STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner, **Case No. 18-6215TTS**

vs.

CRAIG DUDLEY,

Respondent.
_____/

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS TO THE RECOMMENDED ORDER

The Respondent, CRAIG DUDLEY, files this response to the Petitioner's Exceptions to the Recommended Order issued by the Administrative Law Judge (ALJ). The ALJ considered one day of testimony from witnesses for both parties as well as exhibits entered by the Petitioner. The ALJ found that Respondent was guilty of misconduct in office, incompetency, gross insubordination, and willful neglect of duty. (R.O. ¶ 41 - 47, 64, 66 - 68). The ALJ also found that Respondent violated School Board Policy 2400 (1), 4800 B. 1 and 8. (R.O. ¶ 46, 70, 72). However, the ALJ also found that the Respondent did not violate School Board Policy 2400 (3), School Board Policy 4800B. 3, or School Board Policy 4.9. (R.O. ¶ 46, 48, 49, 70, 72)

The ALJ, in her Recommended Order, did not attempt to manipulate the standard of review. Rather, the ALJ recognized the mixed issues of law and fact, and addressed those factual distinctions appropriately. Though the School Board has the legal right to increase or decrease a penalty due as a result of a mere disagreement with the ALJ's recommendation, such increase or

decrease must be within the purview of the School Board's statutory authority. Such statutory authority, in our view, is limited by School Board Policy 4.9, regarding Progressive Discipline.

STANDARD OF REVIEW

Fla. Stat. §1012.33 gives the School Board the authority to discipline instructional staff. The School Board also adopted School Board Policy 4.9, which identifies two levels of misconduct: Category A offenses, which require termination, and Category B offenses, which provide a progressive disciplinary process, up to and including termination, under specific factual circumstances. Specifically, Policy 4.9, Section I(d) states:

> "...The severity of the misconduct in [Category B cases], together with relevant circumstances (III (c)), will determine what step in the range of progressive corrective action is followed. In most cases, the District follows a ***progressive corrective action process*** consistent with the "Just Cause" standard designed to give employees the opportunity to correct the undesirable performance, conduct or attendance. A more severe corrective measure will be used ***when there is evidence that students, employees, or the community we serve was negatively impacted***..."

(emphasis added). The School Board is also limited by Fla. Stat. §120.57(1)(l) and §120.68(10), which provides that an agency cannot reject an ALJ's findings that are supported by competent substantial evidence in the record. *See also Abrams v. Seminole County School Board*, 73 So. 3d 285, 294 (Fla. 5th DCA 2011).

Petitioner also relies on *Crim. Justice Standards & Training Comm'n v, Bradley*, 595 So. 2d 661 (Fla. 1992), which clarified the holding in *Bernal v. Dept. of Professional Regulation, Bd. of Medicine*, 517 So. 2d 113, 116 (Fla. 3rd DCA 1987) (The Regulatory Board's decision to increase a recommended penalty was not supported by the Board's statutory guidelines for punishment, or by the facts of record). In the instant case, the Recommended Order does not

manipulate the School Board's standard by labeling a penalty as a finding of fact and/or a conclusion of law. The Recommended Order instead recognizes that, because the Petitioner charged the Respondent with violation of School Board Policy 4.9, its progressive disciplinary policy, (R.O. ¶ 49) the penalty became an ultimate issue of fact to be decided by the ALJ.

Petitioner also states that paragraphs 39, 50, 51, 52, 53, 76, 77, and 78 of the Recommended Order have been mislabeled, and that any improperly labeled findings may be disregarded and treated as if they were properly labeled. This is a misinterpretation of *Abrams* (no pinpoint cite), and an incomplete interpretation of *Battaglia Properties, LTD v. Florida Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). According to *Battaglia*, "an agency...may not disregard the hearing officer's findings of fact by simply characterizing the finding as a conclusion of law." *Id.*; *see also Kinney v. Dept. of State*, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). Because the issue of level of discipline was raised as a charge against the Respondent, the ALJ made an ultimate finding of fact related to the issue of progressive discipline, which would more properly be labeled as a finding of fact and/or conclusion of law.

Therefore, the ALJ's finding that Respondent did not violate that policy (R.O. ¶ 49) would lead to the finding of fact and conclusion of law that the appropriate penalty should be suspension without pay. While the Respondent agrees that the standard of review which applies to recommended penalties is a mere disagreement with the assessment of the seriousness of the offenses, whether a suspension should be imposed rather than a termination is governed by School Board Policy 4.9. The Petitioner made the degree of discipline to be imposed an issue in the Administrative Complaint. Such issue is, therefore, an ultimate issue of fact determinable by

the ALJ. *Heifetz v. Department of Business Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("It is the hearing officer's function to … reach ultimate findings of fact based on competent, substantial evidence); *citing State Beverage Dept. v. Ernal, Inc.*, 115 So. 2d 556 (Fla. 3d DCA 1959).

EXCEPTION 1: R.O. ¶ 39

Petitioner in this exception states that some elements of an offense may be decided as a matter of law, or may even be matters of opinion about which the reviewing agency will give less weight to the ALJ's findings. However, this is not the intended holding of *Purvis v. Marion County School Board*, 766 So. 2d 492 (Fla. 5th DCA 2000), nor *Walker v. Highlands County School Board*, 752 So. 2d 127 (Fla. 2nd DCA 2000). In fact, any issue that is fact-determinative, such as misconduct in office, dictates that greater weight must be given to those findings of fact which relate to such issues. *Abrams* at 294-295.

The Respondent urges the School Board to reject this exception and adopt the findings of fact ¶ 39 as written by the ALJ.

EXCEPTION 2: R.O. ¶ 50

As stated previously, the Petitioner accused Respondent of violating School Board Policy 4.9. The ALJ's finding that Respondent did not violate School Board Policy 4.9 is based on competent, substantial evidence. The ALJ is not manipulating the School Board, nor is she trying to limit the School Board's discretion to increase or decrease the recommended penalty. As explained in Respondent's Response to Exception 1 above, the ultimate issue of fact and those issues that are based on fact, such as the application of School Board Policy 4.9 to the misconduct found to have occurred, are properly within the purview of the ALJ, whose findings

should not be disturbed inasmuch as they are supported by competent substantial record evidence.

EXCEPTION 3: R.O. ¶ 51

For this response the Respondent refers to the analysis above.

Therefore, Respondent requests that the School Board reject this exception and accept this paragraph as written and labeled by the ALJ.

EXCEPTION 4: R.O. ¶ 52

For this response the Respondent refers to the analysis above.

Therefore, Respondent requests that the School Board reject this exception and accept this paragraph as written and labeled by the ALJ.

EXCEPTION 5: R.O. ¶ 53

For this response the Respondent refers to the analysis above.

Therefore, Respondent requests that the School Board reject this exception and accept this paragraph as written and labeled by the ALJ.

EXCEPTION 6: R.O. ¶ 76

For this response the Respondent refers to the analysis above.

Therefore, Respondent requests that the School Board reject this exception and accept this paragraph as written and labeled by the ALJ.

EXCEPTION 7: R.O. ¶ 77

For this response the Respondent refers to the analysis above.

Therefore, Respondent requests that the School Board reject this exception and accept this paragraph as written and labeled by the ALJ.

EXCEPTION 8: R.O. ¶ 78

For this response the Respondent refers to the analysis above.

Therefore, Respondent requests that the School Board reject this exception and accept this paragraph as written and labeled by the ALJ.

EXCEPTION 9: R.O. RECOMMENDATION

The Respondent agrees that the School Board may increase or decrease the ALJ's recommendation upon a mere disagreement based on the seriousness of the offenses. *Crim. Justice Standards & Training Comm'n* at 645; *Phillips v. Bd. of Dentistry, Dept. of Health*, 884 So. 2d 78 (Fla. 4th DCA 2004). However, the Respondent does not agree that the seriousness of this offense is substantiated by the findings of facts that the Petitioner does not dispute.

Addiction to drugs and alcohol is a disease, recognized as a disability under the Americans with Disabilities Act. U.S. Equal Employment Opportunity Commission (2017); *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*. Retrieved from: https://www.eeoc.gov/facts/performance-conduct.html#fn82. While no one would condone active drug and alcohol use on School Property, some recognition must be given to the Respondent, who has struggled with addiction and who has found the right path. The ALJ recognized these mitigating factors when she recommended suspension, and not termination, as the appropriate penalty. .

The ALJ found, and the Petitioner did not find exception to, the following findings of facts:

21. No evidence was presented that the students in Respondent's class were actually physically or psychologically injured or harmed as a result of Respondent being absent from his classroom on May 18, 2018.

28. Respondent was forthright in admitting that he suffers from a substance abuse problem.

30. Respondent has come to realize that he cannot overcome his substance abuse problem on his own and that there is no shame in asking others for help in dealing with his problem.

31. To that end, Respondent participated in, and has completed, the Evolution substance abuse program, which consisted of counseling sessions three to four days a week, for a three-to-four month period, and attending therapy classes and meetings each week.

32. As a condition of participation in Evolution, Respondent was subject to random substance abuse testing. He did not test positive for alcohol or drug use during his participation in the program.

33. The spiritual counseling and substance abuse trigger counseling that Respondent received in the Evolution program have resonated with him and have helped him successfully address his substance abuse problem.

34. In order to avoid backsliding, Respondent remains in weekly contact with one of his therapists at Evolution, and attends meetings three to four times a week, to place himself in an environment that enables and fosters his success in fighting his substance abuse problem.

35. Since commencing Evolution, Respondent has not engaged in alcohol or drug use.

36. Respondent expressed remorse at his behavior and poor judgment at habing reported to work under the influence of controlled substances on May 18, 2018. He testified that he did so because he previously had been reprimanded for being absent, and was concerned about missing more

school. He recognized that his choice to go to school in that condition was “bad thinking at the time.”

37. Respondent credibly testified that he greatly enjoys teaching and that he chose teaching as a career because he loves working with kids, relates well to them, and believes he can help them. His colleague, Tyrell Dozier, testified that Respondent gets along well with his students and is a caring, effective teacher.

These findings of fact are supported by competent, substantial evidence. We urge that termination in this case, in light of these facts, is not an appropriate measure of discipline.

Furthermore, while Respondent does not disagree that leaving his students unsupervised was appropriate, the discipline of termination for this offense, when Respondent shows remorse for his actions and is fully engaging in treatment and recovery, is inappropriate.

Therefore, we request that the School Board reject the Petitioner’s Exception to the Recommended Penalty, and reduce the penalty to suspension, the duration of which can be determined as per School Board Policy 4.9 of Progressive Discipline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been filed electronically, which will furnish an email transmission of this document to Douglas Griffin, Assistant General Counsel, Broward County School Board, 600 S.E. 3rd Avenue, Fort Lauderdale, Florida 33301, doug.griffin@browardschools.com, on August 9, 2019.

/s/ Robert F. McKee_____
ROBERT F. MCKEE
Florida Bar No. 295132
yborlaw@gmail.com
Secondary Email: bdjarnagin@gmail.com
KATHERINE HEFFNER
Florida Bar No. 112955
katheffner@gmail.com
ROBERT F. MCKEE, P.A.
1718 E. 7th Avenue, Suite 301
Tampa, FL 33605
(813)248-6400
(813)248-4020 (Fax)