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STATE OF FLORIDA
DISTRICT COURT OF APPEAL, FIRST DISTRICT

ESCAMBIA COUNTY SCHOOL BOARD,

Appellant,

v.

DCA Case Number: 1D19-2067

Lower Case Number: 18-3340RX

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

Appellee.

_____ /

ON APPEAL FROM
FINAL ORDER OF ADMINISTRATIVE LAW JUDGE
IN RULE CHALLENGE PROCEEDING

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

ISSUE I

THE ADMINISTRATIVE LAW JUDGE ERRED IN CONCLUDING SCHOOL BOARD RULE 2.04 IS VOID AS AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY.

Standard of Review: Those portions of the ALJ’S conclusions that rest on findings of fact are subject to a competent substantial evidence standard of review, however, those portions which are interpretations of law are subject to a de novo standard. See *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594, 597 (Fla. 1st DCA 2000).

The Administrative Law Judge erred in the Final Order finding the School Board exceeded its delegated legislative authority in adopting Rule 2.04 because the statutes implemented by Rule 2.04 do not include language granting specific authority authorizing school boards to adopt rules to implement those statutory duties. The Administrative Law Judge makes this finding by erroneously relying on the “flush left” language of §120.52(8) and §120.536.¹ (R298, ¶13). These statutory provisions of the Administration Procedures Act (APA) limit agency rule making authority to only that specifically provided in the statute to be implemented. The ALJ’s decision as well as the Appellee Union’s Answer Brief

¹The statutory language of §120.536(1) is identical to the final “flush left” paragraph of §120.52(8).

fails to recognize that the legislature, in §120.81(1)(a), enhanced the authority of district school boards to make rules implementing statutorily imposed duties by distinguishing “district school boards” and their rule making authority from other “agencies” subject to the strictures of §120.52(8) and §120.536. The Union’s Answer Brief recognizes that §120.81(1)(a) relieves school boards of “some rule making requirements generally imposed on state agencies” and that school boards may adopt policies and rules “and need not have the specific authority required of other agencies engaging in rule making”. (Answer Brief, p. 20). However, as noted in Appellant’s Initial Brief and as noted above, the ALJ failed to recognize the legislature, in §120.81(1)(a), directly relieved district school boards from the strictures of §120.52(8) and §120.536. The ALJ error is demonstrated by the ALJ finding “the flush left language of §120.52(8) makes clear everything must flow from the language of the statute being implemented”. (Final Order at R-309-10, para. 43). The Union’s Answer Brief cites no authority to counter the School Board’s reliance on the opinion of then Administrative Law Judge T. Kent Wetherell, II, in *R.H.C. and Associates, Inc. v. Hillsborough County School Board*, DOAH-02-3138. In the *Hillsborough County School Board* case the enhanced authority of district school boards pursuant to §120.81(1)(a) was addressed in the context of the requirements of §120.52(8) and §120.536 both

which hold an agency does not have authority to adopt a rule implementing a statutory duty unless the statute defining the duty gives the agency that authority. In *Hillsborough County School Board* Judge Wetherell found the “flush left” paragraph at the end of §120.52(8) “is not implicated in this proceeding” because §120.81(1)(a) eliminated that consideration. *Id* at p. 31. The ALJ Final Order in the instant case clearly rests upon the “flush left” paragraph at the end of §120.52(8) and its general agency application notwithstanding the enhanced authority of district school boards through §120.81(1)(a) eliminating those requirements for rule making with respect to district school boards.

The Administrative Law Judge plainly erred in failing to recognize that §120.81(1)(a) enhanced the power of district school boards to adopt rules to implement statutory duties under their “general powers” at §1001.41 even where the statute being implemented does not include specific language for agency implementation. Through this error the ALJ then erred in finding School Board Rule 2.04 void as an invalid exercise of legislative authority.

School Board Background Screening Is Not Restricted To Those Offenses Listed In §1012.315, Florida Statutes.

The error of the Administrative Law Judge in declaring Rule 2.04 void as an invalid exercise of delegated legislative authority is further demonstrated by the

misapplication of the statutes at issue, §1012.465, §1012.32, and §1012.315. The ALJ correctly referenced §1012.465 as providing that non-instructional employees who have direct contact with children must meet level 2 screening requirements described in §1012.32, however, the ALJ erred by then concluding that §1012.32 references §1012.315 as “the list of disqualifying offenses”. (R-298, para. 11). This error resulted from the ALJ adopting the position of the Union that §1012.315 constitutes the implementation of “level 2 requirements” described in §1012.465. It does not. Level 2 screening requirements are found only at §435.04, Florida Statutes.

The linchpin for the Appellee’s argument that the School Board unlawfully adopted Rule 2.04 to implement statutorily required level 2 screening for all School District employees is §1012.315 (2017). Section 1012.315 lists criminal offenses that disqualify individuals from educator certification as well as employment in instructional and administrative positions that require direct contact with students. While admitting §1012.315 “on its face” applies only to educator certification and instructional personnel and administrators who have “direct contact with students”, the Appellee Union, nonetheless, argues §1012.315 screening applies to *all* District employees and is the *only* statutorily authorized screening standard. (Appellee Brief, p. 13). The Union makes its argument by

ignoring the language of §1012.465 requiring “level 2 screening” for non-instructional employees and misconstruing §1012.32(2) as somehow changing §1012.315 so that it applies to *all* employees rather than only to educator certification and instructional and administrative employees who have direct contact with students. The Union asserts “[T]he only disqualifying offenses listed in the Education Code are found at §1012.315, F.S. These apply to all employees of the school district.” (Appellee Brief, p. 13). This is a misapplication of not only §1012.315 but also §1012.465 requiring all non-instructional employees “meet level 2 screening requirements” and §1012.32(2) requiring that all instructional and non-instructional personnel who fill positions that require direct contact with students undergo background screening as required under §1012.465. The Union’s position that §1012.315 and its enumerated offenses is the *only* screening required or authorized for *all* School District employees, notwithstanding the plain language of §1012.465, derives from the flush left paragraph at the end of §1012.32(2) following the lettered paragraphs. This flush left paragraph provides that fingerprints be submitted to the Department of Law Enforcement for criminal background checks as well as with the FBI. Further the paragraph provides:

A person subject to this subsection who is found ineligible for employment under s. 1012.315 or otherwise found through

background screening to have been convicted of any crime involving moral turpitude as defined by rule of the State Board of Education, shall not be employed, engaged to provide services, or serve in any position that requires direct contact with students. (Emphasis supplied). §1012.32(2)

Those subject to the above constraints are those persons “subject to this subsection”. The Union misconstrues this paragraph by concluding “A person subject to this subsection” means *all* District employees. If this paragraph applied to all School District employees, it would say so. What the paragraph provides, however, is that DOE certificated personnel in both public and private schools found to have been convicted of an enumerated offense under §1012.315 or of any crime involving moral turpitude “as defined by rule of the State Board of Education” shall not be employed in any position that requires “direct contact with students”. That, of course, mirrors what §1012.315 says where it holds a person is ineligible for educator certification and employment in an instructional position or administrator position that requires direct contact with students if convicted of any of the enumerated offenses therein. A crime involving “moral turpitude” as defined by the rules of the State Board of Education applies to *educators*. The applicable State Board of Education Rule, 6A-10.083 titled “Standards Relating to Gross Immorality and Acts of Moral Turpitude”, applies to Florida educator certification and Florida “educators”. The Union, in its brief, relies upon the Third DCA

opinion in *Cisneros v. School Board of Miami-Dade County*, 990 So.2d 1179 (Fla. 3rd DCA 2008) for the proposition that §1012.315 applies to all employees and not just “educators”. That reliance is misplaced. (Appellee Brief, pp. 24, 29). *Cisneros*, on appeal, reviewed the Final School Board Order adopting the ALJ Recommended Order. In *Miami-Dade School Board, Petitioner v. Jorge Cisneros, Respondent*, DOAH Case No. 07-3266 the Administrative Law Judge addressed the issue of whether the Miami-Dade School Board had “just cause” to terminate *Cisneros*’ employment as a *teacher* based on his conviction of the crime of vehicular homicide. The school board had charged Cisneros with conviction of a crime involving moral turpitude disqualifying him from employment for his failure to meet statutory employment screening standard pursuant to Chapter 435, Florida Statutes. (Id. p. 2). The case was presented to the ALJ based on stipulated facts. Those stipulated facts demonstrated Cisneros was employed as a teacher by the Miami-Dade County Public Schools commencing February 2000. (Id. at 3). In May of 2002 Cisneros pled *no contest* and was adjudicated guilty of the offense of vehicular homicide. In March of 2006 the school board took action to suspend Cisneros and initiate dismissal proceedings due to his conviction of a crime involving moral turpitude. (Id. at 4). A school district rule predicated on Chapter 435 screening defined vehicular homicide (§782.071, F.S.) as a crime involving

moral turpitude. The *Cisneros* ALJ decision referenced §1012.32(1), F.S., providing, in part, that to be eligible for employment in any position in any school district system a person be of good moral character. The decision then references §1012.33(1)(a) and (4)(c), F.S., governing *teacher* instructional contracts of employment with school districts as authorizing termination of a *teacher* convicted of a crime of moral turpitude as defined by the State Board of Education. The then State Board of Education Rule 6B-4.009(6) (now 6A-5.056) defined moral turpitude as a crime evidenced by an act of baseness, vileness, or depravity. (Id. at 6). The *Cisnaros* ALJ recommended order, adopted by the School Board as its final order, concluded that because the Respondent had stipulated the School Board had adopted a rule incorporating vehicular homicide as a disqualifying offense, the school board was entitled to rely upon its lawfully adopted rule “until a forum of competent jurisdiction declares it to be unconstitutional or an invalid exercise of delegated legislative authority”. (Id. at 7). The ALJ concluded the school board’s termination of Cisnaros pursuant to its rule and the Respondent’s conviction authorized the termination of his employment. Cisnaros appealed. In *Cisnaros v. The School Board of Miami-Dade County*, 990 So.2d 1179 (3rd DCA 2008) the Court of Appeals reversed concluding the school board rule defining vehicular homicide as a crime of moral turpitude pertained only to job applicants and not to

an employed *teacher*. The Court concluded that for purposes of “an already-employed teacher” that State Board of Education Rule 6B-4.009(6) defining moral turpitude was dispositive. The Court then concluded that a crime of moral turpitude for “educators” as defined by Rule 6B-4.009(6) requires base, vile, and depraved acts and that Cisnaros’ recklessness resulting in his conviction of vehicular homicide did not demonstrate moral turpitude as defined by that Rule. (Id. at 1182). The Court of Appeals concluded the final administrative order addressed statutes and matters exceeding the stipulated “sole issue of whether Cisnaros was convicted of a crime involving moral turpitude”. Furthermore, the statutes referred to in the final order were not part of the stipulation and may not be applicable depending on factors not of record. With that predicate the Court concluded the School Board failed to carry its burden of proof on the stipulated issue. (Id. at 1183). *Cisnaros*, however, does not stand for the proposition that applicants for school district employment and education support employees may not be subject to Level 2 screening of §435.04, F.S. The reference in footnote 5 to the opinion regarding disqualifying offenses presently embodied within §1012.315(1) demonstrates that this provision, when applicable, “disqualifies an *educator* from employment in a position requiring direct contact with students”. (Emphasis supplied). The Union made the same argument regarding the same

statutes when Warren appealed the School Board's decision to suspend him without pay while his felony charges were pending. This Union position was rejected when this Court affirmed the Final Order of the Escambia County School Board suspending Warren without pay. See *Warren v. Escambia County School Board*, 1D18-2270, 2019 WL 2142753. Recently this Court affirmed a similar Final Order of the Escambia County School Board in *Peterson v. Escambia County School Board*. See 1D18-2343. Peterson was a non-instructional employee suspended without pay while felony charges potentially constituting disqualifying offenses under the level 2 screening requirements of 435.04 were pending. In an administrative hearing where *Peterson* challenged just cause for her suspension without pay Administrative Law Judge McKibben, in DOAH case number 17-5600, issued a Recommended Order subsequently adopted by the School Board as its Final Order. The Order addressed just cause for Peterson's suspension without pay while felony charges were pending as authorized by Escambia County School Board Rule 2.04. Judge McKibben addressed the authority of the School Board to adopt Rule 2.04(6) providing that conviction of offenses defined in §435.04 and/or 1012.315 disqualified further employment. Judge McKibben recognized that §1012.315(1)(y) identifies theft as a disqualifying offense only if the amount at issue exceeds \$3,000.00 where Peterson's charged offense was for less than that

amount. Judge McKibben recognized, however, that under §435.04(2)(cc), the crime of theft is listed as a disqualifying offense if it was a felony, regardless of the amount. Judge McKibben addressed the history of Chapter 435 and the Florida Department of Education Technical Assistance Paper (TAP) to assist school boards concerning hiring practices.² Judge McKibben recognized that according to the TAP, a school board may not, without more, simply adopt the crimes enumerated in Chapter 435 as “disqualifiers”. Judge McKibben went on to find, however, that §1012.315 disqualifiers are “only some of the reasons a person may not be eligible for employment”. (DOAH 17-5600, p. 11, para. 20). In paragraph 24 Judge McKibben’s Order found:

The TAP states clearly that, “[a]ny of the offenses listed in s. 435.04, F.S., may certainly be a disqualifier for employment at a district.” In the present case, the Board has determined that admitting guilt to felony theft does not demonstrate good moral character and thus may constitute a basis for denying employment. School Board Policy 2.04(6)A states that any offense under chapter 435 and/or chapter 1012 may be considered by the Board when determining whether a person is eligible for employment. The School Board Policy could have also included the Ten Commandments or the Code of Hammurabi as basis for determining disqualifying offenses; it is, stated the TAP, up to each school board to decide. (It is the opinion of the undersigned that the TAP simply said that when considering disqualifying offenses, chapter 1012 must be considered; other chapters or sources might also be considered, but chapter 1012 was paramount.)

²The TAP is referenced by the Union in its brief at pages 16 and 17.

The Union argues that School Board and Superintendent's legislative authority addressed in Chapter 1012 is exclusionary, meaning that if it is not in Chapter 1012, it does not exist. By example the Union Answer Brief references the School Board authority under §1012.22, F.S., to designate positions to be filled, prescribe qualification for those positions, and provide for compensation of promotion, suspension and dismissal of employees "subject to the requirements of this Chapter". (Answer Brief, p. 27). This assertion, however, runs contrary to the School Board's rule making authority pursuant to §1001.41(2) as recognized when the legislature enhanced the rule making authority of district school boards pursuant to 120.81(a). The obvious meaning of the "subject to" language in the statutory authority provisions of Chapter 1012 means consistent with what Chapter 1012 requires rather than the exclusion of any other statutory authority not included in Chapter 1012.

The Union's constrained application of Chapter 1012 is asserted for the proposition that Rule 2.04(6) is invalid because it incorporates the level 2 and disqualifying offenses of §435.04. The Union asserts "[T]here is no requirement in Chapter 1012, F.S., that employees of a school board be screened pursuant to Chapter 435, F.S., or a requirement that makes the disposition of disqualifying offenses listed in §435.04, F.S., applicable to School Board employees, including

Warren”. (Appellee Brief, p. 30). This contention is in error. It assumes that no school board can exclude employees from employment absent a conviction of offense listed in §1012.315 or conviction of a “crime of moral turpitude” as defined for teachers and educators under DOE Rule 6A-10.083. First it should be noted that §1012.32(2)(a) provides that both instructional and non-instructional personnel hired to fill positions that require direct contact with students undergo background screening as required under §1012.465. Section 1012.465 requires those employees “must meet level 2 screening requirements”. Level 2 screening requirements are only found at §435.04. As noted in Appellant’s Initial Brief, as addressed in the Florida Attorney General Opinion, AGO 2007-42, 2007 WL 304272 (October 2007), the legislative history of §1012.465 indicates the reference to “level 2 screening requirements” means those standards set forth in §435.04, F.S.

In consideration of the above the ALJ in the instant case erred by concluding that the Escambia County School Board adoption of Rule 2.04 was void as an invalid exercise of delegated legislative authority when the ALJ failed to recognize that, notwithstanding the “flush left” language of §120.52(8) and §120.536, district school boards were granted the authority through §120.81(a) to adopt and implement rules under the district school board’s general rule making

authority found at §1001.41 even where the statute being implemented does not include specific language for agency implementation. Thereafter the ALJ further erred in concluding that the disqualifying offenses of §1012.315 constituted the only list of disqualifying criminal offenses and that the School Board was without statutory authority to go outside those enumerated offenses in §1012.315. The Escambia County School Board properly adopted and implemented Rule 2.04 and in doing so did not exceed delegated legislative authority.

CONCLUSION

Appellant, Escambia County School Board, prays this Court reverse the Final Order of the Administrative Law Judge finding School Board Rule 2.04 void as an invalid exercise of delegated authority.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished by electronic mail to Ronald G. Stowers, Esquire and Mark S. Levine, Esquire on this 8th day of January, 2020.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that this Answer Brief is in compliance with the Court's type and pitch requirements of Rule 9.210(a)(2), Fla.R.App.P., and state that the Answer Brief is in Times New Roman 14 point font and contains 3,400 words to this point.

Respectfully submitted,

/s/ Joseph L. Hammons

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