STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RENYA JONES,

Petitioner,

vs. Case No. 17-5889RX

ST. LUCIE COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

On January 23, 2018, Administrative Law Judge Lisa Shearer Nelson conducted a final hearing pursuant to section 120.56, Florida Statutes (2017), in Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Nicholas Wolfmeyer, Esquire
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Orlando, Florida 32802

For Respondent: Barbara L. Sadaka, Esquire
Legal Department
School District of St. Lucie County
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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether St. Lucie County School Board (School Board) Rules 6.16 and 6.50*+ are invalid exercises in delegated legislative authority as defined by sections 120.52(8)(c), (d), and (e).

PRELIMINARY STATEMENT

On October 26, 2017, Petitioner, Renya Jones, filed a Petition to Determine Validity of School Board Rules 6.16 and 6.50*+ (Rule Challenge).[1/] On November 1, 2017, Petitioner also filed a motion to consolidate the Rule Challenge with two pending employment termination cases brought by the School Board, DOAH Case Nos. 17-4226TTS (Termination I) and 17-5566TTS (Termination II). A status conference was conducted to address scheduling, because the employment termination cases were already scheduled to go forward on December 4, 2017, five days past the statutory deadline for scheduling a rule challenge, absent an agreement of the parties or good cause shown. See § 120.56(1)(c), Fla. Stat. After discussion with the parties, Termination I was severed from Termination II and the Rule Challenge, and Termination I remained scheduled for hearing on December 4, 2017. Termination II and the Rule Challenge were consolidated for hearing and scheduled for hearing on January 23, 2018.

On January 5, 2018, the School Board moved for a continuance, requesting that Termination II and the Rule Challenge be continued until the issuance of the Recommended Order in Termination I.[2/] The Motion for Continuance was denied by Order dated January 16, 2018, and that same day the parties filed witness and exhibit lists, and a Joint Pre-hearing

Stipulation. The Joint Pre-hearing Stipulation contains a limited number of factual stipulations for which no evidence at hearing was required, and those stipulated facts are included in the Findings of Fact below.

On January 18, 2018, the School Board filed a Notice of Voluntary Dismissal without Prejudice as to Termination II. As a result, an Order Severing DOAH Case No. 17-5566TTS and Closing File and Relinquishing Jurisdiction was issued on January 22, 2018, leaving only the Rule Challenge for hearing.

The hearing on the Rule Challenge proceeded as scheduled. Petitioner testified on her own behalf and Petitioner's Exhibits 1-9, 11-12, and 16 were admitted into evidence. The School Board presented the testimony of Aaron Clements, Director of Human Resources, and Respondent's Exhibits 1-27 were admitted. By agreement of the parties, the deadline for filing proposed final orders was extended to March 2, 2018. The Transcript of the hearing was filed with the Division on February 2, 2018, and both parties' Proposed Final Orders were timely filed. All references to Florida Statutes are to the 2017 codification.

FINDINGS OF FACT

1. Ms. Jones is currently an employee of the St. Lucie County School Board, and has a professional service contract pursuant to section 1012.33, Florida Statutes. Her status with

the School Board is "suspended without pay," for reasons that are not relevant to this proceeding.

2. As a classroom teacher, Ms. Jones is covered by the Collective Bargaining Agreement between the School Board of St. Lucie County and the Classroom Teachers Association.

3. On June 13, 2017, the School Board suspended Ms. Jones without pay and on July 27, 2017, a Petition for Termination in Termination I was referred to the Division of Administrative Hearings for an evidentiary hearing.

4. At that point, while Ms. Jones remained an employee of the School Board, she received no pay and no benefits from the School District. She began to look for other employment to support herself and her family.

5. Ms. Jones applied to and was offered a job to work as a music teacher by the Somerset Academy St. Lucie (Somerset). Somerset is a charter school in St. Lucie County sponsored by and located within the geographical bounds of the School District and the jurisdictional bounds of the School Board. Ms. Jones did not submit an application for leave and the School Board did not approve a request for leave of absence in order for Ms. Jones to work at Somerset.

6. By letter dated August 28, 2017, Superintendent Gent notified Ms. Jones of his intent to recommended to the School Board that she be terminated for grounds in addition to the

already-existing suspension, i.e., for violating the School Board's Rules 6.16(1); 6.301(2), (3)(b)(i), (3)(b)(xix), and (3)(b)(xxix); and 6.50*+. That letter became the basis for the Termination II proceeding.

7. The factual basis for pursuing the second termination proceeding was that Ms. Jones was working at Somerset without having applied for and received approval for a leave of absence from the School Board. The merits of the School Board's allegations in this second proceeding are no longer relevant in terms of Ms. Jones' employment with the School Board, as the School Board, through counsel, has represented that the School Board no longer intends to pursue the allegations in Termination II. The allegations are relevant and informative, however, in establishing the School Board's interpretation of its rules and establishing Ms. Jones' standing to challenge the validity of those rules. The evidence presented at hearing established that Ms. Jones has standing to bring this rule challenge.

8. School Board rule 6.16 is entitled "Dual employment," and provides as follows:

> (1) No person may be employed to work in more than one position in the school system except upon the recommendation of the Superintendent and approval of the School Board.

> (2) No employee shall accept other employment that might impair the independence of his or her judgment in the performance of his or her duties.

9. Rule 6.16 lists as its statutory authority sections 1001.41, 1012.22, and 1012.33, Florida Statutes, and lists sections 1001.43 and 1012.22 as the laws implemented. No reference to authority granted by the Florida Constitution is identified.

10. School Board Policy 6.50*+ is entitled "Leave of Absence," and provides in pertinent part:

> (1) Leave of absence. A leave of absence is permission granted by the School Board or allowed under its adopted policies for an employee to be absent from duty for a specified period of time with the right to return to employment upon the expiration of leave. Any absence of a member of the staff from duty shall be covered by leave duly authorized and granted. Leave shall be officially granted in advance and shall be used for the purposes set forth in the leave application. Leave for sickness or other emergencies may be deemed to be granted in advance if prompt report is made to the proper authority.
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> (2) Length of Leave and Pay. Generally, no leave or combination of leaves, except military leave or Workers' Compensation Leave, will be granted for a period in excess of one year. Illness-in-line-of-duty leave may not be extended beyond the maximum medical improvement date or a maximum of two (2) years from the date of injury, whichever is the earliest date. Leave may be with or without pay as provided by law, regulations of the State Board, and these rules. For any absence

that is without pay, the deduction for each day of absence shall be determined by dividing the annual salary by the number of days/hours for the employment period.

(3) Employment leave. A leave shall not be granted to any employee to accept other employment unless the leave is to accept employment at a charter school as provided in paragraph (5) below. Accepting employment while on a leave of absence cancels the leave automatically. The person on leave will be notified that he or she must return to work with the School Board immediately, resign or be terminated.

(4) The Superintendent shall develop procedures to implement leave provisions.

(5) Charter School Leave. An employee may be granted leave to accept employment at a charter school in St. Lucie County in accordance with the following provisions:

> (a) Teachers. Teachers may apply for leave to work at a charter school. The School Board will not require resignation of teachers desiring to work at a charter school. Teachers granted such leave by the School Board are not required to be on a continuing or professional services contract and shall not be subject to the seven (7) continuous years' service requirement. Should a teacher on leave elect to return to work at the District, the teacher shall return to the teacher's former position or a comparable position for which the teacher is qualified.
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> * * *
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> (d) Method to Request Leave. An application to request leave to accept employment in a charter school shall be submitted using the procedures

specified in Policy 6.501(1). For ten month instructional personnel, an application to request leave to accept employment at a charter school shall be submitted to the principal at least forty-five (45) days prior to the first day of work for the school year . . . .

(e) Insurance and Retirement Benefits. It shall be the sole responsibility of the charter school site to provide insurance and retirement benefits to charter school employees . . . .

* * *

(h) Notice of Intent to Return. Employees on charter school leave shall give the School Board written notice of their intent to return at least sixty (60) days prior to the beginning of the semester they wish to return.

(i) Requirement for Annual Renewal. Charter school leave must be renewed annually. It is the sole responsibility of the employee on leave to submit an annual written letter notice of leave to the Superintendent or designee, and a copy of the annual written letter notice of leave to the employee's school principal or immediate supervisor, as applicable, on or before April 1 of each year if they wish to renew their charter school leave for the following school year. Employees who do not submit the required annual leave form on or before April 1st will be considered to have voluntarily terminated their employment, and will no longer be eligible for any benefits or other consideration under this leave policy. (Emphasis supplied.)

11. Rule 6.50*+ lists sections 1001.41, 1012.22, and 1012.33 as its statutory authority, and lists sections 1001.43, 1002.33(12)(e), 1012.22, 1012.61, 1012.63, and 1012.66 as the laws it implements. No reference to authority granted by the Florida Constitution is identified.

12. Rule 6.50*+ provides that if a teacher working for the School Board wishes to work at a charter school within St. Lucie County, that teacher must apply for permission to do so. However, the definition of a leave of absence in the first paragraph of rule 6.50*+ specifically provides that a leave of absence allowed under the rule is for a specified period of time "with the right to return to employment upon the expiration of leave." By its terms, the rule does not appear to encompass those employees whose status is "suspended without pay," given that those employees who are suspended without pay do not necessarily have the right to return to employment upon expiration of leave.

13. Rule 6.50*+ also provides that an application for charter school leave shall be provided to the teacher's principal at least 45 days before the beginning of the school year. For teachers on suspension without pay or who are not assigned to a particular school, there is no principal to whom the application can be given. The rule does not specify an alternative. Instead, Mr. Clements stated that it would be up

to Ms. Jones (and presumably, anyone in her circumstance) to ask where to submit an application for charter school leave.

14. The School Board interprets rule 6.50*+ as applying to all employees, regardless of their status.

15. Rule 6.50*+ does not indicate what criteria would be used for determining if an employee's application for leave should be granted. Mr. Clements testified that the decision is made on a case-by-case basis. He also testified that had Ms. Jones applied for charter school leave, he would not have recommended that her request be approved, because as a teacher on unpaid suspension, she is not in good standing with the School District. Nothing in rule 6.50*+ alerts Ms. Jones, or any other teacher in her circumstances, that her suspension without pay would be a basis for disapproval of an application for charter school leave. Nothing in the rule alerts any applicant of the criteria to be considered for the grant or denial of a requested leave of absence.

16. The consideration of a staff member's current disciplinary status is not an unreasonable consideration for the Superintendent or for the School District. It is not, however, included in the rule as a basis for deciding whether a request for charter school leave should be approved or denied.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes.

18. Petitioner has standing to challenge the rules in this proceeding. Section 120.56 allows a person who is substantially affected by a rule or agency statement to initiate a challenge. To establish standing under the "substantially affected" test, a party must demonstrate that: 1) the rule will result in a real and immediate injury in fact, and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358 (Fla. 1st DCA 2005); see also Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, 808 So. 2d 243, 250 (Fla. 1st DCA 2002), superseded on other grounds, Dep't of Health v. Merritt, 919 So. 2d 561 (Fla. 1st DCA 2006).

19. Petitioner has established that she is an instructional employee of the School District, currently working at a charter school within the School District, subject to School Board rules. She is substantially affected by the application of the rules to her and has standing to challenge them.

20. Petitioner is challenging existing, as opposed to proposed, rules. Section 120.56(3) requires Petitioner to prove by a preponderance of the evidence that the existing rules are an invalid exercise of delegated legislative authority as to the objections raised.

21. Section 120.56(1)(a) provides that a person that is substantially affected by a rule or proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

22. Section 120.52(8) defines the term "invalid exercise of delegated legislative authority" as follows:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
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> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
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> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

23. Generally, under the Administrative Procedure Act, each agency rule must be accompanied by a reference to specific rulemaking authority and a reference to the section of the Florida Statutes or Laws of Florida being implemented, interpreted, or made specific. § 120.54(3)(a)1., Fla. Stat.

"After adoption of a rule, the [agency] may not rely on statutory provisions not cited in the proposed rule as statutory authority." Dep't of Child. & Fams. v. I.B., 891 So. 2d 1168, 1172 (Fla. 1st DCA 2005)(quoting Fla. League of Cities v. Dep't of Ins., 540 So. 2d 850, 865 (Fla. 1st DCA 1989)).

24. Section 120.81(1)(a) relieves school boards of some rulemaking requirements generally imposed on state agencies, stating, "notwithstanding s. 120.536(1) and flush left provisions of s. 120.52(8), district school boards may adopt rules to implement their general powers under s. 1001.41." Section 1001.41(2) provides that school boards shall adopt rules "pursuant to section 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it to supplement those prescribed by the State Board of Education and the Commissioner of Education."

25. Taken together, these modifications of the rulemaking process mean that the School Board's rules may be adopted to implement their general powers, and need not have the specific authority required of other agencies engaging in rulemaking. Its rules must, however, still be circumscribed by the definitions of invalid exercise of delegated legislative authority contained in section 120.52(8).

26. Here, the rules at issue identify both specific authority and law implemented.

27. Both rules list sections 1001.41, 1012.22, and 1012.23 as providing statutory authority for the rules. The relevant text of section 1001.41 is quoted at paragraph 23, above. Section 1012.22(2) authorizes the adoption of policies relating to personnel leave, and specifically authorizes rules related to annual leave, sick leave, illness-in-the-line-of-duty leave, and sabbatical leave. Section 1012.23(1) provides that "except as otherwise provided by law or the State Constitution, district school boards may adopt rules governing personnel matters, including assignment of duties, and responsibilities for all district employees."

28. Both rules list sections 1001.43 and 1012.22 as laws implemented. Section 1001.43(11) authorizes school boards to adopt policies and procedures necessary for the management of all personnel of the school system.

29. In addition, rule 6.50*+ lists sections 1002.33(12)(e), 1012.61, 1012.63, 1012.64, and 1012.66 as laws implemented. Section 1002.33(12)(e) provides:

> Employees of a school district may take leave to accept employment in a charter school upon the approval of the district school board. While employed by the charter school and on leave that is approved by the district school board, the employee may retain seniority accrued in that school district and may continue to be covered by the benefit programs of that school district, if the charter school and the district school board agree to this

> arrangement and its financing. School districts shall not require resignations of teachers desiring to teach in a charter school. This paragraph shall not prohibit a district school board from approving alternative leave arrangements consistent with chapter 1012.

30. Sections 1012.61, 1012.63, 1012.64, and 1012.66 address sick leave, illness-in-the-line-of-duty leave, sabbatical leave, and provisions for leaves of absence, respectively.

31. There is no dispute that the School Board has ample authority to adopt both rules at issue in this case.

Rule 6.16

32. Petitioner challenges rule 6.16 (dual employment) as vague, arbitrary, and capricious, and providing unbridled discretion to the School Board, in violation of section 120.52(8)(d) and (e). She argues that the rule 6.16 is vague because of its use of the terms "school system," and "employee."

33. Petitioner contends that she is not an employee of the School Board because she receives no pay or benefits while she is suspended without pay. She continues to hold a professional services contract with the District and is still covered by the Collective Bargaining Agreement between the School Board and the Classroom Teachers Association. In her view, however, her employment with the School Board has been terminated.

34. Petitioner relies on Wright v. State, 389 So. 2d 662, 663 (Fla. 1st DCA 1980). The decision in Wright is distinguishable, in that it addressed whether a teacher who took a voluntary leave of absence to run for school board was required to surrender her continuing contract to run for re-election to the school board in order to remain in compliance with section 112.313(10), Florida Statutes (1975). The First District's decision that Wright was not an employee because she received no pay or benefits during her voluntary leave of absence did not address the statutory scheme for suspending or dismissing instructional personnel. By contrast, section 1012.33(6)(a) provides in part:

> (6)(a) Any member of the instructional staff . . . may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. Such hearing shall be conducted at the district school board's election in accordance with one of the following procedures:
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> * * *

> 2. A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings . . . . in accordance with chapter 120.

35. Hearings conducted pursuant to section 120.57(1) are de novo proceedings, and are intended to formulate final agency action, not to review action taken earlier and preliminarily. Miles v. Fla. A. & M. Univ., 813 So. 2d 242, 246-247 (Fla. 1st DCA 2002)("FAMU's decision to discharge did not and could not become final until after the formal administrative hearing had taken place."); see also Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 785 (Fla. 1st DCA 1981). Therefore, while the School Board has admittedly taken steps to terminate Petitioner's employment, including suspending her without pay pending the resolution of her hearing in Termination I, that action is not yet final. She remains a School District employee.

36. Rule 6.16 is not vague for failure to define employment, especially in light of the statutory framework governing the teaching profession.

37. The same can be said for the use of the term "school system." Petitioner quotes to various provisions within section 1002.33, the statute authorizing charter schools, in support of her contention that employees of a charter school are not employees within the school system.[3/] However, section 1002.02

identifies Florida's "K-20 education system" in a global way, consistent with section 1001.01(3), which provides that "the purpose of the Florida K-20 Education Code is to provide by law for a state system of schools, course, classes, and educational institutions and services adequate to allow, for all Florida's students, the opportunity to obtain a high quality education." The Education Code addresses not only traditional public schools, but charter schools as well.[4/]

38. Section 1002.33(12) specifically addresses employment at charter schools, and section 1002.33(12)(e) authorizes employees of a school district to take leave to accept employment in a charter school upon the approval of the district school board. When reviewed in the context of these provisions, there is no ambiguity caused by the use of the term "school system" in rule 6.16.

39. Petitioner also contends that rule 6.16 vests unbridled discretion in the School Board because it fails to provide adequate standards for School Board decisions. Rule 6.16 simply provides that an employee may not be employed to work in more than one position in the school system "except upon recommendation of the Superintendent and approval of the School Board."

40. There are few cases that actually address the invalidity of a rule based upon the failure to establish

adequate standards, or vesting unbridled discretion in an agency. As stated by Cortes v. Board of Appeals, 655 So. 2d 132, 138 (Fla. 1st DCA 1995),

> An administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised. Otherwise the "lack of . . . standards . . . for the exercise of discretion vested under the . . . rule renders it incapable of understanding . . . and incapable of application in a manner susceptible of review." Staten v. Couch, 507 So. 2d 702 (Fla. 1st DCA 1987). Because a reviewing court "shall not substitute its judgment for that of the agency on an issue of discretion," § 120.68(12), Fla. Stat. (1983), an agency rule that confers standardless discretion insulates agency action from judicial scrutiny. By statute, a rule or part of a rule that "fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency," § 120.52(8)(d), Fla. Stat., is invalid.

41. Rule 6.16 contains no standards to guide the Superintendent in making his or her recommendation to the School Board, or to guide the School Board in making its decision, with respect to any request for dual employment. While the reasons that the Superintendent and the School Board typically consider in making this decision may be valid and reasonable, the rule itself contains no standards to guide an applicant in considering whether to make a request for dual employment, or for the Superintendent or School Board in deciding whether to

grant a request that is submitted. In this single respect, rule 6.16 is an invalid exercise of delegated legislative authority as defined in section 120.62(8)(d).

Rule 6.50*+

42. Petitioner contends that rule 6.50*+, which governs leaves of absence, is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(c), asserting that it contravenes or enlarges its statutory authority because it is being applied to people who are not employees of the School District.

43. Petitioner's assertion is premised on her belief that she is not an employee of the School District. However, as noted above, it is found by the greater weight of the evidence that she remains a school district employee. Nothing in the rule itself indicates that it would apply to people who are not School District personnel. Petitioner's challenge in this respect stems from its application to her, as opposed to the language of the rule itself, and her challenge based upon section 120.52(8)(c) has not been proven.

44. Petitioner also contends that rule 6.50*+ is invalid because it is vague, does not contain adequate standards, and vests unbridled discretion in the Superintendent and the School Board.

45. An administrative rule is invalid under section 120.52(8)(d) if it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. Bouters v. State, 659 So. 2d 235, 238 (Fla. 1995); Sw. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 915 (Fla. 2d DCA 2001); State v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013); see also Witmer v. Dep't of Bus. and Prof'l Reg., 662 So. 2d 1299, 1302 (Fla. 4th DCA 1995).

46. Petitioner has demonstrated by a preponderance of the evidence that rule 6.50*+ is vague. The School Board interprets the rule, based upon its plain language ("[a]ny absence of a member of the staff from duty shall be covered by leave duly authorized and granted"), to apply to all employees, which is consistent with the statutes the rule implements. Yet, the rule also expressly states that leave is granted "for a specified period of time with the right to return to employment upon expiration of leave." An employee who is suspended without pay pending a hearing to resolve a Petition for Termination has little or no expectation that he or she will have a right to return to the School Board. Ms. Jones' belief that the rule could not apply to her, given her unpaid suspension, is reasonable. Both interpretations are reasonable.

47. Moreover, the rule provides no method for instructional employees who are not assigned to a school, such as Ms. Jones, to file an application for leave. Mr. Clements indicated that a teacher so situated should ask. However, the point of the rulemaking process is to put people on notice so that everyone has the same understanding of what is expected of them. As currently written, this rule does not provide that notice with respect to teachers, such as Ms. Jones, who are still employed but not assigned to a particular school.

48. Petitioner also challenges rule 6.50*+ because, like rule 6.16, it does not contain adequate standards, and vests unbridled discretion in the Superintendent and the School Board. Petitioner has proven that rule 6.50*+ is an invalid exercise of delegated legislative authority by a preponderance of the evidence. The evidence presented established that rule 6.50*+ does not provide any criteria by which applications for leave will be evaluated, and Mr. Clements testified that applications are decided on a case-by-case basis. The evidence also established that Mr. Clements would not have recommended that leave be approved for Ms. Jones had she filed an application, because he did not consider her to be in good standing. While his decision is a reasonable one, there are no bounds to the discretion accorded to either the Superintendent or the School Board under this rule. In this respect, rule 6.50*+ is an

invalid exercise of delegated legislative authority as defined in section 120.52(8)(d).

49. Petitioner has not demonstrated that either rule is arbitrary or capricious, in violation of section 120.52(8)(e).

50. Section 120.595(3) mandates that "[i]f the appellate court or administrative law judge declares a rule or a portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust." Inasmuch as this Final Order determines that the proposed rule is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(d), Petitioner is entitled to a hearing as to entitlement and, if entitled, the amount of any reasonable fees and costs.

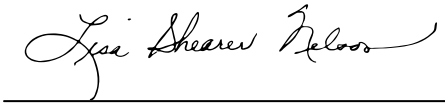
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that rules 6.16(1) and 6.50*+ are invalid exercises of delegated legislative authority. Jurisdiction is retained for the purpose of determining whether attorney's fees and costs are warranted and, if so, the amount. Any motion to determine

fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 22nd day of March, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of March, 2018.

ENDNOTES

[1/] The School Board has a St. Lucie County School Board Policy Manual which contains its policies, including the two at issue here. While the School Board identifies them as policies, they are, by definition, rules. § 120.52(16), Fla. Stat. For simplicity, the policies are identified as rules throughout this Order.

[2/] At that time, the Proposed Recommended Orders in Termination I had yet to be filed. On February 22, 2018, after the hearing in this case, the Recommended Order in Termination I was filed, recommending that Ms. Jones' employment be terminated. The factual findings in that case have no bearing on the issues to be determined in this proceeding, except to the extent that Ms. Jones' employment status is relevant to her standing to bring this Rule Challenge.

[3/] Section 1002.33 is 30 pages long. Petitioner quotes a handful of sentences from section 1002.33 without identifying the paragraph(s) within section 1002.33 where the quoted language can be found.

[4/] Not all provisions of the Education Code apply to charter schools. Section 102.33(16) describes the parameters of the exemptions afforded charter schools, as well as the provisions with which they must comply.

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(eServed)

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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.