STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 17-5600

DEBORAH PETERSON,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final formal administrative hearing was conducted in this case on January 10, 2018, in Pensacola, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Joseph L. Hammons, Esquire
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For Respondent: Mark S. Levine, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the suspension without pay of Respondent, Deborah Peterson, by Petitioner, Escambia County School Board (the "Board"), was justified or appropriate.

PRELIMINARY STATEMENT

In August 2017, Respondent was notified by letter from the Board that she was being suspended without pay from her position as a cafeteria worker. Respondent timely requested an administrative hearing to contest the Board's action. The matter was referred to DOAH on October 12, 2017.

At the final hearing, the Board called three witnesses: Jaleena Davis, food service director; Elizabeth Oakes, director of personnel services; and Dr. Alan Scott, assistant superintendent of human resources. Respondent recalled Dr. Scott and also called Keith Leonard, director of human resources. Fifteen exhibits were jointly offered by the parties and were accepted into evidence. (All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent that evidence did not supplement or explain non-hearsay evidence, such evidence will not be solely used as a basis for any finding herein.)

The parties advised the undersigned that a transcript of the final hearing would be ordered. By rule parties are allowed 10 days from the date the transcript is filed at DOAH to submit proposed recommended orders. The parties requested and were granted an additional 10 days, making the filing deadline 20 days from the filing of the transcript. The Transcript was filed on January 22, 2018. Each party timely submitted a

Proposed Recommended Order and both parties' submissions were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Board is responsible for hiring, supervising, and firing all employees within the Escambia County School system. This responsibility includes taking administrative action when an employee violates any rule or policy created by the Board.

2. Respondent is employed by the Board as a cafeteria worker at Westgate School, a K-through-12 school for special needs students. She is not an instructional employee, but she does have direct contact with students. Respondent has had no prior disciplinary or negative administrative action taken against her. She is considered a very good employee and would be welcomed back to work once she is eligible.

3. By letter dated August 29, 2017, Respondent was notified that "you are placed on suspension with pay effective August 18, 2017, pending the outcome of an arrest for a disqualifying offense." The letter did not identify the disqualifying offense nor did it cite to any authority supporting whether the alleged offense was disqualifying in nature. It merely stated that Respondent had been arrested and that the arrest was for a disqualifying offense.

4. On the same day, Respondent was notified by way of another letter from the Superintendent of schools that he was recommending to the Board that Respondent's suspension be without pay. Although the Superintendent can suspend an employee, only the Board has authority to do so without pay. The letter said the matter would be brought up at the upcoming Board meeting on September 19, 2017. Once again, the letter did not identify the specific facts, stating only that "[t]he conduct at issue involves an arrest for a disqualifying offense." The letter did not cite to any authority for the proposed action. The letter did, however, include a statement that Respondent could "review any and all documentation and records that support this action."

5. Respondent was subsequently notified (via letter dated September 21, 2017) that the Board had approved the Superintendent's recommendation for suspension without pay. The letter stated in pertinent part that, "[Respondent] is suspended without pay beginning Wednesday, September 20, 2017, based on conduct as more specifically identified in the notice letter to the employee." At no point did any of the correspondence to Respondent specifically identify the disqualifying offense.

6. However, as noted above, Respondent was invited to meet with Ms. Oakes, the Board's director of personnel services, after the August 29, 2017, letters were provided to Respondent.

Respondent did meet with Ms. Oakes, who explained that the disqualifying offense alluded to in the letters was Respondent's arrest for theft in the State of Alabama. Respondent was, therefore, orally notified as to the disqualifying offense at issue. This fact was established by Ms. Oakes during her testimony at final hearing. Respondent did not testify at final hearing or otherwise attempt to contradict Ms. Oakes' testimony.

7. According to documentary evidence presented at final hearing, Respondent had been arrested for illegally redeeming a "Redemption ticket" at a casino in Armore, Alabama. The value of the ticket, which belonged to one of Respondent's friends, was $1,180.89. After her arrest for the theft, Respondent entered into a pre-trial diversion agreement with the State of Alabama. Pursuant to the agreement, Respondent admitted to the crime as charged, waived her right to a speedy trial, consented to six months' supervision by the Court, agreed to pay an assessment of $750, was to make restitution to the victim, was to refrain from the use of alcohol or drugs, agreed to not violate any federal or state laws, was to maintain gainful employment, and would have no further contact with the victim. Once the terms of the pre-trial diversion agreement were completed, all charges against Respondent would be nolle prossed.

8. As of the date of final hearing, the pre-trial diversion agreement was still in place. No competent, substantial evidence was introduced as to how Respondent is progressing in her pre-trial diversion.

9. The Board does not consider the action taken against Respondent to be disciplinary in nature. From the Board's perspective, only actions taken as a result of an employee's violation of their school-related duties are deemed disciplinary. Other actions, such as in Respondent's case or in the case of a teacher allowing their certification to lapse, for example, are not deemed disciplinary. Rather, they are "administrative" actions.

10. The action taken by the Board does not divest Respondent of her status as an "employee" of the Board. She is suspended, but not terminated from employment. This fact is important as Respondent has apparently been engaged in training to become a school bus driver. However, she was purportedly notified by someone from the school that she could not finish her training because of her suspension.[1/] Respondent is required under her pre-trial diversion contract to either be gainfully employed or in a training or educational setting.

11. Respondent challenges the action by the Board on two bases: 1) that the notice she received was deficient because the letters did not contain a specific statement as to the

disqualifying offense; and 2) that the crime of theft cannot be used by the Board for disciplining an employee because the crime does not appear in the list of disqualifying offenses set forth in chapter 1012, Florida Statutes. The offense is included in chapter 435, but Respondent asserts that chapter does not apply to school boards.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over this matter pursuant to sections 120.569 and 120.57(1), Florida Statutes, and pursuant to a contract between DOAH and the Board. Unless specifically stated otherwise, all references to Florida Statutes will be to the 2017 codification.

13. The Board has the burden of proof in this matter as it is the party asserting the affirmative of the issue. See Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). The standard of proof is by a preponderance of the evidence. See Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); and § 120.57(1)(j), Fla. Stat. The Board must prove in this case that Respondent committed a disqualifying offense and her suspension without pay was therefore justified.

14. The Escambia County School Board policies govern the Board's operations and actions. Included in chapter 2 of those

policies are guidelines which may disqualify persons from employment at a school. School Board Policy (6)A states one basis for disqualification:

> Conviction (as defined in sections 435.04, F.S., and/or 1012.315, F.S.) of a crime of moral turpitude (Section 1012.33, F.S.). Moral turpitude as defined by the District includes, but is not limited to, crimes listed in Sections 435.04, F.S., and/or 1012.315, F.S.

15. In section 1012.315(1)(y), theft is listed as a disqualifying offense, but only if the amount exceeds $3,000. In this case, Respondent's offense is for less than that amount, thus there was no disqualifying offense under section 1012.315. Under section 435.04(2)(cc), the crime of theft is listed as a disqualifying offense if it was a felony, regardless of the amount. Respondent's crime in Alabama was a felony under Alabama law and it would be a felony in Florida as well.

16. Respondent argues that chapter 435 sets out specified agencies that fall within its purview. Those agencies are enumerated in section 435.02(5), which states:

> "Specified agency" means the Department of Health, the Department of Children and Families, the Division of Vocational Rehabilitation within the Department of Education, the Agency for Health Care Administration, the Department of Elderly Affairs, the Department of Juvenile Justice, the Agency for Persons with Disabilities, and local licensing agencies approved pursuant to s. 402.307, when these agencies are conducting state and national criminal

> history background screening on persons who work with children or persons who are elderly or disabled.

17. The definition of specified agencies does not include school boards or school districts. It can therefore be deduced that the Legislature did not intend to include school boards or school districts within chapter 435. Respondent argues that the charge of theft, therefore, having come from the list of offenses in chapter 435, is not a valid basis for suspending her employment.

18. Following passage of the Jessica Lunsford Act by the Florida Legislature in 2005, the Florida Department of Education issued a Technical Assistance Paper ("TAP") to assist school boards concerning hiring practices. The TAP included a section addressing certain individuals who could be disqualified from employment. That section, appearing on pages four and five of the TAP, are recited verbatim here as they form much of the basis for Respondent's position in the present matter:

> Section 1012.465, F.S., as amended, states that those required to be screened must meet Level 2 screening requirements "as described in s. 1012.32, F.S."[2/]
>
> Some districts have questioned whether they may simply adopt the crimes enumerated in s. 435.04, F.S., the general Level 2 screening statute, as the disqualifiers. Such an interpretation would be incorrect, as s. 435.01, F.S., states:

"Whenever a background screening for employment or a background security check is required by law for employment, *unless otherwise provided by law*, the provisions of this chapter shall apply." (Emphasis added.) In the case of background screenings for employment at schools, the law (s. 1012.465, F.S.) *otherwise provides* that districts must apply the standards found in s. 1012.32, F.S. Thus districts must look to the language in s. 1012.32, F.S. to determine the scope of disqualifying offenses, using the "crimes of moral turpitude" standard, just as schools have been previously doing for their own employees. Rule 6B-4.009(6), used by many school districts for their own employees, defines moral turpitude as:

"Moral turpitude is a crime that is evidenced by an act of baseness, vileness, or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of an act itself and not its prohibition by statute fixes the moral turpitude."

Any of the offenses listed in s. 435.04, F.S., may certainly be a disqualifier for employment at a district. However, each district must make is own case-by-case determination of whether an act or acts revealed in a background check disqualifies an individual from employment at the district. See, Palm Beach County Sch. Bd. v. Ray Ano, DOAH Case No. 03-2497, (Amended Recommended Order, July 1, 2004). In effect, the law now holds all contractual employees to the same standards as the district's own employees with regard to background screening.

19. Thus, according to the TAP, a school board may not, without more, simply adopt the crimes enumerated in chapter 435 as "disqualifiers." The disqualifying offenses are already listed in section 1012.315. In order to add other disqualifying offenses (such as those listed in chapter 435), a school board must look to section 1012.32 for guidance. That statute states in pertinent part:

> (1) To be eligible for appointment in any position in any district school system, a person must be of good moral character; must have attained the age of 18 years, if he or she is to be employed in an instructional capacity; must not be ineligible for such employment under s. 1012.315; and must, when required by law, hold a certificate or license issued under rules of the State Board of Education or the Department of Children and Families. . . .

20. The section 1012.315 disqualifiers are only some of the reasons a person may not be eligible for employment. A school board may also add a disqualifier that concerns an issue of good moral character, insufficient age, or failure to have a license.

21. Moral turpitude is addressed in Florida Administrative Code Rule 6A-10.083. The bar for establishing moral turpitude is pretty low; it includes "[a]n act or omission, regardless of whether the individual is charged with or convicted of any criminal offense, which would constitute a felony or a first

degree misdemeanor under the laws of the State of Florida or equivalent law in another state or U.S. Territory, or laws of the United States of America." Fla. Admin. Code R. 6A-10.083(3).

22. The above-identified rule also sets forth factors to be considered when determining whether an act or omission rises to the level of gross immorality or moral turpitude, including the following:

> (a) The [employee's] dishonesty or deception;
>
> * * *
>
> (f) The harm, injury or insult to the victim;
>
> * * *
>
> (h) The benefit derived by the [employee's]

Fla. Admin. Code R. 6A-10.083(4).

23. The record established that Respondent took a payment voucher which had been issued to her friend while they were visiting a casino in Alabama. Respondent falsified and redeemed the voucher in her own name. She was charged with a felony by Alabama authorities and, according to the Pre-Trial Diversion Agreement, admitted her guilt in the matter.

24. The TAP states clearly that, "[a]ny of the offenses listed in s. 435.04, F.S., may certainly be a disqualifier for employment at a district." In the present case, the Board has

determined that admitting guilt to felony theft does not demonstrate good moral character and thus may constitute a basis for denying employment. School Board Policy 2.04(6)A states that any offense under chapter 435 and/or chapter 1012 may be considered by the Board when determining whether a person is eligible for employment. The School Board Policy could have also included the Ten Commandments or the Code of Hammurabi as bases for determining disqualifying offenses; it is, stated the TAP, up to each school board to decide. (It is the opinion of the undersigned that the TAP simply said that when considering disqualifying offenses, chapter 1012 must be considered; other chapters or sources might also be considered, but chapter 1012 was paramount.)

25. Thus, although the Board is not directly subject to chapter 435, it has accepted the findings from the TAP and allowed theft--taken from the list of offenses set out in section 435.04(2)(cc)--as a "disqualifier for employment" in the Escambia County School District.

26. Even though the letters to Respondent did not contain references to these statutory provisions, they alluded to an unnamed disqualifying offense. During Respondent's face-to-face meeting with Ms. Oates, she was sufficiently advised of the exact reason for her suspension. As the disqualifying offense

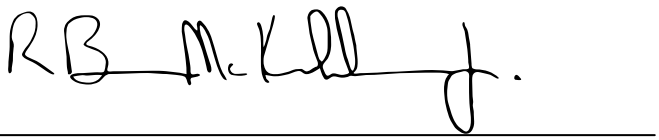
was of the sort contemplated in the Board's policies, its actions were justified.

27. Despite well-reasoned arguments by Respondent's counsel, wherein the interplay and seeming inconsistency of competing statutes were brilliantly addressed, the bottom line in this case is that Respondent, an employee of the Board, engaged in an activity which the Board found, and memorialized in its adopted School Board Policy (6)A, to be outside the realm of good moral character. In accordance with its existing policies, the Board chose to suspend--not to terminate Respondent's employment status.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by Petitioner, Escambia County School Board, upholding the decision to suspend Respondent, Deborah Peterson, without pay.

DONE AND ENTERED this 1st day of March 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March 2018.

ENDNOTES

[1/] Again, Respondent did not provide testimony or other evidence at final hearing concerning her efforts to comply with the pretrial diversion requirements. Respondent's alleged training was alluded to by her counsel, but no legitimate evidence was presented in that regard.

[2/] Section 1012.32 states in pertinent part:

> (2)(a) Instructional and non-instructional personnel who are hired or contracted to fill positions that require direct contact with students in any district school system or university lab school must, upon employment or engagement to provide services, undergo background screening as required under s. 1012.465 or 1012.56, whichever is applicable.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.