STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 09-2259
)
MICHAEL D. PROVOST,)
)
Respondent.)
_______________________________)

RECOMMENDED ORDER

Upon appropriate notice this cause came on for final hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings in Brooksville, Florida, on June 23, 2009. The appearances were as follows:

APPEARANCES

For Petitioner: J. Paul Carland, II, Esquire
Hernando County School Board
919 North Broad Street
Brooksville, Florida 34601

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19 North, Suite 110
Clearwater, Florida 33761

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner School Board has just cause to terminate

the Respondent's employment as a teacher, with reference to a positive drug test for purported use of marijuana.

PRELIMINARY STATEMENT

This case arose upon a determination and recommendation by the Superintendent of the Hernando County School District that just cause existed for termination of the Petitioner's employment. The School Board for Hernando County (Petitioner) adopted the recommendation and issued a Petition for Termination of Employment. The petition was filed with the Division of Administrative Hearings on April 27, 2009, and, after the Respondent elected to dispute the matter, this proceeding ensued. A Notice of Hearing was issued on May 4, 2009, setting this case for hearing for June 23, 2009, in Brooksville, Florida.

The cause came on for hearing before the undersigned, as noticed. The Petitioner presented the testimony of two witnesses at hearing: Leechele Booker, Principal of Delores S. Parrott Middle School, and Heather Martin, Executive Director of "Business Services" and "Human Resources." Additionally, the Petitioner's Exhibits 1 through 11 were admitted by stipulation.

The Respondent presented the testimony of one witness, the Respondent, Michael Provost. The Respondent offered no exhibits.

Upon conclusion of the hearing, the parties agreed to order a transcript thereof and to file proposed recommended orders within 20 days of the filing of the transcript. On July 2, 2009, the transcript was filed and the proposed recommended orders were timely filed on or before July 23, 2009. Those Proposed Recommended Orders have been considered in this rendition of this Recommended Order.

FINDINGS OF FACT

1. The Respondent has been employed at Dolores S. Parrott Middle School (DSPMS) as a teacher for a total of seven years, including the 2008-2009 school year. The Respondent taught Health, Career Education, and Physical Education. A large component of the Health curriculum is drug use prevention. It includes, as a portion of its curriculum and discussion, the subject of marijuana use.

2. The Respondent was the S.T.A.N.D. (Students Taking Action on Drugs) sponsor at the school for several years prior to the 2008-2009 school year. He was thus responsible for providing students with information about the dangers of using and abusing drugs and the possible consequences related thereto. His position as the Health teacher and the S.T.A.N.D. sponsor made him a role model for students regarding the subject of drug use and drug abuse prevention.

3. The principal at DSPMS for the 2008-2009 school year was Leechele Booker. She has been principal at that school for two years and was an assistant principal and teacher for some twelve years prior to that with the Hernando County School District. In her capacity as principal she is responsible for supervising and evaluating employees, enforcing policy and procedures, as well as investigating alleged violations of policies, law and recommending any resultant disciplinary measures to the District.

4. On March 11, 2009, an unidentified woman called the principal at DSPMS and left a voice mail message identifying herself as "Michelle". She requested that the principal return her call concerning one of the teachers at the school. The principal returned the call to the number that the woman had left. Since no one answered that call, the principal left a message identifying herself.

5. Ms. Booker received a return call approximately thirty minutes later. When Ms. Booker took the call the woman identified herself as Michelle, and acknowledged receiving the message which Principal Booker had left on the voicemail.

6. The person identified as Michelle thereupon informed the principal that she had knowledge of one of the teachers at DSPMS engaging in recent use of marijuana. She claimed to have observed him smoking marijuana over the past weekend and told

the principal of her concern at seeing that conduct by one of the teachers. Michelle also advised Ms. Booker that the teacher's fiancée was present when the teacher was smoking marijuana. She identified the teacher's fiancé as a woman named "Brenda." She then stated that the teacher's name was "Mike" and that he was the Health teacher at DSPMS.

7. Ms. Booker then realized that there was only one teacher by that name at the school, the Respondent, Michael Provost. She was already aware that the Respondent's fiancée's name was Brenda, having met her on several occasions.

8. The principal ended the call by advising Michelle that she would investigate the matter and thanked her for the information. She did not request any additional contact information from Michelle. She did not learn additional facts concerning where the Respondent had been seen using marijuana, when it occurred, how Michelle knew the Respondent, or the nature of her relationship with the Respondent. It is likely, although not clear from the record, that Principal Booker did not want to reveal to the caller what her thoughts might be concerning the identity of the teacher who was the subject of the complaint.

9. After ending the phone call with Michelle, Ms. Booker met with Assistant Principals Gary Buel and Nancy Vasquez. She told them of the phone call and the nature of it and they

discussed what actions should be taken, based upon the Petitioner's policy 6.33 "Alcohol and Drug-Free Workplace."

10. Ms. Booker then contacted the district office of the Petitioner and spoke with the secretary in "Human Resources." She was thereby advised that an investigation would have to be conducted and that Heather Martin, the Administrator for the Department of Human Resources, would have to be involved.

11. After contact with the district office, Principal Booker and Ms. Vasquez discussed the matter and agreed that they had "reasonable suspicion," under the above-referenced policy, to require the Respondent to take a drug test.

12. The Petitioner maintains that that reasonable suspicion is based upon the information provided in the phone call with Michelle, as well as the fact that the principal was aware that the Respondent was having financial difficulties and needed to be paid for extra-curricular duties immediately, rather than waiting for the normal payment process. He was known to have requested permission to leave work early more frequently than other employees.

13. Ms. Booker called the Respondent to her office to report the allegations lodged against him by the caller. She advised him of the phone call and the reference to smoking marijuana. She informed him that she believed she had

reasonable suspicion to have him drug-tested. She told him that Mr. Buel would escort him to the testing facility.

14. The principal then left her office, but was called back because the Respondent had some questions for her. She located a Union representative, Marlene Richie, who accompanied her back to the office to confer with the Respondent.

15. When the principal and Ms. Richie arrived at the office, the principal informed her of the allegations against the Respondent. Ms. Richie made some phone calls to Sandra Armstrong, the Executive Director of the Teachers Association and Joe Vitalo, the Union President.

16. After these phone conversations, Ms. Richie informed Ms. Booker that the Respondent wished to speak to her alone. Ms. Booker spoke with the Respondent alone, in her office, and he informed her that he had been smoking marijuana and told her that the test would be positive. The Respondent admitted his marijuana use because he respected the principal, and it was in everyone's best interest for him to be honest and candid about his problem. He was not coerced or under any pressure to make the admission. He made the admission voluntarily.

17. The Union representative, Ms. Richie, then rejoined Ms. Booker and the Respondent in the office, and the Respondent informed Ms. Richie of what he had told Ms. Booker concerning his marijuana use. Ms. Booker informed the Respondent that he

would still need to have drug testing, and she also discussed the Employee Assistance Program ("EAP"). The Respondent volunteered to enroll in the EAP program and made an appointment to see a counselor. The Respondent had not requested assistance or a referral to the EAP before the conversation with the principal on this day, when he admitted his marijuana use.

18. There are two means of referring employees to the EAP under the district's drug and alcohol policy; either self-referral by the employee or referral by management. Under this policy, no disciplinary action is taken when an employee self-refers to the program, or when he or she admits to a drug or alcohol problem and is referred to EAP by a manager.

19. The Petitioner maintains that the Respondent did not volunteer that he had a drug or alcohol problem until confronted with the principal's suspicion and direction to take a drug test. At the same time, however, the Petitioner acknowledges that the Respondent's admission concerning his marijuana use was not because he felt coerced. The Petitioner maintains that, in its view, the request for EAP assistance was not a voluntary request and that therefore, under the Petitioner's policy, disciplinary action can still be taken.

20. The preponderant, persuasive evidence, based upon credibility of the witnesses, including the Respondent, demonstrates that the request for EAP assistance was a voluntary

one and was done in conjunction with the principal voluntarily discussing the availability of the EAP program to the Respondent. The Respondent was under no pressure or coercion when he made the admission. In fact, the Respondent, as well as the Petitioner, have presented substantial argument concerning whether there was even "reasonable suspicion," under relevant case law, for the principal to order a drug test. Because of the findings made, and conclusions reached herein, the question of whether "reasonable suspicion" for drug testing existed is immaterial, in light of the District's Policy 6.33 and Section 112.0455, Florida Statutes (2008).

21. After meetings and conversations with Union representatives, the Respondent agreed to the drug test and the results were received on March 18, 2009. They indicated that the test was positive for the presence of marijuana.

22. The Respondent was suspended with pay on March 12, 2009, pending the outcome of an investigation. The Respondent was advised in writing of his suspension at the time of his meeting with the principal and through a letter from the Superintendent.

23. A pre-determination conference was scheduled for March 20, 2009, after the receipt of the drug test results. This was to provide the Respondent an opportunity to dispute any of the information collected through the investigation, before

discipline was recommended. The Respondent attended the conference and again admitted to using marijuana and stated that he was aware of the Drug and Alcohol-Free Workplace Policy. He explained that his drug use was the result of personal problems he was experiencing.

24. Following the pre-determination conference, and before making a disciplinary recommendation to the Superintendent, Ms. Martin attempted to contact the informant Michelle, to confirm her story. It was important for Ms. Martin to ensure that she had a name and phone number of the informant since the District does not act on anonymous complaints. A complaint is deemed anonymous if the District has no contact information and no name.

25. Ms. Martin called the number that Michelle had left with the principal and the phone was answered by someone who said it was "Chrissy's phone." Ms. Martin asked for Michelle and a different person came on the line and identified herself as Michelle.

26. The phone number and phone in question were registered to a Chrissy Campbell. Chrissy Campbell is married to the Respondent's fiancée's brother. The Respondent and Campbell are acquainted with each other but do not get along.

27. Ms. Martin advised Michelle that she was calling in reference to the complaint received earlier by the principal.

She stated that the District was conducting an investigation and asked if Michelle was willing to provide additional information. At that point, Michelle refused to give any additional information. In her conversation with Michelle, Ms. Martin did not use the Respondent's name, nor did she indicate the call concerned a drug test.

28. After her conversation with Michelle, Ms. Martin reviewed the drug test results and the personnel file, including the Respondent's disciplinary history, before making a recommendation for discipline to the Superintendent.

29. The Respondent's personnel file contained three additional discipline records. In 2005, he received a written warning concerning a violation of the Professional Code of Ethics regarding an inappropriate comment. In 2007, he was reprimanded in writing, stripped of his S.T.A.N.D. sponsor duties and suspended without pay for ten days for failing to properly handle a student's reported drug use. In 2008, he received a Letter of Direction for failing to follow the curriculum and being too personal with students.

30. Ms. Martin took that disciplinary history into consideration in making her recommendation to the Superintendent for termination of employment. By letter of March 23, 2009, the Superintendent advised the Respondent of his recommendation to

the School Board that the Respondent be terminated from employment. This proceeding ensued.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

32. The Superintendent is authorized to recommend to the School Board that instructional employees be suspended and/or dismissed from employment pursuant to Section 1012.27 Florida Statutes (2008). The Respondent is an instructional employee as defined by Section 1012.01(2), Florida Statutes (2008). The School Board's authority to terminate or suspend instructional employees resides in Sections 1012.22(1)(f) and 1012.33(6)(a), Florida Statutes (2008).

33. The standard for termination of instructional personnel is "just cause" as provided in Section 1012.33(1)(a), Florida Statutes (2008). A plenary definition of "just cause" is not provided in the statutes. The Petitioner agency has discretion, subject to de novo challenge at hearing, to set standards which subject an employee to discipline of varying degrees, or levels, including termination. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2d DCA 1994). The School Board has the burden of establishing just cause by preponderance of the evidence. McNeill v. Pinellas School Board

of Dade County, 678 So. 2d 476 (Fla. 2d DCA 1996); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990); See also § 120.57(1)(j), Fla. Stat. (2009).

34. In establishing standards to assist it in determining just cause in a given employee discipline situation, the Petitioner has enacted "School Board Policy 6.33." That policy provides, in pertinent part, as follows:

> (1) Goal: To establish a policy that ensures all employees remain drug free as a condition of employment. It is further the policy of the HCSB to prohibit the possession or use of alcohol by all employees under circumstances that will or may affect the efficient operation of the business of the HCSB and the safety of its employees, students and the public it serves.
>
> (2) Prohibition Against Drug and/or Alcohol Abuse.
>
> Employees are prohibited from engaging in any of the following activities:
>
> (a) Illegal controlled Substances The HCSB prohibits the use, distribution, manufacture, possession, sale, cultivation, or attempt to sell illegal controlled substances at any time whether on or off duty, or on or off HCSB property. Illegal controlled substances are defined by Florida Statutes, Chapter 893, and/or 21 U.S.C. 812.
>
> (5) Testing
>
> (b) Employees
>
> (2) When two or more supervisory employees have or when the

Superintendent otherwise has reasonable suspicion to believe any employee is in violation of paragraph 2(a) and/or (b) of this policy (known as Reasonable Suspicion Testing).

(10) Employee Assistance

(a) Self Referral. Employees who have a drug or alcohol related problem may seek assistance through the Employee Assistance program and Drug Free Program School Specialist. Self referrals will be confidential to the extend [sic] required or allowed by law; unless the medical provider or Specialist determines the problem is of such magnitude that failure to report it to the Superintendent would constitute a safety or serious operational problem.

(b) Referral by Management. If an employee voluntarily reports a drug or alcohol related problem to a member of management, unless the problem is determined by the Superintendent to be of such a magnitude as to constitute a safety or serious operational problem, the Superintendent shall refer the employee to the Drug Free Program School Specialist for assistance. Such referrals will be confidential except that the Specialist shall keep the Superintendent, or the Superintendent's designee, advised as to the progress of the assistance plan for the employee.

(c) Others. Employees who violate paragraph 2(a) and/or (b) above who have not sought voluntary assistance or reported their problem under paragraphs (a) and/or (b) shall be subject to immediate disciplinary action up to and including termination of employment.

(12) Procedures

> The Superintendent is authorized to adopt procedures to effectuate this policy and to ensure compliance with applicable law, including the Omnibus Transportation Employees Testing Act, known as "OTETA," and to obtain the discount and other advantages set forth in Florida Statutes §440.102.

Petitioner's Employee Handbook states in pertinent part:

> DRUG FREE WORKPLACE POLICY
>
> As a condition of employment, an employee shall:
>
> 3. Understand that violation of the District's alcohol and other drugs policy will lead to disciplinary sanctions up to and including termination of employment and prosecution.

35. The Petitioner contends that it has just cause to terminate the Respondent based upon a positive drug test which was administered pursuant to its drug "Drug Free Workplace Policy." That policy provides multiple means of administering a drug test. In this case, however, the test was administered as a "reasonable suspicion" test.

36. The Petitioner and Respondent dispute whether there was "reasonable suspicion" justifying the requirement of a drug test. The Petitioner maintains that the primary consideration was the phone call that the principal received from "Michelle." Michelle identified the Respondent, by name, as a teacher at the school and stated that she had witnessed him smoking marijuana.

She also knew the Respondents fiancé's name and knew that he was the Health teacher at the school.

37. The Respondent argues that these considerations are not a valid basis for "reasonable suspicion" and requiring a drug test. He contends that they cannot form a legal basis for a reasonable suspicion test because Michelle was not a credible and reliable source of information, as well as the fact that her statements were lacking in detail, and that there were extenuating circumstances (building a house) that resulted in the Respondent's financial trouble and need to leave work early repetitively (other collateral reasons why the principal maintained she had reasonable suspicion).

38 The determinative issues herein, however, are not so much whether reasonable suspicion for ordering a drug test existed or not, but rather whether this was the Respondent's first positive drug test or first admitted illicit drug use. If that is the case, then pursuant to Section 112.0455, Florida Statutes (2008), the Florida Drug-Free Workplace Act, the Respondent is not subject to disciplinary action for a first positive drug test, assuming that this statutory provision applies to school boards and not just to executive branch agencies of state government. Moreover, it is also the case that under Policy 6.33, quoted above (the applicable policy to be employed in the determination of just cause for discipline in

the case of marijuana use by an employee) first-time offenders who are self-referred or employer-referred to a counseling/rehabilitation program, are not subject to disciplinary action or termination. The Petitioner apparently contends that this exculpatory provision does not apply if a drug test has been mandated, versus a completely voluntary admission of drug use, before any suspicion, reasonable or otherwise, is aroused.

39. In this connection, Section 112.0455(8)(n)1., Florida Statutes (2008), prohibits an employer from discharging all but law enforcement personnel or fire safety equipment inspectors, installers and maintenance personnel, upon their first positive confirmed test, unless first given an opportunity to participate in a drug rehabilitation program. That provision states, in pertinent part:

> No employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive, confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program . . . .

40. See § 112.0455(8)(n)1., Fla. Stat. (2008). Section 112.0455, Florida Statutes, also provides, at Section 112.0455(8)t that:

> No employer shall discharge, discipline, or discriminate against an employee solely upon voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered an alcohol and drug rehabilitation program . . . .

This Act defines "drug" as including marijuana and there is no dispute that the Respondent has not previously tested positive nor entered any employee assistance or drug rehabilitation program.

41. On March 11, 2009, when confronted by the principal with the suspicion of marijuana use and the principal's referral for a drug test, the Respondent candidly admitted that he had used marijuana and that it was not really necessary to require a drug test because he admitted doing so. The Respondent maintains that that admission is the equivalent of a first offender drug test and that the Respondent is entitled to the protection afforded a first offender, referenced above, under Section 112.0455.

42. Section 112.0455(5)(h), extends the protection of that Act to

> " . . . Any agency within State government that employs individuals for salary, wages, or other remuneration."

43. The essential issue then becomes, as to applicability of Section 112.0455, whether the County School Board is an

"agency within state government." The Petitioner Board maintains that it is not and, therefore, that the statute and its preclusion of discipline for a first offender, does not apply to the subject situation involving School Board discipline of an instructional employee. The Petitioner cites Dunbar Electric Supply, Inc. v. School Board of Dade County, 690 So. 2d 1339, 1340 (Fla. 3d DCA 1997), for the point that school boards are constitutional entities and do not exist within the executive branch of state government. It also cites Travelers Indemnity Co. v. School Board of Dade County, 666 F.2d 505 (11th Cir. 1982), citing Campbell v. Gadsden County District School Board, 534 F.2d 650 (5th Cir 1976) (no 11th amendment immunity for school boards as they are not agencies of the state). The Petitioner argues that for the statute to be applicable it would have to define the term "agency" to include school boards and that the definition provision in the above statutory section does not specifically mention school boards. There is no general definition for state agencies elsewhere in Part I of Chapter 112. The Petitioner does acknowledge, however, that "public schools" are included in the definition of agency in Section 112.312. The Petitioner maintains that this definition only applies to that term as it is used in Part III of Chapter 112.

44. The Petitioner acknowledges that the case of McIntyre v. Seminole County School Board, 779 So. 2d 639 (Fla. 5th DCA 2001), was a case where the Fifth DCA vacated an employee's termination, citing to Section 112.0455, Florida Statutes, on the grounds that the employee could not be terminated for a first time positive drug test. The Petitioner points out that the Court did not discuss the application of that statutory section to the Seminole County School Board as a state agency. Implicitly, it applied the statutory provision to the school board because, for that purpose, it viewed the School Board as a state agency.

45. The Petitioner finds a difference between the situation in the McIntyre case with that of the Respondent in that the Fifth District noted that the Seminole County Drug-Free Policy stated: "Any School Board employee who violates this policy shall be treated in accordance with appropriate Florida Statutes and/or appropriate Contract Agreement." The Petitioner then contends that this policy statement left open the question as to what law applied to the drug-free workplace program of that School Board and that the Fifth District simply applied Chapter 112. The Petitioner maintains that, unlike the McIntyre situation, the question of the applicable drug-free workplace law has not been left open to interpretation in the instant case. The Petitioner contends that its Policy 6.33 states that

it is specifically designed to meet the requirements of Section 440.102, Florida Statutes (the Drug-Free Workplace Provision of the Workers Compensation Law) and that there is no reference to Chapter 112, or any section of Chapter 112, in the body of the Petitioner's policy or in its statement of Statutory Authority or laws implemented.

46. It is determined, however, that the Petitioner's distinction of the McIntyre case from the subject situation is not a pivotal distinction. This is because to do so would allow the School Board's internal policy, written and adopted for one county school district, to control the applicability of a state statute. The School Board's policy cannot render inapplicable Section 112.0455, so long as the School Board, for purposes of the applicability of that statute, is carrying out disciplinary, just cause determinations pursuant to a statutory mandate to uniformly regulate the practices of instructional personnel (statewide public function), set forth by the Legislature for all school districts in Chapter 1012, Florida Statutes. Since it is doing so, it is determined to be an agency within state government.

47. Concerning this point, the Court in Buck v. McLean, 115 So. 764, 765 (Fla. 1st DCA 1959), held, "In short, county school boards are part of the machinery of government operating at the local level as an agency of the state in the performance

of public functions." Certainly the determination, pursuant to a state statute, regarding just cause and discipline of instructional employees is a "public function." See also Witgenstein v. School Board of Leon County, 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977) (Wherein Chapter 120, which defined "agency" as "each other unit of government in the state" was construed to extend to a county school board); Motor v. Citrus County School Board, 856 So. 2d 1054 (Fla. 5th DCA 2003) (which extended to county school boards the requirement in Florida Statutes Section 768.28, Florida Statutes, that persons suing a county or other "state agency" must give written notice of the claim to the agency and the Department of Insurance). See also Ingraham v. Dade County School Board, 450 So. 2d 847 (Fla. 1984) wherein the court held that a statutory limitation on attorney's fees was applicable where the state agency, a school district, had purchased supplemental and discretionary insurance.

48. While the Petitioner correctly argues that the court in McIntyre, supra, did not specifically address whether the Florida Drug-Free Workplace Act, Section 112.0455, Florida Statutes, applies to local school boards, its repetitive reference to that act during its discussion, in the context of the facts of that case, certainly shows that the Court considered the act to be applicable to local school boards.

49. Moreover, an apt discussion of whether school boards are part of the executive branch of state government or are state agencies for certain purposes is set forth in 27 Stetson L. Rev. 1127 (1998). In that article, the author, Scott Sternberg, discussed the Dunbar case relied upon by the Petitioner herein as authority for school boards not being state agencies. That commentary makes it clear that, on that appeal from the Division of Administrative Hearings and the School Board, the Court's determination that the School Board was not an executive branch agency was applied narrowly to the situation concerning whether Section 120.53(5), Florida Statutes, was applicable to procurement by the School Board. Section 120.53(5) is applicable to agency purchasing arising under Chapter 287 Florida Statutes. Chapter 287 covers the executive branch of state government and, because the school board is not a part of the executive branch, it was determined by the Court in Dunbar to not be subject to Section 120.53(5). The judge in that opinion held that the hearing officer and School Board in that case correctly denied relief to Dunbar under Section 120.53(5). Even so, for other broader purposes school boards have been definitely held to be agencies of the state, as, for instance, for employee disciplinary purposes.

50. A county school board has been held to be a state agency falling within Chapter 120 of the Florida Statutes for

quasi-judicial administrative orders, as, for instance, for proceedings and resultant agency final orders concerning employee discipline, a statewide program, enacted by the legislature in Chapter 1012, Florida Statutes. See Sublett v. District School Board of Sumter County, 617 So. 2d 374, 376 (Fla. 5th DCA 1993); Canney v. Board of Public Instruction of Alachua County, 222 So. 2d 803, 804 (Fla. 1st DCA 1969); See also Von Stephens v. School Board of Sarasota County, 338 So. 2d 890 (Fla. 2d DCA 1976).

51. Because the School Board has been held to be a state agency for purposes of Chapter 120 and for purposes of a statewide program concerning regulation of public instruction, in Chapter 1012, Florida Statutes, the Petitioner is a state agency for purposes of this employee disciplinary case. See Mitchell v. Leon County School Board, 591 So. 2d 1032 (Fla. 1st DCA 1991); Citrus Oaks Homeowners Assoc., Inc., v. Orange County School Board, Case No. 05-0160RU (Recommended Order August 1, 2005). Therefore, under the above-referenced provisions of Section 112.0455, Florida Statutes, the Respondent cannot be disciplined for this first proven instance of illicit drug use, inasmuch as he has voluntarily admitted such use and agreed to engage in a rehabilitation program.

52. Moreover, in addition to the applicability of the above-referenced provisions of Chapter 112, Florida Statutes,

the School Board's policy 6.33, by its own terms, quoted above, provides that when the employee, after admitting drug use, voluntarily submits to a rehabilitation program, the employee cannot be disciplined, under the circumstances shown in the above Findings of Fact. The Respondent's admission is deemed to be voluntary because it was made before a drug test could establish independent proof of whether or not illicit drugs had been used. The Respondent candidly admitted drug use, without being coerced, and agreed to the rehabilitation program requirements. Thus, even under the Board's disciplinary policy, the Respondent cannot be subjected to discipline for this first offense situation.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the School Board of Hernando County dismissing its Petition for Termination of Employment and reinstating the employment of the Respondent with attendant provision of back pay and all related benefits.

DONE AND ENTERED this 9th day of September, 2009, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
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Filed with the Clerk of the
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this 9th day of September, 2009

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.