

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 05-1802
)
 JOAN E. WILLIAMS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on October 17-20, 2005, and on December 13-15, 2005, in Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Madelyn Schere, Esquire¹
Ana I. Segura, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
2595 Tampa Road, Suite J
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STATEMENT OF THE ISSUE

Whether Respondent's employment as a school psychologist should be terminated on the grounds set forth in the Notice of Specific Charges.

PRELIMINARY STATEMENT

At its regular meeting on May 18, 2005, Petitioner voted to suspend Respondent's employment without pay pending the termination of her employment as a school psychologist. Respondent timely requested a formal administrative hearing to challenge the proposed action, the matter was referred to DOAH, and this proceeding followed.

Thereafter, Petitioner filed its Notice of Specific Charges that alleged that Respondent was guilty of incompetency, as defined by Florida Administrative Code Rule 6B-4.009(1)(a) and that she was guilty of insubordination or willful neglect of duty, as defined by Florida Administrative Code Rule 6B-4.009(4).

At all times relevant to this proceeding, Respondent was a school psychologist assigned to Petitioner's Region 3 (R3), which has been, at times, also referred to as Access Center 3. Respondent works closely with Child Study Teams (CSTs) to determine student's eligibility for and/or appropriate placement in Petitioner's Exceptional Student Education (ESE) program.

At the formal hearing, Petitioner presented the testimony of the following witnesses who were either employees or former employees of Petitioner. The name of each witness is followed in parentheses with the position he or she held at the times relevant to this proceeding. Those witnesses were: Martha Boden (former director of operations for R3); Gigi Gilbert (school principal); Edith Norniella (school principal); Myra Silverstein (former director of the ESE program for R3); Lilia Angela Dobao (assistant school principal); Gail Senita (school principal); Cynthia Flanagan (school principal); Nick JacAngelo (school principal); Orlando B. Milligan (school principal); Luethel Boyd (ESE department chairperson at a high school); Marcia Gams-Prichep (staffing specialist for R3); Deborah Wilson (assistant school principal); Nicholas Emmanuel (school principal); Rosa R. Simmons (school principal); Teresa Simas (staffing specialist R3); Mary Paz (instructional supervisor for R3); Judith Anton (school principal); Dyona McLean (school principal); Aaron L. Enteen (school principal); Pamela Sanders-White (school principal); Dr. Sue Lee Buslinger-Clifford (instructional supervisor of psychological services for the School District); Danysu Pritchett (former administrative director of Petitioner's Office of Professional Standards); Robert Lawrence Kalinsky (administrator director for R3); Lucy Iturrey (director of Petitioner's Office of Professional

Standards); Gail Pacheco (chairperson of the Psychological Services Department for R3); and Joseph Jackson (administrative director for Petitioner's Division of Psychological Services), and Respondent. Petitioner presented 253 sequentially-numbered Exhibits, each of which was admitted into evidence with the exception of Exhibits 108, 123, 135, 171, 201, 219, 249, 250, and 251.

Respondent testified on her own behalf and presented the additional testimony of the following witnesses: Leila Perez (secretary R3); Robert Pittman (school psychologist assigned to R3); Lisa Rolling (secretary for R3); Lillian Cooper (school principal); Rosetta Vickers (children's advocate for R3); Akim Glass (exceptional student education specialist of a middle school); Benjamin Isom (clinical psychologist in private practice); and Maria Mitchell (a learning disability teacher). Respondent offered 42 Exhibits, each of which was admitted into evidence. Pursuant to a stipulation of the parties Respondent took the deposition testimony of Irma Hutchinson (school psychologist assigned to R3) and Susan Renick-Blount (former director of R3), subsequent to the hearing. Those two depositions are admitted into evidence as Respondent's Exhibits 43 and 44, respectively.

The transcript of the proceedings conducted October 17-20, 2005, was filed with DOAH on November 15, 2005. That portion of

the transcript consists of four volumes. The transcript of the proceedings conducted December 13-15, 2005, was filed with DOAH on January 18, 2006. That portion of the transcript consists of three volumes. The transcript of the proceedings correctly chronicles the witnesses who testified, their testimony, the exhibits that were admitted into evidence, as well as all objections and rulings thereon.

The parties filed Proposed Recommended Orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent was a school psychologist employed by Petitioner pursuant to a continuing contract. Respondent was first employed by Petitioner in 1968 as a guidance counselor. In 1974 she began her employment as a school psychologist. At all times relevant to this proceeding, Respondent was a member of the United Teachers of Dade (UTD) and subject to the provisions of the collective bargaining agreement between Petitioner and UTD.

2. At all times material hereto, Petitioner was a duly-constituted school board charged with the duty to operate, control and supervise all free public schools within the school district of Miami-Dade County, Florida, pursuant to Article IX,

Constitution of the State of Florida, and Section 1001.32, Florida Statutes (2005).²

3. For administrative purposes, Petitioner's school district is divided into regions. R3 is the region to which Respondent has been assigned at the times relevant to this proceeding.

4. In R3, each school, whether an elementary, middle, or high school, has a CST. Each such team includes an administrator, a school counselor, one or more special education teachers, a school psychologist, and other specialists as appropriate. Typically, a child is referred to the CST because he or she is experiencing difficulties, such as academic or behavioral problems. The child's case is discussed at a CST meeting and the CST decides whether to refer the child to a school psychologist for a psychoeducational evaluation. If that decision is in the affirmative, certain background information is put together and that information is sent to the R3 office to be opened as a case file. The assigned school psychologist receives the case file, performs a psychological evaluation on the child, writes a report detailing his or her findings, and returns the case file to a staffing specialist. The staffing specialist schedules another CST meeting to determine the next appropriate step in the process, which may result in the

preparation of an Individualized Education Plan (IEP) for the student.

5. Petitioner has adopted a manual titled "Psychological Services Procedures Manual" (the Manual) that defines the psychological services provided by Petitioner and delineates the procedures school psychologists are to follow in testing, evaluating, referring and placing students who qualify for the ESE program. The Manual also provides an evaluation report format that school psychologists are to follow.

6. School psychologists are required to keep certain records and file certain monthly reports. They are required to report the number of evaluations and other services performed during the month on a form titled "Psychological Services Monthly Report." They are also required to keep a case log by school for each student with an open case file at that school. The case log contains the names of children whose cases are opened at each school and the status of the case. The case log is updated monthly to reflect the status of each case.

7. A school psychologist is an essential member of the CST and is a critical player in the development of IEPs for students who qualify for ESE. Time constraints are placed on the CST and on each school psychologist. Petitioner's policy is that the period from the initial referral of a child to a CST to the development of the child's IEP (for those children who qualify

for ESE services) should not exceed 90 days. Since September 2004, Florida Administrative Code Rule 6A-6.0331 has required that students who are suspected of having a disability must be evaluated within a period of time, not to exceed 60 school days in which the student is in attendance. School psychologists are instructed to make every effort to complete the psychological evaluation report and to submit the report for typing within five days after the evaluation is completed.

8. Typically, each school psychologist in R3 is responsible for two or three assigned schools. In an average week, school psychologists spend most of their time at their assigned schools, where they are required to keep the same work hours as the instructional personnel assigned to that school. At the school, the school psychologist meets with other school personnel (whether informally or as part of a CST) and evaluates students.

9. Each school psychologist has at least one day a week at the R3 office, where he or she writes reports and consults with other R3 personnel as needed. During the R3 office day, new cases are assigned and special assignments are made.

EVALUATIONS THROUGH SCHOOL YEAR 2001-02

10. From the school year 1990-91 through the school year 2000-01, Martha Boden was Respondent's supervisor. For each of those school years, Ms. Boden evaluated Respondent's

performance. During those years, Ms. Boden received a myriad of complaints about Respondent's job performance. Several school principals testified that they would not want Respondent to serve as their school psychologist based on unfavorable experiences with Respondent during the school years Ms. Boden served as her supervisor. Despite the complaints she received about Respondent, Ms. Boden evaluated Respondent's performance as being acceptable for each year Ms. Boden supervised Respondent. Each annual evaluation of Respondent by Ms. Boden was a summative evaluation in the sense that Ms. Boden considered all information, both good and bad, that she had about Respondent's job performance. Ms. Boden's conclusion that Respondent was an acceptable employee for each of the years that she supervised Respondent is persuasive. The evidence presented by Petitioner as to Respondent's job performance during the school years 1990-91 through 2000-01 does not establish the allegations set forth in the Notice of Specific Charges. That evidence does, however, establish that Respondent's job performance was problematic and provides a context for subsequent evaluations.

11. Ms. Boden exerted considerable effort in attempts to help Respondent improve her job performance. Respondent did not take advantage of the help Ms. Boden offered. Respondent knew

from Ms. Boden that she was required to produce timely, accurate psychological evaluations and monthly reports.

12. Myra Silverstein supervised and evaluated Respondent for the 2001-02 school year. That evaluation was also a summative evaluation and also concluded that Respondent was an acceptable employee. Ms. Silverstein's conclusion that Respondent was an acceptable employee for the year she supervised Respondent is persuasive. The evidence presented by Petitioner as to Respondent's job performance during the 2001-02 school year does not establish the allegations set forth in the Notice of Specific Charges. That evidence does, however, establish that Respondent's job performance continued to be problematic and provides additional context for subsequent evaluations.

DELAYED EVALUATIONS AND REPORTS

13. During the school years subsequent to the 2001-02 school year Respondent failed, on multiple occasions, to timely evaluate and complete reports for children who were being evaluated for ESE services. At Olinda Elementary School, a student was tested by Respondent on February 23, 2004 and Respondent did not close the case until January 12, 2005. Partly because of that delay, the principal of Olinda Elementary School requested that a school psychologist other than Respondent be assigned to her school. During the 2004-05 school

year, Respondent was assigned to evaluate two students at Miami Springs Elementary School. More than a year passed between the time Respondent received her assignment and the time she did the testing. During the 2003-04 school year, Respondent was assigned a case in January 2004. Respondent did not do the testing on this student until July 2004 and she did not complete her report until January 2005. At Orchard Villa Elementary, Respondent was assigned a case during the summer of 2004. As of June 2005, the case had not been closed. There was no justification for the lapses in time between the dates of assignment and the dates of completion of Respondent's reports.³

14. The CSTs could not determine appropriate strategies for the students Respondent was assigned to evaluate without a psychological report. Respondent's lapses between her assignments and the completion of her reports delayed the staffing of those students and delayed the development of and the provision of appropriate services for those students.

15. Mary Paz, the Instructional Supervisor at the R3 office became Respondent's supervisor in March 2004. After she assumed that responsibility, Ms. Paz received multiple complaints from principals and parents as to Respondent's repeated failures to timely complete evaluations and/or reports. In May 2004, Ms. Paz received a memorandum from an assistant principal at Banyan Elementary School regarding an incomplete

evaluation report done by Respondent. Material in the case file established that the Bender Gestalt evaluation was administered, but the Respondent's report made no mention of that diagnostic tool. Another school psychologist was called in to complete Respondent's report.

16. Pamela Sanders-White was the principal of Orchard Villa Elementary School during the 2004-05 school year. Respondent was the school psychologist for that school during that school year. Ms. Sanders-White received complaints from teachers, parents, and students pertaining to Respondent's failure to timely complete her work. Ms. Sanders-White requested that a school psychologist other than Respondent be assigned to her school for the school year 2005-06.

CONFRONTATIONS AT IEP MEETINGS

17. Petitioner presented evidence that Respondent argued with other professionals during several CST meetings and that she walked out of one such meeting. Petitioner also presented evidence that a few of Respondent's professional opinions were rejected by other professionals. That evidence, while accepted as credible, did not prove or tend to prove that Respondent was incompetent or that she was insubordinate, which are the charges alleged in the Notice of Specific Charges. Consequently, the proposed findings in paragraphs 22, 23, 25, and 26 of Petitioner's Proposed Recommended Order have not been considered

by the undersigned in reaching the ultimate findings of this Recommended Order.

INACCURATE REPORTS

18. Gail Pacheco has been the Chairperson for Psychological Services in R3 since the 1989-90 school year. She is not a supervisor of the R3 school psychologists, but she works with their supervisors as the supervisor's designee in resolving problems. At Joseph Jackson's request after he became Respondent's supervisor in 2003, Ms. Pacheco reviewed 30 reports prepared by Respondent and monitored all 28 school psychologists in R3 for compliance with time frames for testing, preparation of psychological reports, and case closure. Each of the 30 reports prepared by Respondent and reviewed by Ms. Pacheco had at least one error.⁴

19. On May 28, 2003, Mr. Jackson requested all school psychologists, including Respondent, to select a sample evaluation report for review by the respective region chairperson. Respondent did not timely comply with Mr. Jackson's request. When she did comply, the evaluation report she submitted contained numerous errors, including Respondent's erroneous conclusion as to the student's qualification for services.⁵

20. In December 2003 Dr. Sue Lee Buslinger-Clifford became the Instructional Supervisor of Psychological Services at the

District office. Her job duties included the supervision of all school psychologists, which included the authority to give directives to all school psychologists, including Respondent. Dr. Buslinger-Clifford's testimony, considered with the other evidence presented by the parties, established that Respondent failed to follow District procedures in the use of two personality or emotional assessments instruments in evaluating students. Respondent's reports were not individualized for each student, with most of her reports using similar, standardized language. In the academic assessment of students, the reports should identify the needs of the child, the skill level of the child, and specific recommendations. Respondent's reports often contained the same recommendations written in general, non-specific language that did not recommend the implementation of specific services for the student. Some reports were missing information and others contained limited information that was not helpful for the teacher and the members of CSTs.

21. In addition to typographical and grammatical errors, Respondent's reports contained test use and procedural errors. On one evaluation report Respondent misinterpreted evaluation data, which caused her to reach an erroneous conclusion as to a student's eligibility for services.⁶ On some occasions, Respondent's narrative report was inconsistent with the report of the evaluation data.

22. Respondent had difficulty managing her time. Her student evaluations generally took longer than they should have.

23. Dr. Buslinger-Clifford reviewed certain reports submitted by Respondent and advised Respondent as to corrections that needed to be made. Respondent did not comply with that advice.

24. Mr. Jackson, as Respondent's supervisor, reviewed her monthly reports for August through October, 2003, and determined that Respondent's productivity was greatly below that of the average school psychologist, despite having a similar caseload. Mr. Jackson further determined that Respondent had a backlog that was growing each month; that some of the reports were incomplete; and that some of the reports were inconsistent or misleading. On October 31, 2003, Mr. Jackson notified Respondent in a memorandum of serious concerns that he had related to her poor job performance, and he directed Respondent to provide him with answers to certain questions pertaining to her performance⁷ no later than November 10, 2003, at 9:00 a.m.

25. Mr. Jackson requested information as to six specific issues. First, he wanted a written response as to an alleged incident at Westview Middle School during which Respondent got into an argument with a staffing specialist in front of a student's parents during a CST meeting. Second, he wanted to know why three identified cases had not been completed in a

timely manner and ordered her to attach the psychological reports for those students with her response. Third, he wanted her to explain her lack of productivity and provide Medicaid forms for nine students who she had evaluated. Fourth, he wanted Respondent to provide Ms. Pacheco with a copy of a recent psychological report so Ms. Pacheco could review it. Fifth, he wanted an explanation as to why she had not provided a psychological report for review when such a report had been requested of her on three occasions. Sixth, he wanted Respondent to explain why she continued to use an instrument (WIAT) that she allegedly could not score.

26. On November 7, 2003, Respondent responded to Mr. Jackson's memorandum and requested a 60-day extension of the deadline for her response to his questions. Respondent's response included the following:

You have demanded a written response in five (5) days to a long list of you [sic] allegations, to which you offered not [sic] proof, only conjecture, opinions, and a partially extracted table; that was delivered by registered mail on Saturday afternoon at my residence. I feel sure that this memorandum was written and typed on the MDCPS [Miami-Dade County Public School] time clock. No consideration was given for my time clock, or the release of my daily time schedule to complete such a task.

The sixty-day extension period is therefore needed to consult my archives in order to give you a detailed and accurate response. I need ample time to secure financial expense; legal advisement and

representation; and a typist (all of which I will be seeking reimbursement), before undertaking such a task.

27. Mr. Jackson gave Respondent until November 14, 2003, to respond to his memorandum. That was a reasonable deadline.

28. Respondent did not meet the deadline established by Mr. Jackson. On December 17, 2003, Respondent responded in writing to the questions Mr. Jackson had asked in his memorandum.⁸ Mr. Jackson was not satisfied with Respondent's response and continued to have concerns about her job performance. Mr. Jackson's dissatisfaction with Respondent's response was reasonable. His continued concerns about her job performance were also reasonable.

JANUARY 2004 CONFERENCE FOR THE RECORD

29. On January 15, 2004, Mr. Jackson had a Conference for the Record (CFR) with Respondent. A CFR is a meeting of record, held by a supervisor with an employee who is or may be under investigation for possible disciplinary action, to apprise the employee of the review of the record and the possible disciplinary action, and to give the employee an opportunity to respond or append the record.

30. At the CFR conducted January 15, 2004, Mr. Jackson discussed his continued concerns with Respondent and considered her responses (both written and verbal). Mr. Jackson prepared a memorandum dated January 22, 2004, which summarized the events

that transpired at the CFR held January 15, 2004. In the memorandum, Mr. Jackson gave Respondent the following directives:

Your are to be professional and courteous to all staff at all times. You are also to represent the school system in a positive light at all times. This directive begins immediately and continues indefinitely.

You are to complete evaluations of each child within a week of the beginning of testing, unless approved by the Executive Director or the Instructional Supervisor of the Division of Psychological Services or the ACCESS Center 3 Chairperson. Additional testing must be approved by the Chairperson which may be suggested by you and/or the Chairperson. The additional testing is to be completed within one week of notification of the determination for more testing. A completed report of each evaluation must be submitted for typing to the ACCESS Center within two weeks after the evaluation is completed. (Day that the last assessment instrument has been administered.) All evaluations are to be correctly reflected on your monthly report (log). This directive is ongoing and will be reviewed by the 10th of each month, for the next three months.

Your monthly reports/logs are to reflect increased productivity beginning with the February report, averaging a minimum of 10 psychoeducational evaluations per month, unless approved by the Executive Director. Your productivity will be reviewed monthly. If you do not have the assigned cases, you are to request cases from your ACCESS Center chairperson.

You are to complete a minimum of 10 psychological evaluations during the next four weeks. The Psychological Services Monthly Report, with a copy of the completed typed report for each of the 10 evaluations attached, is to be submitted to the office of the Executive Director of the Division of

Psychological Services on February 27, 2004.

All psychological evaluation reports are to be completed and delivered to Ms. Gail Pacheco for review within two weeks after the day the last assessment instrument has been administered. All corrections are to be completed within two school days after they have been received from Ms. Pacheco. No case should be given to the staffing specialist for staffing until the case has been approved by Ms. Pacheco. This directive is to be implemented immediately and will be reviewed randomly by the Executive Director of the Division of Psychological Services during the next six weeks. Reviewing of all reports by the ACCESS Center Chairperson and timelines for completion will be adjusted as needed.

You were referred to the Employee Assistance Program through a Supervisory Referral for performance of professional duties related to assignment failures.

These directives are in effect as of the date of the conference and will be implemented to prevent adverse impact to your professional status with Miami-Dade Public Schools.

31. In the memorandum dated January 22, 2004, Mr. Jackson advised Respondent that he would review the information in the CFR with appropriate school officials and that he would take the following additional action:

All directives will be monitored as stated in the conference and in this memorandum.

If you successfully complete the directives, the requirements of the directives will be adjusted to reflect the requirements of all ACCESS Center based school psychologists.

If you do not successfully complete the directives, additional directives will be

added to assist you in becoming the desired professional you are capable of being.

MARCH 2004 CFR

32. Mr. Jackson conducted a second CFR with Respondent on March 19, 2004.

33. Petitioner established that there continued to be concerns with all six of the directives given to Respondent following the January 2004 CFR. As to directive 1, Mr. Jackson continued to receive complaints as to Respondent's interaction with school-based staff. Petitioner established that Respondent failed to comply with directives 2, 3, 4, and 5. Respondent did not timely complete the evaluation of each child to whom she was assigned nor did she seek or obtain approval from the R3 chairperson for additional testing. Respondent did not submit completed psychological evaluation reports to the R3 office within two weeks of completing all of the evaluations. Respondent's case log report reflects that 10 cases were completed but only eight evaluation reports were submitted. None of the evaluation reports on Respondent's monthly case log report were submitted for review as required. Psychoeducational evaluation reports were not timely submitted to Ms. Pacheco for review. Numerous errors were reflected on the psychoeducational evaluation reports that were submitted. Ms. Pacheco returned the reports to Respondent with instructions to correct the

reports. Respondent did not return corrected reports to Ms. Pacheco.

34. Respondent declined to participate in the Employee Assistance Program, which was offered in Directive 6.⁹

35. In addition to re-issuing the directives that had been given at the January CFR, Mr. Jackson issued directives requiring Respondent to report to work on time, to report her presence at the school site to a designated contact person, and to complete a Professional Improvement Plan (PIP) that was based on specified indicators pursuant to Petitioner's Professional Assessment and Comprehensive Evaluation System (PACES).¹ In addition, Mr. Jackson changed Respondent's schedule to reduce the number of schools she would have to travel to in order to conduct the number of evaluations Mr. Jackson had directed her to evaluate each month. This change was made in an effort to assist Respondent meet her productivity directives.

MAY 2004 CFR

36. Mr. Jackson conducted a CFR with Respondent on May 7, 2004. Petitioner established that Respondent continued to fail to meet the directives that Mr. Jackson had imposed as to productivity. Respondent's evaluation reports and monthly case reports continued to contain procedural and substantive errors. Respondent failed to submit copies of her evaluation reports to Mr. Jackson's office as directed.

37. Mr. Jackson issued revised directives to Respondent. Those revised directives, which were similar to the previously issued directives, are set forth in Petitioner's Exhibit 143 and are incorporated herein by reference. Again, Respondent was directed to complete a PIP on specified indicators on the PACES evaluation system. The PIP Respondent was required to complete was admitted into evidence as Petitioner's Exhibit 144.

ANNUAL EVALUATION FOR 2003-04 SCHOOL YEAR

38. On May 7, 2004, Mr. Jackson completed his annual evaluation of Respondent's job performance for the 2003-04 school year.¹¹ Part A of the evaluation form contains six domains. Mr. Jackson rated Respondent as meeting standards for each of the six domains in Part A. Those domains are "Preparation and Planning", "Management", "Human Relationship", "Professional Practice", and "Contribution to School Improvement". Part B contains the seventh domain of "Professional Responsibilities". For that seventh domain, Mr. Jackson rated Respondent as not meeting standards. Mr. Jackson's overall rating of Respondent was that she did not meet standards. On the PACES evaluation form, the evaluator can make one of the following three recommendations: "Recommended for Employment", "Not Recommended for Employment", or "Performance Probation Carry-over." Mr. Jackson recommended the third option, which meant that Respondent's performance

probation was to be carried over to the next school year.

39. Respondent's May, June, July, and August, 2004, case reports established that she continued to fail to meet productivity directives. She typically did not timely submit reports for typing and she did not complete the assigned number of evaluations. She developed a backlog for her assigned cases.

SEPTEMBER 2004 CFR

40. On September 16, 2004, Mr. Jackson had a CFR with Respondent because she had not complied with the directives that had been given to her. Dr. Buslinger-Clifford attended that meeting. Eleven revised directives, similar to the previously-issued directives, were given to her. Those revised directives are set forth in Petitioner's Exhibit 165 and are incorporated by reference. Included in the directives was another PIP (Petitioner's Exhibit 167).

41. Mr. Jackson ordered Respondent to return 17 cases that had been assigned to her to Dr. Buslinger-Clifford for reassignment. On September 24, 2004, Respondent complied with that order and those cases were reassigned. Also as directed, Respondent reviewed with Dr. Buslinger-Clifford Respondent's backlog of 26 other cases. Dr. Buslinger-Clifford observed that Respondent's case files were disorganized, some contained mold, and some contained pieces of dead roaches.

42. Respondent submitted 26 reports for typing in mid October 2004. Her October 2004 case report fails to reflect that those cases were submitted for typing.

NOVEMBER 2004 CFR

43. On November 16, 2004, Mr. Jackson had a CFR with Respondent because she had not complied with the directives that had been given to her. She had not completed her PIP; the psychological evaluation reports she submitted contained typographical, grammatical, and procedural errors; and she did not submit contact information she had been instructed to submit. Eleven revised directives, similar to the previously-issued directives, were given to her. Those revised directives are set forth in Petitioner's Exhibit 188 and are incorporated by reference.

44. On November 16, 2004, Mr. Jackson reprimanded Respondent in writing. That reprimand is set forth in Petitioner's Exhibit 189, which is incorporated herein by reference.

45. On November 17, 2004, Respondent provided Mr. Jackson with a report listing the cases that had been assigned to her. That list was not accurate because Respondent failed to list five cases that had been assigned to her. Respondent continued to fail to evaluate cases that had been assigned to her on a timely basis.

46. Respondent's case status reports for January and February 2005, did not follow district policies. From those reports, Mr. Jackson could not determine the status of cases that had been assigned to Respondent.

FEBRUARY 2005 CFR

47. For the school year 2004-05, Robert Kalinsky was the personnel director for R3 and DanySu Pritchett was the Administrative Director of Petitioner's Office of Professional Standards (OPS). On February 15, 2005, Ms. Pritchett conducted a CFR with Respondent at the OPS offices. Respondent, Mr. Kalinsky, Mr. Jackson, Dr. Bulsinger-Clifford, and two union representatives also attended the CFR. Petitioner's Exhibit 206, a summary of that CFR, is hereby incorporated by reference. The summary of that CFR reflects the following statement by Ms. Pritchett:

The record reflects that you have been repeatedly insubordinate and grossly insubordinate to directives issued to you by Mr. Jackson. Additionally, the record reflects your failure to complete and submit psychological evaluation reports [for] review by the required timelines and your failure to submit monthly reports/logs.

. . .

48. Mr. Kalinsky received numerous complaints from school-based personnel about Respondent's performance. Mr. Kalinsky had difficulty locating Respondent on one occasion because Respondent was not at her scheduled location and had not

informed her contact person at the school where she was going. He had difficulty locating her on another occasion because she did not timely report to work at the school site she was scheduled to serve. On March 2, 2005, Mr. Kalinsky wrote Respondent a memorandum advising her that she was in violation of directives that had been issued to her at prior CFRs. That memorandum, Petitioner's Exhibit 214, is hereby incorporated by reference.

49. On March 5, 2005, Mr. Kalinsky revised Respondent's schedule so that Tuesdays, Wednesdays, and Thursdays of each week were reserved for completion of prior assignments. Mr. Kalinsky directed Respondent to submit five completed cases to R3 each Friday. Mr. Kalinsky had the authority to issue that directive to Respondent. The directive was reasonable. On Friday, March 18, 2005, Respondent failed to comply with that directive. Respondent also failed to comply with Mr. Kalinsky's directive on Friday, March 25, 2005. Mr. Kalinsky issued another memorandum to Respondent on March 31, 2005, for failing to comply with his directive. That memorandum, Petitioner's Exhibit 222, is incorporated by reference.

50. On May 27, 2005, in the PACES annual evaluation for the School Year 2004-05, Mr. Kalinsky rated Respondent as not meeting standards. Respondent had consistently failed to follow directives that had been issued to her as to timelines and

productivity, had failed to adhere to Petitioner's policies and procedures, and had turned in reports that contained inaccuracies, errors, and misleading information. Mr. Kalinsky did not recommend Respondent for further employment because he reasonably concluded that Respondent had not been fulfilling her professional responsibilities.

51. Respondent's supervisors recommended the termination of her employment as a school psychologist. Petitioner followed all applicable procedures in processing that recommendation, which resulted in the School Board action at its regular meeting on May 18, 2005, that underpins this proceeding.

52. Dating from Ms. Boden tenure as Respondent's supervisor in the 1990s, Petitioner made reasonable efforts to try to help Respondent improve her performance. Respondent consistently rejected those efforts.

CONCLUSIONS OF LAW

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

54. Because this case is a proceeding to terminate Respondent's employment with the School Board and does not involve the loss of a license or certification, Petitioner has the burden of proving the allegations in the Notice of Specific

Charges by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence.

McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

55. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

56. Section 1012.33(4), Florida Statutes, provides grounds for the suspension or dismissal of a continuing contract employee who meets the definition of "instructional personnel", such as Respondent.¹² Included among the grounds are "incompetency," "gross insubordination," and "willful neglect of duty." That provision further provides, in part, as follows:

(c) . . . Whenever such charges are made against any such employee of the district school board, the district school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of suspension by the district school board or by the district school superintendent, the

district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the district school board and such employee is discharged, his or her contract of employment shall be thereby canceled. Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68 provided such appeal is filed within 30 days after the decision of the district school board.

57. Florida Administrative Code Rule 6B-4.009(1) defines the term "incompetency, and provides in pertinent part:

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

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes) [now codified as Section 1012.53, Florida Statutes]. . . .

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

58. Florida Administrative Code Rule 6B-4.009(4), defines "gross insubordination or willful neglect of duty" as being

. . . a constant or continuing refusal to obey a direct order, reasonable in nature, given by and with proper authority.

59. Petitioner established by a preponderance of the evidence that Respondent was guilty of incompetence, as that term is defined by Florida Administrative Code Rule 6B-4.009(1)(a) by proving her inefficiency as that term is defined in the Rule. In light of Respondent's long-term employment with Petitioner, it is concluded that Petitioner failed to prove that Respondent lacked the capacity to perform her duties within the meaning of Florida Administrative Code Rule 6B-4.009(1)(b).

60. Petitioner also established by a preponderance of the evidence that Respondent was guilty of "gross insubordination or willful neglect of duty" as that phrase is defined by Rule 6B-4.009(4), by repeatedly failing to meet reasonable deadlines for complying with directives imposed upon her by her supervisors.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Petitioner enter a Final Order adopting the findings of fact and conclusions of law set forth herein. It is also RECOMMENDED that the Final Order terminate Respondent's employment.

DONE AND ENTERED this 25th day of April, 2006, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2006.

ENDNOTES

- 1/ Ms. Schere represented Petitioner through the portion of the hearing conducted in October 2005. Thereafter, Ms. Schere became unavailable and Ms. Segura assumed the representation of Petitioner.
- 2/ All statutory references are to Florida Statutes (2005). All references to rules are to the version of the rule published in Florida Administrative Code as of the date of this Recommended Order.
- 3/ In reaching this finding, the undersigned has considered Respondent's testimony that attempted to justify the delays. That testimony is found to be unpersuasive.
- 4/ These errors are summarized in Petitioner's Exhibit 158.
- 5/ This report is part of Petitioner's Exhibit 113.
- 6/ See Petitioner's Exhibit 198.
- 7/ See Petitioner's Exhibit 109.
- 8/ See Petitioner's Exhibit 116.

9/ Respondent had the right to decline that assistance and the fact that she exercised that right has not been considered by the undersigned in reaching the conclusions contained herein.

10/ There was a dispute between the parties as to whether the PACES evaluation system was appropriate for Respondent since she was not a member of the instructional staff. Petitioner established that PACES was appropriately used to evaluate the job performance of school psychologists, including Respondent.

11/ See Petitioner's Exhibit 145.

12/ Pursuant to Section 1012.01(2)(b), Florida Statutes, school psychologists are "instructional personnel."

COPIES FURNISHED:

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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.