

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL BOARD OF MIAMI-DADE)
COUNTY, FLORIDA,)
)
Petitioner,)
)
vs.) Case No. 99-5125
)
YVONNE M. WEINSTEIN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case May 2 and 3, 2000, in Miami, Florida, before Patricia Hart Malono, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Madelyn P. Schere, Esquire
School Board of Miami-Dade County
1450 Northeast Avenue, Suite 400
Miami, Florida 33132

For Respondent: G. Ware Cornell, Jr., Esquire
Post Office Box 14633
Fort Lauderdale, Florida 33302

STATEMENT OF THE ISSUE

Whether the Respondent should be dismissed from her employment as a teacher because of incompetency, as alleged in the Petitioner's letter to the Respondent dated November 16,

1999, and in the Notice of Specific Charges filed with the Division of Administrative Hearings on December 22, 1999.

PRELIMINARY STATEMENT

In a letter dated November 18, 1999, the School Board of Miami-Dade County, Florida ("School Board"), notified Yvonne M. Weinstein that it had taken action to suspend her from her employment as a teacher and to initiate dismissal proceedings against her "for incompetency." Ms. Weinstein timely requested an administrative hearing, and the School Board forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. On December 22, 1999, the School Board filed with the Division of Administrative Hearings a Notice of Specific Charges in which it included specific allegations intended to support the charge of incompetency. Ms. Weinstein was charged in Count I of the Notice of Specific Charges with incompetency because of inefficiency, as set forth in Sections 230.23(5)(f) and 231.36(4)(c), Florida Statutes, and in Rule 6B-4.009(1)(a)1. and/or 2., Florida Administrative Code, and in Count II of the Notice of Specific Charges with incompetency because of incapacity, as set forth in Sections 230.23(5)(f) and 231.36(4)(c), Florida Statutes, and in Rule 6B-4.009(1)(b)1. and/or 2., Florida Administrative Code.

Pursuant to notice, the final hearing was held on May 2 and 3, 2000. At the hearing, the School Board presented

the testimony of Larry Harmon, Charles Gibbs, Blanca M. Valle, Thomasina O'Donnell, and, on rebuttal, Joyce Annunziata.

Petitioner's Exhibits 1 through 24 were offered and received into evidence. Ms. Weinstein testified in her own behalf and presented the testimony of David Michael Feazell and Tyrone S. Luis. Respondent's Exhibits 1 through 9, 11, and 12 were offered and received into evidence. Respondent's Exhibit 10 was offered into evidence but rejected; the exhibit was accepted as a proffer.

The two-volume Transcript of the final hearing was filed with the Division of Administrative Hearings on June 30, 2000. The parties timely submitted proposed findings of fact and conclusions of law, which have been considered in the preparation of the Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The School Board of Miami-Dade County, Florida, is the entity authorized to operate the public schools in the county and to "provide for the appointment, compensation, promotion, suspension, and dismissal of employees" of the school district. Section 4(b), Article IX, Florida Constitution; Section 230.23(4) and (5), Florida Statutes (1997).

2. At the times material to this proceeding, Ms. Weinstein was an elementary school teacher employed under a continuing contract by the School Board and assigned to Miami Heights Elementary School ("Miami Heights Elementary"). Ms. Weinstein has been employed by the School Board since 1968. Ms. Weinstein is a member of United Teachers of Dade and is governed by the Contract Between the Dade County Public Schools and the United Teachers of Dade ("UTD Contract").

3. During the 1998-1999 school year, Ms. Weinstein taught a second grade class at Miami Heights Elementary. She was placed on alternate assignment on February 9, 1999, and, in March 1999, she took medical leave, which was approved by the School Board.

4. On October 13, 1999, Ms. Weinstein was advised that she must either resign or retire from her position as a teacher with the School Board by October 20, 1999, and that, if she did not do so, a recommendation would be made to the School Board at its November 17, 1999, meeting that she be dismissed from her employment. The decision that Ms. Weinstein could no longer teach in the Miami-Dade County public school system was based on two grounds. First, she had received an unacceptable evaluation for the 1998-1999 school year based on the determination that her teaching performance was not acceptable and that she had failed to remediate the deficiencies identified in the TADS

formal observations conducted in September and November 1998 and in January 1999. Second, two psychologists had found Ms. Weinstein medically unfit for duty as an elementary school teacher as a result of psychological evaluations conducted in January 1999 and August 1999.

Performance as a teacher

A. Parent and teacher complaints

5. Blanca M. Valle became principal of Miami Heights Elementary in June 1997. Soon after she assumed her duties, Ms. Valle received a letter from a parent complaining that Ms. Weinstein allegedly told her son he was "stupid"; the parent requested that her son not be assigned to Ms. Weinstein's class for the upcoming school year. At the time, Ms. Weinstein was teaching in a summer program at South Miami Heights Elementary School. Although the charge made by the parent was not substantiated, 1/ the child was assigned to a different teacher for the summer program, and Ms. Valle made sure that the child was not assigned to Ms. Weinstein's class for the 1997-1998 school year.

6. Ms. Valle assigned Ms. Weinstein to teach a kindergarten class during the 1997-1998 school year. Ms. Valle received several letters from parents in September 1997 complaining about Ms. Weinstein's treatment of their children. One parent complained that Ms. Weinstein ignored her son when he

raised his hand to participate in class; another parent asked that his child be assigned to another kindergarten class because the child felt intimidated and frightened in Ms. Weinstein's class; another parent complained that Ms. Weinstein was not aware that her daughter was lost in the cafeteria for 45 minutes after lunch; another parent complained that her son's school supplies were stolen from the classroom, his homework was not collected by Ms. Weinstein, and his shirt was cut in several places by another student during the time he was under Ms. Weinstein's supervision.

7. As a result of the complaints, Ms. Valle assigned Ms. Weinstein in October 1997 to teach a third grade class that had just been created at Miami Heights Elementary to accommodate a greater-than-expected number of students. In addition to re-assigning Ms. Weinstein, Ms. Valle assigned another teacher to act as her mentor, assigned the grade level chairperson to work closely with her, and referred her to the School Board's Employee Assistance Program. 2/

8. After Ms. Weinstein was transferred, Ms. Valle received several letters from parents of third grade students complaining about Ms. Weinstein and asking that their children be transferred to another class. One parent complained that, during a field trip the parent was chaperoning, Ms. Weinstein spent an inordinate amount of time berating students for

misbehavior, to no effect; she lacked control of the class, and she was disorganized; another parent complained that, during a conference with Ms. Weinstein and Ms. Clayton, Ms. Weinstein lied about sending progress reports home to the parent and said that her daughter was crazy.

9. During the 1998-1999 school year, Ms. Weinstein was assigned to teach a second grade class. Ms. Valle received several letters from parents complaining about Ms. Weinstein and requesting that their children be transferred to another class. Several parents stated that they wanted their children transferred to another class because they had received negative reports from other parents regarding Ms. Weinstein. One parent complained that her son cried every morning and did not want to go to school, that Ms. Weinstein told the parent that her son lied to the parent and to himself, and that Ms. Weinstein did not have a professional appearance; another parent complained that Ms. Weinstein ignored her daughter when she raised her hand to turn in her homework.

10. Crystal Coffey was the assistant principal at Miami Heights Elementary during the 1998-1999 school year, which was her first year in the position at Miami Heights Elementary. It was not unusual for parents to approach her and ask that their child be transferred out of Ms. Weinstein's class.

11. At the end of the 1998-1999 school year, when Ms. Weinstein was on medical leave, Ms. Valle received letters from three teachers complaining about Ms. Weinstein. The second grade level chairperson during the 1998-1999 school year complained that Ms. Weinstein was very difficult to work with and did not grasp the curriculum or understand how to present lessons. Another teacher commented that she had observed Ms. Weinstein engage in a pattern of unprofessional and often bizarre behavior over the years. A teacher who team-taught language arts with Ms. Weinstein wrote that, among other things, Ms. Weinstein would not let students go to the rest room, that on two occasions Ms. Weinstein sat at her desk during class and ate a chef salad and a tuna salad with her hands, and that Ms. Weinstein would put a "bad behavior" check mark beside children's names for the most minor offenses.

B. Observations of Ms. Weinstein's teaching performance

12. Ms. Weinstein's performance as a teacher was rated acceptable overall and acceptable in every performance category in each annual evaluation from the 1978-1979 school year 3/ through the 1997-1998 school year.

13. Ms. Valle signed Ms. Weinstein's Teacher Assessment and Development System ("TADS") 4/ Annual Evaluation for the 1997-1998 school year based on a formal TADS observation conducted on April 13, 1998, by the then-assistant principal of

Miami Heights Elementary, Alice Clayton. Ms. Clayton prepared a CAI-Post Observation Report for the April 13, 1998, TADS observation rating Ms. Weinstein's performance acceptable in each category assessed. She also rated Ms. Weinstein's performance acceptable for each indicator in each category.

14. Ms. Valle conducted informal observations of the classroom performance of each of the teachers in Miami Heights Elementary; it was her practice to visit all of the classrooms in the school at least once a day. During her informal observations of Ms. Weinstein's classroom performance, she observed students who were not on task, discipline problems, and a general lack of teaching and learning in the classroom.

15. Ms. Coffey made it a practice to informally observe each teacher's classroom at least three times each week. Ms. Coffey informally observed Ms. Weinstein's classroom an average of three times each week during the 1998-1999 school year. At the beginning of the school day, Ms. Coffey would often find Ms. Weinstein sitting at her desk in the classroom eating her breakfast or looking "spacey," apparently unaware that the classroom door was open and that a number of parents were trying to talk with her and/or trying to get their children organized for the day.

16. On September 18, 1998, Ms. Valle, who was trained in the use of TADS, conducted a formal TADS observation of

Ms. Weinstein's classroom performance and completed both a CAI Post-Observation Report and a Record of Observed Deficiencies/Prescription for Performance Improvement with respect to the observation. Ms. Valle rated Ms. Weinstein's classroom performance acceptable in three categories listed on the CAI Post-Observation Report: knowledge of subject matter, teacher-student relationships, and assessment techniques.

17. Ms. Valle rated Ms. Weinstein unacceptable in three categories on the CAI Post-Observation Report: preparation and planning, classroom management, and techniques of instruction. The Record of Observed Deficiencies contains numerous references to Ms. Weinstein's failure to use verbal or non-verbal techniques to redirect students who were off task; rather, Ms. Valle observed that Ms. Weinstein ignored students who were talking and playing and generally behaving poorly, and she seemed to be unaware of the students' behavior in her classroom. Ms. Valle also observed that Ms. Weinstein ignored students who raised their hands with questions or to contribute to the class discussion, did not provide background information for her lesson or any explanation of how to do the problems assigned, did not acknowledge that many of the children were confused by the lesson, and did not provide closure to the lesson.

18. On November 16, 1999, Ms. Coffey, who was trained in the use of TADS, conducted a formal TADS observation of

Ms. Weinstein's classroom performance and completed both a CAI Post-Observation Report and a Record of Observed Deficiencies/Prescription for Performance Improvement with respect to the observation. Ms. Coffey rated Ms. Weinstein's classroom performance acceptable in two categories listed on the CAI Post-Observation Report: knowledge of subject matter and assessment techniques.

19. Ms. Coffey rated Ms. Weinstein unacceptable in four categories on the CAI Post-Observation Report: preparation and planning, classroom management, techniques of instruction, and teacher-student relationships. Ms. Coffey observed that Ms. Weinstein did not follow her lesson plan and went beyond the time allotted for the lesson, leaving the teacher who was to teach the next lesson knocking at the classroom door for over five minutes. Ms. Coffey noticed that students already had completed the workbook page for the lesson, and, in Ms. Coffey's opinion, Ms. Weinstein was not teaching a new lesson during the observation but one she had already taught. Ms. Coffey observed that Ms. Weinstein did not use any verbal or non-verbal techniques to redirect the many students who were off task and that she put check marks for bad behavior and stars for good behavior beside students' names, which she had written on the chalk board, without providing any explanation to the students and often for no discernable reason. Ms. Coffey also observed

that Ms. Weinstein often ignored students' inappropriate behavior, did not monitor whether the students were learning the lesson, did not provide feedback to the students, and did not respond to students who had questions.

20. A Conference-for-the-Record was held on December 8, 1998, to discuss Ms. Weinstein's September and November performance assessments and related matters and her future employment status with the School Board. Ms. Valle and Ms. Coffey attended the conference, as well as Ms. Weinstein and two union stewards. Ms. Valle discussed the two TADS formal observations with Ms. Weinstein, as well as the prescriptive activities assigned in the observation reports and ways in which Ms. Valle and Ms. Coffey would assist her to improve her teaching performance. Ms. Weinstein was advised that disciplinary action would be considered if her performance did not improve.

21. On January 25, 2000, Ms. Valle conducted her second formal observation of Ms. Weinstein's classroom performance, and she completed both a CAI Post-Observation Report and a Record of Observed Deficiencies/Prescription for Performance Improvement with respect to the observation. Ms. Valle rated Ms. Weinstein's classroom performance acceptable in three categories listed on the CAI Post-Observation Report:

preparation and planning, knowledge of subject matter, and teacher-student relationships.

22. Ms. Valle rated Ms. Weinstein unacceptable in three categories on the CAI Post-Observation Report: classroom management, techniques of instruction, and assessment techniques. At the time of the second observation, Ms. Weinstein had not remedied many of the unsatisfactory teaching behaviors Ms. Valle had observed in her formal observation in September 1998. The lesson observed by Ms. Valle on January 25, 1999, was on the concepts of solid, liquid, and gas, but Ms. Valle observed that Ms. Weinstein did not use any supplemental materials or hands-on activities to teach the students, nor did she provide necessary background information or closure for the lesson. Ms. Valle observed that Ms. Weinstein did not call on students who had raised their hands with questions or to contribute to the class discussion, did not provide feedback to help students who were confused by the lesson, failed to use verbal or non-verbal techniques to redirect students who were off task, and ignored students who were off task, seemingly unaware of their behavior. In addition, Ms. Valle found that Ms. Weinstein had virtually no documentation to support grades for the students: As of January 25, 1999, the most recent grade recorded in Ms. Weinstein's grade book was for December 9, 1998, and there

were no assessments and very little work contained in the students' folders.

23. On June 8, 1999, Ms. Valle prepared a memorandum regarding Ms. Weinstein's TADS Annual Evaluation for the 1998-1999 school year, in which Ms. Valle rated Ms. Weinstein unacceptable in every category of classroom assessment; Ms. Valle rated Ms. Weinstein acceptable in professional responsibilities. The memorandum was prepared in lieu of conducting a conference-for-the-record because Ms. Weinstein was on extended medical leave. In the memorandum, Ms. Valle advised Ms. Weinstein that her performance was unacceptable because the deficiencies identified in the formal TADS observations in September and November 1998 and January 1999 had not been remediated. Ms. Valle advised Ms. Weinstein that the assessment process would continue when she returned to Miami Heights Elementary.

24. Had Ms. Weinstein not gone on medical leave in March 1999, she would have been entitled to at least one, and perhaps two, formal TADS observations conducted by a School Board administrator other than Ms. Valle and Ms. Coffey. As it was, no external TADS observation was conducted, and the TADS assessment process was not completed.

Fitness for duty as a teacher

25. In a memorandum to the Office of Professional Standards dated January 13, 1999, Ms. Valle requested that Ms. Weinstein be given a fitness evaluation because she had observed Ms. Weinstein engage in behavior during the 1998-1999 school year that Ms. Valle considered unusual. Ms. Valle attached to the memorandum letters that Ms. Weinstein had prepared requesting that the parents of various students sign a statement "for her autograph book" to the effect that "Ms. Weinstein is a good teacher"; Ms. Weinstein passed the letters out to students and parents and disrupted classes when she took letters to other teachers and asked that they give them to the students whose names she had written on the letters. Both parents and teachers complained to Ms. Valle about these letters.

26. Ms. Valle observed Ms. Weinstein engage in other behavior that Ms. Valle considered unusual: Ms. Weinstein came to school dressed in a manner that Ms. Valle considered inappropriate, and her hair was often untidy; during the winter, Ms. Weinstein sometimes wore a hat pulled down to her eyes the entire day; during a meeting with Ms. Valle and others, Ms. Weinstein took a pair of leopard-print gloves out of a box she carried and put on the gloves; Ms. Weinstein attended a PTA meeting wearing a black see-through skirt and blouse;

Ms. Weinstein gobbled her food and ate food such as tuna salad with her hands; Ms. Weinstein walked in the school halls with a blank look on her face. In addition, Ms. Valle noted that Ms. Weinstein had excessive absences from school.

27. Ms. Coffey observed Ms. Weinstein engage in behavior she considered unusual: When she had conferences with Ms. Weinstein, Ms. Weinstein would not look at her or respond to questions or statements except to say that "it's not true"; Ms. Weinstein wore a fur-like hat and long leopard gloves on hot days and sometimes walked around school under an umbrella when it was not raining; and Ms. Weinstein often had a "spacey" look and seemed not to understand what was being said to her.

28. In response to Ms. Valle's request that Ms. Weinstein be referred for a fitness evaluation, a Conference-for-the-Record was held in the Office of Professional Standards on January 27, 1999, to consider, among other things, Ms. Weinstein's performance assessment and her medical fitness to perform her assigned duties. The Summary of the Conference-for-the-Record reflected that Ms. Weinstein was advised that her absences were considered excessive because she used more sick leave than she had accrued, and the two formal TADS observations completed in September and November 1998 were discussed. Ms. Weinstein acknowledged that the School Board had the right to require that she be evaluated to determine her fitness for

duty, and she chose to be evaluated by Dr. Larry Harmon, whose name appeared on a list of psychologists approved by the School Board. Ms. Weinstein appended a two-page response to the Summary of the Conference-for-the-Record in which she admitted to some of the behaviors identified by Ms. Valle and Ms. Coffey but disputed the conclusion that these behaviors were unusual.

A. Dr. Harmon's evaluation - January 1999

29. At the request of the School Board's Office of Professional Standards, Larry Harmon, who is a licensed clinical psychologist, performed a fitness-for-duty evaluation of Ms. Weinstein on January 28, 1999. In evaluating Ms. Weinstein, Dr. Harmon conducted a clinical interview and a mental status examination, administered several psychological tests, consulted with other mental health professionals, and reviewed materials provided to him by the School Board.

30. Dr. Harmon issued a report dated March 10, 1999, in which he deferred his diagnosis with respect to Axis I "Clinical Disorders and Conditions." 5/ He diagnosed Ms. Weinstein with "Personality Disorder, Not Otherwise Specified" with respect to Axis II "Personality Disorders," 6/ commenting that she exhibited moderate to severe patterns of defensiveness, denial, projection, blame, rationalization, distorted thinking, suspiciousness, selective listening, inability to process and accept feedback, poor judgement, and lack of insight.

Dr. Harmon deferred his diagnosis with respect to Axis III "Physical Disorders and Conditions" to her physician.

31. Dr. Harmon concluded that Ms. Weinstein was not fit for duty as an elementary school teacher. This conclusion was based on his assessment that

[h]er impaired interpersonal behavior and unacceptable work performance in Preparation and Planning, Classroom Management, Techniques of Instruction, and Teacher-Student Relationships is likely to continue and be considered below acceptable standards. Based on this assessment, there is insufficient supporting information to clear her to return to work. . . .

Dr. Harmon's assessment that her interpersonal behavior was impaired was based on his observations that Ms. Weinstein was extremely defensive and almost in a state of denial that there were any problems with her interactions and performance; that she had difficulty processing information conveyed to her during the clinical interview and mental status examination; that her judgment was impaired and her problem-solving ability reduced; and that she had a low level of insight into the effect of her behavior on others. Dr. Harmon found that Ms. Weinstein generally had serious difficulties with job tasks requiring interpersonal interactions and stated that

individuals with her [Ms. Weinstein's] level of defensiveness, distorted thinking, suspiciousness, denial, selective listening, inability to engage feedback, poor judgement, and lack of insight are likely to

evidence significant work difficulties, especially if she is under stress. . . . [T]here appears to be a probability of significant risk that her inadequate interpersonal skills and inability to benefit from feedback will adversely affect her work performance

32. Among other things, Dr. Harmon recommended in his report that Ms. Weinstein be placed on medical leave for at least one month to allow her to receive intensive mental health treatment to help her improve her interpersonal skills and work performance and that she participate in psychotherapy sessions and follow the recommendations of her psychotherapist.

33. Another Conference-for-the Record was held in the Office of Professional Standards on March 17, 1999, for the purpose of discussing Ms. Weinstein's medical fitness to perform her assigned duties. At the time, Ms. Weinstein was temporarily assigned to the Region VI Office, where she had been placed in early February 1999. Dr. Harmon's report was reviewed at the conference with Ms. Weinstein and the union representative, and the recommendations in his report were accepted by the School Board as conditions for Ms. Weinstein's continued employment as follows:

Obtain medical clearance from the Board approved evaluator to return to work within 29 working days of this conference or implement procedures for Board approved medical leave.
Participate in psychotherapeutic sessions on a regular basis to be monitored by personnel

from the District's support agency. Follow all recommendations of the health care professionals.

Sign a limited Release and Exchange of Information for all of your mental health professionals which restricts the release and exchange of information to those symptoms, behavioral patterns, and treatment compliance issues directly relevant to your fitness for duty determination.

Upon the recommendation of the District's support agency, which will be based upon discussions with your treating mental health professionals, a re-evaluation will be scheduled for you with Dr. Harmon.

Ms. Weinstein was advised that, if she did not comply with Dr. Harmon's recommendations, the School Board would be compelled to take disciplinary measures against her including suspension, demotion, or dismissal.

34. In the School Board's opinion, Ms. Weinstein was not ready to assume her duties after 30 days, and she subsequently took School Board-approved medical leave through the end of the 1998-1999 school year.

B. Dr. Feazell's evaluation - March 1999

35. After the School Board received Dr. Harmon's evaluation report, Ms. Weinstein sought a second opinion on her fitness to carry out her duties as a second grade teacher with the Miami-Dade County school system. David A. Feazell, a licensed psychologist, conducted a psychological evaluation of

Ms. Weinstein on March 22 and 26, 1999, and prepared a report summarizing his findings. Dr. Feazell spent approximately two hours with Ms. Weinstein in a clinical interview and another two hours administering psychological tests, which included personality and intelligence tests. Ms. Weinstein provided Dr. Feazell a copy of Dr. Harmon's report; he did not have access to the information provided to Dr. Harmon by the School Board, although he had access to the summary of the information contained in Dr. Harmon's report.

36. Dr. Feazell noted in his evaluation report that, during the clinical interview, Ms. Weinstein's account of her employment situation was relevant and detailed and consisted of explanations for her behavior and rebuttal of the complaints made about her. Ms. Weinstein believed that she had made an unduly negative impression on Dr. Harmon because she was ill at ease and defensive in answering his questions.

37. The psychological tests given by Dr. Feazell revealed that

Ms. Weinstein's MMPI-2 [Minnesota Multiphasic Personality Inventory-2] profile is defensive, going beyond that which is commonly seen in fitness for duty evaluations. She denies emotional discomfort and vulnerability, as well as common place human faults and frailties. She presents an unusually positive self-image, describes herself as self-controlled and quite socially responsible, and reports unusually low levels of depression or anxiety. In MMPI-2 item responses, she admits minimal social anxiety and

characterizes herself as very outgoing, despite describing herself in the interview as shy.

Individuals with Ms. Weinstein's MMPI-2 and Rorschach profiles are typically inclined to deny problems and not to have a high level of introspection or insight into their own feelings. They can be simplistic or inflexible into [sic] their approach to problems and tend to see things too much in terms of how others do not understand them or treat them unfairly. Ms. Weinstein actually shows several signs of a particular need for the approval and affection of others, so that she may find situations quite disconcerting in which others evaluate, criticize, or take a demanding, skeptical view of her.

In terms of judgment, Ms. Weinstein is capable of thoughtful, perceptive analysis of situations. However, she also appears likely to overlook or misinterpret important details. Her judgment can be inconsistent, especially under conditions of emotional stress. She seems to react strongly to emotional stimuli. She could benefit from the support or guidance of others in learning to stop and to look at a situation from other points of view before she draws unwarranted or inaccurate conclusions. It is noted that testing shows no bizarre thinking or major distortion of judgment.

38. Based on his clinical interview and testing of Ms. Weinstein, Dr. Feazell diagnosed her with an Axis I clinical diagnosis of "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct in the face of occupational and personal stress." Dr. Feazell did not make an Axis II diagnosis, noting that "[a]lthough personality patterns predispose her to respond with some defensive inflexibility to certain interpersonal

stresses, there may not be sufficient evidence of a formal personality disorder." Dr. Feazell did note, however, that, at the time of his evaluation, Ms. Weinstein was inclined to overreact to stress and to misunderstand things and form incomplete conclusions when she was under stress.

39. Dr. Feazell finally observed that Ms. Weinstein needs continuing psychotherapy to develop better ways to recognize and deal with uncomfortable feelings, to learn better skills for hearing and taking in feedback and information without over-reacting and selectively misunderstanding it, and to learn better awareness of how her won style of judgment and interaction can hinder her problem solving under pressure.

In Dr. Feazell's opinion, Ms. Weinstein was fit for duty at the time he evaluated her in March 1999 "as long as she has the support of treatment while working out her job issues with her principal. It is recommended that Ms. Weinstein return to work with continuing treatment." According to Dr. Feazell, Ms. Weinstein's prognosis is fairly good if she continues in treatment.

C. Dr. Gibb's evaluation - August 1999

40. Ms. Weinstein was referred by the School Board for a follow-up fitness-for-duty evaluation, which was performed by Charles C. Gibbs on August 13, 1999. Dr. Gibbs conducted a clinical interview with Ms. Weinstein, administered several psychological tests, reviewed records provided by the School

Board, and reviewed the evaluations of Ms. Weinstein performed by Dr. Harmon, Dr. Feazell, and Dr. Maurer, a psychologist who evaluated Ms. Weinstein at her request in June and July 1999. Dr. Gibbs tried to contact Ms. Weinstein's psychotherapist, Tyrone Lewis, but Mr. Lewis did not return several telephone calls.

41. In Dr. Gibbs' opinion, Ms. Weinstein's most likely diagnosis would be an Axis I clinical disorder, such as depression, anxiety, or an adjustment disorder.

42. Dr. Gibbs concluded that Ms. Weinstein was not fit to return to her job duties as an elementary school teacher as of August 1999, observing in the report of his psychological evaluation that

[c]urrent test results and clinical data indicate that Ms. Weinstein is excessively defensive, guarded, substitutes fantasy for reality in stressful situations and she is plagued with poor judgment given her tendency to make decisions based on inadequate information. Furthermore she is not introspective and lacks insight into her behavior. As such she tends to project blame onto others and minimize the effects of her behavior on those in her environment. The aforementioned summary of the data in my professional opinion would make it difficult for Ms. Weinstein to counsel students when adjustment and/or academic problems arise. Further concern is raised in that she tends to make poor decisions based on inadequate information. Working with children requires a great deal of patience and as noted by results from Dr. Maurer with which I concur she is in a constant state of stimulus

overload. Thus such typical stressors such as managing classroom rules and behavior of students will likely result in Ms. Weinstein becoming overwhelmed. Additionally, her unconventional and egocentric style will not allow her to meet the changing and challenging emotional needs of elementary children. I am further concerned that her defensiveness will prevent her from benefiting from constructive [sic] criticism which will impair her participating in professional meetings and being able to put into action new information obtained from conferences and inservice classes.

Dr. Gibbs noted in his report that Dr. Feazell and Dr. Maurer had both concluded that Ms. Weinstein was fit for duty but that they had not reviewed the materials he received from the School Board.

43. Dr. Gibbs also was concerned that Ms. Weinstein had some mild organic impairment, and he recommended that she have a full neuropsychological evaluation. He further recommended that Ms. Weinstein continue in therapy for at least three months before having another evaluation of her fitness for duty and that, if she were at some point allowed to resume her duties as an elementary school teacher, she "team teach with another professional for 3 months prior to teaching on her own."

D. Ms. Weinstein's psychotherapy treatment

44. Ms. Weinstein has been in treatment with Tyrone Lewis, a psychotherapist, since January 1999. Mr. Lewis sees Ms. Weinstein once a week and sometimes once every two weeks; he

engages in what he describes as "supportive psychotherapy" with Ms. Weinstein, which is designed to provide her with insight into her current situation and to help relieve her depression and anxiety. Currently, he is working with Ms. Weinstein to help her deal with the uncertainty about her job and the possibility that she will not work as a teacher. At the time of the hearing, Mr. Lewis was of the opinion that Ms. Weinstein was much improved, specifically with respect to her cognitive skills, her depression, her anxiety, and her awareness of her current life situation.

Final Conference-for-the Record

45. A Conference-for-the-Record was held at the Office of Professional Standards on October 13, 1999, to review Ms. Weinstein's performance assessment and her medical fitness to perform assigned duties. Ms. Weinstein had been working in her alternate assignment in the Region VI Office since the beginning of the 1999-2000 school year.

46. With respect to Ms. Weinstein's performance assessment, the results of the observations done by Ms. Valle and Ms. Coffey in September and November 1998 and in January 1999 were reviewed, and it was noted that her 1998-1999 TADS Annual Evaluation was unacceptable. Ms. Weinstein was advised that her teaching performance was not acceptable and that she had not remediated the cited deficiencies.

47. With respect to Ms. Weinstein's medical fitness to perform her duties, the report of Dr. Gibbs was reviewed with Ms. Weinstein and her union representative. The School Board personnel acknowledged that Dr. Feazell and Dr. Maurer both concluded that Ms. Weinstein was able to return to work, while Dr. Harmon and Dr. Gibbs concluded that Ms. Weinstein was not able to return to work. The School Board accepted the assessment of Dr. Gibbs.

48. Ms. Weinstein requested that she be evaluated by a fifth doctor, as a "tie breaker"; this request was denied, as were Ms. Weinstein's requests that she be transferred from Miami Heights Elementary and that the School Board authorize additional leave to allow time for her to have the neurological examination recommended by Dr. Gibbs. Ms. Weinstein was advised that she must either resign her job or retire because she had been unable to obtain medical clearance to return to her teaching duties and was not eligible for additional leave. Ms. Weinstein did not choose to resign or retire by the October 20, 1999, deadline, and the School Board suspended her and recommended her dismissal from employment at its November 17, 1999, meeting.

Summary

49. The evidence presented by the School Board is sufficient to establish with the requisite degree of certainty

that Ms. Weinstein is incompetent as a teacher because she failed to communicate with or relate to her students to such a degree that the students were denied a minimum educational experience. Based on the formal and informal observations of Ms. Valle and Ms. Coffey during the fall of 1998 and in January 1999, Ms. Weinstein exercised virtually no control over the students in her classroom and either indiscriminately reprimanded the students or ignored their inappropriate behavior. Ms. Weinstein did not present her lessons in a coherent fashion, did not respond to students who were either confused or wanted to participate in the class, and was seemingly indifferent to whether the students learned in her classroom. No improvement of Ms. Weinstein's classroom performance was noted by Ms. Valle in her formal observation in January 1999 even though Ms. Weinstein had completed the activities prescribed by Ms. Valle and Ms. Coffey with respect to the September and November 1999 observations. The School Board has shown by the greater weight of the persuasive evidence that Ms. Weinstein is unable to perform her responsibilities as an elementary school teacher as a result of inefficiency in the classroom.

50. The evidence presented by the School Board is sufficient to establish with the requisite degree of certainty that Ms. Weinstein is incompetent as a teacher because she is

not emotionally stable. Dr. Harmon, Dr. Gibbs, and Dr. Feazell reached virtually the same conclusions regarding Ms. Weinstein's psychological profile and personality traits. All three psychologists found that Ms. Weinstein is extremely defensive, shows little insight into her own behavior, is unable to accept and benefit from feedback, makes judgments based on incomplete or incorrect information, and processes information poorly when she is in a stressful situation. On the basis of their assessments, Dr. Harmon and Dr. Gibbs concluded that Ms. Weinstein is unfit to carry out the duties as a teacher of elementary school children; Dr. Feazell concluded that Ms. Weinstein was fit to return to her teaching duties as of July 1999, as long as she continued in treatment to resolve the issues he identified in his evaluation report. The psychotherapy treatment Ms. Weinstein is receiving is not, however, focused on developing her ability to interact with others, to process and benefit from feedback, or to improve her judgment and ability to react properly in stressful situations, and Mr. Lewis supported his opinion that Ms. Weinstein was fit for duty as an elementary school teacher with nothing more than the observation that she was "much improved." The School Board has shown by the greater weight of the persuasive evidence that Ms. Weinstein is not fit to discharge her duties as a teacher at Miami Heights Elementary as a result of emotional instability.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (1999).

52. Because this case is a proceeding to terminate Ms. Weinstein's employment with the School Board and does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in the Notice of Specific Charges by a preponderance of the evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

53. Section 230.23(5), Florida Statutes (1999), provides that a school board has the power to suspend and dismiss employees as follows:

(f) Suspension and dismissal and return to annual status.--Suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed or returned to annual contract except as provided in chapter 231.

54. Ms. Weinstein is a teacher with a continuing contract with the School Board. Section 231.36, Florida Statutes (1999), provides in pertinent part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certificated pursuant to s. 231.17 or employed pursuant to s. 231.1725 and shall be entitled to and shall receive a written contract as specified in chapter 230. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

* * *

(4)(a) An employee who has continuing contract status prior to July 1, 1984, shall be entitled to retain such contract and all rights arising therefrom in accordance with existing laws, rules of the State Board of Education, or any laws repealed by this act, unless the employee voluntarily relinquishes his or her continuing contract.

* * *

(c) Any member of the district administrative or supervisory staff and any member of the instructional staff, including any principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction

of a crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against any such employee of the school board, the school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of suspension by the school board or by the superintendent, the school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the school board and such employee is discharged, his or her contract of employment shall be thereby canceled. Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the school board.

55. In the Notice of Specific Charges, the School Board asserts in Count I that Ms. Weinstein's employment should be terminated on the grounds of incompetency based on inefficiency, as set forth in Rule 6B-4.009(1)(a)(1) and (2), Florida Administrative Code. The School Board asserts in Count II of the Notice of Specific Charges that Ms. Weinstein's employment should be terminated on the grounds of incompetency based on incapacity, as set forth in Rule 6B-4.009(1)(b)(1), Florida Administrative Code.

56. Rule 6B-4.009, Florida Administrative Code, provides in pertinent part as follows:

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience;

(b) Incapacity: (1) lack of emotional stability;

57. Section 231.09, Florida Statutes (1999), provides:

The primary duty of instructional personnel is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement requirements, and to master the skills required to graduate from high school prepared for postsecondary education and work. This duty applies to instructional personnel whether they teach or function in a support role. Members of the instructional staff of the public schools shall perform duties prescribed by

rules of the school board. Such rules shall include, but not be limited to, rules relating to a teacher's duty to help students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully, using prescribed materials and methods, including technology-based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the school board.

58. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that Ms. Weinstein is incompetent as a teacher on the grounds of inefficiency. The School Board did not satisfy its burden of proof by proving that Ms. Weinstein repeatedly failed to perform all of the duties assigned by Section 231.09, Florida Statutes (1999), or contained in School Board rules. It did, however, satisfy its burden of proof with respect to Ms. Weinstein's incompetency by proving that Ms. Weinstein failed to provide her students with the minimum educational experience to which they were entitled because of her repeated failure to communicate with or relate to the students.

59. Based on the findings of fact herein, the School Board has proven by a preponderance of the evidence that Ms. Weinstein is incompetent as a teacher on the grounds of incapacity. The School Board has satisfied its burden of proof with respect to

Ms. Weinstein's incompetence by proving that Ms. Weinstein is emotionally unstable and unable to carry out her duties.

60. Because it has proven Ms. Weinstein's incompetence, the School Board may terminate her employment pursuant to Section 231.36(4)(c), Florida Statutes (1999).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Miami-Dade County, Florida, enter a final order sustaining the suspension without pay of Yvonne M. Weinstein and dismissing her as an employee of the School Board of Miami-Dade County, Florida, for incompetency.

DONE AND ENTERED this 11th day of September, 2000, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2000.

ENDNOTES

- ^{1/} The assistant principal of South Miami Heights Elementary School and the assistant principal of Miami Heights Elementary School spoke with students sitting near the child, and none remembered Ms. Weinstein making the comment. There is nothing in the record indicating that School Board personnel further investigated the incident.
- ^{2/} The Employee Assistance Program provides counseling and other help to teachers who are having difficulties. The program is entirely voluntary.
- ^{3/} The 1978-1979 school year was the first year the Miami-Dade County school system used an evaluation form virtually identical to the one currently in use.
- ^{4/} TADS is the instrument used by the School Board to evaluate teachers' classroom performance.
- ^{5/} Pursuant to the American Psychological Association guidelines, Axis I diagnoses identify clinical disorders that are the cause of the current, acute illness and that are transient and usually resolved with treatment.
- ^{6/} Axis II diagnoses identify personality disorders that are part of the personality structure and that, while not transient, can usually be resolved with lengthy and intensive treatment.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.