

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 08-5947
) AMENDED TO CORRECT
 WENDY PORTILLO,) SCRIVENER'S ERRORS,
) PARAGRAPH 37.
 Respondent.)
)
 _____)

AMENDED RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on February 2 and 3, 2009, in Fort Pierce, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Elizabeth Coke, Esquire
Leslie Jennings, Esquire
Richeson & Coke, P.A.
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For Respondent: David Walker, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, St. Lucie County School Board
(Petitioner or School Board) has just cause to discipline Wendy

Portillo's employment based on the conduct alleged in the "Statement of Charges and Petition for One Year Suspension Without Pay and Return to Annual Contract" and the appropriate penalties, if any.

PRELIMINARY STATEMENT

Wendy Portillo (Respondent), a kindergarten teacher with a professional services contract, taught at Morningside Elementary School (Morningside) during the times relevant to this proceeding. Morningside is a public school in St. Lucie County, Florida. The conduct at issue occurred on May 21, 2008, and involved one of Respondent's students, who will be referred to as Student 1 (to protect the student's privacy) and the other students in Respondent's class.

By letter dated November 3, 2008, Michael Lannon, Petitioner's Superintendent of Schools, advised Respondent in writing that based on conduct that will be discussed below, he intended to recommend to the School Board that it suspend Respondent's employment without pay for one year from the final School Board action, and that it reduce her contract status from a Professional Services Contract (which is a tenured position) to an Annual Contract (which is a non-tenured position.)

After advising Respondent of his intention to recommend to the School Board that her employment be suspended without pay for one year, his letter concluded with the following paragraph:

I will also be recommending to the State Board of Education that they impose a one year revocation of your teaching certificate to be effective from the date of the School Board's action. Finally, I recommend that after the one year suspension and when your certificate becomes reinstated, that you be returned to annual contract status. It is also my intention to not place you in any pre-school or with elementary children but will place you in other grades, depending on availability at that time and your being qualified and certified.

Two of the matters set forth in the concluding paragraph of Mr. Lannon's letter of November 3, 2008, were not included in the Petition and are beyond the purview of this proceeding. First, any recommendation to be made by Mr. Lannon to the State Board of Education (State Board) is within his discretion and would not affect the substantial interests of Respondent unless and until the State Board acted against Respondent's certification. If the State Board acted against Respondent's certification, she would then have recourse to challenge the State Board's proposed agency action pursuant to the provisions of Chapter 120, Florida Statutes. Secondly, Mr. Lannon's statement as to where he would assign Respondent should she return to work for the School Board is advisory only and would not be a part of the Final Order to be entered by the School Board pursuant to this Recommended Order.¹

Petitioner's investigative report discussed a complaint from a parent of another student (referred to as Student 2) in

Respondent's class (Petitioner's Exhibit B, beginning on page 9). The Petition did not allege facts pertaining to the complaint from the parent of Student 2 and Petitioner did not offer any competent evidence regarding that complaint at the formal hearing. The undersigned has given no consideration to the alleged complaint from the parent of Student 2 in reaching the findings of fact and conclusions of law set forth in this Recommended Order. Because this is a de novo proceeding, the fact that the alleged incident was part of the investigative report that Mr. Lannon considered, is irrelevant because the recommendation set forth in this Recommended Order is based solely on the competent evidence presented at the formal hearing.

The facts underpinning the Petition pertain to Respondent's conduct on May 21, 2008. Paragraphs 1-17 of the Petition contain factual allegations. Paragraphs 18, 19, and 20 are premised on those factual allegations. Paragraph 18 of the Petition alleged as follows:

18. That Wendy Portillo did violate School Board Rule 6.301(3)(b) which provides a non-inclusive list of infractions which "warrant disciplinary action."

(ix) Abusive or discourteous conduct or language to supervisors, employees, students, visitors, or vendors.

(xxix) Any violation of the Code of Ethics of the Education Profession, the

Principles of Professional Conduct for the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees.

(xxxix) Inappropriate or disparaging remarks to or about students or exposing a student to unnecessary embarrassment or disparagement.

(xxxviii) Inappropriate method of discipline.

Paragraph 19 of the Petition alleged the following:

19. That Wendy Portillo did violate the Code of Ethics of the Education Profession in Florida (Florida Administrative Code Rule 6B-1.001) and the Principles of Professional Conduct for the Education Profession in Florida (Florida Administrative Code Rule 6B-1) [sic]^[2] which require that teachers must:
- a. Seek to exercise the best professional judgment and integrity (F.A.C. §6B-1001(2)) [sic];
 - b. Maintain the respect and confidence of one's colleagues, of students, of parents, and of other members of the community (F.A.C. §6b-1.001(3) [sic];
 - c. Strive to achieve and sustain the highest degree of ethical conduct (F.A.C. §6B-1.001(3) [sic];
 - d. Make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety. (F.A.C. §6B-1.006(3)(a)).
 - e. Shall not harass . . . and shall make reasonable effort to assure that each student is protected from harassment or discrimination. (F.A.C. §6B-1.006(3)(g)). [sic]

The final paragraph of the Petition, paragraph 20, is as follows:

20. That the foregoing acts as set forth in this statement of charges and attached report either individually or in combination as set forth in this statement of charges are for just cause under §1012.33(6)(a), Fla. Stat. to warrant termination and or [sic] a one year suspension of Wendy Portillo's employment with the St. Lucie County School Board and a change of Wendy Portillo's continual [sic] contract to annual status.

At its regularly scheduled meeting on November 18, 2008, the School Board voted to suspend without pay Respondent's employment and to change her Professional Services Contract to an Annual Contract upon the completion of that term of suspension. Respondent timely challenged the proposed action of the School Board and this proceeding followed.

At the final hearing, Petitioner presented during its case-in-chief the testimony of Susan Ranew (Assistant Superintendent of Schools for Human Resources); Michael Lannon; Billy Tomlinson (Petitioner's Director of Exceptional Student Education); Eric Graff (a teacher at Morningside); and Patricia Gascoigne (assistant principal of Morningside). Petitioner also presented the rebuttal testimony of Ms. Gascoigne, Winifred Wynn (office clerk at Morningside), and Marcia Cully (principal of Morningside). Petitioner's pre-marked Exhibits B, H, YYY, and ZZZ were admitted into evidence. Petitioner's Exhibit AAAA was rejected for reasons stated on the record. Respondent testified on her own behalf and presented the additional testimony of

Cindy Swertfeger (a friend and former colleague of Respondent); Robin Marmitt (a literacy coach at Morningside); Tabitha Williams-Johnson (a teacher at Morningside); Diane Zientz (a data specialist employed by Petitioner and the parent of one of Respondent's former students); Lenita Weisfeld (the parent of one of Respondent's former students); and Cathy Oliver (the chairperson of the Exceptional Student Education at Morningside). Respondent offered 18 sequentially-numbered exhibits, each of which was admitted into evidence. Respondent's Exhibit 10 was admitted under seal because it contained confidential student information.

Unless otherwise noted, all statutory references are to Florida Statutes (2008). References to rules are to the rules in effect as of the entry of this Recommended Order. The relevant statutes and rules have not changed since May 21, 2008, the date the conduct at issue occurred.

A Transcript of the proceedings, consisting of three volumes, was filed on February 25, 2009. Each party filed a Proposed Recommended Order, which has been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Petitioner was the constitutional entity authorized to operate, control, and supervise the public schools in St. Lucie County, Florida.

Petitioner has entered into individual contracts and collective bargaining agreements with the teachers it employs and has adopted rules and policies that control the activities of its teaching professionals.

2. At all times relevant to this proceeding, Respondent was a teacher employed by Petitioner pursuant to a professional services contract and assigned to teach kindergarten at Morningside.

3. On May 21, 2008, Respondent was teaching kindergarten in her classroom at Morningside. The door to Respondent's classroom is across a hall from the door of the school office.

4. Typically, kindergarten students are five or six years old.

5. Student 1, a male, was one of 17 students in Respondent's class on May 21, 2008. Student 1 was assigned to Respondent's class in January 2008.

6. Shortly after his placement in her class, Respondent asked Mr. Graff to help her with Student 1 because of Student 1's behavior. Mr. Graff works in Morningside's fourth grade alpha class. The alpha program is designed to identify and assist at-risk third grade students who are having difficulties at home or at school. Mr. Graff has the assistance of a full-time counselor and a full-time paraprofessional. Mr. Graff agreed to help with Student 1 as needed. Student 1 came to

Mr. Graff's classroom on approximately 12 occasions between January and May 21, 2008.

7. In mid-February 2008, Respondent requested a Child Study Team for Student 1, which is the first step in determining whether a student meets the eligibility requirements for services from Petitioner's Exceptional Student Education (ESE) program. This development is part of an on-going process.³

8. The Child Study Team, of which Respondent was a member, developed strategies designed to redirect Student 1's behavior. One of the strategies was a reward system utilizing tokens.

9. On May 21, 2008, Respondent's kindergarten class began at 8:20 a.m. At 9:00 a.m. Respondent's kindergarten class, including Student 1, went to a performance by the fifth grade that ended at approximately 9:45 a.m. The students returned to Respondent's classroom at approximately 10:00 a.m.

10. At approximately 10:30 a.m., while she was teaching her class, Respondent observed that Student 1 was off-task and was being disruptive to the other students by flipping crayons at his classmates and crawling under a table. Student 1 pushed up on the table, where other students were trying to work. Respondent attempted to redirect Student 1, but she could not do so.

11. Respondent summoned Officer Black (the school resource officer) to come to her room. Officer Black assisted in getting Student 1 out from under a table and took him to the office.

12. After Officer Black had escorted Student 1 to the school office, Ms. Gascoigne (the assistant principal) counseled Student 1 as to appropriate versus inappropriate behavior. Student 1 told Ms. Gascoigne that he realized what he had done was wrong and that he wanted to say to Respondent that he was sorry.

13. After keeping Student 1 in the office for approximately 15 minutes, Ms. Gascoigne sent Student 1 back to Respondent's classroom.

14. There was a dispute in the record as to whether Respondent sent a written referral to the office when Officer Black escorted Student 1 to the office at approximately 10:30 a.m. The office did receive a written referral from Respondent on May 21, 2008, pertaining to Student 1's misbehavior. The inference was that pursuant to School Board Policy 5.33, which pertains to removal of students from a classroom as opposed to a disciplinary referral of a student for misbehaving in class, the office personnel should have detained Student 1 for a longer period of time than 15 minutes if Respondent had sent a written referral with him. The greater weight of the credible evidence established that School Board

Policy 5.33 is inapplicable due to Student 1's level of disruption. Moreover, the greater weight of the evidence established that Ms. Gascoigne did not receive the written referral until the afternoon of May 21, 2008, after the occurrence of the events at issue in this proceeding. When she had Officer Black take Student 1 to the office at approximately 10:30 a.m. on May 21, 2008, Respondent did not ask Ms. Gascoigne or anyone else in the office to detain Student 1 for a particular length of time.

15. When Student 1 returned to her classroom, Respondent was in a meeting area where the students were gathered for group instruction. Respondent asked Student 1 why he had returned to the classroom. Student 1 responded to the effect that Ms. Gascoigne had sent him back. Referring to herself and to the other students in her class, Respondent responded to the effect that, "I don't know if we are ready to have you back at this time."

16. After making that statement, Respondent directed Student 1 to join her in front of his classmates. Respondent asked Student 1 why he had done the things he had done earlier that morning. Student 1 shrugged his shoulders. Respondent told Student 1 that shrugging his shoulders was not an answer and that he should use his words.

17. Three or four students began saying things about how Student 1 had behaved. Respondent asked Student 1 to listen to his classmates and asked him how what they were saying made him feel. Referring to herself and to the other students, Respondent stated that she did not think we are ready for you to come back at this time. Respondent then announced that she was going to poll the class as to whether Student 1 could rejoin them. Respondent explained to the class that a poll was like taking a vote. Respondent asked each of Student 1's classmates to verbally vote yes or no whether Student 1 should remain in the classroom and gave each student the opportunity to explain his or her vote. Respondent tallied the votes on the chalk board. The final vote was 14 for removing Student 1 and two for allowing him to remain.⁴ Respondent thereafter sent Student 1 back to the office. Respondent made the ultimate decision to exclude Student 1 from her classroom, but in making that decision she considered the votes that had been cast by Student 1's classmates.

18. The reward system utilizing tokens was in place for Student 1 on May 21, 2008. There was insufficient evidence to establish that Respondent utilized the reward system or any other strategy, including the use of Mr. Graff's class, that had been developed for Student 1 before sending him to the office on the first occasion or before removing him from her class after

the classmates had cast their votes and made statements about his behavior.

19. When Student 1's mother came to pick Student 1 up from school on the evening of May 21, 2008, she told Respondent that she had embarrassed her son and that he was disabled and autistic. Respondent apologized to Student 1's mother. Student 1 was with his mother when she made the quoted statement to Respondent and when Respondent apologized. When asked by his mother how he felt, Student 1 said he felt sad.

20. Except for her conduct on the May 21, 2008, incident described above, Respondent has had a positive 12-year career as a teacher at Morningside.

21. Respondent testified that at no time did she intend to harm, embarrass, or do anything negative to the student. Respondent further testified that she did not, at the time think she was hurting anyone. She believed that she could show all of her students that there are consequences to actions and to show that actions may affect others. Respondent testified, credibly, that early childhood education is her "passion" (as she termed it at Transcript, Volume III, page 275, beginning on line 11).

22. Petitioner's investigative report reflects (beginning on page 13 of Petitioner's Exhibit B) the following:

There is no evidence that Ms. Portillo's conduct was malicious or intended to cause harm or embarrassment to Student 1.

However, there is a question as to whether Ms. Portillo exercised the best professional judgment during the incident under investigation. . . .

23. Immediately following the incident of May 21, 2008, Petitioner prohibited Respondent from returning to Morningside. Petitioner assigned Respondent to the School Board office with pay while Petitioner investigated the matter. On November 14, 2008, Mr. Lannon made his recommendation to the School Board. The recommendation was that Petitioner suspend Respondent for a period of one year dating from the School Board's final order and that her contract be changed from a Professional Services Contract to an Annual Contract. At its meeting of November 14, 2008, the School Board suspended without pay Respondent's employment for a period of one year and voted to change her contract from a Professional Services Contract to an Annual Contract should she return to employment with the School Board.⁵

24. The greater weight of the credible evidence overwhelmingly established that Respondent's conduct on May 21, 2008, described above is properly characterized as misconduct as that term is generally understood.

25. As will be discussed below, Petitioner established that Respondent's conduct on May 21, 2008, violated the Code of Ethics of the Education Profession in Florida and the Principles of Professional Conduct for the Education Profession in Florida,

thereby violating the provisions of subsection (xxix) of School Board Rule 6.301(3)(b), as alleged in paragraph 18 of the Petition.

26. Petitioner established that Respondent's misconduct on May 21, 2008, violated subsection (xxxi) of School Board Rule 6.301(3)(b) as alleged in paragraph 18 of the Petition by exposing Student 1 and the other students in her class to unnecessary embarrassment or disparagement.

27. Petitioner established that Respondent utilized an inappropriate method of discipline in removing Student 1 from her class after the class vote, thereby violating subsection (xxxvii) of School Board Rule 6.301(3)(b), as alleged in paragraph 18 of the Petition.

28. Petitioner failed to establish that Respondent was abusive or discourteous in violation of subsection (ix) of School Board Rule 6.301(3)(b) as alleged in paragraph 18 of the Petition.

29. Mr. Lannon, Ms. Ranew, Ms. Gascoigne, and Ms. Cully are experienced educators with supervisory responsibilities. Each opined that Respondent had violated the Code of Conduct for the Education Profession and explained the reasons for those opinions.

30. Petitioner established that Respondent failed to exercise the best professional judgment on May 21, 2008, as alleged in paragraph 19a of the Petition.

31. The alleged violation set forth in paragraph 19b will be discussed below.

32. Petitioner failed to establish that Respondent's misconduct was unethical and, consequently, failed to establish the violation alleged in paragraph 19c of the Petition.

33. Petitioner established that Respondent failed to make reasonable effort to protect Student 1 from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety as alleged in paragraph 19d of the Petition.

34. Petitioner established that Respondent failed to make reasonable effort to protect Student 1 from harassment as alleged in paragraph 19(e) of the Petition.

35. Petitioner has charged Respondent with "misconduct in office." There is a difference between the generally used term "misconduct" and the term "misconduct in office." The State Board has defined the term "misconduct in office" by Florida Administrative Code Rule 6B-4.009(3), as follows:

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education

Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

36. While there can be no meaningful debate as to whether Respondent's conduct should be characterized as "misconduct," there was a dispute as to whether Respondent's effectiveness in the school system had been impaired, thereby establishing that Respondent was guilty of "misconduct in office" as alleged in the Petition.

37. This incident received extensive coverage by the local, national, and international press. Locally, Petitioner received a high volume of written communications and telephone calls in response to Respondent's conduct. Some communications supported Respondent's conduct while others criticized Respondent's conduct. The communications criticizing Respondent's conduct far outweighed the responses supporting her conduct.⁶ Petitioner received requests from parents that Respondent not be allowed to teach their students should she return to class.

38. In addition to the negative publicity and negative communications generated by her conduct, Respondent's principal has lost confidence in her. Ms. McCully testified as follows in response to questions from Petitioner's counsel (Transcript, Volume III, beginning at page 371, line 17):

Q. After the May 21, 2008, incident involving Ms. Portillo, would you recommend that she be hired as a teacher in your school?

A. No, I would not.

Q. Why is that?

A. Personally, I feel that I would not have that rapport, trust, with her and be able to work with her after this.

39. Dr. Lannon testified as follows in response to questions from Petitioner's counsel (Transcript, Volume I, beginning at page 106, line1):

Q. In your opinion, has Ms. Portillo's actions on May 21, 2008, resulted in a loss of her effectiveness.

A. I believe so.

Q. How do you reconcile that with your recommendation that she can go back to work after a one-year suspension without pay?

A. I came to that with great pain.

I believe that the actions that Ms. Portillo undertook actually rose to the issue of termination. But also, in a sense of fairness, Ms. Portillo is a twelve-year employee who has contributed to the lives and the well-being of children in St. Lucie County.

My sense on this was that while there is a price to pay - and I believe that the action of not protecting children is literally the most serious thing we can do in a negative way - that her past career would warrant a second chance, but not in the environment in which she had willfully created these series of steps leading to the involvement of a particular child in what I believe to be an embarrassing and disparaging way and the involvement of the class in a way that we may never know.

Q. Did you consider terminating Ms. Portillo?

A. I did.

Q. And is it my understanding that you're

saying the fact that she had twelve positive years mitigated that decision.

A. Yes. That's exactly correct.

Q. And that led you to the recommendation that's at issue?

A. That's exactly right.

40. On cross-examination, Mr. Lannon testified in response to questions by Respondent's counsel (Transcript, Volume II, beginning on page 149, line 25):

Q: And you're of the opinion as you sit here today, Mr. Lannon, under no circumstances . . . that you would allow [Respondent] to teach elementary school children in St. Lucie County.

A. I would not put her in pre-K through fifth grade. That's the definition. So that would be correct.

41. In his testimony at the formal hearing and in his letter of November 3, 2008, Mr. Lannon described the mitigating circumstances he considered in contemplating his recommendation to the School Board. The following, taken from Mr. Lannon's letter, succinctly states those considerations:

I have also considered mitigating circumstances.

1. You have had a long (12 years) and positive career in St. Lucie County Public Schools.

2. Your annual evaluations, conducted by five Principals over 12 years are positive.

3. Behavior of young students, in groups such as classrooms, is often difficult and professionally demanding.

4. The official investigation states "there is NO evidence that Ms. Portillo's conduct was malicious or intended to cause harm or embarrassment . . . " [Emphasis in the original.]

42. Except for the conduct at issue in this proceeding, Respondent has been an excellent, dedicated teacher during her 12-year tenure at Morningside. She has spent a considerable amount of her personal time working on an extra-curricular activity named Odyssey of the Mind. Many of the employees at Morningside and parents of former students are supportive of Respondent. As to those employees and parents, Respondent's reputation remains intact despite the negative publicity regarding the conduct at issue.⁷

43. The greater weight of the credible evidence clearly established that Respondent's conduct on May 21, 2008, has impaired her effectiveness in the system.

44. Petitioner established that Respondent's conduct on May 21, 2008, constitutes "misconduct in office" within the meaning of Florida Administrative Code Rule 6B-4.009 and, consequently, constitutes grounds for the suspension of her employment pursuant to Section 1012.33(6)(a), Florida Statutes, which provides, in relevant part, that the employment of a teacher with a professional services contract can be terminated or suspended for just cause, which is defined to include "misconduct in office" as defined by State Board rules.

45. Section 1012.33(4)(b), Florida Statutes, provides, in relevant part, as follows:

(b) Any . . . member of the instructional staff . . . may be returned to annual contract status for another 3 years in the discretion of the district school board, at the end of the school year, when a recommendation to that effect is submitted in writing to the district school board on or before April 1 of any school year, giving good and sufficient reasons therefore

46. In explaining the rationale for his recommendations, Mr. Lannon testified as follows in response to questions from counsel for Respondent as to his recommended disposition of this matter (beginning at Transcript, Volume II, page 133, line 15):

Q. What would happen in the one year that would allow her, from the year that you're recommending that she be suspended to the year that she, if your recommendation is accepted, that she would come back to work for the School Board, what would happen in that year that would change the alleged loss of respect and confidence in her colleagues first?

A. It might not.

Q. Your same answer would be as it relates to students?

A. Yes, sir.

Q. And the parents.

A. That's correct. I have no knowledge of how they would feel.

Q. So in essence, you're allowing, you're recommending that a person that you're not sure would be respectful [sic] or confident [sic] by teachers, students, parents, and members of the community, you're recommending that that person still work for the St. Lucie County School Board.

A. I'm allowing that the 12 years prior to May 21, 2008, mitigated my thinking that said this person is deserving of another chance at some point in time.

Q. And this chance that you're talking about is not a chance of great risk or harm

if I follow your logical conclusion; is that correct.

A. If you look at it more fully, you'll see that I would not allow her to teach at that grade level in an elementary school again. And there is a difference in the ability of students to be able to discern the words of adults as they age. And I'm going to bank on the fact that the quality that Ms. Portillo had previously shown, absent her actions on that day, which I believe to be premeditated and well thought out, even though they were quick, would not occur again.

47. There can be little doubt that Respondent has been traumatized by the negative reactions to her misconduct.⁸ Respondent and her family have suffered economically as a result of her suspension. Respondent apologized to Student 1's mother and testified that she is remorseful.

CONCLUSIONS OF LAW

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

49. Because Petitioner seeks to suspend Respondent's employment for one year and does not involve the loss of a license or certification, Petitioner has the burden of proving the allegations in its Administrative Complaint 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).

50. 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)).

51. Section 1012.33, Florida Statutes, pertains to contracts between school boards and instructional staff, supervisors, and school principals. Petitioner relies on Subsections 1012.33(1)(a) and (6)(a), Florida Statutes. Pursuant to these provisions, the employment of a teacher with a professional services contract can be suspended or terminated for just cause, which includes, relevant to this proceeding, misconduct in office.

52. Petitioner established by the requisite standard that Respondent is guilty of misconduct in office.

53. Mr. Lannon's analysis of this matter is viewed by the undersigned to be thorough and balanced. Mr. Lannon was correct when he opined that the conduct at issue would have justified the termination of Respondent's employment. A one-year

suspension of Respondent's employment is warranted by the conduct at issue in this proceeding. The recommendation that follows is for the one-year suspension period to begin to run as of the date Respondent was suspended without pay on November 18, 2008. To have the period of suspension run as of the date the School Board enters its Final Order based on this Recommended Order unfairly penalizes Respondent for exercising her rights pursuant to Chapter 120, Florida Statutes.

54. Section 1012.33(4)(b), Florida Statutes, provides that a teacher's Professional Services' Contract can be changed to an Annual Contract on a written recommendation from the superintendent made prior to April 1 of any school year "giving good and sufficient reason" for the proposed action. The evidence presented at the formal hearing, including Mr. Lannon's testimony, provides good and sufficient reason for the recommendation pertaining to the change in Respondent's contract status.⁹

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that Petitioner enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order uphold the suspension of Respondent's employment for a period of one year from November 18, 2008, and provide for the

change of her contract status from a Professional Services Contract to an Annual Contract, contingent upon the availability of a position for which Respondent is qualified and certified.

DONE AND ENTERED this 9th day of April, 2009, 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 9th day of April, 2009.

ENDNOTES

^{1/} The responsibilities of the School Board and the Superintendent relating to the assignment of instructional personnel are set forth in Sections 1012.22 and 1012.27, Florida Statutes, respectively.

^{2/} The correct reference is Florida Administrative Code Rule 6B-1.006.

^{3/} As of May 21, 2008, no determination had been made as to Student 1's eligibility for ESE services. In November 2008, Student 1 was determined to be eligible for ESE services under the category autism spectrum disorder. The recommendation of the Child Study Team following Student 1's determination of eligibility for ESE services is for Student 1 to be placed in a general education classroom one hundred percent of the time and that any needed services be provided to him in that setting. No

IEP has been formalized or implemented due to lack of parental consent.

^{4/} As part of a math lesson, Respondent had previously taught her class how to tally objects by "bundling" the tally marks into groups of five. Respondent testified, credibly, that she tallied the votes because it was an opportunity to review what she had previously taught. Respondent had tallied the votes of her students on various issues prior to May 21, 2008.

^{5/} The School Board's action was part of a consent agenda. The School Board approved Mr. Lannon's recommendation without specifying whether the suspension without pay would begin as of November 14, 2008, or when the School Board entered its Final Order following its consideration of this Recommended Order. While there may be a question as to when Mr. Lannon recommended the suspension without pay to begin, the School Board suspended Respondent without pay on November 18, 2008.

^{6/} Mr. Lannon testified, credibly, that the communications he had received or reviewed expressed the greatest level of concern over Respondent's conduct on May 21, 2008, than any other incident he had seen in his forty-plus years in education.

^{7/} The testimony of the witnesses presented by Respondent has been considered by the undersigned in reaching the findings and conclusions set forth in this Recommended Order. Their testimony is considered by the undersigned to be very supportive of Respondent and to be very sincere.

^{8/} See Respondent's testimony, beginning at Transcript, Volume III, page 270, line 16.

^{9/} In reaching this conclusion, the undersigned has considered that open questions exist as to where Respondent will be teaching, as to the grade she will be teaching, and as to how Respondent will react to being back in the classroom.

COPIES FURNISHED:

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Tallahassee, Florida 32399-0400

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.