

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 04-1654
)
 SERGIO H. ESCALONA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing in Miami, Florida, on July 8 and 9, 2004.

APPEARANCES

For Petitioner: Madelyn P. Schere, Esquire
Miami-Dade County School Board
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For Respondent: Ainslee R. Ferdie, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent satisfactorily corrected specified performance deficiencies within the 90-day probation period prescribed by Section

1012.34(3)(d), Florida Statutes, and, if not, whether Respondent's employment should be terminated.

PRELIMINARY STATEMENT

By letter dated April 20, 2004, the Superintendent of Schools in Miami-Dade County notified Respondent Sergio H. Escalona that he intended to recommend to the School Board of Miami-Dade County at its meeting on May 19, 2004, that Mr. Escalona's employment as a teacher be terminated due to unsatisfactory job performance.

Through counsel, Mr. Escalona requested a formal hearing by letter dated April 30, 2004. On May 6, 2004, 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 July 8, 2004, in Miami, Florida. Petitioner presented the following witnesses during its case-in-chief: Douglas Rodriguez, Carlos del Cuadro, Deborah Carter, Ana Drew, Thomas Gammon, and Isabel Siblesz. Petitioner also offered Petitioner's Exhibits 1 through 14, inclusive, which were received in evidence.

Respondent testified on his own behalf and called the following additional witnesses: Daniel Muller, Jesus Llano, Agnes Aldana, Enrique Diaz, Rafael Dacal, Zamira Wuscovi, and Dr. Siblesz. As well, he offered Respondent's Exhibits 2, 4

through 7, 9, and 11 through 17, which were admitted.

(Respondent's Exhibit 18 was marked for identification but not received in evidence.)

The final hearing transcript, comprising two volumes, was filed on August 26, 2004, and after that each party filed a Proposed Recommended Order before the deadline, as enlarged pursuant to Respondent's motion for additional time, which was November 1, 2004.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

A.

1. One of the statutory duties of Petitioner Miami-Dade County School Board ("Board") is to evaluate the performance of every teacher employed in the Miami-Dade County School District ("District"), at least once per year. To accomplish this, the Board uses a personnel assessment system known as "PACES," which is an acronym for Professional Assessment and Comprehensive Evaluation System. PACES is the product of collective bargaining between the Board and the teachers' union, and it has been duly approved by the Florida Department of Education.

2. The Board's evaluation procedure begins with an observation of the subject teacher, conducted by an administrator trained in the use of PACES. On a score sheet

called the Observation Form for Annual Evaluation ("OFAE"), the evaluator rates the teacher's performance on 44 independently dispositive "indicators." The only grades assignable to the respective indicators are "acceptable" and "unacceptable"; thus, the evaluator's decision, for each indicator, is binary: yes or no, thumbs up or thumbs down.¹ A negative mark on any one of the 44 indicators results in an overall performance evaluation of "unsatisfactory." For the teacher under observation, therefore, each indicator constitutes, in effect, a pass/fail test, with his or her job hanging in the balance.

3. If the teacher passes all 44 of the independently dispositive indicators, then the teacher's performance is rated "satisfactory" and the evaluative process is complete. If, on the other hand, the teacher is given a failing grade on one or more of the 44 indicators and hence adjudged an unsatisfactory performer, then the initial observation is deemed to be "not of record" (i.e. inoperative) and a follow-up, "for the record" evaluation is scheduled to occur, upon notice to the affected teacher, about one month later.

4. In the meantime, the teacher is offered the assistance of a Professional Growth Team ("PGT"), a group of peers who, having received special training in PACES, are in a position to help the affected teacher correct performance deficiencies in advance of the follow-up evaluation.

5. The follow-up evaluation is conducted in the same manner as the initial "not of record" evaluation. If the teacher passes all 44 indicators, then his performance is deemed satisfactory and the evaluative process is complete. If he fails one or more of the indicators, however, then the teacher is placed on probation for a period of 90 calendar days (excluding vacations and holidays). The probation period is preceded by a formal Conference-for-the-Record ("CFR"), at which notice of the specific performance deficiencies is provided to the teacher. As well, the teacher is given a Professional Improvement Plan ("PIP"), wherein particular remedial tasks, intended to help the teacher correct the noted performance deficiencies, are assigned.

6. During the performance probation, the teacher must be formally observed at least twice, by an evaluator using the OFAE. If, on any of these probationary observations, the teacher fails at least one indicator, then another PIP is prepared and offered.

7. Within 14 days after the end of probation, a "confirmatory evaluation" is conducted, using the OFAE. The purpose of the confirmatory evaluation is to determine whether the noted performance deficiencies were corrected. If they were, then the teacher's performance is rated "satisfactory." If not, the principal then makes a recommendation to the

superintendent whether to continue or terminate the teacher's employment.

8. As mentioned above, a PACES evaluation takes account of 44 crucial indicators.² The indicators are organized under "components." The 44 outcome determinative indicators fall within 21 components, which are identified on the OFAE. These components are organized, in turn, under "domains," of which six are identified on the OFAE.

9. Each domain has been assigned a Roman numeral identifier: I through VI. The components are distinguished alphabetically: A, B, C, etc. The indicators are numbered using Arabic numerals. Each specific indicator is named according to the Roman numeral of its domain, the letter of its component, and its own Arabic number. Thus, for example, the first indicator under Component A of Domain I is referred to as "I.A.1."

10. Notwithstanding the PACES taxonomy, the classifications of "domain" and "component" are useful only as a means of organizing the indicators. This is because a teacher does not pass or fail a performance evaluation at the domain level or at the component level; rather, he passes or fails at the indicator level, for, again, each of the 44 indicators is independently dispositive under PACES.³ Thus, each of the

determinative 44 indicators is of precisely equal weight. None is more important or less important than another.⁴

B.

11. At all times material to this case, Respondent Sergio H. Escalona ("Escalona") was a teacher in the District. From 2000 until May 19, 2004, when the Board suspended him pending termination of employment, Escalona was a science teacher at Miami Springs Senior High School ("Miami Springs"), a typical high school in the District.

12. During the 2003-04 school year, an evaluator observed Escalona in his classroom on five separate occasions, each time using the OFAE. The dates of these evaluations were, and the names of the respective evaluators are, as follows:

<u>Evaluation Date</u>	<u>Evaluator</u>
November 5, 2003	Carlos M. del Cuadro, Assistant Principal, Miami Springs
December 2, 2003	Mr. del Cuadro
January 16, 2004	Douglas P. Rodriguez, Principal, Miami Springs
February 17, 2004	Deborah Carter, Assistant Principal, Miami Springs
April 5, 2004	Mr. Rodriguez

13. The Board contends that Escalona failed all five evaluations; the first, however, was deemed "not of record" and

thus is relevant only insofar as it opened the door to the process that followed. The following table shows, for each evaluation (including the first), the indicators that the respective evaluators thought Escalona had failed:

	IA1	IA2	IB1	IB3	IE3	IF1	IF2	IIA1	IIA3	IIB2	IIB4
11-05-03	X	X		X	X				X	X	X
12-02-03											X
01-16-04				X						X	X
02-17-04	X					X	X	X			
04-05-04						X	X			X	

	IID1	IID3	IID4	IIE1	IIE2	IIE5	IIIA1	IIIA3	IIIB1	IIIB3	IIIB4
11-05-03	X	X	X	X	X	X					
12-02-03						X				X	
01-16-04	X		X								
02-17-04			X								
04-05-04	X	X	X	X	X						

	IVA3	IVA5	IVA6	IVB1	IVB2	IVB3	IVC2	IVD1	IVD3	IVD6	IVE2
11-05-03	X		X	X	X		X	X	X	X	X
12-02-03		X		X				X			
01-16-04	X	X		X				X		X	X
02-17-04	X	X	X		X	X					
04-05-04	X	⊗	X	⊗		X		⊗		X	X

	IVE4	VA1	VA4	VB1	VB2	VC1	VIA2	VIB1	VIB3	VIC2	VIC4
11-05-03	X	X	X	X	X	X		X	X		
12-02-03		X	X	X			X				
01-16-04		X	X	X		X		X	X	X	
02-17-04											
04-05-04	X	⊗	⊗	⊗		X	⊗	X	X		

14. Because Mr. del Cuadro identified 10 performance deficiencies on December 2, 2003, Escalona was placed on performance probation, pursuant to the procedure described in detail above. Mr. Rodriguez held a CFR on December 9, 2004, to review with Escalona the identified deficiencies and explain the procedures relating to the 90-day probation. Following the CFR,

Escalona was given written notice of unsatisfactory performance, in the form of a Summary of Conference-For-The-Record And Professional Improvement Plan (PIP), dated December 9, 2003 ("Summary"). In the Summary, Mr. Rodriguez charged Escalona with failure to satisfactorily perform the following PACES indicators: II.B.4, II.E.5, III.B.3, IV.A.5, IV.B.1, IV.D.1, V.A.1, V.A.4, V.B.1, and VI.A.2. (These 10 indicators are highlighted vertically in the table above.) At the same time, Escalona was given a PIP, and a PGT was assembled to provide assistance.

15. Following the confirmatory evaluation on April 5, 2004, based on which Mr. Rodriguez identified 24 deficiencies as shown in the table above, Mr. Rodriguez notified the superintendent that Escalona had failed to correct noted performance deficiencies during a 90-day probation and recommended that Escalona's employment be terminated. The superintendent accepted Mr. Rodriguez's recommendation on April 12, 2004, and shortly thereafter notified Escalona of his decision to recommend that the Board terminate Escalona's employment contract. On May 19, 2004, the Board voted to do just that.

C.

16. Of the four evaluations "for the record," the two that were conducted during Escalona's probation (on January 16, 2004,

and February 17, 2004) are presently relevant mainly to establish that the proper procedure was followed—a matter that is not genuinely disputed. The substance of these probationary evaluations cannot affect the outcome here because even if Escalona's performance had been perfect during probation, Mr. Rodriguez nevertheless found deficiencies during the post-probation, confirmatory evaluation, which is the only one probative of the dispositive question: Had Escalona corrected the noted performance deficiencies as of the two-week period after the close of the 90 calendar days' probation?

17. In view of the ultimate issue, the evaluation of December 2, 2003, is primarily relevant because it established the 10 "noted performance deficiencies" that Escalona needed to correct. For reasons that will be discussed below in the Conclusions of Law, the Board cannot terminate Escalona's employment based on other deficiencies allegedly found during probation or at the confirmatory evaluation; rather, it must focus exclusively on those 10 particular deficiencies which Escalona was given 90 calendar days to correct. Thus, stated more precisely, the ultimate question in this case is whether any of the 10 specific deficiencies identified in the Summary provided to Escalona on December 9, 2003, persisted after the 90-day probation.

18. As it happened, Mr. Rodriguez determined, as a result of the confirmatory evaluation on April 5, 2004, that Escalona had corrected three of the 10 noted performance deficiencies, for Mr. Rodriguez gave Escalona a passing grade on the indicators II.B.4, II.E.5, and III.B.3. The remaining seven deficiencies upon which termination could legally be based are identified in the table above with the "⊗" symbol. It is to these seven allegedly uncorrected deficiencies that our attention now must turn.

19. The Board contends, based on Mr. Rodriguez's confirmatory evaluation of April 5, 2004, that Escalona was still, as of that date, failing satisfactorily to perform the following PACES indicators:

IV.A.5: The purpose or importance of learning tasks is clear to learners.

IV.B.1: Teaching and learning activities are appropriate for the complexity of the learning context.

IV.D.1: Learners have opportunities to learn at more than one cognitive and/or performance level or to integrate knowledge and understandings.

V.A.1: Learners are actively engaged and/or involved in developing associations.

V.A.4: Learners are actively engaged and/or involved and encouraged to generate and think about examples from their own experiences.

V.B.1: A variety of questions that enable thinking are asked and/or solicited.

VI.A.2: Learner engagement and/or involvement during learning tasks is monitored.

20. The only descriptive evidence in the record regarding Escalona's performance on April 5, 2004—and hence the only evidence of historical fact upon which the undersigned can decide whether Escalona failed adequately to perform the seven indicators just mentioned—consists of Mr. Rodriguez's testimony. Mr. Rodriguez, who had observed Escalona in the classroom for 50 minutes that day, recounted at final hearing what he had seen as follows:

Again, there were students that were simply not engaged at all in learning. For example, there was a student that put his head down at a particular time. He slept for about fifteen minutes. Mr. Escalona never addressed the student, never redirected the learning, never tried to engage that student. Overall the students continued to pass notes in class. The students simply—there was really no plan at all. That was get up, give a lecture. Kids were not paying attention. No redirection for student learning. Questions again very basic. Most of the questions had no response from the students. And [they] just seemed very disinterested, the students did, and the lesson was just not acceptable.

Final Hearing Transcript at 103-04. To repeat for emphasis, any findings of historical fact concerning Escalona's performance during the confirmatory evaluation must be based on the

foregoing testimony, for that is all the evidence there is on the subject.⁵

21. Mr. Rodriguez did not explain how he had applied the seven indicators quoted above to his classroom observations of Escalona to determine that the teacher's performance was not up to standards.

D.

22. The seven indicators at issue in this case, it will be seen upon close examination, are not standards upon which to base a judgment, but rather factual conditions ("indicator-conditions") for which the evaluator is supposed to look. If a particular indicator-condition (e.g. the purpose of learning tasks is clear to learners) is found to exist, then the evaluator should award the teacher a passing grade of "acceptable" for that indicator (in this example, Indicator IV.A.5); if not, the grade should be "unacceptable."

23. The indicator-conditions are plainly not objective historical facts; they are, rather, subjective facts, which come into being only when the evaluator puts historical facts against external standards, using reason and logic to make qualitative judgments about what occurred. Subjective facts of this nature are sometimes called "ultimate" facts, the answers to "mixed questions" of law and fact.

24. To illustrate this point, imagine that the class Mr. Rodriguez observed on April 5, 2004, had been videotaped from several different camera angles. The resulting tapes would constitute an accurate audio-visual record of what transpired in Escalona's class that day. Anyone later viewing the tapes would be able to make detailed and accurate findings of objective historical fact, including words spoken, actions taken, time spent on particular tasks, etc. But, without more than the videotapes themselves could provide, a viewer would be unable fairly to determine whether, for example, the "[t]eaching and learning activities [had been] appropriate for the complexity of the learning context" (Indicator IV.B.1), or whether the questions asked adequately "enable[d] thinking" (Indicator V.B.1).⁶ This is because to make such determinations fairly, consistently, and in accordance with the rule of law requires the use of standards of decision, yardsticks against which to measure the perceptible reality captured on film.

25. Another term for standards of decision is "neutral principles." A neutral principle prescribes normative conduct in a way that permits fair judgments to be made consistently—that is, in this context, enables the reaching of similar results with respect to similarly performing teachers most of the time. A neutral principle must not be either political or

results oriented. It must be capable of being applied across-the-board, to all teachers in all evaluations.

26. In the unique milieu of PACES, neutral principles could take a variety of forms. One obvious form would be standards of teacher conduct. Such standards might be defined, for example, with reference to the average competent teacher in the District (or school, or state, etc.). In an adjudicative proceeding such as this one, expert testimony might then be necessary to establish what the average competent teacher does, for example, to monitor learner engagement and/or involvement during learning tasks (Indicator VI.A.2) or to create opportunities to learn at more than one cognitive level (Indicator IV.D.1).⁷

27. Other standards might be definitional. For example, to determine whether teaching and learning activities are appropriate (Indicator IV.B.1) practically demands a definition of the term "appropriate" for this context. Still other standards might be framed as tests, e.g. a test for determining whether a question enables thinking (Indicator V.B.1).

28. However the neutral principles are framed, at bottom there must be standards that describe what "satisfactory" performance of the indicators looks like, so that different people can agree, most of the time, that the indicator-conditions are present or absent in a given situation—and in

other, similar situations. Without neutral principles to discipline the decision-maker, the indicators can be used as cover for almost any conclusion an evaluator (or Administrative Law Judge) might want to make.

29. In this case, the record is devoid of any persuasive evidence of neutral principles for use in determining, as a matter of ultimate fact, whether the conditions described in the seven relevant indicators were extant in Escalona's classroom on April 5, 2004, or not.

E.

30. In this de novo proceeding, the undersigned fact-finder is charged with the responsibility of determining independently, as a matter of ultimate fact, whether, as of the two-week period following probation, Escalona had corrected all of the performance deficiencies of which he was notified at the outset of probation. The only evidence of Escalona's post-probation teaching performance consists of Mr. Rogriguez's testimony about his observation of Escalona for 50 minutes on April 5, 2004, which was quoted above.

31. Mr. Rodriguez's testimony gives the undersigned little to work with. His observations can be boiled down to four major points, none of which flatters Escalona: (a) Escalona lectured, and the students, who seemed disinterested, did not pay attention—some even passed notes; (b) Escalona asked "very

basic" questions, most of which elicited "no response"; (c) one student slept for 15 minutes, and Escalona left him alone; (d) the lesson was "just not acceptable."

32. On inspection, these points are much less helpful than they might at first blush appear. One of them—point (d)—is merely a conclusion which invades the undersigned's province as the fact-finder; accordingly, it has been given practically no weight. The only facts offered in support of the conclusions, in point (a), that the students "seemed" disinterested and were "not paying attention" to Escalona's lecture is the testimony that some students passed notes, and some (many?) did not answer the teacher's questions. But this is a rather thin foundation upon which to rest a conclusion that the students were bored because Escalona's teaching was poor. And even if they were (or looked) bored, is it not fairly common for teenaged high-school students to be (or appear) bored in school, for reasons unrelated to the teacher's performance? There is no evidence whatsoever that student boredom (or note passing or non-responsiveness) features only in the classrooms of poorly performing teachers. As for the supposedly "basic" nature of Escalona's questions, see point (b), the undersigned cannot give Mr. Rodriguez's testimony much weight, because there is no evidence as to what the questions actually were or why they were so very basic. Finally, regarding point (c), the fact that a

student slept during class is, to be sure, somewhat damaging to Escalona, inasmuch as students should not generally be napping in class, but without additional information about the student (who might have been sick, for all the undersigned knows) and the surrounding circumstances the undersigned is not persuaded that the sleeping student is res ipsa loquitur on the quality of Escalona's teaching performance. There is certainly no evidence that students doze only in the bad teachers' classes.

33. More important, however, than the paucity of evidence establishing the objective historical facts concerning Escalona's performance on April 5, 2004, is the failure of proof regarding neutral principles for use in determining the existence or nonexistence of the relevant indicator-conditions. Even if the undersigned had a clear picture of what actually occurred in Escalona's classroom that day, which he lacks, he has been provided no standards against which to measure Escalona's performance, to determine whether the indicator-conditions were met or not.

34. The absence of evidence of such standards is fatal to the Board's case. To make ultimate factual determinations without proof of neutral principles, the undersigned would need to apply standards of his own devising. 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 Escalona.

CONCLUSIONS OF LAW

A.

35. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, 120.57(1), and 1012.34(3)(d)2.b.(II), Florida Statutes.

36. When a teacher contests a superintendent's recommendation of dismissal, as here, the ensuing hearing must be conducted "in accordance with chapter 120." See § 1012.34(3)(d)2.b.(II), Fla. Stat. A "chapter 120 proceeding [entails] 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)). Thus, 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's burden was to persuade the undersigned himself to find, independently, that Young's performance was deficient.

37. 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 was required to prove the alleged grounds for Escalona's dismissal by a preponderance of the evidence. McNeill v. Pinellas County School Bd., 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).

B.

38. 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.

Pursuant to this section, a school district's performance assessment is not limited to basing unsatisfactory performance of instructional personnel and school administrators upon student performance, but may include other criteria approved to assess instructional personnel and school administrators' performance, or any combination of student performance and other approved criteria. 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 implementation of the rigorous reading requirement pursuant to s. 1003.415, when applicable, and 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.

(Underlining and italics added).

39. Under Section 1012.34(3), school districts must establish a primarily student performance-based procedure (or system) for assessing the performance of teachers. In other words, 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.

40. In clear terms, then, the legislature has announced that the primary (though not exclusive)⁸ 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.⁹

41. The statute further mandates 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.)

42. Section 1008.22, which is referenced specifically in Section 1012.34(3)(a), 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.

43. 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. Section 1008.22(5) provides additionally that "[s]tudent performance data shall be used in . . . evaluation of instructional personnel[.]"

44. Section 1012.34(3)(a) prescribes two and only two permissible measures of student performance for use in evaluating teachers: (a) the statewide FCAT assessments and (b)

the gap-filling local assessments, both of which measures are required under Section 1008.22. It is clear that Sections 1012.34(3) and 1008.22 have at least one subject in common, namely, student performance-based assessment of teachers. 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 Com'n, 643 So. 2d 668, 671 (Fla. 1st DCA 1994)(statutes on same subject and having same general purpose should be construed in pari materia).

45. 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.

46. The absence of evidence in the record concerning the performance of Escalona's students either on the FCAT or on local assessments, as appropriate, see endnote 5, supra, 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 Escalona's performance was deficient in the first place, much less whether he corrected the alleged performance deficiencies in accordance with Section 1012.34(3)(d). Without such findings, the Board cannot dismiss Escalona for failure to correct noted performance deficiencies.

C.

47. It was stated in the Findings of Fact above that the Board can terminate Escalona's employment only if, based on an assessment of his performance as of the two-week period following the 90 calendar days of probation, the teacher had failed to correct the particular performance deficiencies of which he had been formally notified in writing prior to probation; other alleged deficiencies, whether observed during probation or thereafter, cannot be relied upon in support of a decision to dismiss Escalona. Standing behind this observation is Section 1012.34(3)(d), Florida Statutes.

48. The pertinent statutory language instructs that a teacher whose performance has been deemed unsatisfactory must be

provided a written "notice of unsatisfactory performance," which notice shall include a description of "such unsatisfactory performance" plus recommendations for improvement in the "specific areas of unsatisfactory performance." The statute then specifies that the teacher must be allowed 90 calendar days "following the receipt of the notice of unsatisfactory performance" to correct "the noted performance deficiencies." Clearly, the "noted performance deficiencies" are the specific areas of unsatisfactory performance described in the notice of unsatisfactory performance. Finally, the statute mandates that the teacher shall be assessed within two weeks after the end of probation to determine whether "the performance deficiencies" have been corrected. It is clear, again, that "the performance deficiencies" are "the noted performance deficiencies" described in the written notice of unsatisfactory performance. See § 1012.34(3)(d)1. & 2.a., Fla. Stat. (emphasis added).

49. The reason why a decision to terminate a poorly performing teacher must be based solely on the specific performance deficiencies described in the pre-probation notice of unsatisfactory performance is plain: allowing the school district to rely on subsequently observed deficiencies would defeat the teacher's unambiguous statutory right to have 90 post-notice calendar days in which to correct the noted

performance deficiencies that triggered probation in the first place.

50. This case exemplifies the problem posed by post-notice deficiencies. The notice of unsatisfactory performance (the Summary) that gave rise to Escalona's probation, which was based on Mr. del Cuadro's evaluation of December 2, 2003, charged the teacher with 10 specific performance deficiencies. By February 17, 2004, when Ms. Carter formally observed Escalona for the last time before the end of probation, Escalona had corrected all but one (Indicator IV.A.5) of the noted performance deficiencies—suggesting that he had made significant improvement.

51. Unfortunately for Escalona, however, Ms. Carter believed that the teacher had exhibited nine deficiencies besides the noted performance deficiencies, with the net result that, near the end of probation, Escalona still had 10 deficiencies. Of these nine post-notice deficiencies, four (Indicators I.F.1, I.F.2, II.A.1, and IV.B.3) were recorded for the first time ever on February 17, 2004. Obviously, Escalona was not given 90 days to correct these four alleged deficiencies. Yet another three of the post-notice deficiencies reported by Ms. Carter (Indicators I.A.1, IV.A.6, and IV.B.2) had not been seen since Mr. Cuadro's initial evaluation of November 5, 2003. This initial evaluation, being "not of

record," cannot count as a notice of unsatisfactory performance to Escalona. Hence he was not given 90 days to correct these three alleged deficiencies. For that matter, the remaining two post-notice deficiencies alleged to exist on February 17, 2004—Indicators II.D.4 and IV.A.3—had not been observed, post-notice, until January 16, 2004, which means that Escalona did not have 90 days to correct them, either.

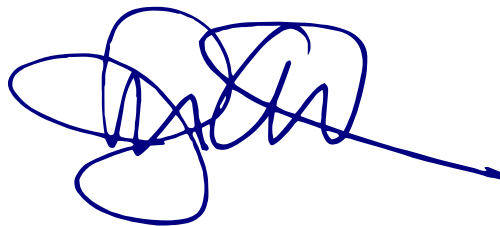
52. For the above reasons, when assessing whether, in fact, Escalona had corrected the noted performance deficiencies as of the two-week period following probation, the undersigned focused, as he was required to do, exclusively on the 10 deficiencies described in the Summary, seven of which were alleged not to have been timely corrected. Having determined as a matter of fact that the evidence was insufficient to prove these seven alleged deficiencies existed or persisted, it must be concluded that the Board has failed to carry its burden of establishing the alleged factual grounds for dismissal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board enter a final order: (a) exonerating Escalona of all charges brought against him in this proceeding; (b) providing that Escalona be immediately reinstated to the position from which he was suspended; and (c) awarding Escalona back salary, plus benefits, to the extent

these accrued during the suspension period, together with interest thereon at the statutory rate.

DONE AND ENTERED this 23rd day of November, 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 23rd day of November, 2004.

ENDNOTES

^{1/} The evaluator indicates unacceptable performance of an indicator by circling the indicator's name on the OFAE. (See paragraph 9, infra in the text, for a description of how the indicators are named.)

^{2/} In fact, PACES comprises more than 100 indicators. Only the independently dispositive 44 are meaningful, however; a teacher's successful (even superb) performance of all 56+ additional indicators would not overcome a failing grade on even one of the crucial 44.

^{3/} Put another way, PACES evaluators do not rate teachers at the domain level or the component level. That is, when an evaluator determines that a teacher has failed a particular indicator, say II.E.5 (quickly and reasonably manages unacceptable behavior),

the evaluator does not then make a qualitative determination whether the teacher failed the broader Component E (monitoring and maintaining learner behavior). Such a determination would require that the teacher's failure to manage unacceptable behavior (however that failure was manifested in a given observation) be considered in context with his satisfactory performance of the other indicators relating to monitoring and maintaining learner behavior, to assess whether, on the whole, the teacher was adequately monitoring and maintaining learner behavior. Under PACES, such a determination is not necessary because failing the indicator automatically results (without need for further deliberation or consideration of other indicators, components, or domains) in the conclusion of overall unsatisfactory performance. Likewise, and for the very same reasons, the evaluator, upon finding a teacher's performance of indicator II.E.5 deficient, does not then make a qualitative determination whether the teacher failed the overarching Domain II (managing the learning environment), which would require that the teacher's failure to manage unacceptable behavior (however that failure was manifested in a given observation) be considered in context with his performance of (a) the other indicators relating to Component E and (b) the indicators relating to the rest of the components under Domain II, to assess whether, on the whole, the teacher was adequately managing the learning environment.

^{4/} The 44 indicators are not equally apportioned between the six domains. There are 12 indicators under Domain IV and 10 under Domain II; seven under Domain I; and five apiece under Domains III, V, and VI. Therefore, all indicators being equal (and they are), a teacher is more likely to fail an observation on an indicator falling under Domains II or IV than, say, V or VI. In this statistical sense, then, it could be said that Domains II and IV are more important than the others. But this would be somewhat misleading, because passing Domain IV is of no greater benefit to the teacher than passing Domain V, or any other. In the final analysis, all that truly matters is whether or not the teacher passed each and every indicator.

^{5/} There is no evidence in the record regarding the performance of Escalona's students as measured by state and/or local assessments; indeed, the Board's witnesses admitted (and the undersigned finds) that Escalona's evaluators did not take account of his students' standardized test results. Because of this, it is impossible for the undersigned to make de novo

findings based primarily on student performance as to whether, ultimately, Escalona's performance was satisfactory.

^{6/} A viewer could make such determinations, of course, but he would necessarily make them based upon personal standards of his own choosing, for the cameras would not have recorded decisional standards. Determinations founded upon personal preferences are not fair (or consistent with the rule of law) because they inevitably produce inconsistent results, each decision-maker doing what is right in his or her own eyes, seeing similar situations differently.

A real-life example of this phenomenon is provided by a news story receiving wide coverage as this Recommended Order is being written. The story involves a U.S. Marine who, during the liberation of Fallujah, Iraq, shot and killed a wounded enemy combatant, which latter might—or might not—have posed a present danger. The incident happened to have been caught on film by an embedded reporter. Once the video was broadcast on television, the question arose: Was this a murder, or a justified killing in battle? The matter is far from settled as of this writing, but opinions on both sides of the issue have been expressed in the media by experts, pundits, and others. The point here is this: A viewer watching the videotape cannot fairly determine, without more than the film shows, whether a war crime was committed, for that determination requires that the historical facts be compared to external standards (known as law), using reason and logic to arrive at an ultimate determination of guilt or innocence. The question of guilt or innocence cannot be settled fairly, consistent with the rule of law, unless the fact-finder is provided with (and disciplined by) neutral standards of decision against which the historical facts as captured on the film and established through other evidence can be measured.

^{7/} Such expert testimony, designed to assist the fact-finder in understanding the applicable standard of conduct, must be distinguished from testimony, offered in the guise of expert opinion, which is calculated merely to instruct the fact-finder how to decide the case, without helping the fact-finder make an independent determination about what occurred. Testimony that simply tells the fact-finder how to decide the case is impermissible and generally inadmissible. See, e.g., Schneer v. Allstate Indem. Co., 767 So. 2d 485, 488-89 (Fla. 3d DCA 2000)(no error in excluding proffered expert testimony that plaintiffs had not committed insurance fraud); Fino v. Nodine,

646 So. 2d 746, 749 (Fla. 4th DCA 1994)(opinion testimony that accident was "unavoidable" should not have been admitted); 3-M Corp.—McGhan Medical Reports Div. v. Brown, 475 So. 2d 994, 997 (Fla. 1st DCA 1985)(opinion that product was "defective" was inadmissible).

Much of the evaluators' testimony in this case about Escalona's allegedly unsatisfactory performance largely had the effect of advising the undersigned how to decide the case, as opposed to supplying evidence about what specifically occurred in the classroom and what standards should be used to judge such performance. In other words, much of the testimony amounted to little more than witnesses opining that Escalona's performance was "unsatisfactory"—an ultimate determination that the undersigned independently must make. The undersigned, exercising his prerogative as the fact-finder, has given little weight to such testimony, which probably would have been excluded in a civil trial.

^{8/} In 2004 the legislature added a sentence to § 1012.34 (3), effective June 10, 2004, the language of which is shown in italics in the quotation above. See Ch. 2004-295, § 11, Laws of Fla. The Board maintains, and the undersigned agrees, that this recent amendment merely makes clear what was already reasonably apparent from the statute's preexisting language, namely, that student performance is not the only factor to consider in evaluating a teacher. Rather, as the amendment underscores, unsatisfactory performance can be found to exist even if the student performance data are acceptable, where the teacher's performance, as measured against other approved criteria, is so poor as to outweigh the favorable indicators of student performance. As a clarifier, the amendment does not change the statutory directive that teacher evaluations be based primarily on student performance as measured by the FCAT and other standardized tests. Thus, in short, while a teacher's performance might be deemed unsatisfactory for reasons other than student performance, student performance on standardized tests cannot be ignored (or given short shrift) in a teacher's evaluation, for an assessment that gives little or no weight to students' test scores obviously is not one "primarily based on the performance of students" "as measured by [specific] state [and local] assessments" under any reasonable understanding of those unambiguous words.

^{9/} Whatever its shortcomings, the prescribed approach leans heavily on objective factors (test scores), thereby minimizing the subjectivity (and potential unfairness) inherent in other methods of evaluation.

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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.