

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 18-2270

JUSTIN WARREN,

Respondent.

_____ /

RECOMMENDED ORDER

On September 13, 2018, Administrative Law Judge Yolonda Y. Green conducted a final hearing pursuant to section 120.57(1), Florida Statutes (2018), in Pensacola, Florida.

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 to be determined in this proceeding is whether Respondent is entitled to back pay following reinstatement to employment after suspension without pay.

PRELIMINARY STATEMENT

On February 23, 2018, Petitioner, Escambia School Board ("Petitioner" or "School Board"), entered a final order in DOAH Case No. 17-4220, which resulted in the School Board suspending Respondent, Justin Warren ("Respondent" or "Mr. Warren"), without pay. By letter dated November 15, 2017, the superintendent notified Respondent that he would recommend that Respondent be reinstated to his position, effective November 17, 2017. However, the recommendation did not include an award for back pay for the period of suspension without pay. On April 24, 2018, Mr. Warren requested an administrative hearing to dispute the School Board's determination to not award back pay following his reinstatement to employment. This matter was assigned to the undersigned on May 8, 2018. This matter was scheduled for hearing on July 11, 2018. On June 20, 2018, the parties requested a continuance, which was granted. The parties were instructed to file a status report by July 9, 2018. On July 6, 2018, the parties filed their Status Report stating they agreed to consolidate the Rule Challenge filed in DOAH Case No. 18-3340RX with the instant case. On July 6, 2018, the undersigned conducted a status conference to address scheduling the final hearing. Thereafter, the undersigned entered an Order consolidating DOAH Case Nos. 18-2270 and 18-3340RX and scheduling the final hearing for September 13, 2018.

The final hearing proceeded as scheduled on September 13, 2018. At hearing, the parties offered three witnesses: James Alan Scott, Ed.D., assistant superintendent for human resources of the Escambia County School District ("School District"); Nicole Spika, executive director of ESP and Union of Education Association; and Donna Sessions Waters, general counsel for the School District. Petitioners offered Exhibits 1 through 6, which were admitted. Respondent offered Exhibits 1 through 9, which were admitted.

Following the hearing, the undersigned granted the parties' request for an extended deadline of 30 days after filing of the official hearing transcript to file proposed recommended orders ("PROs").^{1/} The one-volume Transcript of the hearing was filed on October 31, 2018, and the PROs were initially due on November 29, 2018. Thereafter, the parties requested an extension of time on three separate occasions, which the undersigned granted. A fourth request for extension of time was denied. The parties filed their PROs after the designated time for filing, February 15, 2019, and, thus, were untimely.

On February 18, 2019, Petitioners filed their Unopposed Motion to Deem Proposed Final Order Timely Filed. On February 19, 2019, Respondent filed a Motion for Submitting and Filing Proposed Recommended Order (case no. 18-2270) and Proposed Final Order (case no. 18-3340RX) Two Business Days out

of Time. The undersigned hereby grants both motions. The parties' PROs were considered in preparing this Recommended Order.

Unless otherwise indicated, all references to Florida Statutes are to the 2017 codification.

FINDINGS OF FACT

1. At the final hearing, the parties stipulated to adopting the Findings of Fact from DOAH Case No. 17-4220, which are incorporated herein as follows:

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the system of public schools in Escambia County, Florida. Art. IX, § 4(b), Fla. Const.; § 1001.32, Fla. Stat. The School Board has the statutory responsibility to prescribe qualifications for positions of employment and for the suspension and dismissal of employees subject to the requirements of chapter 1012.

2. At all times relevant to this proceeding, Respondent is a noninstructional support employee, who has been employed as a Custodial Worker I by the School Board since October 13, 2014. Mr. Warren worked 40 hours a week at Pine Forest High School. Mr. Warren's position with the School Board is annual, rather than based on the academic school year calendar.

3. During the regular school year, students are required to be on campus from 8:30 a.m. to 3:30 p.m. After the school day, there are students who remain at the school for various activities with clubs and organizations. While students are

present, custodial workers complete their duties and work assignments throughout the school. On a regular school day students may be present at the school for clubs and organizations until as late as 9:00 p.m.

4. Respondent works the 2:00 p.m. to 10:30 p.m. shift and would be present when students are present.

5. The background regarding Respondent's arrest arises from a dispute where it was alleged that he forged a quitclaim deed, transferring property from his uncle to himself. On May 9, 2017, Respondent was arrested. Thereafter, an information was filed against Respondent by the State Attorney's Office alleging that he knowingly obtained or endeavored to obtain certain property of another valued at \$20,000.00 or more, but less than \$100,000.00, in violation of section 812.014(1)(a) and (1)(b), and (2)(b)1., a second degree felony.

6. At the time of the final hearing, Respondent's criminal case was pending final disposition.

7. On May 18, 2017, Superintendent of the School Board, Malcolm Thomas, provided written notice to Respondent that he was suspended "with pay effective immediately . . . pending the outcome of an arrest for §812.014.2b1 [sic], F.S., a disqualifying offense." The Superintendent's letter did not provide authority for the Superintendent's action. The Superintendent also cited no authority for his position that the alleged offense was a "disqualifying offense."

8. Also, on May 18, 2017, the Superintendent notified Respondent of his intent to recommend to the School Board that Mr. Warren be placed on suspension without pay beginning June 21, 2017. In

his request to the School Board, the Superintendent stated that his recommendation was "based on conduct as more specifically identified in the notice letter to the employee." Similar to the notice regarding the intended recommendation, the Superintendent cited no authority for his recommendation, nor his position that the alleged offense was a "disqualifying offense."

9. By letter dated June 21, 2017, Dr. Scott advised Respondent that the School Board voted to accept the Superintendent's recommendation placing him on suspension without pay, effective June 21, 2017. As cause for Mr. Warren's suspension without pay, Dr. Scott's letter stated that it is "based on conduct as more specifically identified in the [Superintendent's] notice letter to the employee." Dr. Scott's letter did not use the term "disqualifying offense," nor did it cite any authority for the School Board's action.

10. Respondent had no history of disciplinary action during his employment by the School Board. In addition, Ms. Touchstone testified that Respondent "has been a good employee for us."

Additional Findings of Fact

2. While DOAH Case No. 17-4220 addressed the issue of whether the School Board had authority to suspend Mr. Warren without pay until final resolution of the criminal charge alleging a violation of section 812.014(2)(b)1., Florida Statutes, the issue of reinstatement and back pay were not at issue in that case.

3. There was no evidence offered at hearing that the School Board offered Mr. Warren the opportunity to work in a location that does not have direct contact with students until the charges were resolved.

4. Nearly five months after the Final Order was entered in DOAH Case No. 17-4220, the criminal charges, which served as the basis for Mr. Warren's suspension without pay, were dismissed. As a result, the School Board reinstated Mr. Warren to his same position as a custodial worker, effective November 17, 2017. The School Board denied Mr. Warren back pay for the period he was suspended without pay.

5. The School Board relied on its Rules and Procedure rule 2.04 (2017), when it approved the recommendation to suspend Mr. Warren without pay for the pending criminal charge.

6. Rule 2.04 provides that "a record clear of disqualifying offenses as defined in section A . . . is required for employment or continued employment." However, rule 2.04 fails to address the method of reinstatement or the condition upon which an employee would receive back pay if criminal allegations related to a potentially disqualifying offense were resolved favorably for the employee.

7. The School Board has refused to award back pay to Mr. Warren on the basis that his criminal charges resulted from actions outside the scope of his employment. There is no

written policy in rule 2.04 or otherwise that an existing employee who is suspended without pay for conduct that occurred outside the scope of his or her work environment is not entitled to back pay upon reinstatement. It is simply general practice.

8. The assistant superintendent of human resources for the School District (Dr. Scott) and the general counsel (Ms. Waters) testified regarding the policy of not awarding back pay to reinstated employees after suspension without pay.

9. Dr. Scott, who has served as the assistant superintendent of human resources for the School District since 2005, testified that "[g]enerally, if an employee is suspended without pay based on criminal charges or investigation of misconduct but in the scope of the employee's position . . . and the employee is subsequently exonerated and reinstated, back pay will be awarded." By contrast, "if an employee is suspended without pay pending criminal charges and/or investigation, potentially, unlawful conduct unrelated to the employee's performance of their duties in his or employment, in the event the employee is reinstated, back pay is generally not award[ed]." Dr. Scott also testified that the District's practice "can be a substitute" for a properly adopted rule. He acknowledged that the policy has not been approved by the School Board. Moreover, he acknowledged that the policy is not based on any adopted rule.

10. Ms. Waters also testified about the policy of not awarding back pay. She testified that she "was not able to answer the question in the abstract" regarding whether the policy was generally applicable. She stated that it would be "a fact kind of question."

11. In this case, Mr. Warren was deprived of wages that he would have earned but for the suspension without pay for criminal charges that were later dismissed.

12. There was much discussion at hearing regarding whether the School Board's action of suspending Mr. Warren without pay should be considered discipline. Ms. Spika testified that the action of suspending Mr. Warren without pay is considered disciplinary action.

13. Discipline is defined in the Collective Bargaining Agreement ("CBA") as including suspension without pay. Discipline is also defined as corrective action to improve behavior. Here, the School Board did not consider Mr. Warren's suspension without pay as disciplinary action as it was not intended to correct his work performance or work place conduct.

CONCLUSIONS OF LAW

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

15. Petitioner has standing 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).

16. Mr. Warren has established that he is a noninstructional employee of the School District, currently working at a school within the School District, subject to School Board rules. Moreover, he was reinstated to employment following a suspension for a pending criminal arrest for a potentially disqualifying offense. Mr. Warren is substantially affected by the application of the School Board's policy regarding back pay.

17. The party seeking to prove the affirmative of an issue has the burden of proof. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

18. The party seeking to prove this type of case must do so by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

19. Mr. Warren seeks to recover back pay for the time period during the time he was suspended without pay. Thus, Mr. Warren must prove by a preponderance of evidence that he is entitled to back pay.

20. To the extent there is a statute, rule, employment contract, or CBA that authorizes such relief, Mr. Warren should be reinstated and awarded full back pay and benefits. See Sch. Bd. of Seminole Cnty. v. Morgan, 582 So. 2d 787, 788 (Fla. 5th DCA 1991); Brooks v. Sch. Bd. of Brevard Cnty., 419 So. 2d 659, 661 (Fla. 5th DCA 1982).

21. There is no statutory authority to award back pay to a noninstructional employee following suspension without pay.

22. The CBA did not address the issue of back pay. School Board rule 2.04, which served as the basis for Mr. Warren's suspension without pay, also did not address back pay under the circumstances here. Finally, the undersigned is unaware whether Petitioner had an employment contract with the School Board as none was offered at hearing.

23. The testimony at hearing demonstrates that the School Board had an unwritten practice or policy to deny back pay to existing employees who had pending criminal charge arising out

of conduct that was outside the scope of the employee's employment.

24. But for this unwritten policy, Mr. Warren would have been entitled to the salary and benefits he would have earned during the period of suspension.

25. Dr. Scott testified that the School District's practice "can be a substitute" for a properly adopted rule. He testified that the policy was not based on any adopted rule. However, based on the testimony of Dr. Scott and Ms. Waters, the policy of refusing to award back pay to employees charged with a crime unrelated to the person's employment by its terms is not limited to the facts. It is instead a general practice, which applies to any employee who is similarly situated as Mr. Warren.

26. There is no such requirement in the statute or rule 2.04. To impose such a stringent practice or policy here would be impermissibly basing agency action on an unadopted rule. This practice or policy would be applicable to any similarly situated existing employee. The School Board's action in this respect constitutes an unadopted rule. Section 120.57(1)(e) prohibits an agency or an administrative law judge from basing agency action that determines the substantial interests of a party on an unadopted rule.

27. The School Board argued that Petitioner may not raise a rule challenge in this matter because it should have been

raised pursuant to section 120.56(4)(g). However, section 120.56(4) does not preclude Respondent from raising an unadopted rule challenge during a disputed fact hearing under section 120.57(1). Petitioner, however, did not raise an unadopted rule challenge argument here.

28. To the extent the School Board makes a determination of awarding back pay to Mr. Warren, Ms. Waters testified the decision regarding awarding back pay is "a fact kind of question."

29. Consistent with Mr. Warren's reinstatement, the facts here support an award of back pay. The circumstances surrounding the incident involved a family dispute over property. The criminal charges were dismissed, and as a result, the potentially disqualifying offense was not legally substantiated. The School Board determined that the suspension without pay would not constitute discipline against Mr. Warren. However, to deprive Mr. Warren of his interest in the salary and benefits he would have earned had he not been suspended without pay would have the effect of disciplinary action.

30. There appears to be ample authority for the School Board to award back pay to Mr. Warren, and it is routinely done when the alleged, but unproven, disqualifying offense is "within the scope of employment." A rational basis to support a

distinction based on the relationship of the offense to employment was not proven in this matter.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that to the extent there is authority to do so, Mr. Warren should be reinstated and awarded full back pay and benefits. See Sch. Bd. of Seminole Cnty. v. Morgan, 582 So. 2d 787, 788 (Fla. 5th DCA 1991); Brooks v. Sch. Bd. of Brevard Cnty., 419 So. 2d 659, 661 (Fla. 5th DCA 1982).

DONE AND ENTERED this 16th day of May, 2019, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2019.

ENDNOTE

^{1/} By agreeing to an extended deadline for post-hearing submissions, the 30-day time period for filing this Recommended Order was waived.

COPIES FURNISHED:

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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.