

STATE OF FLORIDA
SCHOOL BOARD OF BROWARD COUNTY

BROWARD COUNTY SCHOOL BOARD

DOAH CASE NO: 14-3011TTS

Petitioner,

v.

CHRISTOPHER MARSHALL,

Respondent.

PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

The Petitioner, ROBEERT W. RUNCIE, as Superintendent of Schools, by and through his undersigned attorney, Charles T. Whitelock, P.A., files the following exceptions to the Recommended Order issued by Administrative Law Judge John G. Van Laningham ("ALJ") on March 20, 2016, and states as follows:

PRELIMINARY STATEMENT

1. Although the ALJ determined that the Respondent is guilty of incompetency, pursuant to Rule 6A-5.056(3) (Count 3) which constitutes just cause for his dismissal from employment, the ALJ incorrectly determined that Respondent was not guilty of violating the following charges:

- (A) Failure to Correct Performance Deficiencies (Count 4);
- (B) Violation of Section 1012.53 (Count 5 and 6); and
- (C) Violation of School Board Rule 4008(B) (Count 6).

2. An agency may reject or modify the findings of fact if the agency first determines from a review of the entire record that: (1) the findings of fact were not based upon competent

substantial evidence or (2) that the proceedings on which the findings were based did not comply with the essential requirements of law. Section 120.57(1)(l), Florida Statutes.

3. A party may also except to a Conclusion of Law cited in the Recommended Order. The agency's responsibility is found in Section 120.57(1)(l) which states:

“The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.”

4. The Judge's determination regarding Respondent's failure to correct his performance deficiencies is not based on competent substantial evidence established by the witnesses and exhibits at the hearing. Rather, the judge inserted his own and different formula in place of the components in the parties Memorandum of Understanding (“MOU”); which components in question were included in the District's Plan when approved by the Department of Education in accordance with state law. The Judge erroneously terms the IPS scoring as a “false precision,” which occurs when numerical data are presented in a manner that implies a more accurate precision than is actually the case. There is no “false” precision in the Respondent's IPS. To the contrary, the IPS number is arithmetically accurate. The Judge just determined the parties should be required to use two, rather than three decimal digits as required by the MOU. That argument could have been used as a defense, although contrary to the law, except there was no evidence, competent substantial or otherwise, to support that position, nor did the Respondent make that argument. In effect, the Judge became a witness for or a representative of the Respondent, unbeknownst to the Petitioner or the undersigned.

5. Further, the Judge factually detailed the Respondent's incompetency in paragraphs 3 through 11, concluding: "He is simply not suited to the job of teaching high school math" (See: paragraph 11). The Judge further concludes, as a matter of law, that Respondent's incompetency was demonstrated by his:

"...inability to help students meet learning goals due to inefficiency in the form of his chronic failures to communicate appropriately with and relate to students, colleagues and administrators." (See: paragraph 39).

6. Section 1012.53 entitled: Duties of Instructional Personnel, lists the duties which the Judge, both factually and as a matter of law, determined Respondent failed to perform. The Judge made no factual findings regarding Count 6 (Violation of School Board Policy 4008) which requires instructional personnel to teach efficiently.

7. Instead, the Judge concluded that "apart from his incompetency" Respondent did not "independently" violate either his statutory or contractual duties. What that term means in the context of this record is lost on the undersigned. Respondent's incompetency, as determined both factual and as a matter of law, by this Judge, clearly violates both the Respondent's statutory duties and contractual requirements to his students.

8. The following symbols and designation will be used in the following manner.

- (Px. #) - Petitioner's exhibit/page number
- (Rx. #) - Respondent's Exhibit
- (T. #) - Hearing Transcript page number /line number
- (NAME) - Witnesses surname reference their testimony
- (SY) - School Year
- (PDP) - Performance Development Plan

- (IPS) - Instructional Practice Score
- (RO) - Recommended Order
- (FOF) - Finding of Fact
- (COL) - Conclusions of Law

EXCEPTION NUMBER 1
(FOF #16-24 and 27; COL #41)

1. Petitioner charged Respondent in Count 4 with a violation of Section 1012.34, Florida Statutes (Failure to Correct Performance Deficiencies).

2. The ALJ in his Recommended Order relied upon his own testimony in re-configuring the Respondent's IPS score. While, it's certainly creative, and might serve as a defense in another setting, his findings were neither supported by the evidence, nor contained in the parties MOU (Px. #2). To the contrary, the Agreement specifically states the following:

5. The INSTRUCTIONAL PRACTICE SCORE CALCULATION.

For 2012-2014, the Overall Evaluation is as follows:

- **HE** (Highly Effective) - 3.450-4.000;
- **E** (Effective) - 2.500-3.449;
- **NI** (Needs Improvement) - 2.000-2.499;
- **U** (Unsatisfactory) - 1.000-1.999

(See: PX. #2/page 3 of 7).

3. The parties agreed to use the three, not two, decimal digits, to the thousandths place in their computation of the IPS. The Judge may want to simplify this agreement, but it is the agreement between the School Board and the Union. He is not a party to it and has no standing to rewrite it.

4. The Respondent's IPS' of 1.963 was calculated in accordance with the terms of the parties' agreement, and cannot be amended or modified by the Judge. His job is to make findings and conclusions based on the evidence presented at the hearing, not create evidence. There is no evidence of any nature to support the Judge's findings.

5. The term "False Precision" concept was misapplied or misunderstood by the ALJ. A number or calculation which is precise cannot be false. My grandmother's claim, that the tree in her backyard was planted when she was in grammar school to support the statement that the tree is 80 years old, is a false precision. The exact number of years is not accurate and thus a "false precision." The Respondent's IPS, which was arithmetically computed in accordance with the MOU, is a "precise" number. There is no inaccuracy.

6. The ALJ's paragraph 20 comes up with another clever argument. Here, the ALJ after eliminating the three digit calculations concludes Respondent's rating, when placed on the PDP, was Needs Improvement, rather than Unsatisfactory. Ignoring for the moment his incorrect analysis of Section 1012.34 requiring an Unsatisfactory to be placed on a PDP, the parties MOU clearly and unequivocally states:

"Once an educator receives 10 or more Beginning and/or Not Using data marks, an average IP Score of **NEEDS IMPROVEMENT** (emphasis added) or Unsatisfactory, and at least two formal and one additional observation, a Performance Development Plan may be written." (See Px. #2 Section 1 page 4 of 7).

Evidently, the Judge misread the terms of the MOU, or didn't understand the testimony of Mrs. Pinkney and the other witnesses. At one point the Judge was using the wrong exhibit in following the testimony and didn't comprehend the system (T#261-265; T# 301-314).

7. One further issue concerns the statement that Respondent's IPS 1.963 was not his final Overall Evaluation Score, since he was not credited with the 3.0 "School Score" factored into a final evaluation.

8. Once again, the Judge misses the point. Although the school year ended sooner, Respondent was terminated on June 24, 2014 and the school scores were issued in November (T. #314/11-25). Section 1012.34(3)(d) allows an amendment of an evaluation based upon assessment data from the current school year if the data becomes available within ninety (90) days after the close of the school year. The school scores were more than ninety (90) days beyond either the end of the school year or this board's action.

9. Petitioner contends these FOF are not based on competent substantial evidence and the ALJ's calculations constitute ex-parte matters which are not supported by the record and do not comply with the essential requirements of law. The FOF should state that the Respondent's IPS was 1.963 and unsatisfactory at the conclusion of his PDP. Thus, Respondent failed to correct his performance deficiencies in violation of Section 1012.34.

EXCEPTION NUMBER 2
(FOF #28 and 29; COL #42)

1. This exception addresses the ALJ's perception that Respondent incompetency over a period of years demonstrated by:

- Remarkable high percentage of F's and D's by his students, "**year in and year out**" (FOF #4);
- 2013-2014 school year - 31% of Math 2 students received a failing grade; 25% of Math Readiness students failed and 10% of Algebra 2 students got F's. This was consistent with a "**Decade Long**" pattern (FOF #5);
- Parents complained causing students to transfer into other classes. Respondent's class became smaller while other teacher's grew causing

complaints (FOF #6);

- Respondent did not challenge his students, choosing instead to have them do rote exercises (FOF #8);
- Respondent's students had difficulty in their subsequent courses because they had not learned the prerequisite material (FOF #8);
- Respondent ignored implementing different pedagogical techniques and strategies (FOF #9);
- The bad grades consistently received by the students are a symptom of Respondent's inability to teach (FOF #11);
- Respondent lacks the skills necessary to impart his knowledge to the students (FOF #11); and
- Respondent is not suited to the job of teaching (FOF #11).

2. In other words, Respondent is incompetent. But, the ALJ opined that "apart from his incompetency," Respondent did not independently violate Section 1012.53 or School Board Policy 4008(B).

3. The ALJ's legal conclusion is clearly erroneous. The version of the Rule 6A-5.056 in effect in the 2011-2012 SY specifically references Section 231.09 Florida Statutes, which was titled "Duties of Instructional Personnel." In 2002, this statutory section was repealed and the same language re-enacted in the newly created Section 1012.53 (Counts 5 & 6) also entitled "Duties of Instructional Personnel." **This statute prescribes the most basic, fundamental duties of instructional personnel in the teaching profession.**

4. This law formulates the basis for incompetency by inefficiency as defined in Rule 6A-5.0-56(3)(a), to wit: failure to perform **duties as prescribed by law**, Duties of Instructional Personnel being the "law" prescribing Respondent's duties. He clearly failed in that regard and no other charge need accompany Counts 5 & 6. (See Miami Dade School Board v. Kristal,

DOAH Case No: 13-447, paragraph 135, page 39).

WHEREFORE, Petitioner would request: (1) that these exceptions be granted and the material allegations regarding the Section 1012.34 process and the final IPS in the Petitioner's Administrative Complaint be adopted as the FOF in the Final Order. The COL should reflect Respondent's violation of Count 4 (Failure to Correct Performance Deficiencies); and (2) that the exceptions regarding the COL regarding Section 1012.53 and School Board Policy 4008(B) be granted and adopted as COL in the Final Order.

Respectfully Submitted,

CHARLES T. WHITELOCK, P.A.
Counsel for Petitioner
300 Southeast Thirteenth Street
Fort Lauderdale, Florida 33316
Telephone: (954) 463-2001
Facsimile: (954) 463-0410

/s/Charles T. Whitelock
Charles T. Whitelock
Florida Bar No.: 166020

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished via e-mail to: Melissa C. Mihok, Esq., Melissa C. Mihok, P.A., 1718 E. 7th Avenue, #301, Tampa, FL 33605, e-mail: melissa@melissacmihokpa.com and bdjarnagin@gmail.com, Robert W. Runcie, Superintendent of the School Board of Broward County, 600 S.E. 3rd Ave., Ft. Lauderdale, FL 33301, e-mail supt_Runcie@browardschools.com, Barbara Myrick, General Counsel, School Board of Broward County, 600 S.E. 3rd Ave., Ft. Lauderdale, FL 33301, e-mail: barbara.myrick@browardschools.com, Doug Griffin, Assistant General Counsel, School Board Of Broward County, 600 S.E. 3rd Ave.Ft.Lauderdale,FL33301, e-mail doug.griffin@browardschools.com and Joanne C. Fritz, School Board of Broward County, 600 S.E. 3rd Ave., Ft. Lauderdale, FL 33301, e-mail: joanne.fritz@browardschools.com, this 29th day of April, 2016.

/s/Charles T. Whitelock

CHARLES T. WHITELOCK