STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUSTIN WARREN AND THE UNION OF
ESCAMBIA EDUCATION STAFF
PROFESSIONALS, FEA, NEA, AFT,

Petitioners,

vs. Case No. 18-3340RX

ESCAMBIA COUNTY SCHOOL BOARD,

Respondent.
_____/

FINAL ORDER

On September 13, 2018, Yolonda Y. Green, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("Division") conducted a final hearing pursuant to section 120.56(3), Florida Statutes (2018), in Pensacola, Florida.

APPEARANCES

For Petitioner: Mark S. Levine, Esquire
Levine & Stivers, LLC
245 East Virginia Street
Tallahassee, Florida 32301

For Respondent: Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125

STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether Escambia County School Board ("School Board") Rule 2.04 (2017-

2018)[1/] is an invalid exercise of delegated authority, as defined in section 120.52(8)(b), (c), (d), and (e).

PRELIMINARY STATEMENT

On June 29, 2018, Petitioners, Justin Warren ("Mr. Warren"), and The Union of Escambia Education Staff Professionals, FEA, NEA, AFT ("ESP"), filed a Petition for Administrative Determination to Challenge the Validity of Rules ("Rule Challenge"). On July 6, 2018, the parties filed their Status Report stating the parties agreed to consolidate the Rule Challenge with the pending back pay case brought by Mr. Warren in DOAH Case No. 18-2270. The undersigned entered an Order consolidating DOAH Case Nos. 18-2270 and 18-3340RX for hearing purposes. On July 6, 2018, the undersigned conducted a status conference to address scheduling the final hearing as the hearing on the back pay case had previously been continued. During the status conference, the parties agreed to a final hearing on a date after the 30-day timeline to schedule a rule challenge. The cases were consolidated and scheduled for hearing on September 13, 2018.

On July 24, 2018, the undersigned granted Petitioner's Motion to Amend Rules Challenge Petition.

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.

At the end of the final hearing, the undersigned granted the parties' request for an extended deadline of 30 days after filing of the official hearing transcript for proposed final orders ("PFOs").[2/] The one-volume Transcript of the hearing was filed on October 31, 2018, and the PFOs were 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' PFOs were filed 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' PFOs were considered in preparing this Final Order.

Unless otherwise indicated, all references to Florida Statutes are to the 2017 codification, and all references to rule 2.04 are to the March 2018 codification.

FINDINGS OF FACT

1. At 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.
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> 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.
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> 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."
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> 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.
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> 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."

2. As a noninstructional employee, Mr. Warren is covered by the Collective Bargaining Agreement ("CBA") between the School Board and the ESP. In addition, the School Board, in part, relied upon rule 2.04 (2017), when it approved the recommendation to suspend Mr. Warren without pay for a criminal arrest. If Mr. Warren had been convicted of the alleged crime, he would have been disqualified from employment with the School Board. While the issue of whether the School Board had authority to suspend Mr. Warren's license was addressed in DOAH Case No. 17-4220, that matter did not address the issue of the method of reinstatement and back pay for existing employees. As

will be further discussed in the Conclusions of Law below, Mr. Warren has standing to challenge the rules in an individual capacity.

3. A Recommended Order upholding Mr. Warren's suspension without pay was issued on December 22, 2017. The School Board issued a Final Order adopting the Recommended Order in toto, issued on February 23, 2018.

4. Since the Final Order was filed in DOAH Case No. 17-4220, Mr. Warren pled no contest to Filing a False Document, a non-disqualifying offense, pursuant to section 435.04, Florida Statutes, and the court withheld adjudication.[3/] Other charges, including the alleged disqualifying offense, were nolle prossed.

5. On December 22, 2017, as a result of the plea agreement, the School Board voted to reinstate Mr. Warren to work, effective November 17, 2017.

6. Mr. Warren's suspension without pay was formally rescinded, and he was reinstated to his position as a custodial worker. However, in reliance on School Board Policy 2.04, the School Board has refused to pay him back pay and benefits for the roughly five-month period of suspension without pay.

7. Mr. Warren timely appealed the School Board's decision to deny him back pay and benefits. The case is currently pending at the Division (DOAH Case No. 18-2270).

8. Petitioner, ESP, is the union that solely and exclusively serves as the bargaining agent for collective bargaining on behalf of employees employed by the School Board. ESP has associational standing to represent members of the bargaining unit and to challenge rules that may affect employees covered by the CBA.

9. School Board rule 2.04 is entitled "Recruitment and Selection of Personnel" and provides, in pertinent part, as follows:

> (6) Guidelines which may disqualify from employment:
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> A. 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.
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> * * *
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> D. Any other felony crime not listed in Sections 435.04, F.S., or 1012.315, F.S., with a final disposition of guilt or plea of nolo contendere (no contest), regardless of adjudication of guilt.
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> * * *
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> J. Noncompliance with the District hiring requirements under Sections 435.04, F.S., 1012.465, F.S., 1012.315, F.S., and 1012.56, F.S. A record clear of disqualifying offenses as defined in Section A above is required for employment and continued employment with the District.

> Individuals who have pending criminal charges for an offense which would disqualify from employment or who are currently on probation or participating in a program for first-time offenders as a result of the offense will be automatically disqualified from employment or continued employment until resolution of the charge(s).
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> * * *
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> (8) All applicants and vendors have the right to appeal before the Human Resources Appeals Committee. The Assistant Superintendent of Human Resource Services or designated representative will select the members of this committee to ensure diversity. The Committee is responsible for following and abiding by all local, state, and federal employment procedures and laws. A second applicant or vendor appeal will be granted only when new facts or additional information has been presented that was not considered in the first appeal hearing.
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> (9) The Superintendent shall review decisions made by the Human Resources Appeals Committee and has the authority to overturn decisions made by the Committee, excluding appeals from offenses listed in Sections 435.04, F.S., and/or 1012.315, F.S., and/or 1012.467, F.S.

10. Rule 2.04 lists as its statutory authority sections 1001.41, 1001.42, and 1001.43, Florida Statutes, and lists sections 112.3173, 435.04, 440.102, 800.04, 943.051, 1001.01, 1001.10, 1001.42, 1001.43, 1003.02, 1003.32, 1003.451, 1012.22, 1012.27, 1012.32, 1012.335, and 1012.39, Florida Statutes, as the law it implements. The rule does not cite section 435.04 as statutory rulemaking authority. The rule does not list any

reference to 1012.315 or 1012.465 as rulemaking authority or as law implemented.

11. Rule 2.04 provides that an individual may be disqualified from employment or continued employment if he or she has pending criminal charges. The rule requires compliance with sections 435.04, 1012.465, and 1012.315. Section 1012.465 provides that noninstructional employees who have direct contact with children must meet the level 2 requirements described in 1012.32, which references section 1012.315 as the list of disqualifying offenses.

12. Moreover, rule 2.04 allows for an employee to be disqualified, i.e., suspended from employment until resolution of the alleged charges, without providing a method for reinstatement or back pay should the allegations be resolved favorably for the employee.

13. The School Board asserts that it has a duty and statutory authority to adopt and implement rules to facilitate the level 2 background screening required by 1012.465. However, there is no such authority in section 1012.465, 1012.315, or 1012.32, by reference or otherwise.

14. Rule 2.04 also does not indicate the criteria that would be used for determining whether an employee should be reinstated with back pay. Dr. Scott testified that, "generally, the decision to award back pay is made on a case-by-case basis.

It has been a general 'practice' to not award back pay for private conduct which resulted in criminal charges." Ms. Waters agreed with Dr. Scott that back pay may be awarded based on the circumstances. Ms. Waters testified that the superintendent determines whether a reinstated employee should be awarded back pay, completely, partially, or not at all. Nothing in rule 2.04 provides Mr. Warren, or any other existing employee in his circumstances, with notice that suspension without pay for pending criminal charges for a disqualifying offense may result in the employee being awarded back pay upon reinstatement.

15. The School Board's determination that back pay would not be awarded following resolution of pending criminal charges was based solely on the superintendent's discretion.

16. If an employee is suspended without pay based on criminal charges related to the employee's position and the charges are subsequently resolved, the employee may be awarded back pay.

CONCLUSIONS OF LAW

17. 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.

18. Petitioners have 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).

19. Mr. Warren has established that he is a noninstructional employee of the School District, currently working at a school within the School District, and subject to School Board rules. He is substantially affected by the application of the rules to him and has standing to challenge them.

20. With respect to associational standing, the Supreme Court of Florida has stated that to meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. The subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to

receive on behalf of its members. NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003); Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982). That standard has been met here, and the parties do not dispute ESP's standing to participate in this proceeding.

21. The parties stipulated that this proceeding is a challenge to an existing rule. Petitioners have challenged rule 2.04 (2018), which is the amendment of rule 2.04 (2017).

22. Before addressing the validity of rule 2.04, we turn to whether the Division has jurisdiction to address the 2017 codification of the rule. In Office of Insurance Regulation v. Service Insurance Company, 50 So. 3d 637, 638 (Fla. 1st DCA 2010), rev. denied, 63 So. 3d 750 (Fla. 2011), the First District considered a decision in which the administrative law judge found a rule of the Office of Insurance Regulation related to arbitration to be invalid. In reversing the final order, the Court stated:

> Section 120.56(3)(a), Florida Statutes (2008), sets forth the parameters of an ALJ's jurisdiction to entertain a rule challenge. It provides that "[a] substantially affected person may seek an administrative determination of the invalidity of an existing rule *at any time during the existence of the rule*." § 120.56(3)(a) (emphasis added). This statute does not authorize a rule challenge to a rule that is no longer in existence. See id.; Dep't of Revenue v. Sheraton Bal Harbour Ass'n, Ltd., 864 So. 2d 454

> (Fla. 1st DCA 2003). Once a rule's enabling statute is repealed, the rule itself automatically expires. Canal Ins. Co. v. Cont'l Cas. Co., 489 So. 2d 136, 138 (Fla. 2d DCA 1986) (citing Hulmes v. Div. of Ret., Dep't of Admin., 418 So. 2d 269 (Fla. 1st DCA 1982)). Therefore, even if the rule is still in print, it is no longer effective and does not meaningfully "exist."
>
> We recognize that our sister court in Witmer v. Department of Business and Professional Regulation, 662 So. 2d 1299 (Fla. 4th DCA 1995), held that an expired rule could be challenged as long as it was still being applied to the petitioner. While this holding may be a good policy, it does not reflect the plain language of section 120.56(3), which requires that a challenge be initiated during the existence of the rule. The plain language of the statute makes this requirement an issue of timing rather than substance. See § 120.56(3)(a) ("A substantially affected person may seek an administrative determination of the invalidity of an existing rule *at any time during the existence of the rule*.") (emphasis added). For this reason, we disagree with the Witmer court and hold that the ALJ in the instant case erred in reviewing the expired rule. Because Appellee did not file its challenge during the rule's eleven years of existence, the challenge was too late, and the ALJ should have declined to review it. Consequently, we reverse.

23. Here rule 2.04 (2017) was amended and replaced by rule 2.04 (2018). Thus, 2.04 (2017) no longer exists. Based on the clear language of section 120.56(3)(a) and the holding in Office of Insurance Regulation, the Division does not have

jurisdiction to consider the merits of Petitioners' challenge to rule 2.04 (2017). Id. at 637.

24. Since Petitioners are challenging existing rule 2.04, section 120.56(3) requires Petitioners to prove by a preponderance of the evidence that the rule is an existing rule and is an invalid exercise of delegated legislative authority. Dep't of Health v. Merritt, 919 So. 2d at 564.

25. A preponderance of the evidence has been defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 281 n.1 (Fla. 2000).

26. Section 120.56(1)(a) provides that any person substantially affected by a 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. Section 120.52(8) defines "invalid exercise of delegated legislative authority." It provides:

> (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:
>
> (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.

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.

27. The School Board is an agency within the meaning of chapter 120. Section 120.52(1) and (6) provide that school boards and educational units are subject to the operation of chapter 120.

28. Generally, under the Administrative Procedure Act, each agency rule must be accompanied by a reference to specific rulemaking authority and a reference to the specific section of the Florida Statutes or Laws of Florida being implemented or interpreted. §§ 120.536(1), Fla. Stat. However, 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 ss. 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."

29. The 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).

30. Here, rule 2.04 identifies specific authority and law implemented.

31. Rule 2.04 lists sections 1001.41, 1001.42, and 1001.43 as providing statutory authority for the rules.

32. The rule making authority pursuant to section 1001.41 is described, in pertinent part, in paragraph 28 above.

33. Section 1001.42(28) authorizes adoption of rules to implement that section. Section 1001.42(5), of the same chapter, includes designating positions to be filled, prescribing qualifications for those positions, and providing for the appointment, compensation, promotion, suspension, and dismissal of employees subject to the requirements of chapter 1012.

34. Section 1001.43(11) provides "the district school board may adopt policies and procedures necessary for the management of all personnel of the school system."

35. Rule 2.04 also lists sections 1001.42 and 1001.43 as laws implemented. As stated in paragraph 33 above, section 1001.42 authorizes school boards to adopt policies for suspension and dismissal of employees. As stated in paragraph 34 above, section 1001.43 authorizes school boards to adopt policies for personnel management. In addition, rule 2.04

lists sections 1012.22 and 1012.27, which address suspension and dismissal of personnel.

36. Rule 2.04 does not, however, list sections 1012.465 or 1012.315, which apply to disqualification from employment, as law implemented. The School Board asserts that it is not necessary to include section 1012.315 because it only applies to "instructional personnel and administrators." However, as the rule applies to Petitioner, ESP, the rule applies to the instructional employees it represents. Thus, it was necessary to cite sections 1012.315 and 1012.465 as laws implemented.

37. Unlike sections 1012.315 and 1012.465, section 435.04, is listed as a law implemented by rule 2.04. There is no authority under section 435.04 regarding disqualification from employment by a school district, i.e., suspension without pay during a pending criminal charge. The authority for disqualification from employment is under sections 1012.32 and 1012.465, and section 2012.315 lists the disqualifying offenses.

38. The School Board did not have authority to adopt rules that disqualify employment based on pending criminal charges as listed in section 435.04. In examining the rule authority and law cited in the rule, the School Board exceeded its legislative authority adopting rules that disqualify employment for a pending crime under section 435.04.

39. Petitioners challenge rule 2.04 as enlarging, modifying, and contravening the law implemented; being vague and providing unbridled discretion to the superintendent or School Board; and on the grounds that the rule is arbitrary and capricious, in violation of section 120.52(8)(b), (c), (d) and (e).

Whether the Rule Enlarges, Modifies, or Contravenes the Specific Provisions of the Law Implemented

40. Petitioners contend that rule 2.04 is invalid pursuant to section 120.52(8)(c), because it enlarges, modifies, or contravenes the specific provisions of the law implemented. As noted by the First District in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, 794 So. 2d 696, 701 (Fla. 1st DCA 2001), while subsections (b) and (c) are "interrelated, two different issues are involved."

41. The plain language in section 1012.465 provides that background-screening requirements for noninstructional employees who are permitted on school grounds when students are present must undergo a level 2 screening requirement as described in section 1012.32. Section 1012.32 indicates an employee may be disqualified from employment if he or she has been convicted of offenses listed in section 1012.315. Nothing in section 1012.32 authorizes the School Board to conduct screening requirements under section 435.04. More importantly, section 1012.32 only

disqualifies a person from employment if the person was convicted of a crime. The rule modifies and enlarges the potential prohibited criminal matters by including pending charges. Under section 1012.32, Mr. Warren would not have been disqualified from employment, as his prior pending charges were for a crime that was listed in 1012.315.

42. The School Board argues that it may implement section 435.04 merely because it relates to background screening. However, section 1012.32 clearly provides that the screening requirements should meet the requirements provided in section 1012.32.

43. The School Board seeks to apply section 435.04 to School Board employees where sections 1012.465 and 1012.32 are clear on the issue. The premise underlying rule challenges in general requires an examination of what the Legislature actually authorized compared to what the agency (here the School Board) charged with implementing a statute has done pursuant to the statutory authority granted to it. As section 120.536 and the flush-left language of section 120.52(8) make clear, everything must flow from the language of the statute being implemented. The undersigned declines to look beyond the plain language of sections 1012.465 and 1012.32 and leaves expansion of the list of disqualifying offenses under those statutes to the

Legislature. See Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 69 (Fla. 2005).

44. Respondent argues that the School Board may implement section 435.01 based on the following language:

> (1)(a) Unless otherwise provided by law, whenever a background screening for employment or a background security check is required by law to be conducted pursuant to this chapter, the provisions of this chapter apply.
>
> (b) Unless expressly provided otherwise, a reference in any section of the Florida Statutes to chapter 435 or to any section or sections or portion of a section of chapter 435 includes all subsequent amendments to chapter 435 or to the referenced section or sections or portions of a section. The purpose of this chapter is to facilitate uniform background screening and, to this end, a reference to this chapter, or to any section or subdivision within this chapter, constitutes a general reference under the doctrine of incorporation by reference.
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> (2) Agencies may adopt rules to administer this chapter.

45. However, section 435.01 states that the statute applies, "unless otherwise provided by law." Here, section 1012.465 states that the background screening provisions of section 1012.32 applies to personnel as it relates to disqualification of employment. Section 1012.32 references section 1012.315 as the statute that applies when determining employment eligibility of School Board personnel. There is no reference to section 435.04 in section 1012.32 (or section

1012.315). As a result, rule 2.04 expands the lists of potentially disqualifying offenses.

46. The School Board also did not cite section 435.04 as rulemaking authority to support implementing that statute. Each rule must not only include the law implemented, but also include a reference to the specific rulemaking authority. See §§ 120.52(8) and 120.54(3)(a)1., Fla. Stat.

47. Petitioners have demonstrated by a preponderance of the evidence that adding section 435.04 to rule 2.04 enlarges, modifies, or contravenes the statute that specifically relates to noninstructional personnel, in contravention of section 120.52(8)(c).

Whether Rule 2.04 is Vague and Vests Unbridled Discretion in the Superintendent

48. Petitioners assert that rule 2.04 is vague, however, Petitioners present no specific argument to support its contention that rule 2.04 is vague.

49. 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).

50. Petitioners have demonstrated by a preponderance of evidence that rule 2.04 is vague. Petitioners contend that rule 2.04(7) applies to only applicants and not existing employees based on its plain language ("[o]ffers of employment may be suspended . . . pending final disposition of the charges through the judicial process). In the School Board's acknowledgment that the provision applies only to applicants, the School Board contends that existing employees are addressed at rule 2.04(6)(J), which provides that "[a] record clear of disqualifying offenses as defined in Section A above is required for employment and continued employment with the District." The plain language of rule 2.04(6)(J) does not specifically address the action that an existing employee would be subject to if he or she had a pending criminal charge. An employee with existing pending charges is entitled to notice of how the rule applies to his or her conduct. Both Petitioners' and Respondent's interpretations are reasonable and, therefore, rule 2.04(7) is vague.

51. The rule also vests unbridled discretion in the superintendent. Rule 2.04, in relevant part, only provides that individuals who have pending charges for a disqualifying offense

will be "automatically disqualified from employment or continued employment until resolution of the charge(s)." Furthermore, applicants and vendors are entitled to appeal the School Board's decision before the Human Resources Appeal Committee.

52. 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.

53. Here, rule 2.04 contains no standards to guide the superintendent in making his or her review of the decisions made by the Human Resources Appeals Committee. There are no

standards provided regarding the method for reinstatement of an existing employee if he or she were suspended from employment until resolution of pending charges. Finally, there is no criteria for determination of whether an employee who has been suspended without pay and subsequently reinstated may receive back pay for the period of time he or she was suspended. There are no boundaries to the discretion afforded to the superintendent or the School Board under rule 2.04. Thus, rule 2.04 is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(d) because it vests unbridled discretion in the superintendent and School Board.

Whether Rule 2.04 is Arbitrary and Capricious

54. Section 120.52(8)(e) states that a rule is an invalid exercise of delegated legislative authority when it is arbitrary and capricious. The statute recognizes the longstanding definitions of the terms, stating that 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." See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 (Fla. 1st DCA 1992).

55. The evidence demonstrates that rule 2.04 was adopted to protect the safety of children from school board personnel who may have engaged in certain criminal activity. The basis for the rule is reasonable. Therefore, Petitioner has not

demonstrated that rule 2.04 is arbitrary or capricious, in violation of section 120.52(8)(e).

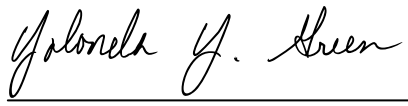
56. Section 120.595(3) requires that "[i]f the appellate court or administrative law judge declares a rule or a portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates 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)(c) and (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 rule 2.04 is an invalid exercise of delegated legislative authority. Jurisdiction is retained for the purposes of determining whether attorney's fees and costs are warranted, and, if so, the amount. Any motion to determine entitlement to fees and costs shall be filed within 60 days of the date of issuance of this Final Order.

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



YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2019.

ENDNOTES

[1/] The School Board has a Human Resources Services Manual which contains its recruitment personnel policies, including rule 2.04, the policy at issue here. While the School Board identifies the policies, they are rules. § 120.52(16), Fla. Stat.

[2/] By agreeing to the extended deadline for post-hearing submittals beyond the statutory time period, the parties waived the 30-day time period for filing the final order in this matter.

[3/] The offense would also be a non-disqualifying offense pursuant to section 1012.315, Florida Statutes.

COPIES FURNISHED:

Joseph L. Hammons, Esquire
The Hammons Law Firm, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125
(eServed)

Mark S. Levine, Esquire
Levine & Stivers, LLC
245 East Virginia Street
Tallahassee, Florida 32301
(eServed)

Ronald G. Stowers, Esquire
Levine & Stivers, LLC
245 East Virginia Street
Tallahassee, Florida 32301
(eServed)

Malcolm Thomas, Superintendent
Escambia County School Board
75 North Pace Boulevard
Pensacola, Florida 32505

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400
(eServed)

Ernest Reddick, Program Administrator
Anya Grosenbaugh
Florida Administrative Code & Register
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(eServed)

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(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.