntax, punctuation or misspelling in 29 of the essay's 37 sentences. Petitioner asserts that the finding is not supported by competent substantial evidence.

Having fully reviewed the record, Petitioner and Respondent jointly submitted Petitioner's essay response to FELE Subtest 3 for consideration as evidence. Joint Exhibit #3. Although several witnesses testified as to the contents of the response, the findings in paragraph 67 can be supported by the ALJ's ordinary review thereof. Accordingly, it is clear that the

findings in paragraph 53 are supported by competent substantial evidence. As such, Petitioner's seventh exception is hereby rejected.

Exception 10: Findings of Fact, Paragraph 68

In her tenth exception, Petitioner takes issue with the findings of paragraph 68 to the extent that, as characterized by the Petitioner, the ALJ self-scores Petitioner's essay. Petitioner asserts that the finding is not supported by competent substantial evidence.

Having reviewed the record in full, the findings identified in paragraph 68 appear to be based on the ALJ's review of the FELE rubric and Petitioner's essay response to FELE Subtest 3. Joint Exhibit #2, Joint Exhibit #3. Although not substantive in nature – the ALJ simply uses the finding to illustrate a fallacious approach to rubric application – it is a finding well supported by evidence. Accordingly, it is clear that the findings in paragraph 53 are supported by competent substantial evidence. As such, Petitioner's tenth exception is hereby rejected.

Exception 11: Findings of Fact, Paragraph 70

In her eleventh exception, Petitioner takes issue with the findings of paragraph 70, to the extent that it finds that the written performance assessment exam was administered and scored fairly. Petitioner asserts that the finding is not supported by competent substantial evidence.

Having reviewed the record in full, Petitioner misconstrues the findings of paragraph 70. The substantive finding contained therein states that Petitioner *failed to prove* that the process by which her written assessment was developed, administered and scored was unfair, discriminatory or fraudulent. Indeed, the identified paragraph makes no finding as to the inherent fairness of the administration and scoring of the examination. Accordingly, Petitioner's exception must be rejected as immaterial.

Exception 12: Findings of Fact, Paragraph 73

In her twelfth exception, Petitioner takes issue with the findings of paragraph 73, to the extent that it finds that "too many examinees achieved passing scores on the FELE in the past, despite [weak] written communication skills". Petitioner asserts that the finding is not supported by competent substantial evidence.

In review, Petitioner misconstrues the findings of paragraph 73. The substantive finding contained therein states that written performance assessment passage rates, standing alone, provide no support for Petitioner's contention that the assessment is unfair, arbitrary or capricious. The materials identified in Petitioner's exception are simply the ALJ's musing as to the potential cause for reduced passage rates, and have no bearing on the substantive findings contained therein. As such, Petitioner's twelfth exception must be rejected as immaterial.

Exception 13: Conclusions of Law, Paragraphs 85, 86, 87 and 88

In her thirteenth and final exception, Petitioner asserts that paragraphs 85, 86, 87 and 88 of the Recommended Order misapply rule 6A-4.00821(10)(b), Florida Administrative Code, to the facts concerning the score verification process applied to Petitioner. Petitioner's exception provides no further argument as to the alleged misapplication of law, and provides no substitute conclusions of law for the Commissioner's consideration.

With regard to conclusions of law, an agency must state with particularity its reasons for rejecting or modifying such conclusion or interpretation, and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Fla. Stat. §120.57(1)(l). Here, the Department finds that Petitioner's proposed exception is not as reasonable as the ALJ's original conclusion, nor is it more reasonable. Accordingly, Petitioner's exception is rejected.

DISPOSITION

WHEREFORE, it is ORDERED and ADJUDGED as follows:

1. Petitioner's exceptions 1-13 are REJECTED;

2. The findings and conclusions in the Recommended Order are ADOPTED;

3. The Administrative Law Judge's recommendation is ADOPTED;

DONE AND ORDERED this 19th day of January, 2018, in Tallahassee, Florida.

Pam Stewart

PAM STEWART
Commissioner of Education

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Education, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with Rule 9.110, Florida Rules of Appellate Procedure, and Section 120.68, Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above FINAL ORDER has been filed with the Agency Clerk of the Department of Education on this 19th day of January, 2018, and that a true and correct copy has been furnished by U.S. Mail to:

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AGENCY CLERK