STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 00-4445

ANDREA L. DEMSEY,

Respondent.

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on May 30 and 31, 2001.

APPEARANCES

For Petitioner: Luis M. Garcia
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For Respondent: Richard Baron
Baron and Cliff
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STATEMENT OF THE ISSUE

The issue is whether Petitioner may terminate Respondent's employment as a teacher.

PRELIMINARY STATEMENT

By Notice of Specific Charges dated May 2, 2001, Petitioner alleged that it has employed Respondent as a teacher since August 1994. Petitioner alleged that Respondent was absent an excessive number of times while on leave without pay from December 4, 1996, through February 4, 1997; administratively referred to Respondent's Employee Assistance Program on November 5, 1997; and absent from May 20 to June 2, 1999.

Petitioner alleged that, on June 2, 1999, Respondent's principal requested that Petitioner's Office of Professional Standards monitor Respondent's return to work. Petitioner alleged that, on June 8, 1999, Petitioner's representatives and Respondent met in a Conference for the Record to address Respondent's attendance, fitness to teach, and future employment with Petitioner. Petitioner alleged that its representatives advised Respondent of its procedures authorizing drug testing on the basis of reasonable suspicion and warned her that they would require that she undergo drug testing if she appeared to be under the influence. Petitioner alleged that its representatives issued Respondent another referral to Petitioner's Employee Assistance Program and directives concerning attendance, lesson plans, and obtaining leaves of absence. Petitioner alleged that its representatives warned

Respondent that a failure to comply with these directives would lead to disciplinary action.

Petitioner alleged that, on September 27, 1999, Respondent requested a substitute teacher because she was sick. Respondent allegedly asked for a substitute for the following day, claiming to be sick; however, she allegedly showed up at school on September 28, 1999. Petitioner alleged that Respondent left school on September 29 without authorization and prior to the end of the school day.

Petitioner alleged that Respondent did not report to work from October 11-14, 1999, because she claimed to be sick and hospitalized. On October 19, Respondent allegedly failed to report to work and failed until later in the day to notify the school of her absence, leaving her students unsupervised in the hallway. On October 20, Respondent allegedly again failed to report to work or timely notify the school, again leaving her students unsupervised in the hallway. Later in the day, while driving her car to the school, Respondent allegedly struck a fire hydrant, reported to work crying, and appeared to be under the influence of drugs or alcohol.

Petitioner alleged that, on October 21, Respondent failed to report to work or timely notify the school of her absence. Petitioner alleged that, on October 22, it required Respondent

to undergo a drug test and that the results, obtained one week later, revealed the presence of cocaine.

Petitioner alleged that, on November 1, it notified Respondent that she could not return to work until she obtained clearance from Petitioner's Office of Professional Standards. Petitioner alleged that, one week later, Respondent requested a medical leave of absence without pay from October 22, 1999, through June 16, 2000.

Petitioner alleged that, on July 11, 2000, Respondent's treating physician cleared her to return to duty upon participation in an approved drug abuse recovery program. On July 28, 2000, Petitioner's representatives and Respondent allegedly participated in another Conference for the Record to address her medical fitness, attendance problems, noncompliance with Petitioner's rules, violation of various education rules, and future employment with Petitioner. Respondent allegedly asserted that she was clean and sober. At this time, Respondent allegedly took a drug test, which 11 days later, revealed the presence of morphine.

Petitioner alleged that its representatives and Respondent participated in another Conference for the Record on August 30, 2000, at which Petitioner's representatives advised Respondent of her option to request a confirmatory drug screen. On

October 11, 2000, Petitioner suspended Respondent and commenced this proceeding to terminate her employment.

Count I of the Notice of Specific Charges alleges that Respondent is guilty of incompetency, in violation of Articles XI and XXI of the labor contract, School Board Rules 6Gx13-4A-1.21 and 6Gx-4A-1.21, and Rule 6B-4.009(1), Florida Administrative Code; inefficiency, in violation of Rule 6B-4.009(1)(a)1 and 2, Florida Administrative Code, and Section 231.09, Florida Statutes; and incapacity, in violation of Rule 6B-4.009(1)(b)1 and 2, Florida Administrative Code.

Count II of the Notice of Specific Charges alleges that Respondent is guilty of reporting to school while under the influence of a controlled and illegal substance and failing to meet the requirements of an approved substance abuse recovery program, in violation of Rules 6B-1.001(2) and (3) and 6B-1.006(3)(a) and (5)(a), Florida Administrative Code; and impaired effectiveness as a teacher and misconduct in office, in violation of Rule 6B-4.009(3), Florida Administrative Code.

Count III of the Notice of Specific Charges alleges that Respondent is guilty of appearing on school property while under the influence of illegal drugs, in violation of School Board Rules 6Gx13-4-1.05 and 6Gx13-4A-1.21.

Count IV of the Notice of Specific Charges alleges that Respondent is guilty of conduct unbecoming a school board employee, in violation of School Board Rule 6Gx13-4A-1.21.

Count V of the Notice of Specific Charges alleges that Respondent is guilty of willful absence from work, in violation of School Board Rule 6Gx13-4E-1.011 and Section 231.44, Florida Statutes.

At the hearing, Petitioner called four witnesses and offered into evidence 38 exhibits: Petitioner Exhibits 1-38. Respondent called three witnesses and offered into evidence four exhibits: Respondent Exhibits 1-4. All exhibits were admitted. However, Respondent failed to file Respondent Exhibits 1 and 3, so they are deemed withdrawn.

The court reporter filed the transcript on July 27, 2001. The parties filed their proposed recommended orders on September 21, 2001.

FINDINGS OF FACT

1. Respondent has been a teacher since 1993. She is a 34-year-old divorced mother of a four-year-old son.

2. Respondent has suffered from a chemical dependency since she was 18 years old. At that time, she completed a 28-day detoxification program at Mt. Sinai Medical Center in Miami. Six or seven years later, Respondent underwent additional inpatient treatment for her addiction to drugs. She submitted

to a third detoxification, lasting five to seven days, in 1993 or 1994. Respondent underwent a fourth detoxification ten months later and, in 1996, a fifth detoxification. Respondent admits that she has undergone detoxification several more times since 1996. These detoxifications and Respondent's intermittent participation in Narcotics Anonymous were parts of treatment programs attempting to relieve Respondent from her addiction to cocaine and heroin.

3. Respondent's addiction has spanned her college years through her entire teaching career. The effects of Respondent's illness have, at times, precluded her from reaching her full potential as a classroom teacher.

4. After a brief period of employment by Petitioner as a permanent substitute teacher, Respondent began fulltime employment with Petitioner in August 1994 as a teacher at Oak Grove Elementary School.

5. While at Oak Grove, Respondent was a satisfactory teacher, although her attendance was less than satisfactory. Also, on at least six occasions, evidently starting in her second year, Respondent fell asleep while conducting a reading tutorial session in which the students spent 20 minutes in separate cubicles.

6. Respondent's principal at Oak Grove documented by a memorandum dated December 4, 1995, eleven full-day absences and

two half-day absences during the 1995-96 school year and two instances of sleeping while charged with the instruction of a student--both on the same day and both discovered by the principal. Due to these incidents and an earlier incident of sleeping while on duty, the principal administratively referred Respondent to Petitioner's Employee Assistance Program (EAP).

7. The December 4 memorandum documented the actions taken at a conference held the same date involving, among others, Respondent and the principal. Respondent then missed work on December 6 and 7--calling in at 10:06 a.m. on December 7 saying that she had overslept and asking if it was too late to report to work.

8. Respondent missed a considerable amount of work during the 1996-97 school year. Some of the absences, especially from early December through early February, were due to Respondent's chemical dependency. However, some absences, especially during the latter part of the school year, may be attributed to the birth of Respondent's child on July 9, 1997, following a high-risk pregnancy.

9. The record does not disclose much about the 1997-98 school year. However, Respondent missed ten days of work due to sick or personal leave and eleven days of work due to unpaid, but authorized, leave. The absence of additional administrative

action against Respondent suggests that she may have improved her attendance and eliminated her sleeping while on duty.

10. For the 1998-99 school year, Respondent transferred to a new school, Linda Lentin Elementary School. Again, Respondent was a satisfactory teacher, except for absenteeism. However, during a nine-day absence from May 20 through June 2, 1999, the principal received a telephone call from someone claiming that Respondent had had a breakdown and was in a "drug rehabilitation hospital." Accordingly, the principal requested that Petitioner's Office of Professional Standards (OPS) monitor Respondent's return to work.

11. On June 8, 1999, Respondent, the principal, Petitioner's OPS Director, and others participated in a Conference for the Record (CFR). Respondent attributed her 21 absences in the 1997-98 school year, as well as 20.5 absences in the 1998-99 school year, to six miscarriages and depression. Petitioner's OPS Director explained the procedures for reasonable-suspicion drug testing. The CFR memorandum concludes by emphasizing that Respondent must report to work when scheduled and on time, obtain medical excuses for all absences, provide lesson plans for substitute teachers, and obtain approval for scheduled leave. At the same time, Petitioner's OPS Director referred Respondent to Petitioner's EAP. Subject

to these actions, Petitioner approved Respondent's return to the classroom.

12. However, Respondent's attendance did not improve the following school year, and her behavior became somewhat eccentric early in the school year. At noon on September 27, 1999, Respondent told the principal that she was ill and needed to go home for the remainder of the day and the following day. Respondent went home, but, despite requesting leave and a substitute for the following day, returned to work the following day without calling first. Near the end of the school day, while her students were in a special-area class, Respondent signed out of school and walked down the street, despite the fact that it was raining. The next day, Respondent left the school grounds without permission and, the following day, failed to attend a mandatory teachers' meeting.

13. The situation deteriorated in mid-October 1999. From October 11-14, Respondent telephoned the school each day and reported that she was sick and in the hospital. The following Monday, October 18, Respondent reported to work. However, on October 19, Respondent failed to report to work or call, leaving her class sitting in the hallway. Respondent telephoned the school at mid-day and stated that she had been in a five-car accident. This accident did not take place.

14. On October 20, while driving to school, Respondent was involved in a two-car accident, which resulted in her striking a fire hydrant not far from the school. The accident took place at about 8:45 a.m., which was about 15 minutes after Respondent assumed direct supervision of her students. Respondent arrived at school late, crying and disconcerted. An acquaintance transported Respondent home.

15. The next morning, prior to the start of school, Respondent called the school and stated that she would not be at work.

16. On the following morning, October 22, Respondent reported to work, and her principal ordered her to submit to a reasonable-suspicion drug test. Respondent complied, and the drug test revealed the presence of cocaine and morphine. The drug test accurately detected the presence of these substances because Respondent had used crack cocaine and heroin within the period for which the drug test is sensitive.

17. By memorandum dated October 29, 1999, Respondent's principal asked Petitioner's OPS to monitor Respondent's return to work. By memorandum dated November 1, 1999, Petitioner's OPS informed Respondent that she would require a clearance from OPS before returning to work.

18. On November 8, 1999, Respondent requested a leave of absence without pay to extend from October 22, 1999, through

June 16, 2000. Petitioner granted this request. Shortly after starting her leave from work, Respondent was first seen by Dr. John Eustace.

19. Dr. Eustace is Board-certified in internal medicine and is also certified in the treatment of addictions. He is the medical director of the Addiction Treatment Program at Mt. Sinai Medical Center. He is also an assistant professor of psychiatry at the University of Miami medical school. In the last ten years, Dr. Eustace has performed 2000 evaluations of professionals to assess whether they can return to practice with the requisite skill and safety. During his career, Dr. Eustace has diagnosed and treated over 10,000 patients for addictions.

20. Dr. Eustace admitted Respondent as an in-patient at Mt. Sinai for, among other things, a four- or five-day detoxification program. He found that Respondent was in the late middle stage of addiction to heroin and cocaine and that her illness was active.

21. When releasing Respondent from the detoxification program, Dr. Eustace recommended that Respondent enter a twelve-step program to better prepare Respondent for the difficult recovery process, which requires, among other things, gaining insight into the consequences of the addiction.

22. Following the detoxification process, Dr. Eustace opined that Respondent had an even chance of avoiding another

relapse. However, this prognosis improves with time. After the first five years without relapse, the relapse rate is only ten percent. Also, after a second treatment, the recovery rate is over 90 percent. Of the 2000 professionals whom Dr. Eustace has treated, over 90 percent have recovered.

23. Unfortunately, Respondent relapsed after her 1999 detoxification and treatment by Dr. Eustace. Despite her return to active use of illegal drugs, Respondent chose to restart the process by which she could return to the classroom.

24. Petitioner's OPS informed Respondent that she would need OPS clearance before returning to work. Reacting to Respondent's request for a clearance, OPS scheduled a CFR with Respondent and others to take place on July 28, 2000.

25. At the July 28 CFR, Respondent signed an Employee Acknowledgement Form concerning Petitioner's drug-free workplace policy. The form states: "Before returning to duty, I must undergo a return-to-duty . . . controlled substances test with verified negative results." At the CFR, Respondent admitted that she had had a chemical dependency, but represented that she was now clean and sober.

26. Apparently, Respondent did not anticipate that she would be required to take a drug test at the July 28 CFR. However, with the new school year imminent, it is difficult to understand exactly when Respondent thought she would be required

to take the drug test. If she were going to teach the next school year, her principal needed more than a few days' notice. In any event, Respondent took the test on July 28, and the test revealed the presence of morphine, although not cocaine.

27. By memorandum dated September 6, 2000, from Petitioner's OPS Director to Respondent, Petitioner advised Respondent that it was reviewing its options after receiving the results of the July 28 drug test. By letter dated October 6, 2000, to Respondent, Petitioner's Superintendent advised Respondent that Petitioner was suspending her and initiating dismissal proceedings due to just cause, including incompetency, misconduct in office, gross insubordination, excessive absences, and violation of Petitioner's Rules 6Gx13-4-105 (drug-free workplace) and 6Gx13-4A-1.21 (responsibilities and duties). By letter dated October 12, 2000, and revised October 17, 2000, Petitioner's board took the action recommended by the Superintendent.

28. The contract between Petitioner and the United Teachers of Dade (Contract) provides in Article XXI, Section 1.B.1.a, that "[a]ny member of the instructional staff may be suspended or dismissed at any time during the school year, provided that the charges against him/her are based upon Florida Statutes."

29. Article XXI, Section 2.G, sets forth the Drug-Free Workplace General Policy Statement. Section 2.G.b provides the policy statement on illegal drugs, Section 2.G.c provides the policy statement on alcohol and prescription drugs, and Section 2.G.d provides the policy statement on employee drug screening. Under employee drug screening, Section 2.G.d.5 states:

> [Petitioner] recognizes that chemical dependency is an illness that can be successfully treated. It is the policy of [Petitioner], where possible, to seek rehabilitation of employees with a self-admitted or detected drug problem. Disciplinary action may be instituted against employees who the Board believes will not be assisted by rehabilitation or who have negatively impacted students and/or staff. Employees who have previously been referred for assistance or employees unwilling or unable to rehabilitate may be subject to appropriate action, pursuant to Board Policy, applicable Florida Statutes, State Board Rules, and applicable provisions of collective bargaining agreements.

30. Petitioner has invoked two of its rules in this case. Rule 6Gx13-4A-1.21, which is a statement of "Responsibilities and Duties," requires, at Section 1, all employees "to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system." It is unnecessary to determine whether the Contract incorporates this rule, or whether Petitioner may otherwise rely on this rule to dismiss an instructional employee during the school year.

31. Rule 6Gx13-4-1.05 (Rule), which is the "Drug-Free Workplace General Policy Statement," is a restatement of the Drug-Free Workplace General Policy Statement contained in the Contract. The prominent role of the Drug-Free Workplace General Policy Statement in the Contract, as well as its provision for the dismissal of employees, justifies Petitioner's reliance upon a violation of the Rule as a basis for dismissing an instructional employee during the school year, notwithstanding the provision of the Contract otherwise requiring that all such dismissals be based on violations of Florida Statutes.

32. In most respects, the Drug-Free Workplace General Policy Statement is the same in the Rule and the Contract. The Rule provides for "disciplinary sanctions" against employees who have violated the "standards of conduct" set forth within the Rule. Like the Contract, the Rule contains three "policy statements," which supply most of the operative provisions of the Rule.

33. For illegal drugs, the policy statement, as set forth in the Rule, provides: "Employees are expected to conduct themselves in a manner consistent with the following provisions:

> A. Employees on duty or on School Board property will not manufacture, distribute, dispense, possess or use illegal drugs, nor will they be under the influence of such drugs.

> B. Employees on or off duty will not influence students to use illegal or abuse legal drugs.
>
> C. An employee convicted, adjudicated guilty, or who has entered a plea of guilty for an criminal drug statute violation occurring in the workplace shall notify [Petitioner] within 48 hours after final judgment.

34. Paragraphs A and C are limited to acts and conditions that take place while an employee is on Petitioner's property or on duty. Paragraph B is limited to acts of the employee directed toward students. The evidence does not suggest that Respondent violated any of these provisions of the Rule. Petitioner failed to serve that the incidents involving Respondent sleeping while in charge of students appear not to have been due to her cocaine or heroin intoxication; it is at least as likely that the sleeping resulted from fatigue following the use of one or both of these drugs the preceding night. The distinction between intoxicating levels of these drugs and nonintoxicating trace amounts is explicitly dismissed by the Rule's treatment of alcohol, as to which employees must be "free of measurable . . . concentrations."

35. After the policy statements on illegal drugs and alcohol and prescription drugs, the Rule sets forth the policy statement on employee drug screening. Although this part of the Rule fails to provide explicitly that a positive drug screen is

a violation of the Rule, the introductory paragraph of the Rule acknowledges that Petitioner and the United Teachers of Dade are jointly committed "to create and maintain a drug-free work environment." Paragraph D within the drug-screening policy statement restates this purpose. Also, the disciplinary sanctions provided by the Rule clearly state that a refusal to submit to a drug test or a second violation of the Rule constitutes an inability to be assisted by rehabilitation; if a refusal to submit to a drug test is a violation, a failed drug test must also be a violation. These statements are therefore sufficient to provide that the presence in employees of even nonintoxicating amounts of illegal drugs, while on duty, constitute a violation of the Rule.

36. In two respects, the Drug-Free Workplace General Policy Statement, as described in the Rule, is materially different from the Drug-Free Workplace General Policy Statement, as described in the Contract.

37. First, the Rule adds another objective:

> To communicate that persons who violate the standards of conduct cited in this rule and who refuse or cannot be assisted by rehabilitation or who have negatively impacted students and/or staff shall be dismissed.

38. Second, the Rule provides disciplinary sanctions for any violation--not just for violations of the drug-screening

policy statement, as provided by the Contract--of the Drug-Free Workplace General Policy Statement. The Rule also adds two presumptive conditions for determining when an employee is unable to be assisted by rehabilitation. The Rule states:

> Employees who violate the standards of conduct cited it this rule and who the Board determines will not be assisted by rehabilitation or who have negatively impacted students and/or staff shall be dismissed. A refusal to submit to a drug test or a second violation of the Drug-Free Workplace Policy shall constitute an inability to be assisted by rehabilitation.
> . . .

39. This case turns on whether Petitioner has proved that Respondent would not be assisted by rehabilitation because Petitioner has produced little detailed evidence of any negative impact upon Respondent's students. The record lacks detail of Respondent's specific teaching duties, the specific impact of her sleeping incidents or absences, and the academic achievements of her students during the periods in which these shortcomings took place.

40. Notwithstanding the marked shortcomings in Respondent's performance as a teacher, Petitioner did not dismiss her until first giving her a chance to rehabilitate herself. The most likely inference is that Petitioner's administrative employees found that the situation did not

satisfy the first criterion for dismissal--negatively impacting students.

41. The basic issue, then, is whether Petitioner could reasonably have determined, from July to October 2000, that Respondent would not be assisted by rehabilitation. Petitioner could choose to show rehabilitation would be futile by relying on one of the two presumptions contained in the Rule. However, Respondent never refused to submit to a drug test, and difficult questions of her employment status in July 2000 obscure the determination as to whether her failure of the July 2000 drug test constitutes a second violation of the Rule.

42. In this case, though, Petitioner may satisfy its standard of proof without regard to either of the presumptions in the Rule. After a display of considerable patience and good faith by Petitioner, Respondent, in July 2000, misrepresented to Petitioner that she was clean and sober and prematurely requested permission to return to teaching duties despite her knowledge that she was still abusing drugs and not ready to return to the classroom. These facts support the finding that, as of July or October 2000, Respondent would not be assisted by rehabilitation.

43. This finding of the futility of rehabilitation, as of July or October 2000, is difficult due to the fact that subsequent events suggest that Respondent may finally be

rehabilitating herself. After Petitioner dismissed her, Respondent underwent detoxification and then began treatment at St. Luke's Addiction Recovery Center, which is sponsored by Catholic Charities of the Archdiocese of Miami, Inc. She was in intensive residential treatment from November 6, 2000, through January 24, 2001. She later underwent nine urinalyses, through June 1, 2001--a day after the end of the hearing in this case--and all of them were negative. Respondent is successfully participating in the St. Luke's aftercare program, where she takes weekly drug tests. She is proud of the fact that she has turned her life over to God and has achieved the longest period of sobriety that she has experienced in many years.

44. After regaining sobriety, Respondent substituted for awhile and then found a job teaching a third-grade class at a private school in the Miami area. At the time of the hearing, Respondent had been so employed for six weeks, she had not been late or missed a day of school, and the school had invited her to teach again for the 2001-02 school year. Dr. Eustace opines that Respondent's prognosis is much improved from the prognosis of September 2000.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

46. Section 231.36(1)(a) authorizes the termination of instructional employees for "just cause." The statute defines "just cause" illustratively, not comprehensively, so that Petitioner may incorporate its drug-free workplace rule into its contracts with employees. See also Gamble v. Mills, 483 So. 2d 826 (Fla. 4th DCA 1986).

47. Petitioner must prove the material allegations by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

48. It is unnecessary to determine whether the facts constitute a violation of the provisions of the Florida Statutes and Florida Administrative Code that Petitioner has cited because Petitioner has proved that Respondent violated the Drug-Free Workplace General Policy Statement, as set forth in Petitioner's Rule 6Gx13-4-1.05.

49. Although not intoxicated, Respondent was not drug-free while at work in October 1999. Without regard to Respondent's employment status in July 2000 when she failed another drug test, the key facts are Respondent's misrepresentation of her

condition in July 2000, her request in July 2000 to resume her teaching duties when she knew that she was again using illegal drugs, and the ample time and opportunity that Petitioner had given Respondent to obtain treatment for her illness.

50. The point at which to determine Respondent's amenability to rehabilitation in this case is July through October 2000, not the present. After considerable forbearance, Petitioner decided to take action at some point, and the sustainability of its determination to dismiss Respondent, as distinguished from a licensing determination, depends on the facts in existence at that time of Petitioner's decision to dismiss Respondent.

51. For these reasons, Petitioner had ample grounds to conclude, from July to October 2000, that Respondent would not be assisted by rehabilitation.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order dismissing Respondent from employment.

DONE AND ENTERED this 5th day of November, 2001, in Tallahassee, Leon County, Florida.

____

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of November, 2001.

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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 must be filed with the agency that will issue the final order in this case.