

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-2992  
 )  
 DEBRA DUNAWAY, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 23, 2009, by video teleconference, with the parties appearing in West Palm Beach, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Vicki L. Evans Paré, Esquire  
Palm Beach County School Board  
Post Office Box 19239  
West Palm Beach, Florida 33416-9239

For Respondent: Matthew Haynes, Esquire  
Jeff Sirmons, Esquire  
Johnson, Haynes & Miller, P.A.  
The Barrister's Building  
1615 Forum Place, Suite 500-B  
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Petition dated May 29, 2009, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In a Petition dated May 29, 2009, the Palm Beach County School Board ("School Board") requested that Debra Dunaway be suspended without pay and terminated from employment with the School Board on the basis of the following charges:

[F]ailure to exercise best professional judgment, misconduct in office in violation of School District Policies 1.013 and 3.96, as well as Florida Administrative Code [Rule] 6B-1.001, 6B-1006 and 6B-4.009, and Florida Statutes Sections 112.0455 and 440.101, thereby precluding Respondent from meeting the District minimum standards and constituting just cause for suspension under Florida Statutes Section 1013.33 and/or Section 112.0455.

Ms. Dunaway timely requested an administrative hearing, and the School Board forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on September 23, 2009.

At the hearing, the School Board presented the testimony of Ms. Dunaway, Gail Pasterczyk, Alfredo Taulh, and Britoni Garson; Petitioner's Exhibits 3, 4, 6, 14, 16, 19, 21, and 25 were offered and received into evidence. Ms. Dunaway did not present

the testimony of any witnesses; Respondent's Exhibits 1 through 12 and 15 were offered and received into evidence.

The one-volume transcript of the proceeding was filed with the Division of Administrative Hearings on November 6, 2009, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The School Board is 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. Article IX, Florida Constitution; § 1001.32, Fla. Stat. (2008).<sup>1</sup> Specifically, the School Board has the authority to discipline employees. § 1012.22(1)(f), Fla. Stat.

2. Ms. Dunaway has been a teacher with the School Board since 1988. At the times pertinent to this proceeding, she was employed under a professional service contract as a third-grade teacher at Elbridge Gale Elementary School.

3. As a classroom teacher in Palm Beach County, Ms. Dunaway's employment is subject to the collective bargaining

agreement between the School Board and the local teacher's union.

4. Disciplinary action was taken against Ms. Dunaway prior to the events giving rise to this proceeding. On April 18, 2007, the School Board issued a Written Reprimand for Violation of School Board Policy 3.96, Drug- and Alcohol-Free Workplace, after a drug test administered by the School Board in 2007 showed a positive result for cocaine. In the written reprimand, Ms. Dunaway was advised that, if she failed to comply with School Board Policy 3.96, a recommendation for termination of her employment with the School Board would be issued. Pursuant to the collective bargaining agreement, the written reprimand was placed in Ms. Dunaway's personnel file.

5. Ms. Dunaway began using cocaine in 2003 as a result of her feelings of devastation, humiliation, and embarrassment after an ex-boyfriend sent nude pictures of her, via electronic mail, to every employee of the school at which she was a teacher.

6. After she tested positive for cocaine in the early part of 2007, Ms. Dunaway requested and received assistance through the School Board's Employee Assistance Program, and she stopped using cocaine as a result of her successful completion in November 2007 of an intensive program at the Gratitude House

7. Ms. Dunaway was transferred to Elbridge Gale Elementary School in August 2008. Ms. Dunaway had a strained relationship with the school principal, Gail Pasterczyk. Ms. Dunaway felt that she was subjected to frequent, intense scrutiny by Ms. Pasterczyk, and this caused Ms. Dunaway to feel uncomfortable and increasingly anxious.

8. According to Ms. Dunaway, Ms. Pasterczyk conducted a formal evaluation of Ms. Dunaway's teaching performance on Thursday of the second week in February 2009, which was February 12, 2009. Ms. Pasterczyk was very critical of Ms. Dunaway and gave her a poor evaluation.

9. Ms. Dunaway was very upset about the poor evaluation and, on Friday, February 13, 2009, she used cocaine for the first time since November 2007. Ms. Dunaway admitted that she took "lots of [cocaine]" but stated that she had "stopped on Friday."<sup>2</sup>

10. Ms. Dunaway returned to school the following Tuesday, February 17, 2009, because Monday was a holiday. According to Ms. Dunaway, she had a very bad toothache during the weekend and arranged a dentist appointment for Tuesday afternoon. She was very nervous and took Xanax, which had been prescribed for her in February, to ease her anxiety. Ms. Dunaway claimed to have taken a Xanax right before lunch on Tuesday and to have become so "inebriated" from the Xanax that she doesn't remember

anything that happened after she noticed that she was slurring her speech.

11. On Thursday, February 19, 2009, while Ms. Pasterczyk was eating lunch in the teachers' dining room, several third-grade teachers approached her and expressed their concern about Ms. Dunaway's behavior during the morning and at lunch. Ms. Pasterczyk went to Ms. Dunaway's classroom and observed Ms. Dunaway standing at the front of the classroom, slurring her words, saying inappropriate things in front of the class, and using an overhead projector, unaware that the paper she had on the projector was upside down until she was alerted to this by her third-grade students.

12. Ms. Pasterczyk returned to her office and consulted with Britoni Garson in the School Board's employee relation's office. Ms. Garson sent Ms. Pasterczyk a Drug and Alcohol Documentation of Observable Behaviors form by facsimile transmittal, which Ms. Pasterczyk completed and sent back to Ms. Garson by facsimile transmittal. On the form, Ms. Pasterczyk noted that she had observed sudden changes in Ms. Dunaway's behavior, emotional behavior, nervousness, slurred speech, increased and/or loud talking, and hand tremors.

13. Ms. Garson reviewed the documentation submitted by Ms. Pasterczyk and determined that there was reasonable cause to subject Ms. Dunaway to a drug test. Ms. Garson contacted

Ms. Pasterczyk and told her that she was to go to Ms. Dunaway's classroom and accompany Ms. Dunaway to her office, where they would wait for the drug-test team to arrive.

14. Ms. Pasterczyk did as Ms. Garson directed, and the drug test was administered to Ms. Dunaway at approximately 2:30 p.m. on Thursday, February 19, 2009. The results were submitted to the School Board on February 25, 2009, and were positive for cocaine and for benzodiazepines, the family of drugs within which Xanax falls.

15. Cocaine is a mood-altering drug that raises a person's tempo and makes them more animated. Xanax is a type of tranquilizer that is prescribed for people who are nervous or who cannot sleep, and it has a calming effect.

16. Cocaine stays in the body for two to three days, but, by the fourth day after use, the results of a drug test would be negative for cocaine, that is, the amount of cocaine would be less than 300 nanograms per milliliter.

17. Ms. Dunaway met with Alfredo Taulh to discuss her test results, and Mr. Taulh advised her that she could challenge the results of the drug test within seven days; she did not do so.

18. The School Board conducted an investigation and, after going through all of the pre-disciplinary steps required by the collective bargaining agreement, the Superintendent of the Palm Beach County school system issued a Notice of Suspension and

Recommendation for Termination from Employment dated April 24, 2009, advising Ms. Dunaway that he intended to recommend to the School Board her suspension without pay and termination of employment at the May 6, 2009, School Board meeting.

19. Article II, Section M of the collective bargaining agreement governs the discipline of employees. Article II, Section M of the collective bargaining agreement provides in pertinent part:

1. Without the consent of the employee and the Association, disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.

2. All disciplinary action shall be governed by applicable statutes and provisions of this Agreement. . . .

\* \* \*

5. Only previous disciplinary actions which are a part of the employee's personnel file or which are a matter of record as provided in paragraph # 7 below may be cited.

6. Where just cause warrants such disciplinary action(s) and in keeping with provisions of this Section, and employee may be reprimanded verbally, reprimanded in writing, suspended without pay or dismissed upon the recommendation of the immediate supervisor to the Superintendent. Other disciplinary action(s) may be taken with the mutual agreement of the parties.

7. Except in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee



constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered as follows:

a. Verbal Reprimand With A Written Notation . . .

b. Written Reprimand - A written reprimand may be issued to an employee when appropriate in keeping with this Section. Such written reprimand shall be dated and signed by the giver and the receiver of the reprimand and shall be filed in the affected employee's personnel file in keeping with provisions of Article II, Section B of this Agreement.

c. Suspension Without Pay . . .

d. Dismissal - An employee may be dismissed (employment contract terminated or non-renewed) when appropriate in keeping with the provisions of this Section, including just cause and applicable laws.

#### Summary

20. Based upon a consideration of all of the evidence presented, the proof is sufficient to establish with the requisite degree of certainty that, under the circumstance of this case, the School Board's decision to terminate Ms. Dunaway conforms to the progressive discipline provisions in Article II, Section M 7., of the collective bargaining agreement. Ms. Dunaway's action in ingesting large quantities of cocaine that remained in her system when she reported for work demonstrates a flagrant disregard of the School Board's policy of ensuring a drug-free workplace, a policy with which

Ms. Dunaway was familiar as a result of the written reprimand she received in 2007 for her first violation of the policy. Ms. Dunaway's testimony that she did not ingest cocaine after Friday, February 13, 2009, is rejected as not credible. The drug test was administered on Thursday, February 19, 2009, and, given that cocaine is entirely dissipated from the human body within four days, Ms. Dunaway would have tested negative for cocaine if she had not ingested any of the drug since the previous Friday, six days, prior to the drug test. In order to test positive for cocaine on Thursday, Ms. Dunaway must have ingested cocaine on Monday, a school holiday, and she could have ingested cocaine at any time between Monday and Thursday.

21. Ms. Dunaway attributed the positive test result for benzodiazepine to the Xanax she had taken to calm her anxiety about a dental appointment she had in the afternoon of Tuesday, February 17, 2009. According to Ms. Dunaway, she took the Xanax before lunch and, after realizing that her speech was slurred, remembered nothing more about the afternoon. Ms. Dunaway may have had a dental appointment on Tuesday afternoon, and she may have taken Xanax at school, but it is clear from the context of her testimony that Ms. Dunaway was referring to a lapse in memory that occurred on the day on which the drug test was administered, that is, on Thursday, February 19, 2009.

22. The inconsistencies in Ms. Dunaway's version of the events surrounding her ingestion of cocaine and Xanax undermine the credibility of her testimony as a whole and make it difficult to credit her claim that she was not under the influence of cocaine on the day of her drug test. Even if her version of events is credited, the fact remains that she tested positive for cocaine and for benzodiazepine on Thursday, February 19, 2009. Regardless of whether her condition on that day was the result of the cocaine in her system or of the Xanax in her system or of the combination of drugs, it is reasonable to infer that her presence in a third-grade classroom when she was so impaired that she had no recollection of being there constituted a real and present danger to the students in her class.

#### CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

24. The School Board seeks to terminate Ms. Dunaway's employment as a teacher as a disciplinary measure. Pursuant to Article 11, Section M 1., of the collective bargaining agreement, the School Board must prove by clear and convincing evidence that it has just cause to take disciplinary action

against Ms. Dunaway, and it must prove that the penalty of termination is appropriate under the collective bargaining agreement.

25. Section 1012.33, Florida Statutes, sets out the grounds on which instructional personnel on professional service contracts may be disciplined and provides in pertinent part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

\* \* \*

(6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4) [employees under continuing contracts], may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee

must, within 15 days after receipt of the written notice, submit a written request for a hearing.

26. The only charge made by the School Board against Ms. Dunaway that constitutes "just cause" for suspension or dismissal pursuant to Section 1012.33(1)(a) and (6)(a) is "misconduct in office." "Misconduct in office" is defined in Florida Administrative Code Rule 6B-4.009(3) "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."

27. In paragraph 42 of the Respondent's Proposed Recommended Order, Ms. Dunaway concedes that "[b]y testing positive for cocaine, she committed misconduct in office, as defined by Fla. Admin. Code (FAC) Rule 6B-4.009." Ms. Dunaway is willing to accept as a disciplinary action suspension without pay, but she takes the position that the termination of her employment with the School Board for her second violation of School Board Policy 3.96, Drug- and Alcohol-Free Workplace, is not in accordance with the schedule of progressive discipline established in the collective bargaining agreement.

28. Article 11, Section M 7., of the collective bargaining agreement governing the School Board's discipline of employees

provides two exceptions to the requirement that the School Board follow the progression of discipline set out in that section. In accordance with the collective bargaining agreement, the School Board can deviate from the progressive discipline guidelines when the actions of an employee "clearly constitute a real and immediate danger to the District" or when the actions of an employee "constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations."

29. School Board Policy 3.96 was enacted to carry out the Legislature's stated intent in Sections 112.0455, 440.101, and 440.102, Florida Statutes, that employees in the State of Florida shall be drug-free and alcohol-free in the workplace. It is a reasonable rule that prohibits a person from reporting to work or remaining at work while under the influence of drugs or alcohol. Based on the findings of fact herein, Ms. Dunaway presented a real and immediate danger to her students on Thursday, February 19, 2009, and was in flagrant disregard of School Board Policy 3.96 after having been warned in the Written Reprimand issued April 18, 2007, that a second violation of that policy would "result in a disciplinary recommendation for your termination of employment with the School District of Palm Beach County." The School Board may terminate Ms. Dunaway's employment; the collective bargaining agreement permits the School Board to progress immediately to dismissal when the

teacher's conduct, as here, poses a real and immediate danger to the students for whom the District is responsible and constitutes a flagrant and purposeful violation of School Board Policy 3.96.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Palm Beach County, Florida, enter a final order sustaining the suspension of Debra Dunaway without pay and terminating her employment.

DONE AND ENTERED this 29th day of January, 2010, in Tallahassee, Leon County, Florida.



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PATRICIA M. HART  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of January, 2010.

ENDNOTES

<sup>1/</sup> References herein to the Florida Statutes shall be to the 2008 edition unless otherwise indicated.

<sup>2/</sup> Transcript at page 77. Although Ms. Dunaway provided this information during the School Board's direct examination of Dr. Taulh, Ms. Dunaway had previously been placed under oath and her remarks are part of the evidentiary record of this case.

COPIES FURNISHED:

Matthew E. Haynes, Esquire  
Johnson, Haynes & Miller, P.A.  
241 Almyra Drive  
Lake Mary, Florida 32746

Vicki L. Evans-Pare, Esquire  
Palm Beach County School Board  
Post Office Box 19239  
West Palm Beach, Florida 33416-9239

Jeffrey Scott Sirmons, Esquire  
Johnson, Haynes, & Miller  
510 Vonderburg Drive, Suite 305  
Brandon, Florida 33511

Dr. Arthur C. Johnson, Superintendent  
Palm Beach County School Board  
3340 Forest Hill Boulevard, C316  
West Palm Beach, Florida 33406-5869

Dr. Eric J. Smith, Commissioner  
Department of Education  
Turlington Building, Suite 1514  
325 West Gaines Street  
Tallahassee, Florida 32399-0400

Deborah K. Kearney, General Counsel  
Department of Education  
Turlington Building, Suite 1244  
325 West Gaines Street  
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.