STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NASSAU COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 19-2092

PHYLLIS ALDERMAN,

Respondent.
_____/

RECOMMENDED ORDER

This case is presented for consideration before Administrative Law Judge Lisa Shearer Nelson on a stipulated record submitted by the parties.

APPEARANCES

For Petitioner: J. Ray Poole, Esquire
Nassau County School Board
1201 Atlantic Avenue
Fernandina Beach, Florida 32034

For Respondent: Thomas W. Brooks, Esquire
Meyer, Brooks, Blohm and Hearn, P.A.
131 North Gadsden Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Petitioner's substantial interests are affected by the decision of the Nassau County School Board (School Board) to eliminate her paraprofessional position, and whether the School Board's decision to terminate her was lawful.

PRELIMINARY STATEMENT

On May 10, 2018, the Superintendent of the School Board issued his recommendation regarding the assignment of non-instructional personnel for the 2018-2019 school year. Petitioner, Phyllis Alderman (Petitioner or Ms. Alderman) was not assigned to a school within the school district. On March 19, 2019, Ms. Alderman filed a Petition for Administrative Hearing with the School Board, alleging that whether she has a property interest in her employment, and whether she was terminated from her position for just cause are ultimate facts in dispute. On April 18, 2019, the School Board forwarded the Petition for Administrative Hearing to the Division of Administrative Hearings for the assignment of an administrative law judge.

The case was originally scheduled for hearing to take place on June 11, 2019. At the request of both parties, the hearing was continued and rescheduled for August 6, 2019. The School Board filed a Motion to Dismiss for Lack of Jurisdiction, which was denied by Order dated July 12, 2019.

The parties filed a Joint Pre-hearing Stipulation on July 29, 2019, and on July 30, 2019, filed a Joint Motion for Status Conference. In the request for a status conference, the parties advised that they believed that they had stipulated to the essential underlying operative facts in this case necessary

for an administrative law judge to decide the ultimate factual and legal issues set forth in paragraphs G and H of the Pre-hearing Stipulation, and that an evidentiary hearing was not necessary. They requested a status conference to discuss canceling the hearing and submitting proposed recommended orders based on the facts to which the parties have stipulated. A telephone conference was conducted,[1/] after which an Order Canceling Hearing and Proceeding on Stipulated Record was issued on July 31, 2019. The final hearing was canceled and the parties were directed to file stipulated exhibits by August 2, 2019, and proposed recommended orders no later than August 19, 2019.

Joint Exhibit 1 and Respondent's Exhibits numbered 1 and 2 were filed August 2, 2019. On August 16, 2019, Respondent filed an Unopposed Motion to Add Stipulated Exhibits to add Respondent's Exhibits numbered 3 and 4 to the stipulated record, which was granted by Order dated August 16, 2019. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

All references to the Florida Statutes are to the 2017 codification, unless otherwise specified.

FINDINGS OF FACT

Based upon the stipulation of the parties, as recited in their Joint Pre-hearing Statement, and the Stipulated Record submitted by the parties, the following facts are found:

1. Respondent was an educational support employee for Petitioner from the 1999-2000 school year through the 2017-2018 school year, during which time she received annual performance evaluations of satisfactory or higher.

2. Her evaluation for the 2017-2018 school year, signed by her supervisor on April 6, 2018, recommended another evaluation in 12 months.

3. Respondent's position is covered by the Collective Bargaining Agreement Between the School Board of Nassau County, Florida, and the Nassau Educational Support Personnel Association (CBA), which provides in Article VII(C): "Upon completion of the probationary period as provided herein, and during the term of the employee's normal work year, he/she shall not be terminated except for just cause."

4. Respondent became a post-probationary employee in August 2000.

5. Respondent worked as a paraprofessional assigned to the guidance department of West Nassau High School (WNHS) from at least the 2011-2012 school year through the 2017-2018 school year, not as an instructional paraprofessional.

6. In April 2018, WNHS Principal Curtis Gaus met with Respondent and told her that her position would be phased out as of the end of the 2017-2018 school year.

7. Principal Gaus did not state that Respondent's position was being terminated for a reason stated in the CBA, nor that Respondent's employment was being terminated due to districtwide layoffs made for financial reasons.

8. Respondent was not given written notice that her employment was being terminated for reasons outlined in the CBA, nor was she terminated for any such reason.

9. Respondent was not relieved of her duties at the end of the 2017-2018 school year as part of a reduction in the number of employees on a districtwide basis for financial reasons.

10. Superintendent Burns has never recommended to Petitioner that Respondent be terminated for just cause or for any other reason, nor has Petitioner itself taken official action to terminate Petitioner's employment.

11. Petitioner did not file a petition to terminate Respondent's employment, stating the specific reasons Respondent was being terminated, or otherwise comply with the requirements of Florida Administrative Code Rule 28-106.2015.

12. Respondent did not pursue arbitration or file a grievance, as permitted under the CBA. Petitioner has not

identified what specific provision of the CBA Respondent could identify to support a grievance, if filed.

13. The parties stipulated to the existence of certain portions of the CBA, but did not provide context that informs the scope of some of the provisions cited.

14. Of particular relevance to this proceeding are the provisions contained in Article IV (Grievance Procedure); Article V (Vacancies, Transfers and Reduction of Personnel); and Article VII (Discipline of Employee). The pertinent portions of each are quoted below, with those portions to which the parties stipulated designated by italics, and those provision determined by the undersigned to be particularly relevant designated by being underscored.

15. Article IV provides, in pertinent part:

> ARTICLE IV – GRIEVANCE PROCEDURE
>
> A. GENERAL
>
> The purpose of this procedure is to secure, at the lowest possible administrative level, resolution of any dispute which may arise concerning the proper interpretation and application of this contract. Both parties agree that these procedures will be kept as informal and confidential as may be appropriate at any level of the procedure.
>
> 1. Time limits. The time limits as called for herein shall be considered the maximum time limits to be used for grievance processing. Extensions may be granted by mutual agreement at level one or two. Each

party shall attempt to expedite grievance processing.

* * *

4. Processing. Grievances not timely filed or processed to the next step by the grievant, shall be considered settled. Grievances not timely responded to shall permit processing to the next step.

* * *

6. Requirements.
a. A grievance shall be filed in a timely manner and shall be an alleged violation, misapplication, or misinterpretation of a specific article or section of this Agreement. . . .

* * *

B. Procedures

* * *

4. Step III
Step III (Mediation of Termination)
a. If the subject of the grievance is termination as the result of unsatisfactory evaluation [See Article VII section F] and the grievant is dissatisfied with the response at Step II or if no response is timely given, the grievant may, within ten (10) working days, notify the office of the Superintendent using the district's grievance form, that s/he is requesting grievance mediation by the Federal Mediation and Conciliation Service (FMCS).

* * *

e. Restrictions and Limitations
1) Evidence not produced in Step I or II by a party shall not be offered in mediation.

2) The judgment of the evaluator leading to the rating shall not be mediated. However, the process may be subject to review.
3) The mediator shall not have the power to recommend an addition to, subtraction from, or alteration of the terms of the agreement or to recommend the alteration of the evaluation results of the grievant.
4) The mediator shall only have the authority to mediate the termination issue presented for mediation by the parties and shall not have the power or authority to create or alter the issue of the parties or the issue as perceived by each party.
5) *The employment of the grievant shall not be extended beyond the end of the contract year as the result of the time required for the grievance and mediation procedure.*

f. The final results of the mediation process shall be presented to the School Board for its final decision. The decision of the School Board shall be final unless appealed by the grievant to Step III B, Binding Arbitration.

Step III b (Binding Arbitration)
a. 1) If the grievant is dissatisfied with the response at Step II or if no response is timely given, the grievant may within ten (10) working days notify the Superintendent using the District's grievance form, that the grievance is being arbitrated.

* * *

e. Restrictions and Limitations of Arbitration

1) Evidence not produced in Step I or II by a party shall not be offered in Arbitration.
2) The Arbitrator shall not have the power to add to, subtract from, or alter the terms of the grievant. *In the case of a termination grievance the arbitrator shall not have the power to extend employment*

> *beyond the term of the affected employment year for the grievant's classification.* (emphasis added).

16. Article V of the CBA addresses Vacancies, Transfers and Reduction of Personnel. The relevant sections provide as follows:

> F. Reduction in Personnel
>
> 1. Reduction in force shall take place when the Superintendent of Schools:
> a. Announces that a reduction in force is to take place.
> b. Determines and announces the type of reduction to take place as:
> 1) System-wide
> 2) Building-wide
> 3) Departmentally
> 4) Any combination of 1), 2), and 3) herein by title and/or position
> c. Notifies any employee or employees that an employee or group of employees is being dismissed under this provision.

17. Finally, Article VII of the CBA addresses discipline of employees. It provides in pertinent part:

> B. A person employed after the effective date of this Agreement shall serve a probationary period of 365 calendar days. During such probationary period he/she serves at the pleasure of the Board and may be disciplined and/or terminated at the discretion of the Board without further recourse.
> C. Upon completion of the probationary period and during the term of the employee's normal work year, he/she shall not be terminated except for just cause.
> D. Provided that in lieu of termination and with the written consent of the employee, the employee may be returned to probationary status.

> E. The judgment of the evaluator in the performance appraisal of an employee shall not be subject to the grievance procedure of this Agreement.
> F. In the event a non-probationary employee is terminated as a result of unsatisfactory evaluation, such termination shall be subject to the grievance procedure of this Agreement.
> G. 1. The Board/Superintendent reserve the right to take disciplinary action, up to and including dismissal, against any employee based on the seriousness of the offense and the employee's record.

18. The CBA does not address non-renewal of year-to-year employees outside the context of discipline or a reduction in force announced by the Superintendent.

19. Article XII of the CBA provides that the CBA "shall supersede any rules, regulations or practices of the Board which will be contrary to or inconsistent with the terms of this agreement." It does not by its terms supersede any rights created by statute.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 1012.40, Florida Statutes.

21. Neither party addressed who bears the burden of proof or what the burden is for this proceeding, either in the Joint Pre-hearing Statement or in their Proposed Recommended Orders. Given that Petitioner is the party that has taken action to

terminate Respondent, it bears the burden of proof, by a preponderance of evidence. § 120.57(1)(j), Fla. Stat.

22. The first issue to be determined is whether this case can be decided in this forum or whether the CBA eliminates that avenue of redress. Section 120.569(1) provides that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Sections 120.573 and 120.574 provide the procedures for mediation and summary hearings, respectively. Educational units, such as school boards, are considered "agencies" as defined in section 120.52(1)(a) and (6). Seiden v. Adams, 150 So. 3d 1215, 1218 (Fla. 4th DCA 2014); Sublett v. Dist. Sch. Bd. of Sumter Cnty., 617 So. 2d 374, 377 (Fla. 5th DCA 1993). While there are exceptions to the Administrative Procedure Act (APA) for educational units listed in section 120.81, proceedings such as this one are not among those exceptions.

23. The School Board contends that Respondent was required to file a grievance as outlined in the CBA, and cannot proceed under the APA. However, by its terms, the CBA does not negate Respondent's statutory right to challenge her termination through an administrative hearing. Moreover, the CBA does not specifically address non-renewal of employees at the end of a school year. Article V of the CBA addresses reduction in

personnel, but the process outlined requires an announcement by the Superintendent of Schools that a reduction in force is to take place, along with the type of reduction to occur. There is no evidence or stipulation by the parties that such an announcement ever took place.

24. In addition, Article IV, section A(6), which outlines the requirements to file a grievance, specifies that a grievance "shall be an alleged violation, misapplication, or misinterpretation of a specific article or section of this Agreement." The grievance form requires that the employee identify the Article and Section grieved. While Petitioner contends that the elimination of Respondent's position should have been resolved through the grievance process, it has not identified the specific provision of the CBA Ms. Alderman would cite when she was not terminated for cause or for a reduction in force.

25. The School Board cites Sickon v. School Board of Alachua County, 719 So. 2d 360 (Fla. 1st DCA 1998), for the premise that there is no right to a section 120.57(1) hearing in this case. In Sickon, a school teacher sought a hearing to challenge her assignment as assistant band director, as opposed to band director, at the high school where she taught. Assignment of either position would be considered as

"supplemented duties" to the duties assigned as a teacher, and were independent of her professional services contract.

26. Ms. Sickon also received a performance appraisal that she successfully grieved through the process provided by the collective bargaining agreement, but sought to challenge the band assignment through a chapter 120 proceeding. The school board denied her request, stating that she had no property interest in the supplemental appointment beyond the current year, and no other substantial interest was affected. The First District agreed, stating that Ms. Sickon would be entitled to a hearing under the APA if non-renewal of her "supplemental duties" affected or determined substantial interests within the meaning of sections 120.52(12), 120.569, and 120.57(1). The court stated that whether Ms. Sickon had a substantial interest must be determined by examining substantive law, to see whether the purported injury was one the substantive law meant to protect. 719 So. 2d at 363. The rights that she alleged were affected were conferred by the collective bargaining agreement. The court held that the redress for violations of rights arising under a collective bargaining agreement must be pursued in the manner contemplated by the collective bargaining agreement, stating, "[i]n the absence of any contrary language in the collective bargaining agreement or countervailing public policy, we hold that the parties must pursue the procedures established

by the collective bargaining agreement rather than turn to the Administrative Procedures Act, when only rights created by the collective bargaining agreement are at issue." 719 So. 2d at 365 (emphasis added).

27. By contrast, Respondent relies on the Fifth District decision in Sublett v. District School Board of Sumter County, 617 So. 2d 374 (Fla. 5th DCA 1993). In Sublett, a maintenance department employee was terminated based on charges of sexual abuse of his daughter. Although the criminal charges were dismissed, apparently the Superintendent of Schools had been advised that Mr. Sublett was guilty notwithstanding the failure to prosecute him. Mr. Sublett was advised by letter that the Superintendent would recommend his termination, and Sublett sought a section 120.57(1) hearing.

28. As is the case here, the school district had a collective bargaining agreement covering support personnel. The collective bargaining agreement in Sublett stated, "nothing contained herein shall be construed to deny or restrict to any employee such rights as he/she may have under Florida State laws or other applicable laws or regulations. The rights granted to employees hereunder shall be deemed to be in addition to those provided elsewhere." The school board asserted that the collective bargaining agreement barred Mr. Sublett's right to an administrative hearing, but the Fifth District disagreed,

relying in part on Public Employees Relations Commission v. District School Board of De Soto County, 374 So. 2d 1005 (Fla. 2d DCA 1979), which held, "[w]e feel that it is clear that the legislature did not intend to permit a public employer to negotiate a collective bargaining agreement in which it relinquishes a statutory duty or in which its employees relinquish statutory rights. The agreement may add to statutory rights and duties, but may not diminish them." 374 So. 2d at 1015.

29. After careful consideration, Ms. Alderman's case is more in line with Sublett and PERC v. District School Board of De Soto County than it is with Sickon. In Sickon, the employee's alleged substantial interest involved a supplemental assignment for a particular school year, not her employment itself. In this case, the substantial interest at stake is Ms. Alderman's livelihood. In addition, the First District held in Sickon that the employee was limited to the procedures in the collective bargaining agreement because the rights at issue were created by that agreement. The same cannot be said here.

30. In addition, the CBA here supersedes rules, regulations and policies of the School Board, but does not supersede a statutory right. Given the Legislature's enactment of section 1012.40, the substantial interest at issue is not created by the CBA, but by the Legislature. Accordingly, it is

found that Respondent is permitted to seek redress through a section 120.57(1) hearing.

31. The second issue that must be addressed is whether the School Board had authority to terminate Respondent's employment. Section 1012.40 sets the standard by which the termination must be measured, and provides in pertinent part:

> (2)(a) Each educational support employee shall be employed on a probationary basis for a period to be determined through the appropriate collective bargaining agreement or by district board rule in cases where a collective bargaining agreement does not exist.
> (b) Upon successful completion of the probationary period by the employee, the employee's status shall continue from year to year unless the district school board superintendent terminates the employee for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist, or reduces the number of employees on a districtwide basis for financial reasons.
> (c) In the event a district school board superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event that there is no collective bargaining agreement.
> (emphasis added).

32. There is no dispute that Respondent was not a probationary employee, was not terminated for cause, and was not

terminated as part of a districtwide reduction in force. In fact, the parties stipulated that Superintendent Burns never recommended to the School Board that Respondent be terminated, and the School Board never took official action to terminate her employment. In short, the basis for her termination is not contemplated by section 1012.40 or by the CBA.

33. Petitioner takes the position that during the school year, a non-probationary support employee may only be dismissed for cause, but that "upon expiration of their annual contracts, Petitioner's non-probationary employees – including Respondent – were subject to non-reappointment at will." However, the CBA never expressly provides that employment is subject to non-reappointment at will. Petitioner points to two provisions in support of its position, both dealing with the process for grieving a termination. However, both of those provisions address the grievance procedure itself, to be used after a decision to terminate has been communicated to the employee. There is no express statement in the CBA that would alert an employee that their employment may be ended with no explanation at the end of the school year.

34. Moreover, such an interpretation appears to conflict with the language of section 1012.40, which provides that once an employee meets his or her probationary period, the employee's status "shall continue from year to year." The crux of this

case, then, rests on the meaning of this phrase. Petitioner contends that there is no requirement to continue employment past any school year. Respondent counters that "shall continue from year to year" means that an educational support employee who successfully serves the prescribed probationary period is no longer subject to annual non-reappointment without cause, but rather, is automatically renewed each year unless the requirements of section 1012.40(2)(b) are met.

35. If Petitioner's interpretation were to prevail, then there would be no reason for the language "shall continue from year to year." Statutes should be interpreted to give meaning to every phrase, and to take into account the context in which each phrase is used. Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 1260, 1265 (Fla. 2008); Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914 (Fla. 2001).

36. The meaning of the statute is clear. However, should there be any doubt, the legislative history reinforces that when created, the staff analysis supports this interpretation. Legislative staff summaries may be consulted when interpreting a statute, and the relevant summaries have been included as exhibits in the record without objection. Am. Home Assur. Co. v. Plaza Mat'ls Corp., 908 So. 2d 360, 368-69 (Fla. 2005) ("legislative history . . . is a basic and invaluable tool of statutory construction").

37. Section 1012.40 represents the re-enactment of section 231.3605, Florida Statutes, when the Florida Education Code was transferred from chapters 228 through 246 to chapters 1000 through 1013, in 2002. § 715, ch. 2002-387, Laws of Fla. Section 231.3605 was created in 1994. § 1, ch. 94-195, Laws of Fla. The bill leading to its creation comprised three sections: one creating section 231.3605, one amending section 231.434 (authorizing rules for provision of annual leave) to include educational support employees, and one providing an effective date. The title for chapter 94-195 provides in part: "An act . . . providing for employment of educational support employees; providing definitions; providing for probationary status and continued employment."

38. Chapter 94-195 was a committee substitute for House Bill 751 (HB 751). The Final Bill Analysis and Economic Impact Statement for HB 751 states in pertinent part:

> I. SUMMARY:
>
> This bill would define and provide guidelines for the continued employment of educational support employees (such as teacher aides and assistants, department personnel, and clerical employees.) The bill would provide for a probationary period after which an educational support employee must be annually rehired unless terminated for reasons statement in a collective bargaining agreement or in school board rules. . . .

> II. SUBSTANTIVE ANALYSIS:
>
> * * *
>
> b. EFFECT OF PROPOSED CHANGES:
>
> * * *
>
> After the employee successfully completes the probationary period, the school board would be required to rehire the employee each year. However, the superintendent would have the authority to terminate the employment of an educational support employee for reasons stated in a collective bargaining agreement or for reasons provided in school board rule if there is no collective bargaining agreement. The superintendent would also have the authority to terminate the employment of educational support employees if the number of employees is reduced on a district-side basis for financial reasons. (emphasis added).

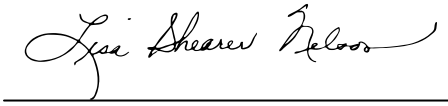
39. The explanation in the final bill analysis is inconsistent with Petitioner's interpretation of section 1012.40, and supports the most reasonable reading of the section.

40. It is undisputed that Respondent was not terminated for any reason outlined in the CBA or as a result of a districtwide reduction in force. It is also undisputed that the School Board did not affirmatively act to terminate her employment using the process provided in section 1012.40, but rather, that someone simply chose not to renew her employment. Based on the record presented, Petitioner failed to demonstrate that it had a lawful basis for terminating Respondent's employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Nassau County School Board enter a final order reinstating Respondent to her prior status as a non-probationary educational support employee with back pay and all other lost benefits she would have received had she not been improperly terminated.

DONE AND ENTERED this 9th day of September, 2019, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 9th day of September, 2019.

ENDNOTE

[1/] Due to the undersigned's unavailability, the telephone status conference was conducted by Senior Administrative Law Judge E. Gary Early.

COPIES FURNISHED:

Thomas W. Brooks, Esquire
Meyer, Brooks, Blohm and Hearn, P.A.
131 North Gadsden Street
Tallahassee, Florida 32301
(eServed)

J. Ray Poole, Esquire
Nassau County School Board
1201 Atlantic Avenue
Fernandina Beach, Florida 32034
(eServed)

Kathy Burns, Superintendent
Nassau County School Board
1201 Atlantic Avenue
Fernandina Beach, Florida 32034-3403

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

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.