STATE OF FLORIDA
DEPARTMENT OF EDUCATION

DR. ALBERTO T. FERNANDEZ,
HENNY CRISTOBOL, AND
PATRICIA E. RAMIREZ,

Petitioners,

vs.

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.
_____/

CASE No. DOE-2014-3055
DOAH Case No. 13-1492

FINAL ORDER

Upon review of the record, the Florida Department of Education hereby enters this Final Order pursuant to sections 120.569 and 120.57(1), F.S.

PRELIMINARY STATEMENT

This cause arises from the Petitioners' complaints, who are employees of the Miami-Dade County School Board, claiming that the School Board committed acts of reprisal against them because of their involvement in an attempt to convert Neva King Cooper Educational Center (Neva King) to a public charter school. Such reprisals were allegedly in violation of section 1002.33(4)(a), F.S. That provision of the law prohibits unlawful reprisal and provides in relevant part:

> *[n]o district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school.*

The complaints were heard by the Division of Administrative Hearings. The hearing was held on January 27 through 31, and on February 14, 2014.

In his June 30, 2014, Recommended Order (RO), the Administrative Law Judge (ALJ)

> *RECOMMENDED that the Florida Department of Education enter a final order: finding that the Miami-Dade County School Board violated section 1002.33(4)(a) with respect to each Petitioner; awarding attorney's fees to each Petitioner; and ordering that the Miami-Dade County School Board compensate Petitioner Dr. Alberto T. Fernandez in the amount of $10,590.00.*

A copy of the RO is attached as Exhibit A.

Both the Petitioners and the Respondents filed exceptions to the RO, as well as responses to the exceptions, pursuant to section 120.57(1)(k), F.S., and Fla. Admin. Code R. 28-106.217.

STANDARD OF REVIEW

Standard of Review of Findings of Fact

The agency may not reject or modify a factual finding unless the agency reviews the entire record and states with particularity in the order that the finding was not based on competent substantial evidence or that the proceeding did not comply with the essential requirements of law. See, section 120.57(1), F.S. Factual inferences are to be drawn by the [ALJ] as trier of fact. Prysi v. Department of Health, 823 So.2d 823 (Fla. 1st DCA 2002); Heifetz v. Dep't of Bus. Reg. Division of Alcoholic Beverages & Tobacco, 475 So.2d 1277, 1283 (Fla. 1st DCA 1985). An agency is not authorized to weigh evidence or judge credibility. Id. at 1281; Greseth v. Department of Health & Rehab. Serv., 573 So.2d 1004 (Fla. 4th DCA 1991). An ALJ's findings cannot be rejected unless there is no competent substantial evidence from which the findings could reasonably be inferred. Prysi, 823 at 825; Heifetz, 475 So.2d at 1281.

Standard of Review of Conclusions of Law

Unlike factual conclusions, an agency's review of conclusions of law and interpretations of administrative rules found within an RO is de novo where the statutes or rules fall within the substantive jurisdiction of the agency. See, Hoffman v. State, Dep't of Management Service, 964 So.2d 163 (Fla. 1st DCA 2007). Thus, pursuant to section 120.57(1), F.S., an agency may reject or modify an ALJ's conclusion of law and the interpretation of administrative rules over which the agency has substantive jurisdiction. In doing so, an agency must state with particularity its reasons for rejecting or modifying the conclusion of law or interpretation of rule and must find that its substituted conclusion of law is as reasonable, or more reasonable, than the one it rejects or modifies. Considerable deference should be accorded to agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless clearly erroneous. See, e.g., Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); Dep't of Envtl. Regulation v. Goldring, 477 So.2d 532, 534 (Fla. 1985).

RULINGS ON EXCEPTIONS

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of ALJs by filing exceptions to recommended orders. See, Comm'n on Ethics v. Barker, 677 So.2d 254, 256 (Fla. 1996). Having filed no exceptions to certain findings of fact, the party has thereby expressed its agreement with, or at least waived any objections to, those findings of fact. See, Envtl. Coalition of Fla. v Broward County, 586 So.2d 1212, 1213, (Fla. 1st

DCA 1991). In reviewing a recommended order, the agency's final order "shall include an explicit ruling on each exception." See, section 120.57(1)(k), F.S.

EXCEPTIONS SUBMITTED BY THE SCHOOL BOARD

The School Board did not file an exception to the finding that the Board had unlawfully retaliated against the Petitioners for pursuing a conversion charter for Neva King. The School Board has, however, submitted one exception, namely that the record lacks any competent substantial evidence to support the award of a $10,000 bonus to Dr. Fernandez.

The RO states as follows:

> *. . . the credible evidence demonstrates that, by virtue of his placement on alternate assignment, Dr. Fernandez was deprived of bonuses totaling at least $10,000 ($5,000 in 2011-2012, as well as an identical bonus the following school year).*

RO at p. 40, Paragraph 67.

> *[w]ith respect to compensation for "lost wages, benefits, or other lost remuneration caused by the unlawful reprisal," Dr. Fernandez has demonstrated that his placement on alternate assignment deprived him of bonuses totaling $10,000. It is concluded, however, that Petitioners' remaining requests for compensation either fail as a matter of proof or fall outside the ambit of section 1002.33(4)(b)3.*

RO p. 55, Paragraph 96.

The record reveals that previous to the unlawful reprisal Dr. Fernandez' performance was assessed as either distinguished or exemplary, the two highest ratings awarded by the school district. (T. 348, 388) Further, in the past and while serving as principal of Neva King, Dr. Fernandez received the highest bonus given to any principal in the district. (T. 1414.) Bonuses were given by the school district during the 2011-12 and 2012-13 school years under the Race to the Top grant. These bonuses ranged from $3,000 to $25,000 annually. (T. 1414-1416) Bonuses were provided based upon student achievement using the FCAT or the assessment given to students with disabilities,

specifically the Florida Alternate Assessment (FAA). The students at Neva King took the Alternate Assessment. Based upon this evidence, and the reasonable inferences to be drawn from this evidence, there is competent substantial evidence for the ALJ to determine that Dr. Fernandez was deprived of two bonuses of at least $5,000 each year. While there was testimony that bonuses were dependent upon school grades, there was also testimony that the bonuses were dependent upon student performance and that performance of students at Neva King was measured by the FAA. Conflicting testimony has been resolved by the ALJ. Therefore, after review of the entire record, this exception is denied.

EXCEPTIONS SUBMITTED BY THE PETITIONERS

The Petitioners have filed exceptions to the remedies recommended by the ALJ.

Exception 1: Reinstatement

First, Dr. Fernandez and Mr. Cristobol argue that their current positions with the School Board are not equivalent to their prior positions and seek an order compelling the School Board to hire them at Neva King in their former positions, respectively as the principal and assistant principal.

The relevant paragraphs of the RO provide as follows:

> *Finally, it is necessary to address Dr. Fernandez and Mr. Cristobol's requests for reinstatement to their former positions. In resolving this issue, it is critical to note, first, that each Petitioner presently occupies an assignment that is equivalent, both in terms of compensation and responsibility, to his previous position at NKCED. This is significant, for section 1002.33(4)(b)1. Does not mandate the restoration of the employee to his or her former assignment; rather, it contemplates reinstatement either to the same position "or to an equivalent position." (Emphasis added). Finally, it is important to acknowledge that, during the two-year period since Dr. Fernandez and Mr. Cristobol's removal from NKCEC, MDCPS assigned two new administrators (neither of whom had any involvement with the reprisal) to fill the vacancies created by the involuntary transfers.*
>
> *Although mindful of Dr. Fernandez and Mr. Cristobol's deep commitment to NKCEC's students and faculty, as well as the substantial grief and heartbreak that accompanied their adverse transfers, the undersigned declines to recommend Petitioners'*

reinstatement to their former positions—relief that would necessitate the displacement of NKCEC's entire administrative staff and result in further disruption to the institution.

RO, Paragraphs 97-98.

The question of whether a position is an equivalent one is a question of fact. Factors to be considered in determining whether a position is equivalent include compensation, title, job responsibilities, working conditions and status. See, Weaver v. Casa Gallaido, 922 F.2d 1515, 1527 (11th Cir. 1991). The record reveals that Mr. Cristobol has the same title, job responsibilities and better compensation. (T. 1454, 1455). While Mr. Cristobal is Assistant Principal of a magnet school and not one serving students with disabilities, the statute does not require placement in an identical position. See, section 1002.33(4)(b)1., F.S. Similarly, Dr. Fernandez is serving as a principal and holds the position of Exceptional Student Education Principal system-wide. Indeed, he serves the same type of student, that is, students with disabilities, and he receives the same compensation (T. 331-333). The factual conclusion that Dr. Fernandez and Mr. Cristobol hold an equivalent position is supported by competent substantial evidence and thus, the exception is denied.

The Petitioners' argument that the statute prioritizes the remedy of reinstatement to the former position is a question of law and is rejected. The relief under the statute for unlawful reprisal includes three alternatives, including reinstatement to the same position, appointment to an equivalent position and payment of reasonable front pay. See, section 1002.33(4)(b)1., F.S. When deciding which of these remedies to provide, the district's constitutional authority to operate, control, and supervise public schools within the district must be considered. Further, even in the absence of state constitutional considerations, reinstatement is not required where there are countervailing concerns.

See, Bruso v. United Airlines, 239 F.3d 848 (7th Cir. 2001). For the foregoing reasons, Exception 1 is denied.

Exception 2: Economic Losses by Mr. Cristobol and Ms. Ramirez

Next, Mr. Cristobol and Ms. Ramirez have filed exceptions regarding economic losses. The relevant portion of the RO provides as follows:

> *[w]ith respect to compensation for "lost wages, benefits, or other lost remuneration caused by the unlawful reprisal, Dr. Fernandez has demonstrated that his placement on alternate assignment deprived him of bonuses totaling $10,000. It is concluded, however, that Petitioners' remaining requests for compensation either fail as a matter of proof or fall outside the ambit of section 1002.33(4)(b)3.*

RO, paragraph 96.

The relevant portion of the statute provides that the remedy for unlawful reprisal includes "[c]ompensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the unlawful reprisal." Section 1002.33(4)(b)3, F.S. The question of whether a cost falls within the parameters of the statute is one of law. There is no definition of remuneration in the reprisal statute, but in other places in the educational code, remuneration is defined as salary, bonuses, and cash-equivalent compensation paid to [an employee] . . . by his or her employer for work performed. See, e.g., sections 1001.50(5); 1012.885(1)(c); 1012.975(1)(c); 1012.976(1)(c), F.S. When a term is not defined within a statute, a fundamental tool of construction requires giving a statutory term its plain and ordinary meaning. Green v. State, 604 So.2d 471 (Fla. 1992). When necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary. Id. at 473. Remuneration is defined as payment for a service in the Webster's Dictionary, and as a reward, recompense, salary or compensation in Black's Dictionary. Under the definitions found in the educational code and the ordinary meaning of the word, the expenses Ms. Ramirez seeks for additional travel time and child care, are not

lost compensation under the statute. For the same reason, payment for an additional hour while reassigned also fails.

With regard to compensation for the lost opportunity for summer employment, the RO provides that "there is a paucity of evidence concerning the availability of such positions." (RO page 63, n. 50.) An agency is not authorized to reweigh the evidence and thus, the exception, is denied.

The exception claiming that Mr. Cristobol should have been awarded $1,000 for the two school years of 2010-11 and 2011-12, as a Race to the Top bonus is also denied. Contrary to Petitioners' argument, evidence about the bonus value for a principal does not constitute competent substantial evidence about the value of a bonus for an assistant principal. As the ALJ correctly noted, the Petitioner has failed to provide any non-hearsay evidence on the value of any putative bonus. (RO, p. 63, n. 49.) Exception 2 is denied.

Exception 3: Removal of Derogatory materials from personnel files

Petitioners "seek to have their personnel files cleared of derogatory matter that was used to justify what has now been discredited as an unlawful reprisal . . ." . (Petitioners Exceptions to Recommended Order, p. 13.) Petitioner relies upon section 1012.31, F.S., as authority for the removal contending that since exploration of a conversion charter cannot serve as a basis for discipline, all derogatory material relating to the Petitioners' efforts in this regard must be removed from their files. Assuming that this relief was properly requested, it falls outside of the relief authorized as a remedy for unlawful reprisal under section 1002.33(4)(a) and is contrary to the public records law. See, AGO 2011-19 (assessment of assistant superintendent that was not completed in

accordance with the law is a public record and may not be removed from public view or destroyed); See also, AGO 94-54 (in the absence of express statutory authority, an agency is not authorized to maintain its personnel records of its employees under two files, one open and one confidential). As a result, this exception is denied.

Exception 4: Remand to DOAH for a recommendation as to the amount of reasonable costs, including attorney's fees

The RO recommends the award of attorney's fees to each Petitioner. (RO, page 57). The RO, however, does not contain a recommendation as to the amount of the costs and fees. The petitioners have filed an exception, requesting that the matter of fees and costs be remanded to DOAH for an evidentiary hearing. The school district's response does not address this exception. The award of fees and costs is obviously authorized under the statute. See, section 1002.33(4)(b)4., F.S. Further, it appears that the request is more properly viewed as a motion to remand, rather than an exception to the RO. As such, the exception is construed as a motion to remand, and the motion is granted solely for the purpose of conducting a fact finding determination, to be followed by a recommendation, as to the amount of reasonable costs and attorney's fees to be awarded the plaintiffs.

FINDINGS OF FACT

The Administrative Law Judge's Findings of Fact, paragraphs 1-79, of the Recommended Order, are hereby adopted as the Findings of Fact of this Final Order.

CONCLUSIONS OF LAW

The Administrative Law Judge's Conclusions of Law, paragraphs 80-98, are hereby adopted as the Conclusions of Law of this Final Order.

DISPOSITION

Upon review of the entire record, the foregoing Findings of Fact, Conclusions of Law, and Rulings on the Exceptions filed by the Parties, it is

ORDERED and ADJUDGED that

(1) Miami-Dade County School Board violated section 1002.33(4)(a), F.S. with respect to the three Petitioners, Dr. Alberto T. Fernandez, Mr. Henny Cristobol and Ms. Patricia E. Ramirez.

(2) The Respondent Miami-Dade County School Board shall compensate Petitioner Dr. Alberto T. Fernandez in the amount of $10,590.00.

(3) The Petitioners are awarded reasonable costs, including attorney's fees; and

(4) The matter is remanded to the ALJ solely for the purpose of a fact finding determination, supported by contemporaneous time records and evidence as to the appropriate hourly rate, to be followed by a recommendation as to the amount of reasonable costs, including attorney's fees, to the Petitioners.

DONE AND ORDERED this 6 day of November 2014, in Tallahassee, Leon County, Florida.

Pam Stewart
Commissioner of Education
State of Florida

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NOTICE OF APPEAL RIGHTS

This order is final agency action. Judicial review of final agency action may be had by filing notices of appeal in both the appellate district where the petitioner resides and with the clerk of the Department within 30 calendar days of the date this order is filed in the official records of the Department. §120.68, F.S.; Fla. R. App. P. 9.110. UNLESS A NOTICE OF APPEAL IS TIMELY FILED, NO FURTHER REVIEW IS PERMITTED.

CERTIFICATE OF SERVICE BY THE AGENCY CLERK

I **HEREBY CERTIFY**, that a true and correct copy of the foregoing Final Order has been furnished by United States mail to:

this 10 day of November, 2014.

Agency Clerk