

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

DOAH Case No. 17-0615 TTS

vs.

ILISSA SANDERS,

Respondent.

FINAL ORDER

THIS CAUSE, came before The School Board of Palm Beach County, Florida (“School Board”) pursuant to sections 120.569 and 120.57, Florida Statutes, on December 6, 2017, on the Exceptions filed by Respondent Ilissa Sanders regarding the Recommended Order issued by Administrative Law Judge Cathy M. Sellers on July 24, 2017. In her Recommended Order, Judge Sellers recommended that the School Board enter a final order suspending Respondent without pay for 15 days and terminating her employment. Copies of the Recommended Order, Respondent’s Exceptions to the Recommended Order with Incorporated Memorandum of Law (filed August 8, 2017), and the Superintendent’s Response to Respondent’s Exceptions (filed August 18, 2017), are attached hereto as Exhibits A, B, and C respectively.

Upon review of the Recommended Order, the Respondent’s Exceptions, and the Superintendent’s Response to Respondent’s Exceptions, having heard the arguments of the Parties, and after review of the complete record in this case, it is hereby **ORDERED AND ADJUDGED** as follows:

- I. The School Board Need Not Rule on Respondent’s Exceptions Because They Do Not Include Appropriate and Specific Citations to the Record.**

As a preliminary matter, the School Board does not need to rule on any of Respondent’s Exceptions. Under section 120.57(1)(k), Florida Statutes, “The final order shall include an explicit

ruling on each exception, but *an agency need not rule on an exception* that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or *that does not include appropriate and specific citations to the record.*" (Emphasis added.) *See also* Fla. Admin. Code R. 28-106.217(1) ("Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record."). Respondent does identify the disputed portion of the Recommended Order by page number or paragraph and she does identify the legal basis for each Exception. But she does not include appropriate and specific citations to the record. Respondent's assertions about evidence in the record are not supported by citations to the record where that evidence can be found. Accordingly, under section 120.57(1)(k), Florida Statutes, the School Board need not rule on any of Respondent's Exceptions. For that reason alone, the School Board adopts the ALJ's Recommended Order as the Final Order of the School Board in this case.

II. To the Extent Rulings Are Required, Respondent's Exceptions Are Denied.

The School Board heard argument and voted on Respondent's Exceptions on December 6, 2017. The School Board voted to deny all three of Respondent's Exceptions and to adopt the ALJ's Recommended Order as the Final Order of the School Board. Under section 120.57(1)(l), Florida Statutes,

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule 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. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of

the entire record, and states with particularity in the order, 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. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

A. Exception 1

Respondent's first Exception is to paragraph 121 of the Recommended Order, which is a Conclusion of Law. Her Exception is that

Contrary to the evidence presented at hearing, the ALJ concluded that "in violating the statutory and rule requirements prohibiting assisting students in answering the questions on the FSA, Respondent did not exercise best professional judgment or integrity, did not sustain a high degree of ethical conduct, and did not make reasonable efforts to protect the students from conditions harmful to their learning."

The first Exception contains challenges to the ALJ's "Ultimate Findings of Fact" in paragraphs 95 through 101.¹ Respondent asks the School Board to reject these findings of fact.

1. Paragraph 95

Paragraph 95 describes the ALJ's findings about the credibility of witnesses and the persuasiveness of their testimony, including her finding that the discrepancies in their testimony concerned minor or collateral details, and that many of the students' testimonial descriptions were precise and explicit and were strikingly similar and remarkably consistent regarding certain conduct in which Respondent was alleged to have engaged. Respondent disputes that the inconsistencies in testimony were about minor or collateral details, namely inconsistencies about whether testing boards were used during the FSA. She also disputes that the students' testimony

¹ Respondent also identifies paragraphs 94 and 114 in the Exception, but, as she acknowledges, paragraph 94 merely contains the ALJ's overall conclusion that all nine students who testified described actions on Respondent's part that, as described, violated established FSA administration protocol, and paragraph 114 merely recites the clear-and-convincing evidentiary standard.

was sufficiently precise and explicit to meet the clear-and-convincing evidentiary standard.

“It is the hearing officer’s function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.” *Heifetz v. Dep’t of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). When reviewing the record for competent substantial evidence, the School Board may not “re-weigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion.” *Bill Salter Advert., Inc. v. Dep’t of Transp.*, 974 So. 2d 548, 551 (Fla. 1st DCA 2008). As Respondent acknowledges, paragraph 95 “describes the ALJ’s findings regarding the credibility of witnesses and the weight of the various portions of their testimony.” Respondent’s Exceptions at 5. The School Board may not revisit the ALJ’s credibility determinations or re-weigh the evidence. Accordingly, Respondent has not presented a permissible basis for the School Board to reject or modify the findings of fact in paragraph 95.²

2. *Paragraphs 96, 100, and 101*

Respondent next cites to paragraphs 96, 100, and 101 of the Recommended Order. In these paragraphs, the ALJ outlined students’ testimony about Respondent’s actions in pointing to questions on their exam papers or touching their exam papers, giving a “thumbs up” during the exam, and rubbing a student’s back during an exam. She further outlined the students’ testimony

² The provision of section 120.57(1)(D), Florida Statutes, which allows the agency to reject or modify findings of fact when the proceedings on which the findings were based did not comply with essential requirements of law, also does not apply. That provision “authorizes an agency to test the procedural regularity of the proceedings before the hearing officer.” *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). But “[i]t does not authorize the agency to reevaluate the quantity and quality of the evidence beyond a determination of whether the evidence is competent and substantial.” *Id.* And it may not be relied upon even if, in the agency’s opinion, the evidence before the hearing officer was not clear and convincing. *See id.*

about how some of them perceived or interpreted Respondent's actions.

Respondent challenges that there was no testimony that a student remembered to which question Respondent pointed or which answer was changed because of Respondent's touching, and, similarly, that A.S. could not recall the precise question for which she changed her answer after Respondent pointed to a question on her test. Respondent also asserts that the students who testified about the "thumbs up" gesture or the back rubbing did not testify that they were instructed about what those things might mean.

Competent substantial evidence, is " 'such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred' or such evidence as is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.' " *Heifetz*, 475 So. 2d at 1281 (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). The ALJ's findings in paragraphs 96, 100, and 101 were about Respondent's actions and the students' perceptions of the meaning of those actions. As the Superintendent points out in his Response to the Exceptions, the students' testimony about Respondent's actions was clear and unequivocal. The students' lack of testimony about specific questions they changed as a result of Respondent's actions, more than a year after the fact, does not mean that the students' testimony about Respondent's actions during the exam does not provide competent substantial evidence for the ALJ's findings. Likewise, that there was no testimony that the students were instructed what Respondent's non-verbal gestures meant does not mean that the students' testimony about what they perceived or interpreted does not provide competent substantial evidence for the ALJ's findings. Further, the School Board agrees with the ALJ's conclusions that Respondent's non-verbal gestures to students were prohibited conduct, notwithstanding the lack of evidence that Respondent specifically instructed students about the meaning of her gestures.

Respondent also argues that A.S. may have been testifying about a different day because she testified that she was using a testing board on the day in question. She further argues that the ALJ ignored Respondent's testimony that she is blind in one eye and suffers from a condition that would prohibit her from reading student exams as she moved about the classroom. These are again invitations to revisit the ALJ's credibility determinations or re-weigh the evidence, which the School Board may not do when reviewing the record for competent substantial evidence. *See Bill Salter Advert.*, 974 So. 2d at 551; *Heifetz*, 475 So. 2d at 1281.

3. Paragraph 97

Paragraph 97 describes the ALJ's findings that several students testified credibly that, during the exam, Respondent whispered to them about a question or response, saying "good job" or indicating that they should check an answer, and that some students saw Respondent whisper to other students in the class during the exam. Respondent seizes on the "good job" phrase, but the finding was broader than that, namely that Respondent whispered to students about questions or responses, saying "good job" or indicating that they should check an answer. To that end, L.W. testified that Respondent whispered "good job" to her while she was taking the exam, RO ¶ 26, R.T. testified that he saw Respondent whisper to other students who were taking the exam, RO ¶ 34, and S.T. testified that Respondent whispered to her during the math portion of the FSA that she was "supposed to correct something and go back and check my test" and that she saw Respondent whispering to another student during the exam, RO ¶¶ 46-47.

Respondent also again argues that there was no student testimony about particular questions with which Respondent offered this assistance and that the exam papers themselves were not presented as evidence. But this lack of specificity or documentary evidence does not mean that the ALJ's findings, based on the students' testimony about Respondent's actions during the exam,

were not supported by competent substantial evidence.

4. *Paragraph 98*

Paragraph 98 describes the ALJ's findings that several students testified credibly that Respondent verbally paced the class by telling them, during the exam, that they should be on a specific question at that particular time, or that they should slow down or speed up in answering questions. Respondent's contention here is that some, unspecified students denied any pacing took place. It appears that Respondent is referring to the testimony of R.T., M.R., and H.S. as the students who testified that pacing did not take place, but that is not an accurate summary of their testimony. R.T. testified that he did not remember Respondent stating the students should be on a specific question at a particular time or telling the students to speed up or slow down in answering the questions. RO ¶ 36. M.R. testified that he did not recall whether Respondent stated students should be on a specific question at a specific time, but that she did remember Respondent telling students to slow down. RO ¶ 43. And H.S. testified only that Respondent did not tell students to raise their hands during the exam. RO ¶ 64. Thus, these students did not deny that any pacing took place: two could not remember and the other only denied the hand-raising conduct. By contrast, seven students affirmatively testified that Respondent did pace the class in some manner during the exam. *See* R.O. ¶¶ 28-29, 43, 48-49, 55, 67, 70, 73. In any event, this is another improper invitation to revisit the ALJ's credibility determinations or re-weigh the evidence, which the School Board may not do when reviewing the record for competent substantial evidence. *See Bill Salter Advert.*, 974 So. 2d at 551; *Heifetz*, 475 So. 2d at 1281.

5. *Paragraph 99*

Paragraph 99 describes the ALJ's findings that some students testified credibly that, after the exam period was over, Respondent allowed students to fill in answers to questions that they

had not finished. Respondent contends that there was no testimony that students admitted that they actually did this, however, and that those who testified about extra time could not recall which students were allowed such time. Again, this does not mean that the testimony of these students that Respondent allowed students extra time or told them to fill in answers that they had not completed, RO ¶¶ 56, 63, 71, did not amount to competent substantial evidence to support a finding that Respondent engaged in prohibited conduct.

6. Conclusion

In sum, Respondent fails to show that the ALJ's findings of fact are not supported by competent substantial evidence or to offer an otherwise proper basis for rejecting or modifying the ALJ's findings of fact. Exception 1 is **DENIED**.

B. Exception 2

Respondent's second Exception is to a different part of paragraph 121 of the Recommended Order, which is a Conclusion of Law. Her Exception is that

The ALJ also concluded contrary to the evidence that "in answering questions on the FSA, [Ms. Sanders] engaged in intentional misrepresentation of the facts concerning an educational matter through potentially affecting the accuracy of their exam scores, and she failed to maintain honesty in professional dealings associated with administering the FSA.

Respondent omits a crucial part of the ALJ's conclusion in paragraph 121. The full sentence quoted from reads, "Further, *in assisting students in answering questions on the FSA, [Respondent] engaged in intentional misrepresentation*" RO ¶ 121 (emphasis added). Respondent's argument that there was no evidence that Respondent herself "answer[ed] questions on the FSA," Exceptions p. 10, is a nonstarter, because the ALJ did not so find. To the extent Exception 2 reiterates Respondent's arguments from Exception 1, those are addressed and rejected above. Exception 2 is **DENIED**.

C. Exception 3

Respondent's third and final Exception is to the ALJ's Conclusion of Law in paragraph 134. Her Exception is that

Lastly, the ALJ concluded that "Respondent's conduct constituted a clearly flagrant and purposeful violation of Petitioner's rules and regulations. Accordingly, it is concluded that Petitioner is not required to adhere to the progressive discipline sequence set forth in article II, section M, of the CBA, and is authorized to suspend Respondent without pay and to terminate her employment.

Respondent's argument is derivative of the arguments in her other Exceptions, that is, that Petitioner failed to prove any infraction by clear and convincing evidence and therefore failed to prove a basis for not following progressive discipline. Respondent's arguments about the lack of competent substantial evidence for the findings challenged in Exceptions 1 and 2 are addressed and rejected above. Respondent also does not challenge the ALJ's findings of fact in paragraphs 11 through 17 or 90, that detail the training that Respondent received, as well as materials that Respondent received and was charged with understanding and following, which show that conduct such as assisting students in answering test questions, giving students verbal or non-verbal cues, and interfering with students' responses on the exam, was prohibited. The ALJ's findings of fact support her conclusion that Respondent's conduct was a clearly flagrant and purposeful violation of applicable rules and regulations. Accordingly, Exception 3 is **DENIED**.


WHEREFORE, the School Board hereby adopts and incorporates the Recommended Order of Administrative Law Judge Sellers as the final order of the School Board in this case. Respondent Illissa Sanders is suspended without pay for 15 days and her employment is terminated. This Final Order shall take effect upon being filed with the Clerk of the School Board.

DONE AND ORDERED this 15 day of Dec, 2017

The School Board of Palm Beach
County, Florida



Chuck Shaw, Chairman

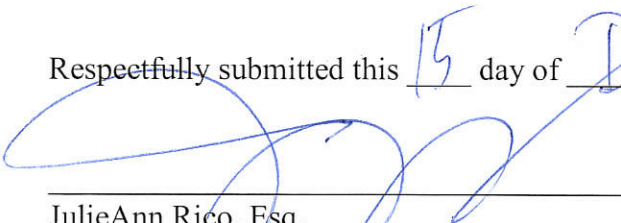


Robert M. Avossa, Ed.D., Superintendent

NOTICE OF RIGHT TO JUDICIAL REVIEW

This Final Order constitutes final agency action. Any party who is adversely affected by this Final Order has the right to seek judicial review of the Final Order 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 agency clerk of The School Board of Palm Beach County, Florida, and a second copy, accompanied by appropriate filing fees as prescribed by law, with Fourth District Court of Appeal, or with the District Court of Appeal in the Appellate District, where the party resides, if applicable. The notice of appeal must be filed within thirty (30) days of rendition of the Order to be reviewed.

Respectfully submitted this 15 day of Dec, 2017



JulieAnn Rico, Esq.
General Counsel for The School Board
of Palm Beach County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished via email to counsel for Respondent, Nicholas Caggia, Esq., at nick@tjlawpa.com; Law Office of Thomas Johnson, P.A., 510 Vonderburg Drive, Suite 309, Brandon, Florida 33511, on this 15 day of Dec, 2017.

THE SCHOOL BOARD OF PALM
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By: _____


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