

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 03-2740
)
 SAMUEL K. YOUNG,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing in West Palm Beach, Florida, on November 4 and 5, 2003.

APPEARANCES

For Petitioner: Jean Marie Nelson, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are: (1) Whether Petitioner's allegations regarding Respondent schoolteacher's purported

performance deficiencies are, in fact, true, thereby justifying Petitioner's placing Respondent on statutory performance probation; (2) If the first question is answered in the affirmative, then, Whether Respondent satisfactorily corrected the specified performance deficiencies within the 90-day probation period prescribed by Section 1012.34(3)(d), Florida Statutes; and (3) Whether Respondent's employment should be continued or terminated.

PRELIMINARY STATEMENT

By letter dated November 18, 2002, and again via a Petition for Suspension Without Pay and Dismissal From Employment dated July 1, 2003, the Superintendent of Schools in Palm Beach County notified Respondent Samuel K. Young that he intended to recommend to the School Board of Palm Beach County that Mr. Young be suspended without pay pending the termination of his employment as a teacher due to unsatisfactory job performance.

Mr. Young requested a formal hearing by letter dated July 10, 2003. The School Board met on July 16, 2003, and approved the Superintendent's recommendation. On July 28, 2003, the matter was referred to the Division of Administrative Hearings, where it was assigned to an Administrative Law Judge.

The undersigned convened the final hearing, as scheduled, on November 5, 2003, in West Palm Beach, Florida. Petitioner presented the following witnesses during its case-in-chief:

Dr. Lisa Troute, Curriculum Specialist, Palm Beach County School District; Dr. Kathleen K. Huie, Professor, Florida Atlantic University; Diane Curcio-Greaves, Manager, Palm Beach County School District, Department of Professional Standards; Leo Barrett and Tanya Daniel, Assistant Principals, Alexander W. Dreyfoos, Jr. School of the Arts; and Ellen Van Arsdale, Principal, Alexander W. Dreyfoos, Jr. School of the Arts. Petitioner also called Mr. Young as an adverse witness. Finally, Petitioner offered Petitioner's Exhibits 1-8 and 10-27, which were received in evidence.

Respondent testified on his own behalf and also called Mary Cole, Deborah Svec, and Delores Lucas as witnesses. He offered Respondent's Exhibits 1-6, which were admitted.

In addition to their respective exhibits, the parties introduced Joint Exhibits 1-3, and these were received in evidence.

The final hearing transcript, comprising four volumes, was filed on January 6, 2004, and after that each party filed a Proposed Recommended Order before the deadline established at the close of the hearing, which was February 5, 2004.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2003 Florida Statutes.

FINDINGS OF FACT

Material Historical Facts

1. At all times material to this case, Respondent Samuel K. Young ("Young") was a teacher in the Palm Beach County School District ("District"). From 1993 until July 2003, when Respondent Palm Beach County School Board ("Board") suspended him without pay, Young taught English at the Alexander W. Dreyfoos, Jr. School of the Arts ("Dreyfoos"), a magnet high school for students interested in an arts-centered education.

2. In August or early September of 2001, shortly after the beginning of the 2001-02 school year, one of the Assistant Principals at Dreyfoos, Tanya Daniel, began routinely to observe Young, on an "informal" basis, while he was teaching his classes. These unscheduled, informal observations were triggered by students' complaints, of which Ms. Daniel, as Young's immediate supervisor, had been the recipient or been made aware.

3. As time passed, the informal observations became increasingly formal. On October 25, 2001, Ms. Daniel conducted a formal evaluation of Young, using the Summative Observation Instrument, which is a tool that was developed for the Florida Department of Education's Florida Performance Measurement System. Another Assistant Principal, Leo Barrett, also started formally observing Young's classes.

4. By early December 2001, Ms. Daniel had come to the conclusion that Young was not performing his teaching responsibilities in a satisfactory manner. Specifically, Ms. Daniel believed that Young was deficient in the areas of classroom management; presentation and organization; planning; student assessment; obedience to policies and procedures; and maintenance of the learning environment.

5. Two points are especially notable about Ms. Daniel's negative assessment of Young. First, she placed considerable reliance on student feedback. Indeed, Ms. Daniel invited and encouraged Young's students to report to her on how he was doing in the classroom. Second, she did not rely upon student performance as measured, in accordance with Section 1008.22, Florida Statutes, by state and/or local assessments.

6. On January 8, 2002, as a result of Ms. Daniel's evaluation, the Principal of Dreyfoos, Ellen Van Arsdale, placed Young on school-level performance probation pursuant to the procedures spelled out in the Classroom Teacher Assessment System (CTAS) Evaluation Handbook (the "CTAS"). (Under the Collective Bargaining Agreement Between the District and the Palm Beach County Classroom Teachers Association, effective July 1, 2002 to June 30, 2005 (the "Union Contract"), the District is required to conduct formal evaluations of teachers "in keeping with" the 1999 CTAS.) The CTAS provides that a

teacher whose performance is found deficient must be afforded at least 30 calendar days to improve his performance to a satisfactory level. During that time, the teacher must be given "school-site assistance" to help him correct the identified performance deficiencies. Accordingly, a 30-day School-Site Assistance Plan was developed for Young and put into effect on January 8, 2002.

7. The school-level performance probation that began in January 2002 constituted a new phase in the evaluation process. The purpose of the first phase, which lasted about three months (from September through December 2001), purportedly was to determine whether Young's performance was satisfactory or not. Thus, the first-phase evaluators should not have assumed at the outset that Young's performance was satisfactory or unsatisfactory. In contrast, during the second phase, the evaluators worked from the initial premise that Young's performance was, in fact, unsatisfactory, in the several areas noted by Ms. Daniel. The focus, therefore, was on whether Young was improving sufficiently to correct deficiencies that were assumed to exist.

8. Throughout the school-level probationary period, a number of evaluators reviewed Young's performance. Ms. Van Arsdale conducted several evaluations, and Mr. Barrett performed at least one. Another was conducted by Dr. Lisa Troute, a

Curriculum Specialist with the District. Others, too, were involved. None of the evaluators questioned the conclusion, which was based largely on Ms. Daniel's opinions, that Young's performance actually was deficient.

9. Ms. Daniel did not observe Young's classroom performance during this second phase, evidently in consequence of Young's having voiced some concerns about her impartiality. Ms. Daniel remained an important participant in the process, however, and she continued actively to solicit students' opinions about Young's competence. On February 20, 2002, she interviewed at least three of Young's students, making handwritten notes (which are in evidence) to memorialize their respective assessments. Ms. Daniel asked one student to rate Young's performance on a scale from 1 to 10, with 1 being "poor" and 10 being "great"; the student gave Young a 3.5. There is no evidence that Ms. Daniel elicited the opinions of a random, representative sample of Young's students—or instead, for example, polled only the known malcontents. There is also no persuasive evidence that Ms. Daniel ever did anything but accept the students' mostly unfavorable opinions uncritically. What the evidence does establish is that Ms. Daniel put great weight on the students' opinions—so much so that the students she spoke with effectively became Young's evaluators themselves.

10. The school-level probationary period was extended well beyond 30 days, and ended up lasting until the end of the 2001-02 school year. By letter dated May 17, 2002, Ms. Van Arsdale informed the Superintendent that Young's performance remained unsatisfactory after 91 days of school-site assistance. Specifically, it was Ms. Van Arsdale's opinion that Young's performance was deficient in the following six areas, each of which is a designated "indicator" of competence under the CTAS: Management of Student Conduct; Presentation of Subject Matter; Learning Environment; Planning; Assessment; and Policies/Procedures/Ethics. Ms. Van Arsdale asked the Superintendent to place Young on statutory performance probation for 90 days, pursuant to Sections 231.29 and 231.36, Florida Statutes (2001).

11. The assessment procedure used to evaluate Young during the school-level probation was not primarily based on the performance of students as measured by state and/or local assessments administered annually as specified in Section 1008.22, Florida Statutes. In fact, the evaluators placed no meaningful weight on student performance, so measured. Nevertheless, the Superintendent acceded to Ms. Van Arsdale's request. By letter dated May 20, 2002, the Superintendent notified Young that he would be placed on performance probation for 90 calendar days.

12. The statutory performance probation—a distinct, third phase of the evaluation process—commenced in August 2002, at the beginning of the 2002-03 school year. On August 22, 2002, Young was given a Professional Development Plan, which called for the provision of assistance, as well as ongoing evaluations, through November 2002, when a final evaluation would be issued passing judgment on whether he had—or had not—corrected the alleged performance deficiencies.

13. The statutory performance probation unfolded largely as had the school-level performance probation. Young was, again, observed and critiqued by a number of evaluators. Of the written evaluations in evidence, the most balanced is a report dated September 22, 2002, which Dr. Troute prepared concerning her observation of Young on September 10, 2002. Based on this contemporaneous report, the undersigned is persuaded that Dr. Trout then believed Young was a "satisfactory" teacher who could, with additional effort, be a "good" teacher.

14. Others were less charitable, however, including Ms. Van Arsdale, who prepared Young's final evaluation based on her November 5, 2002, observation of his class. On the CTAS's evaluation form, Ms. Van Arsdale gave Young a rating of "concern" on five separate "indicators" of competence: Management of Student Conduct; Presentation of Subject Matter;

Learning Environment; Planning; and Assessment. This resulted in an overall evaluation of "unsatisfactory."

15. The assessment procedure used to evaluate Young while he was on statutory performance probation was not primarily based on the performance of students as measured by state and/or local assessments administered annually as specified in Section 1008.22, Florida Statutes. Indeed, once again, the evaluators placed no meaningful weight on student performance, so measured.

16. By letter dated November 6, 2002, Ms. Van Arsdale notified the Superintendent that, in her opinion, Young had failed to correct performance deficiencies and therefore should be fired. The Superintendent agreed, and by letter dated November 14, 2002, informed Young that he would recommend to the Board that Young's employment be terminated. The Board later accepted the Superintendent's recommendation, and Young was suspended without pay, effective on or about July 16, 2003, pending his discharge.

The CTAS

A.

17. Teachers who are evaluated under the CTAS are rated on 15 categories of qualities or abilities, which are referred to collectively as "indicators." Each indicator, such as, e.g., Management of Student Conduct, is best understood not as a

single ability, but rather as a label for a skill-set, that is, a collection of qualities, abilities, or skills.

18. The indicators are divided into two classes called "performance areas." The performance areas are: "A. Teaching and Learning" and "B. Professional Responsibilities." There are eight indicators under Teaching and Learning and seven under Professional Responsibilities.

19. The CTAS uses a two-point rating scale. The only grades used for scoring a teacher on the 15 indicators are "acceptable" and "concern." The section of the CTAS's evaluation form where the grades are recorded is reproduced below, with the ratings from Ms. Van Arsdale's final evaluation of Young, dated November 6, 2002, added to show how the form is used in practice:

A. TEACHING AND LEARNING	ACCEPTABLE	CONCERN
1. Management of Student Conduct		X
2. Human Development and Learning	X	
3. Presentation of Subject Matter		X
4. Communication	X	
5. Knowledge of Subject Matter	X	
6. Learning and Environment		X
7. Planning		X
8. Assessment		X

B. PROFESSIONAL RESPONSIBILITIES	ACCEPTABLE	CONCERN
9. Technology	X	
10. Record Keeping	X	
11. Continuous Improvement	X	
12. Working Relationships with Coworkers	X	
13. Working Relationships with Parents	X	
14. Policies/Procedures/Ethics	X	
15. Duties as Assigned by the School Administration	X	

20. The teacher's overall evaluation rating of "satisfactory" or "unsatisfactory" depends entirely upon the combination of ratings awarded on the 15 indicators. The following combinations require an overall evaluation of "unsatisfactory":

NUMBER OF CONCERNS	
SECTION A	SECTION B
3	0
2	1
1	3
0	4

As can be seen, the indicators under Section A carry greater relative weight in the overall evaluation than those under Section B. Because Young received five "concerns" on his final evaluation, the CTAS dictated that he be given an overall "unsatisfactory" rating.

21. In rating the various indicators, evaluators are supposed to consider numerous "performance criteria." The CTAS defines the "performance criteria" as "examples of descriptors which define the indicators." To be more precise, the performance criteria are specific behaviors, acts, and practices that the teacher should be performing as an outward manifestation of the teacher's command or mastery of the respective skill-sets known as indicators. Various performance criteria are set out in the CTAS as "bullet points" under each of the indicators. The first bullet point under the first indicator (Management of Student Conduct), for example, is: "[The teacher] specifies and explains rules of conduct and provides for practice of rules when appropriate."

22. For each of the indicators, the CTAS further provides a set of "data collection sources." The CTAS defines the term "data collection sources" as "examples of multiple data sources used to determine a rating of 'acceptable' or 'concern.'" In other words, the data collection sources are lists of "evidence" that can be examined to determine whether, and perhaps how well, the teacher is performing the prescribed performance criteria. For example, the data collection sources for the indicator Planning are: observation reports; lesson plans; conference notes; assessment data; instructional materials; and written reports.

B.

23. As we have seen already, the CTAS defines the terms "satisfactory" and "unsatisfactory" in a completely objective fashion. It does so by specifying the rating combinations that will result in an overall evaluation of "unsatisfactory." Thus, anyone who knows the number of "concerns" that a teacher has received in Sections A and B can apply the formula and assign the overall grade; this ministerial function requires neither discretion nor judgment.

24. What does demand discretion and judgment is rating the teacher's command or mastery of the respective indicators as either "concern" or "acceptable." This rating function requires that qualitative determinations be made at two distinct levels. First, for every indicator (skill-set), the evaluator must decide how well the teacher is executing each of the several subsidiary performance criteria (behaviors). Then, based on how well the teacher is executing the subsidiary performance criteria (behaviors), the evaluator must render a judgment as to how well the teacher is doing with regard to the indicator (skill-set) that comprises those performance criteria. At both stages of the analysis, to arrive consistently at fair conclusions—that is, to obtain similar results with respect to similarly performing teachers most of the time—requires (a) that there be uniform standards to guide evaluators in making

the requisite judgment calls and (b) that the same standards always be applied, to all teachers in all evaluations. Thus, it is important to know what standards, if any, the CTAS prescribes.

25. To begin, some negative findings are in order. First, the indicators are not standards upon which to make a judgment. They are, rather, the qualities to be judged, using appropriate standards of decision. Second, the performance criteria are likewise not standards. They define or prescribe the relevant facts to which, jointly and severally, standards should be applied, so as to make a judgment regarding one indicator or another.¹

26. To illustrate, the fact that a teacher is observed "reinforc[ing] appropriate social behavior" tells us nothing about how well he does this, much less about how well he has mastered Management of Student Conduct, which indicator comprises the referenced performance criterion. Rather, to make a qualitative judgment regarding the teacher's performance of this practice requires some test, some basis, for distinguishing between good and bad performances. Similarly, the ultimate fact that the teacher acceptably "reinforces appropriate social behavior" tells us relatively little, presumably, about whether the teacher's mastery of the indicator Management of Student Conduct is acceptable or not, for there are eleven other

performance criteria to be considered also in respect of this particular indicator. To make a qualitative judgment regarding whether the teacher has demonstrated an acceptable command of the skill-set known as Management of Student Conduct requires some sort of standard, some yardstick for measuring the relative importance of the teacher's demonstrated expertise (or lack thereof)—as determined by the evaluator—in the execution of the various performance criteria.

27. The only "standards" that the evidence in this case persuasively establishes are the terms "acceptable" and "concern." Superficially, these terms seem to possess some degree of objective content. On reflection, however, it should be seen that they do not, a point which will be examined in greater detail below. The undersigned, moreover, has searched the CTAS and the record in vain for an adequate definition of these terms. As far as the proof in this case goes, these terms are criteria without content, and as such can be used as cover for almost any decision an evaluator might want to make.

C.

28. It is desirable at this point to elaborate on why the terms "concern" and "acceptable," by themselves, are not standards that evaluators (or administrative law judges or courts) can consistently and fairly apply to teachers across-the-board. As a starting point, envisage a spectrum comprising

every conceivable level or degree of teacher talent, ranging from, in the abstract, "worst imaginable" (or "perfectly awful") to "best imaginable" (or "perfectly excellent"). It makes no difference, for present purposes, how exactly "worst" and "best" might be defined. Rather, it is sufficient to say of the "worst" teacher, in regard to any imaginable attribute, that "none could be worse." Conversely, it need only be said of the "best" teacher, in regard to any imaginable attribute, that "none could be better." As should be obvious, these "worst" and "best" teachers are constructs that serve to define the terminal points at either end of the "talent-level spectrum" we are calling to mind.

29. This talent-level spectrum can be depicted with a simple drawing, as follows:

Worst ?—————? Best

It can now be observed that all teachers, everywhere, must fall somewhere on this talent-level spectrum, between the two poles as we have defined them. Of course, the precise point at which any given teacher should be placed on the spectrum, at any given time,² is a matter about which reasonable people, in every instance, could disagree. But that is presently of no consequence.

30. Turning next to the facts of this case, the question is posed: Where, on this spectrum of talent, should the mark

Whatever merit such standards might have, they would not be the standards used to judge other teachers, and hence it would be unfair to apply them to Young.

32. Moreover, there is no persuasive evidence in this case as to where the several evaluators placed the mark when they assessed Young's performance.³ The undersigned therefore cannot find that the evaluators all used the same standards—cannot even infer that they did. Consequently, assuming it were proper to do so, the undersigned could not review whether the evaluators acted fairly and appropriately vis-à-vis Young or whether they reached a "correct" (i.e. legally sustainable) judgment regarding his teaching performance.⁴

Student Performance

33. The 1999 CTAS that was used in evaluating Young had been developed in 1998 and approved by then-Commissioner Tom Gallagher in January 1999. By letter dated January 25, 1999, Commissioner Gallagher informed the District that its CTAS had received "Full Approval." The Commissioner further instructed the District:

[I]t will not be necessary for you to resubmit the [CTAS] unless there are statutory changes which affect the requirements for district instructional performance appraisal systems or unless you substantively revise your system for other reasons.

34. In the very next legislative session following this letter, the legislature substantially amended the statute governing the procedures and criteria for the assessment of instructional personnel, which at the time was Section 231.29, Florida Statutes (1999).⁵ See Ch. 99-398, § 57, Laws of Florida. These statutory changes, which will be examined more closely in the Conclusions of Law below, took effect on June 21, 1999. Id. at § 78.

35. The thrust of the relevant amendment was to require that, in evaluating teacher performance, primary emphasis be placed on student performance, as measured by "state assessments" and "local assessments." These latter two terms were defined, at the time, in Section 229.57, Florida Statutes (2000). Section 229.57 was subsequently transferred to Section 1008.22, Florida Statutes (2003).

36. The District never amended the CTAS to reflect the statutory changes. Not surprisingly, therefore, the CTAS puts little or no particular emphasis on student performance⁶ and makes no specific references (that the undersigned can locate) to state and local assessments within the statute's contemplation.⁷

37. Consequently, as was mentioned several times above, none of the assessment procedures used during Young's protracted evaluation was primarily based on student performance as

measured by state and/or local assessments administered annually as specified in Section 1008.22, Florida Statutes (2003).

38. Equally if not more important, however, is the lack of persuasive (indeed any) evidence in the record regarding the performance of Young's students as measured by state and/or local assessments. Because of this, it is impossible for the undersigned to make de novo findings based primarily on student performance as to either (a) whether Young's execution of the performance criteria was "acceptable" or not, or (b) whether, ultimately, his command of the indicators in dispute was of "concern," as the Board has alleged.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

40. Because this case is a proceeding to terminate a teacher's employment and does not involve the loss of a license or certification, the Board has the burden of proving the alleged grounds for dismissal by a preponderance of the evidence. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Bd. of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Bd. of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).⁸

41. Section 1012.34, Florida Statutes, which governs the process for evaluating teachers, provides in full as follows:

1012.34 Assessment procedures and criteria.--

(1) For the purpose of improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures for assessing the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel employed by the school district. The Department of Education must approve each district's instructional personnel assessment system.

(2) The following conditions must be considered in the design of the district's instructional personnel assessment system:

(a) The system must be designed to support district and school level improvement plans.

(b) The system must provide appropriate instruments, procedures, and criteria for continuous quality improvement of the professional skills of instructional personnel.

(c) The system must include a mechanism to give parents an opportunity to provide input into employee performance assessments when appropriate.

(d) In addition to addressing generic teaching competencies, districts must determine those teaching fields for which special procedures and criteria will be developed.

(e) Each district school board may establish a peer assistance process. The plan may provide a mechanism for assistance of persons who are placed on performance probation as well as offer assistance to other employees who request it.

(f) The district school board shall provide training programs that are based upon guidelines provided by the Department of Education to ensure that all individuals

with evaluation responsibilities understand the proper use of the assessment criteria and procedures.

(3) The assessment procedure for instructional personnel and school administrators must be primarily based on the performance of students assigned to their classrooms or schools, as appropriate.

The procedures must comply with, but are not limited to, the following requirements:

(a) An assessment must be conducted for each employee at least once a year. The assessment must be based upon sound educational principles and contemporary research in effective educational practices. The assessment must primarily use data and indicators of improvement in student performance assessed annually as specified in s. 1008.22 and may consider results of peer reviews in evaluating the employee's performance. Student performance must be measured by state assessments required under s. 1008.22 and by local assessments for subjects and grade levels not measured by the state assessment program. The assessment criteria must include, but are not limited to, indicators that relate to the following:

1. Performance of students.
2. Ability to maintain appropriate discipline.
3. Knowledge of subject matter. The district school board shall make special provisions for evaluating teachers who are assigned to teach out-of-field.
4. Ability to plan and deliver instruction, including the use of technology in the classroom.
5. Ability to evaluate instructional needs.
6. Ability to establish and maintain a positive collaborative relationship with students' families to increase student achievement.
7. Other professional competencies, responsibilities, and requirements as established by rules of the State Board of

Education and policies of the district school board.

(b) All personnel must be fully informed of the criteria and procedures associated with the assessment process before the assessment takes place.

(c) The individual responsible for supervising the employee must assess the employee's performance. The evaluator must submit a written report of the assessment to the district school superintendent for the purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the assessment takes place. The evaluator must discuss the written report of assessment with the employee. The employee shall have the right to initiate a written response to the assessment, and the response shall become a permanent attachment to his or her personnel file.

(d) If an employee is not performing his or her duties in a satisfactory manner, the evaluator shall notify the employee in writing of such determination. The notice must describe such unsatisfactory performance and include notice of the following procedural requirements:

1. Upon delivery of a notice of unsatisfactory performance, the evaluator must confer with the employee, make recommendations with respect to specific areas of unsatisfactory performance, and provide assistance in helping to correct deficiencies within a prescribed period of time.

- 2.a. If the employee holds a professional service contract as provided in s. 1012.33, the employee shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a

professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, a transfer does not extend the period for correcting performance deficiencies.

b. Within 14 days after the close of the 90 calendar days, the evaluator must assess whether the performance deficiencies have been corrected and forward a recommendation to the district school superintendent. Within 14 days after receiving the evaluator's recommendation, the district school superintendent must notify the employee who holds a professional service contract in writing whether the performance deficiencies have been satisfactorily corrected and whether the district school superintendent will recommend that the district school board continue or terminate his or her employment contract. If the employee wishes to contest the district school superintendent's recommendation, the employee must, within 15 days after receipt of the district school superintendent's recommendation, submit a written request for a hearing. The hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

(I) A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of ss. 120.569 and 120.57. A majority vote of the membership of the district school board shall be required to sustain the district school superintendent's recommendation. The determination of the district school board shall be final as to

the sufficiency or insufficiency of the grounds for termination of employment; or

(II) A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

(4) The district school superintendent shall notify the department of any instructional personnel who receive two consecutive unsatisfactory evaluations and who have been given written notice by the district that their employment is being terminated or is not being renewed or that the district school board intends to terminate, or not renew, their employment. The department shall conduct an investigation to determine whether action shall be taken against the certificateholder pursuant to s. 1012.795(1)(b).

(5) The district school superintendent shall develop a mechanism for evaluating the effective use of assessment criteria and evaluation procedures by administrators who are assigned responsibility for evaluating the performance of instructional personnel. The use of the assessment and evaluation procedures shall be considered as part of the annual assessment of the administrator's performance. The system must include a mechanism to give parents and teachers an opportunity to provide input into the administrator's performance assessment, when appropriate.

(6) Nothing in this section shall be construed to grant a probationary employee a

right to continued employment beyond the term of his or her contract.

(7) The district school board shall establish a procedure annually reviewing instructional personnel assessment systems to determine compliance with this section. All substantial revisions to an approved system must be reviewed and approved by the district school board before being used to assess instructional personnel. Upon request by a school district, the department shall provide assistance in developing, improving, or reviewing an assessment system.

(8) The State Board of Education shall adopt rules pursuant to ss. 120.536(1) and 120.54, that establish uniform guidelines for the submission, review, and approval of district procedures for the annual assessment of instructional personnel and that include criteria for evaluating professional performance.

(Emphasis added).

42. The operative terms of the emphasized language in subsection (3) of the statute were added in 1999, with the enactment of Chapter 99-398, Section 57, Laws of Florida. For ease of reference and discussion, the undersigned has outlined the three crucial statements as follows:

1. The assessment procedure for instructional personnel and school administrators must be primarily based on the performance of students assigned to their classrooms or schools, as appropriate.

2. The assessment

(a) must primarily use

(i) data and indicators of improvement in student performance assessed

annually as specified in s.
1008.22

and

(b) may consider

(ii) results of peer reviews in
evaluating the employee's
performance.

3. Student performance must be measured by

(a) state assessments required under s.
1008.22

and by

(b) local assessments for subjects and
grade levels not measured by the
state assessment program.

43. Statement No. 1. This sentence directs that each school district shall establish, for the purpose of "assessing the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel employed by the school district," see Section 1012.34(1), a primarily student performance-based procedure (or system), meaning that the method of accomplishing the assessment must be tailored to meet the goal of forming evaluative judgments about teachers' performance based mainly on the performance of their students.

44. What is striking about this is not that the legislature has demanded a performance-based system for evaluating the performance of teachers;⁹ rather, it is that the

performance upon which the system must primarily be based is that of students. In clear terms, the legislature has announced that the primary (though not exclusive) indicator of whether a teacher is doing a good job is the performance of his students. If a teacher's students are succeeding, then, whatever he is doing, the teacher is likely (though not necessarily) performing his duties satisfactorily. It is plainly the legislature's belief that if we do not know how the teacher's students are performing, then we cannot make a valid judgment as to whether the teacher is performing his duties satisfactorily. The prescribed approach can rightly be called results-oriented and should be thought of in those terms.

45. The Board's argument that the "as appropriate" clause modifies "must be primarily based" is ungrammatical and unpersuasive. It is clear from the statute's plain language, as read with ordinary principles of grammar in mind, that the legislative mandate is not to require that the assessment procedure be primarily based on student performance only when such principal reliance on student performance would be appropriate. Rather, plainly, the legislature has decided that it is always appropriate to employ evaluative methods chiefly suited to drawing conclusions about teacher performance from data relating to student performance. Had the legislature intended to "soften" its mandate, allowing student performance

to be considered or not, "as appropriate," it would not have tacked "as appropriate" onto the end of the sentence, but instead would have placed the clause between "must" and "be" or between "based" and "on." The only reasonable interpretation of the "as appropriate" clause is that it distinguishes between students assigned to teachers' respective classrooms, on the one hand, and students assigned to administrators' respective schools, on the other. The former student population is the appropriate subject of study when teacher performance is being assessed, the latter when administrator performance is being assessed.

46. Sentence No. 2. This sentence requires that, in assessing teachers, indicators of student performance—which performance is assessed annually as specified in Section 1008.22—must be the primarily-used data. (In contrast, evaluators are permitted, but not required, to make use of peer reviews in assessing teacher performance.)

47. Section 1008.22, which is referenced specifically in this sentence, requires that school districts participate in a statewide assessment program, the centerpiece of which is the Florida Comprehensive Assessment Test ("FCAT"). See § 1008.22(3), Fla. Stat. The FCAT is a standardized test that is administered annually to students in grades three through 10. Id.

48. Section 1008.22 is not concerned only with the FCAT, however. Subsection (7), for example, provides as follows:

(7) LOCAL ASSESSMENTS.--Measurement of the learning gains of students in all subjects and grade levels other than subjects and grade levels required for the state student achievement testing program is the responsibility of the school districts.

Thus, the school districts are charged with developing their own local assessment tools, to fill in the gaps left open by the statewide FCAT testing program.

49. Sentence No. 3. This sentence prescribes two—and only two—measures of student performance: (a) the statewide FCAT assessments and (b) the gap-filling local assessments. It is now clear beyond argument that Sections 1012.34(3) and 1008.22 have at least one subject in common, namely, student performance-based assessment of teachers. See also Section 1008.22(5) ("Student performance data shall be used in . . . evaluation of instructional personnel"). Being in pari materia in this regard, Sections 1012.34 and 1008.22 must be construed so as to further the common goal. See, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993) (separate statutory provisions that are in pari materia should be construed to express a unified legislative purpose); Lincoln v. Florida Parole Commission, 643 So. 2d 668, 671 (Fla. 1st DCA

1994)(statutes on same subject and having same general purpose should be construed in pari materia).

50. When the requirements of Section 1012.34(3) are read together with Section 1008.22, several conclusions are inescapable. First, FCAT scores must be the primary source of information used in evaluating any teacher who teaches an FCAT-covered subject to students in grades three through 10. Second, school districts must develop, and annually administer, local assessments for subjects and grade levels not measured by the FCAT. Third, student performance data derived from local assessments must be the primary source of information used in evaluating teachers whose subjects are not covered on the FCAT and/or whose students do not take the FCAT.

51. As previously mentioned, the absence of evidence in the record concerning the performance of Young's students either on the FCAT or on local assessments, as appropriate, deprives the undersigned of information that the legislature has deemed essential to the evaluation of a teacher's performance. Having neither state nor local assessments to review, the undersigned cannot find that Young's performance was deficient in the first place, much less whether he corrected the alleged performance deficiencies. Without such findings, the Board cannot dismiss Young in accordance with Section 1012.34.

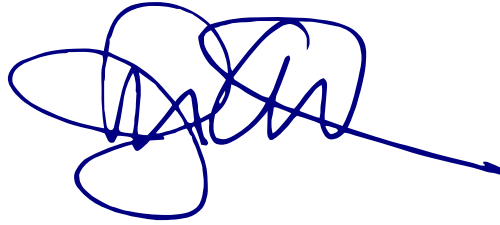
52. Further, even if the lack of student performance data were not fatal to the Board's case, the absence of evidence in the record establishing appropriate standards for evaluating Young's performance is, separately and independently.

53. As a matter of fact and law, therefore, the Board has failed to carry its burden of proving the alleged grounds for dismissal by a preponderance of the evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order: (a) exonerating Young of all charges brought against him in this proceeding; (b) providing that Young be immediately reinstated to the position from which he was suspended without pay; and (c) awarding Young back salary, plus benefits, that accrued during the suspension period, together with interest thereon at the statutory rate.

DONE AND ENTERED this 17th day of March, 2004, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of March, 2004.

ENDNOTES

¹/ Some analogies might be helpful. Data collection sources are like proof. This proof is probative of the teacher's execution of the performance criteria. The performance criteria, in turn, are loosely akin to elements of a cause of action, effectively defining the relevant evidentiary or historical facts. To the extent the evaluator must decide whether the teacher is performing a particular performance criterion, the evaluator is carrying out a straightforward fact-finding function. When the evaluator decides how well the teacher is executing a performance criterion, however, he must measure the historical fact (teacher is/is not doing X) against a standard that defines what constitutes competent performance of X. (The standard might, of course, make other evidentiary facts relevant, such as how frequently the teacher does X, in what circumstances, with what results, etc.) A determination that the teacher is doing X well or badly is tantamount to an ultimate finding of fact. Similarly, when the evaluator decides whether the teacher has sufficiently mastered a particular indicator, the evaluator must measure a set of ultimate factual determinations relating to the

performance criteria (teacher does X well, Y poorly, Z not at all) against a standard that defines what constitutes sufficient command of the indicator in question. Thus, a determination that the teacher has or has not adequately mastered the indicator is tantamount to an ultimate finding of fact.

^{2/} It should go without saying that in evaluating teacher performance, the focus must necessarily be on presently demonstrated talent as opposed to reputed, innate, or potential talent. Thus, because even the very best teachers are capable of performing poorly on a bad day, or during a down year, for any number of reasons, just as even the worst teachers can rise to the occasion sometimes, an evaluation is always a kind of "snapshot" that might underestimate, or overstate, a teacher's "intrinsic talent."

^{3/} Ms. Van Arsdale's testimony underscores the arbitrariness inherent in an evaluation process that lacks fixed standards for measuring teacher performance. She acknowledged, candidly, that "there's going to be some fluctuation" in the standards for acceptable performance "based on the expectations of the principal," with the result that what "would be acceptable to one administrator may not be acceptable to me and vice versa." Transcript at 603. If true, this means, at the very least, that teachers in the same school district are being held to different performance standards, and hence that similarly performing teachers are not necessarily receiving similar evaluations. Just how high the bar might have been for Young was revealed in Ms. Van Arsdale's summary of the factors that led her to recommend Young's termination:

I really had to consider the lives, the education of 150 kids over the next number of years, and I just couldn't—I just couldn't—I just couldn't allow these kids, who were entitled to the best . . . education possible, to be subjected to a poor teacher when they were in need of such a—and entitled to not only an appropriate, but a very, very fine education.

Transcript at 560 (emphasis added). While it is impossible to make specific findings regarding what standards Ms. Van Arsdale used in evaluating Young, it can reasonably be (and is) inferred that she pushed the mark relatively close to the "best" terminal on our talent-level spectrum, more or less equating "acceptable"

with "very fine." Of course, if "acceptable" is synonymous with "very fine," then "concern" includes "good but not great" and maybe even "fine."

^{4/} To be clear, it would not be appropriate to review the Board's preliminary decision respecting Young's termination, for "a chapter 120 proceeding is a hearing de novo intended to 'formulate final agency action, not to review action taken earlier and preliminarily.'" Young v. Department of Community Affairs, 625 So. 2d 831, 833 (Fla. 1993)(quoting McDonald v. Department of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977)). The Board's burden in this case was not merely to persuade the undersigned that the evaluators sincerely believed, after conducting a legally sufficient assessment, that Young's performance was deficient, nor even to persuade the undersigned that the evaluators' judgment was factually and legally tenable. Rather, the Board was required to persuade the undersigned himself to find, independently, that Young's performance was deficient.

^{5/} In 2002, the legislature overhauled the entire Education Code, creating new chapters 1000 through 1013, to which then-chapters 228 through 246 were transferred, as amended. Most of the provisions of the 2002 legislation took effect on January 7, 2003. See Ch. 2002-387, § 1064, Laws of Florida.

^{6/} To be sure, the CTAS does not ignore student performance. Included among the data collection sources are "assessment data." The CTAS defines "assessment data" as "evidence of student performance (e.g. standardized tests, diagnostic tests, portfolio assessment). The source "assessment data" is listed as one of seven data collection sources associated with the indicator Human Learning and Development. It is also listed as one of six data collection sources associated with the indicator Planning. Finally, all of the data collection sources listed for the indicator Assessment can fairly be classified as "assessment data"—and one of the 13 performance criteria for Assessment is, "provides evidence of improvement in student performance." (It should be stated, however, that with respect to the indicator Assessment, the focus of the evaluation is on how effectively the teacher is assessing student performance (through tests, classwork, grades, etc.), not on how student performance reflects on the effectiveness of the teacher.) What the CTAS clearly does not do, however, is make student performance the primary (or even a uniquely important) factor upon which to base the teacher's evaluation.

^{7/} The Union Contract, which requires the District to comply with the 1999 CTAS in evaluating teachers, was approved by all parties as of September 9, 2002, and given an effective date of July 1, 2002. The Union Contract thus took effect after the 1999 amendment to Section 231.29 became law. As a matter of law, provisions of collective bargaining agreements that conflict with statutes never become effective. See § 447.309(3), Fla. Stat. Therefore, the District cannot rely on the Union Contract as a defense to its failure to follow the statutory provisions governing teacher evaluations.

^{8/} Because this is not a proceeding pursuant to Section 1012.33(6), Florida Statutes, to terminate Young's employment for "just cause," however, the Board did not have the authority to suspend Young without pay. See Broward County School Board v. Dorothy D. Clemons, Case No. 00-1203, 2000 WL 1902214, *22-*23 (DOAH Dec. 28, 2000).

^{9/} The first sentence of subsection (3) would be a tautology if that were the message.

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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.