STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAN GOLDNER,

Petitioner,

vs.

BROWARD COUNTY
SCHOOL BOARD,

Respondent.
_____/

CASE No. 03-4057 EHP

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Petitioner, JAN GOLDNER, by and through her undersigned attorneys, and files this her Memorandum of Law In Opposition to Respondent's Motion for Summary Judgment, and in support thereof would show:

The Petitioner, JAN GOLDNER, vigorously disputes the fundamental underpinnings of the filed document entitled Respondent's Motion for Summary Judgment. As there are disputed issues of material fact which prevent summary judgment, the hearing herein should be rescheduled.

The concise statement of facts requiring no proof at trial as set forth in the Joint Pre-Hearing Stipulation sets forth the only undisputed facts in this case.

The document entitled Motion for Summary Judgment is not verified by any witness and does not contain any supporting affidavits. There is no factual basis for summary judgment herein. Rule 1.510, Florida Rules of Civil Procedure, states:

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. (Emphasis added)

Merely attaching documents, which are not sworn to or certified, to a motion for summary judgment does not, without more, satisfy the procedural requirements inherent in Fla. R. Civ. P. 1.510(e). In Bifulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709, 1997 Fla. App. LEXIS 5643, 22 Fla. L. Weekly D 1325 (Fla. 4th DCA 1997) the Court analyzed at length the fundamental and critical nature of this procedural safeguard, and, as to the necessity of sworn statements, the Court held:

The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Consequently, it is not appropriate to consider this document to be an actual viable Motion for Summary Judgment, as such motions are uncommonly understood in Florida jurisprudence. This fatal defect alone should result in Respondent's Motion for Summary Judgment being denied.

Even if one assumes that the factual assertions set forth in the attachments to the Motion for Summary Judgment are true and accurate (which one cannot under Florida law as noted above), the Motion still fails.

A critical issue in this case involves highly disputed issues of fact. The Superintendent opined at a public meeting that he knew something about Petitioner, and her alleged personal relationship with her then Principal at Indian Ridge Middle School.

He knew enough, at that moment, to make decisions regarding her career. Specifically, Paragraph 3 of Respondent's Motion for Summary Judgment states (again, with no sworn evidentiary support),

> In early 2003, following Petitioner's admission that she engaged in a "personal relationship" with the then-Principal of Indian Ridge Middle School, and had engaged in inappropriate behavior on the school campus during school hours, she was reassigned to a position as the Assistant Principal for the remainder of the 2002-2003 school year. *See Exhibit B.*

This supposed undisputed fact is in fact vigorously disputed, and is completely unsupported by the alleged Exhibit which purportedly supports these factual assertions (sworn or not). Exhibit B is simply a letter from the Director of Administrative Procedures for the School Board advising the Petitioner that she has been reassigned from one school to another. There is nothing in this unsworn exhibit which references some purported admission that she engaged in a "personal relationship," or, more portentously, that she had "engaged in inappropriate behavior on the school campus during school hours."

The Petitioner has consistently stated that she was a victim of sexual harassment. She was not a willing participant in a sexual liaison on campus during work hours. This position was and is known to the School Board. It is outrageous that this cavalier position has been taken in this motion on behalf of the School Board in the instant case.

Furthermore, in paragraph 4. of Respondent's Motion for Summary Judgment, the School Board admits that Petitioner has alleged that Superintendent Frank Till made "stigmatizing" statements when he recommended the Petitioner's annual contract not be

renewed. This is not disputed by the School Board in this motion. These "stigmatizing" statements are a significant basis for the request for a liberty interest based "name clearing" hearing through the instant case.

Paragraphs 5, 6, and 7, of the Motion for Summary Judgment reflect the fact that Petitioner finished the 2002-2003 school year as an Assistant Principal and was transferred based upon these stigmatizing statements, and that in the following year, Petitioner was offered only a teaching position, albeit at the same salary for that succeeding school year. These are the only facts alleged in support of this Motion for Summary Judgment.

Consequently, as to the purported factual basis for the Summary Judgment sought by the School Board, a facial review of the Motion with attachments will reveal that 1) there is no verified or sworn basis for such Motion, and 2) even if verified, there is no proper basis for such extraordinary and final relief. As a result, the Motion must fail.

From the legal prospective, the Respondent made lengthy and confusing arguments intertwining the distinct concerns regarding an employee's property interest and an employee's liberty interests. Either of these legally recognized interests would entitle an employee to a hearing.

It was clearly set forth as the position of the Petitioner in the Joint Pre-Hearing Stipulation, at page 5., that this case involves the liberty interests of the Petitioner, i.e., the stigmatizing effects of the Superintendent's comments protected by the 14th Amendment. Despite this clear statement of the interests to be protected herein, the

School Board has spent pages discussing the myriad ways in which the Petitioner had no property interests to be protected at this time. All of such argument is inapposite and of no import whatsoever in this case. Consequently, Point I. of the Memorandum of Law is inapplicable.

The procedural features of a name clearing hearing, or post deprivation hearing involving a liberty interest are set forth in Campbell v. Pierce County, Georgia, 741 F. 2d. 1342 (11th Cir. 1984). This case, which is cited by the School Board, sets forth some of the procedures which should be included in hearings of this type. The employee is entitled to notice. This notice should be sufficient to permit the individual to familiarize himself or herself with the charges that have been made against him or her. 741 F. 2d. at 1346. Superintendent Till said he knew something, enough to decide, but we know not what that was at that time.

Furthermore, the Court in Campbell found that, "the record of the hearing shows that she had, and availed herself of, opportunity to hear and cross-examine all adverse witnesses and to attempt to rebut their claims of insubordination and mishandling of funds [the stigmatizing allegations in that case]." 741 F. 2d. at 1346.

In the instant case, the School Board has the temerity to assert that the Petitioner had such a hearing. In its Motion, it is postulated that Petitioner

was provided an opportunity to be heard, 'clear' her name during and following the School Board's investigation. A hearing was held in Novmeber (sic) of 2003 and the sole stated purpose of the hearing was to give the Petitioner the opportunity to bring forward any additional matters that she believed would be considered before a final decision as to

disciplinary action was reached. Motion for Summary Judgment at p. 12. (Emphasis added).

What actually transpired at this hearing in November was a quite different turn of events. Attached is a copy of the initial five (5) pages of what was a pre-disciplinary hearing, not a name clearing hearing, held on November 20, 2003. Attachment 1 to Exhibit A to this memorandum, Affidavit of Petitioner. It is initially noted that these two (2) types of due process hearings actually involve two (2) different types of concerns. Setting that issue aside, a review of the transcript at pages 4. and 5., reveals the following:

> MR. FERTIG: Before we begin, I do have some questions. First of all, **what will you do with the requests that we give you to interview witnesses? Will you in fact interview witnesses?**
>
> MR. MELITA: **Yes. We'll send an investigator back out. The purpose is to give the superintendent all the information so he can make a decision.**
>
> MR. FERTIG: And will you make a recommendation to the superintendent based upon the additional findings that - -

MR. MELITA: I don't make any recommendation at all. I just give him what the committee found and **I'll tell him what your concerns were based on the predisciplinary hearing and what the additional witnesses brought forward.**

Consequently, counsel for the Petitioner at that hearing, Mr. Fertig, wanted to be assured, on the record, that if additional witnesses were identified, additional investigation would occur. He did receive unequivocal positive assurances from Dr. Melita, representative for the School Board, that "Yes. We'll send an investigator back out." Based upon this information, Mr. Fertig went forward with the hearing, and the names of a number of witnesses were provided to the School Board.

As noted by the attached Affidavit of Petitioner, none of the witnesses that were identified by her or her counsel in the November 20, 2003 pre-disciplinary hearing subsequently were interviewed by School Board investigators. Consequently, after the months rolled by, Mr. Fertig contacted Dr. Melita to ascertain when in fact these interviews would occur, eliciting information which would rebut the claims which the Superintendent had relied upon in making his stigmatizing remarks. Despite the unequivocal positive assurances, nothing had happened.

On February 5, 2004, Mr. Fertig then received a response from Mr. Pettis on behalf of the School Board. See Attachment 2 to Exhibit A to this memorandum, Affidavit of Petitioner. Mr. Pettis advised him that, despite the clear and unambiguous

assertions of Dr. Melita that the investigator would go back out, and that the purpose of that subsequent investigation was to give the Superintendent all the information that he should consider in making a decision, no additional investigation would be made. The stated explanation for this refusal to follow through with additional investigations, as promised, was that it would only "go to the weight of the evidence." This is self-evident. This supposed explanation was somehow intended by Mr. Pettis to indicate that an investigation need not be concerned with data involving credibility, or the appropriate weight to be given to certain evidence. Consequently, subsequent investigation was deemed unimportant.

Mr. Pettis goes on to state, "There was sufficient information in the record for the Professional Standards Committee to complete its evaluation and make its recommendation to the Superintendent." In other words, we have enough now to discipline, why should we muddy the issue by considering more?

He concludes his letter by referring to the instant Chapter 120 proceeding, and indicated to Mr. Fertig that no additional investigation is required as a result of the November 20, 2003 hearing, because this hearing with DOAH is on the horizon. As to the instant proceeding, Mr. Pettis told Mr. Fertig, "she will be able to present any evidence, both documentary or testimonial, that she thinks should be considered in the disposition of her claim." See Attachment 2. Although, as that letter was being sent, the instant motion for summary judgment was being prepared.

Consequently, the School Board believes that it should be able to deny due process in the pre-disciplinary hearing, as her rights would be protected in this later DOAH proceeding (cited as the basis for denial of further due process rights of Petitioner), while on the other hand, receive a Summary Judgment here, as she had her due process below. It is Catch 22. According to Respondent, Petitioner had no right to be heard at the school administrative level, and now should have none before DOAH. Apparently, in Respondent's view, the Petitioner can craft such a lose-lose proposition.

Mr. Pettis concludes this correspondence of February 5, 2004 by stating, "At this point, we believe that we have discovered sufficient evidence to conclude the process of the Professional Standards Committee." In short, we have enough evidence to demote her now, and we don't want to do additional investigation which might confuse or adversely affect "the weight" of that evidence, even though we said we would, because that is all the process that she is due.

The Eleventh Circuit in Campbell states that Petitioner is entitled to notice and the opportunity to hear and rebut the claims of stigmatizing information. The School Board has denied Petitioner such rights (even if one assumes that this document should be deemed to be a viable Motion for Summary Judgment).

One case which is cited in the procedural due process section of Respondent's Motion for Summary Judgment (Section I.) does bears on the instant case. In Sullivan v. School Board of Pinellas County, 773 F. 2d. 1182, 1187, (11th Cir. 1985), the Court held,

Without suggesting to implicate a liberty interest the charge or allegation must involve dishonestly or immorality, we do not find the comments regarding Ms. Sullivan's renewal to be comments that place "a person's good name, reputation, honor, or integrity . . . at stake" or that foreclose Ms. Sullivan's "freedom to take advantage of other employment opportunities." (Internal citation omitted).

In Sullivan, a School Board employee alleged that she was stigmatized by comments that she was adversarial and unable to get along with and gain the respect of her co-workers. The Eleventh Circuit found that these reasons do not implicate a liberty interest. Here, according to the School Board Superintendent, the Petitioner had a personal relationship with her then supervisor and engaged in inappropriate sexual behavior at the school while kids were there. That is the essence of their allegations. Under the most charitable view of these allegations, they would implicate potential dishonesty or immorality, and they would affect a person's good name, reputation, honor, or integrity. These factors noted in Sullivan are present herein. It is disingenuous in the extreme to contend otherwise.

In conclusion, Respondent's Motion for Summary Judgment should be denied. It is unverified and unsupported by Affidavit or other sworn factual information, and thus fatally flawed. In this motion, the School Board sets up a strawman argument regarding deprivation of property interests (never alleged by Petitioner), and then knocks down the strawman that the Petitioner never erected. The School Board then attempts to minimize or demean the liberty interest at issue. The School Board then states that, even if stigmatizing, the Petitioner was provided with an opportunity to be heard, and "clear" her name during the investigation - a hearing which proceeded on the reasonable assumption

that Respondent's representatives would do things that they said they would do, which they did not do. Furthermore, it was improper for the Respondent to direct the Petitioner to the instant proceeding for her opportunity to have her day in Court, only to file the instant Motion to prevent her from having even that opportunity.

The Broward County School Board has requested that this Administrative Law Judge enter an order granting its Motion for Summary Judgment based on a finding that the Petitioner has not established a violation of her liberty interest that can or should be addressed in this administrative proceeding, or alternatively, that the School Board has satisfied the Petitioner's right to clear her name in the record. A protectable liberty interest has been shown. That protectable liberty interest should be acknowledged in the instant administrative proceeding and an appropriate remedy ordered. The School Board has not satisfied the Petitioner's right to clear her name based upon its actions and inactions reflected in the November 20, 2003 Pre-disciplinary Hearing for the Professional Standards Committee. The Motion for Summary Judgment should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail and facsimile transmission to **Eugene Pettis, Esquire**, of Haliczer, Pettis & White, P.A., at 101 NE 3rd Avenue, Sixth Floor, Ft. Lauderdale, Florida, 33301, on this 17th day of March, 2004.

Respectfully submitted,

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BY:_____
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cc: Petitioner
Christopher Fertig, Esquire
p's response to m-sum judg.wpd