

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SARASOTA COUNTY SCHOOL BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-3557
	)	
BRIAN BERRY,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

A formal hearing was held in this matter before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings (DOAH) on November 20, 2009, by video teleconference between Sarasota, Florida, and Tallahassee, Florida.

APPEARANCES

For Petitioner: Hunter W. Carroll, Esquire  
Matthews, Eastmoore, Hardy  
Crauwels & Garcia, P.A.  
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Sarasota, Florida 34236

For Respondent: Brian Berry, pro se  
6409 Glen Abbey Lane  
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STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent's employment as a teacher, for alleged violations of various

School Board rules and policies, as outlined in the Superintendent's letter to Respondent, dated June 15, 2009.

PRELIMINARY STATEMENT

By certified letter, the Superintendent of Sarasota County School District notified Respondent that probable cause existed to terminate Respondent's employment and that a recommendation to that effect would be made to Petitioner. Respondent timely filed a request challenging the decision to terminate his employment, and this matter was referred to DOAH for a formal hearing.

Prior to final hearing, Petitioner and Respondent executed two separate stipulations. At the final hearing, the undersigned confirmed that Respondent did admit each of the stipulations. With Respondent's affirmative response, official recognition of these stipulations was taken. These stipulations constitute findings of fact which have been incorporated into this Recommended Order.

At the final hearing, Petitioner called five witnesses: Aisha Holmes, a former teacher at Booker Middle School (the "School"); Cindy Lowery, the Exceptional Student Education ("ESE") liaison at the School; Chaniqueva Collins, an aid at the School; Joe Bzenas, the principal at the School; and LaTonya Brooks, a former teacher at the School. Petitioner offered Exhibits 1-11, including all subparts of each exhibit, each of

which, including all subparts, were received into evidence. Respondent testified on his own behalf and called two other witnesses: Patricia Goodwin, a teacher at the School, and Jo Anne Townsend, the director of human resources for the Sarasota County School District (the "District"). Respondent's Exhibits 1 and 2 were admitted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH on December 11, 2009. Petitioner and Respondent timely filed their Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is the School Board of Sarasota County, the entity responsible for operating, monitoring, staffing, and maintaining the public schools within Sarasota County, in accordance with Part II, Chapter 1001, Florida Statutes (2009). The School is a middle school operated by Petitioner.

2. Petitioner employed Respondent, Brian Berry, as a teacher at the School for several years. Respondent taught students with ESE designation. Respondent is an "instructional employee" under the Instructional Bargaining Unit Collective Bargaining Agreement between the Sarasota Classified/Teachers Association ("Union"), and Petitioner (July 1, 2006 - June 30, 2009, for the 2008-2009 year)(the "Collective Bargaining

Agreement"). Article XXV of the Collective Bargaining Agreement governs disciplinary actions against teachers, including Respondent.

3. The Collective Bargaining Agreement requires there to be just cause for any discipline. Normally, the following progressive discipline steps are administered: (1) verbal reprimand; (2) written reprimand; (3) suspension and, (4) termination. Following progressive discipline is not required "in cases that constitute a real immediate danger to the district or other flagrant violations."

4. During the 2008-2009 school year, Respondent's classroom was one of four classrooms arranged in a quadrant fashion around a center internal office that connects the four classrooms to each other. Respondent's room was in the southwest quadrant. Holmes had the room in the northwest quadrant. Brooks had the room in the southeast quadrant. Like Respondent, Holmes and Brooks taught ESE students. Brooks and Respondent shared a paraprofessional, Collins.

5. Bzenas became the School's principal in April 2006, and has been its principal since that time.

6. Before resorting to the progressive discipline system, School administration routinely counsel employees on an informal basis when there is a concern. Generally, the counseling occurs as a conversation between the administrator and instructor.

This informal counseling is non-punitive. Administrators also use Memorandums of Instruction to clarify expectations. A Memorandum of Instruction is also non-punitive in nature; however, failing to abide by the expectation contained in a Memorandum of Instruction could warrant discipline.

7. Respondent's prior disciplinary history includes:

- a. Verbal Reprimand, dated December 17, 2007, for failing to monitor students.
- b. Verbal Reprimand, dated January 19, 2009, for failing to submit student attendance on 39 occasions during the 2008-2009 school year through January 6, 2009.
- c. Written Reprimand, dated January 20, 2009, for failing to follow three separate Memorandums of Instruction concerning posting student attendance and for failing to report student attendance on January 7, 2009.

#### Individual Education Plans

8. During the 2008-2009 school year, Respondent was the case manager responsible for drafting Individual Education Plans ("IEPs") for several of his students. Under federal law, IEPs must be updated at least once each year. Failing to update an IEP by the time the prior IEP becomes out of date means such IEP is out of compliance. This jeopardizes ESE funding, which comes from state and federal sources.

9. During the 2008-2009 school year, there was an ESE liaison (Cindy Lowery) at the School who routinely and timely

reminded case managers, including Respondent, of their IEP responsibilities, important deadlines, and steps necessary to be taken by the case manager. At the beginning of the school year, Lowery explained the procedures to case managers, including Respondent. Respondent received numerous reminders prior to the expiration of each IEP for which he was responsible. The expectations relating to IEP completion were clear and known to case managers, including Respondent, at all relevant times.

10. At all times during the 2008-2009 school year prior to his being placed on administrative leave on March 17, 2009, Respondent had the ability to complete in a timely manner each IEP for which he was responsible. He also had access to all materials and assistance necessary to timely complete each of the IEPs.

11. During school year 2008-2009, Respondent was the case manager and responsible for the IEPs of students A.M. (due 11/27/08; completed 12/1/08); J.G. (due 1/17/09; completed 2/25/09); U.S. (due 1/17/09; completed 2/25/09); J.C. (due 2/20/09; completed 2/25/09); N.C. (due 3/3/09; not completed prior to date Respondent was placed on administrative leave on March 17, 2009); B.B. (due 3/11/09; not completed prior to date Respondent was placed on administrative leave on March 17, 2009).

## Reporting Attendance

12. Teachers are required to take classroom attendance each period and timely post that attendance into the School's computer program that tracks attendance. This expectation is contained in the School's staff handbook, which is developed and reviewed annually by a shared-decision making team, composed of administrators, teachers, and community members. Reporting attendance each period is a safety and security matter. Reporting attendance also assists with accountability for funding purposes.

13. During the 2008-2009 school year prior to being placed on administrative leave on March 17, 2009, Respondent failed to report attendance in at least one period on: August 20, 21, 25, 26, 27, 29; September 3, 4, 9 - 12, 15, 16, 22, 26, 30; October 1, 3, 7 - 9, 15, 16, 22, 23, 28, 29; November 6, 7, 12, 18, 20, 21, 25; December 4, 5, 10; January 6, 7; February 19, 24; and March 3, 4, 10, 13, and 16. In all but six of those dates, Respondent failed to report attendance for multiple periods.

14. On October 20, 2008, November 24, 2008, and January 7, 2009, administrators at the School provided Respondent with Memorandums of Instruction reminding Respondent of the need to submit attendance electronically each period.

## FCAT Proctoring

15. On March 10 and 11, 2009, the FCAT was administered at the School. Respondent was assigned to proctor students who were permitted testing accommodations. Some permitted accommodations included extended testing time and having proctors read questions. Testing of these students occurred in the School's media center. Another ESE teacher, Aisha Holmes, was also assigned to proctor similar students.

16. Proctors were instructed that they needed to sign-in and sign-out upon entering and leaving the media center; that they could not engage in personal reading; and that they needed to actively supervise the students at all times.

17. A preponderance of evidence supports the finding that Respondent engaged in the following activities contrary to his duties as proctor:

- a. Over the two-day proctoring session, Respondent failed to sign-in and sign-out every time that he took a break.
- b. Respondent engaged in personal reading and other non-proctoring activities when he was required to be actively proctoring the FCAT.
- c. Respondent stood over student S.L.'s shoulder for a time period exceeding two minutes. While Respondent contends that he was trying to determine if S.L. had finished, S.L. had not finished.



Respondent's actions were intimidating to S.L.

d. On the second testing day, Respondent fell asleep on a couch in the media center for a period of time when he should have been actively proctoring. Respondent snored, causing a disturbance to the students engaged in testing activities. While the length of time Respondent slept was in dispute, the evidence demonstrates that it was considerably longer than a brief moment as advanced by Respondent.

e. On the second day of testing, a student spilled juice on that student's reference sheet. Respondent placed the reference sheet in the microwave but did not monitor the drying process. The microwave scorched the reference sheet, resulting in a burnt smell invading the testing area and causing another disturbance to the students engaged in testing activities.

#### Use of Video with No Learning Objective in Place

18. In February 2009, Respondent showed the movie "Happy Feet" to his class. He concedes that he had no learning objective in mind in showing this video. Although Respondent explained that in his opinion, no learning could be accomplished that day due to the death of a co-teacher's fiancé, Respondent conceded that he requested no assistance in addressing this situation despite such assistance being available to him.

#### Lesson Plans

19. Teachers are required to prepare lesson plans at least one week in advance. Teachers are also required to have the

lesson plan on their desk and available for review. The lesson plan expectations are contained in the School's staff handbook.

20. The lesson plans are the guiding document for instruction, which requires teachers to give forethought as to the content of their lessons. It is used by teachers to focus their lessons, by administrators to ensure content aligns with teaching objectives, and by substitutes in the absence of the teacher.

21. It is undisputed that the School's administration repeatedly counseled Respondent to create and have lesson plans available.

22. Respondent failed to have lesson plans completed and available for the week of October 6, November 17, and December 15, 2008, and January 5, January 20 and February 2, 2009.

February 3, 2009 Weingarten Hearing

23. On February 3, 2009, Bzenas and Respondent met in a formal, noticed meeting to discuss Respondent's failure to complete IEPs for Students J.G. and U.S. That meeting also addressed Respondent's continued failure to comply with school policy on maintaining lesson plans. It is undisputed that Respondent failed to timely complete the IEPs for students J.G. and U.S., and that he failed to comply with the lesson plan requirement.

March 16, 2009 Weingarten Hearing

24. On the afternoon of Monday, March 16, 2009, Bzenas and Respondent and others met in a formal, noticed meeting to discuss: (1) Respondent's failure to complete IEPs for students N.C. and B.B. prior to their IEPs becoming out of compliance; (2) the FCAT proctoring matters; (3) use of the video "Happy Feet" with no learning objective; (4) continued failure to comply with the lesson plan expectation; (5) tardiness on March 9, and March 10, 2009; and (6) use of the girls' restroom.<sup>1</sup>

25. It is undisputed that Respondent failed to complete the IEPs for students N.C. and B.B. in a timely manner, and that he used the video "Happy Feet" with no learning objective in place. During the meeting, Bzenas presented Respondent with the summary of Holmes' observations of Respondent's conduct while proctoring the FCAT. Respondent conceded that he was inattentive at times during FCAT proctoring and did fall asleep for some period of time during the FCAT, although he disputes it was for 45 minutes.

March 17, 2009, Confrontation

26. On the morning of Tuesday, March 17, 2009, Respondent entered Holmes' classroom to "discuss" Holmes' summary of her observations of Respondent during the FCAT. A student, whom Holmes was tutoring, was present in Holmes' room at the time. Holmes was uncomfortable with Respondent's insistence on

discussing the FCAT matter at that time in front of the student. Holmes advised Respondent that she would talk to him later. Respondent, however, persisted in continuing his challenge to Holmes' FCAT proctoring observations in front of the student.

27. At that point, Bzenas entered Holmes's room. Bzenas observed that the situation was "tense" and that Holmes was backed into a corner of the room. Bzenas also observed that the student that was present looked very uncomfortable.

28. At that point, Bzenas, in a reasonable voice, requested that Respondent return to his own classroom to supervise his students. Respondent immediately became upset and began yelling at Bzenas, telling Bzenas not to interrupt him. Respondent approached him and pointed his finger in Bzenas' face.

29. At that time, Collins was in Brooks' room. Collins heard shouting coming from the direction of Holmes' room. Collins proceeded into the center office of the quad. She observed Respondent shouting at Bzenas that he was a "liar" and that Respondent would see Bzenas "in court." Collins did not hear Bzenas raise his voice. Collins was fearful of Respondent; she had never seen Respondent act in that way. She also testified that Bzenas looked fearful of Respondent.

30. Respondent then proceeded into his classroom and Bzenas followed Respondent into the classroom. He put himself

between Respondent and his students, permitting Collins to remove the students from Respondent's classroom, taking them into Brooks' classroom.

31. Respondent continued with his emotional outburst during this time. When Bzenas requested that Respondent leave campus immediately, Respondent threatened Bzenas. Bzenas subjectively believed that Respondent's agitated behavior and his statement to be a threat of violence. Respondent also directed inappropriate comments to his students about Bzenas during his outburst.

32. As Collins brought Respondent's students into Brooks' classroom, Collins was shaking and looked very fearful. After all of Respondent's students were in Brooks' classroom, Brooks locked the doors. Locking the doors is an unusual occurrence; however, Respondent did leave campus voluntarily.

33. Respondent was immediately placed on administrative leave. Shortly thereafter, a police officer went to Respondent's house to advise Respondent to stay away from campus. Respondent complied with the request.

34. Respondent's outburst on March 17, 2009, constituted a real and immediate threat to the School administration, teachers and students and was a flagrant violation of school policies and the State Principles of Professional Conduct.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction over the parties and the subject matter of these proceedings, pursuant to Section 120.569 and Subsections 120.57(1), and 1012.33(6)(a), Florida Statutes (2008).<sup>2</sup>

36. A teacher is an "instructional employee" as defined by Subsection 1012.01(2), Florida Statutes.

37. The District's superintendent has the authority to recommend to Petitioner that instructional employees be suspended or terminated from employment. See § 1012.27(5), Fla. Stat. Petitioner has the authority to suspend or terminate instructional employees. See § 1012.22(1)(f), Fla. Stat.

38. The standard for termination of a member of the instructional staff subject to an annual or continuing contract is just cause, including, but not limited to, misconduct in office. § 1012.33(1)(a), Fla. Stat. Just cause for discipline, up to and including termination, is not limited to the list of offensive conduct set forth in Section 1012.33, Florida Statutes. Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2d DCA 1994) (applying Section 231.36, Florida Statutes, since renumbered as Section 1012.33, Florida Statutes).

39. Misconduct in office "is defined as a violation of the Code of Ethics of the Education Profession as adopted in Florida Administrative Code Rule 6B-1.001(3), and the Principles of

Professional Conduct for the Education Profession in Florida as adopted in [Florida Administrative Code] Rule 6B-1006." See Fla. Admin. Code R. 6B-4.009(3).

40. Instructional personnel can only be disciplined for "just cause." See Collective Bargaining Agreement, Art. XXV, A.2. Specifically, this provision provides that "[d]isciplinary action may not be taken against a teacher except for just cause, and this must be substantiated by sufficient evidence which supports the recommended disciplinary action."

41. "Just cause for discipline is a reason which is rationally and logically related to an employee's conduct in the performance of the employee's job duties and which is concerned with inefficiency, delinquency, poor leadership, lack of role modeling or misconduct." Lee County School Board v. Hall, Case No. 08-5409, paragraph 40 (DOAH June 29, 2009), citing State ex rel. Hathaway v. Smith, 35 So. 2d 650 (Fla. 1948); see also Brevard County School Board v. Sylvester Jones, Case No. 06-1033 (DOAH June 30, 2006) (Recommended Order adopted in toto).

42. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent committed the acts alleged in the Superintendent's letter, dated June 15, 2009, and the reasonableness of the proposed disciplinary action. See McNeill v. Pinellas County

School Board, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Ferris v. Austin, 487 So. 2d 1163 (Fla. 5th DCA 1986).

43. Petitioner established by a preponderance of evidence that Respondent committed a flagrant violation within the meaning of the Collective Bargaining Agreement by threatening violence to Bzenas. Without resorting to the District's progressive discipline system, this threat of violence justifies the termination of Respondent from employment. See Hillsborough Community College v. Dismuke, Case No. 98-0199 (DOAH July 13, 1998), 1998 WL 866182 (a threat of violence is grounds for termination even where, under progressive discipline, termination is not the next discipline step). The comments made by Respondent were a serious and flagrant contravention to proper moral standards. As such, they violated the Code of Ethics of the Education Profession in Florida. See Department of Education, Education Practices Commission v. Ferrell, 10 FALR 4279 (1988).

44. As to Respondent's conduct and comments as alleged herein, the evidence has proven, by a preponderance of evidence, a violation of the Principles of Professional Conduct for the Education Profession in Florida. His conduct and comments to the principal in front of his class, unduly and unnecessarily exposed all of his students to embarrassment and/or disparagement. It further created an atmosphere that was



harmful to learning and placed in jeopardy the students' mental health and safety. See Fla. Admin. Code R. 6B-1.006.

45. Even if Respondent had not engaged in the March 17, 2009, confrontation, he would still be liable for suspension and/or termination under the District's progressive discipline system, as discussed below.

46. Petitioner established by a preponderance of evidence that Respondent engaged in the conduct discussed during the February 3, 2009, meeting, which warrants progressive discipline; that Respondent failed to complete IEPs for students J.G. and U.S.; and that Respondent failed to adhere to the lesson plan expectations. Because Respondent had already received a written reprimand under progressive discipline, these acts, even if considered separately, would have resulted in a suspension recommendation.

47. Petitioner established by a preponderance of the evidence that Respondent engaged in certain conduct discussed during the March 16, 2009, meeting, which warrants progressive discipline. Specifically, Petitioner demonstrated that Respondent failed to complete IEPs for students N.C. and B.B. Respondent had 28 days and 36 days from the date of the February 3, 2009, meeting to complete these IEPs for N.C. and B.B., respectively, where Respondent again was counseled on the need to complete IEPs timely. Additionally, Petitioner

demonstrated that Respondent's actions and omissions during FCAT proctoring constituted actionable misconduct. Finally, Petitioner demonstrated that Respondent's use of a video with no learning objective constituted actionable misconduct. These violations discussed during the March 16, 2009, meeting, each independently would serve as grounds for suspension and/or termination under progressive discipline.

48. Additionally, Respondent's actions on March 17, 2009, constitute misconduct which taken separately would serve as further grounds for termination under progressive discipline.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Sarasota County School Board enter a final order terminating the employment of Respondent from the date Respondent was placed on unpaid leave of absence.

DONE AND ENTERED this 27th day of January, 2010, in  
Tallahassee, Leon County, Florida.



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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of January, 2010.

ENDNOTES

- <sup>1/</sup> Petitioner has not pursued Respondent's tardiness or alleged use of the girls bathroom in this proceeding.
- <sup>2/</sup> All statutory references are to Florida Statutes (2008), unless otherwise noted.

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.