

09-15-10P03:39 FILE

**BEFORE THE SCHOOL BOARD
OF MANATEE COUNTY, FLORIDA**



AGENCY CLERK
SCHOOL BOARD OF MANATEE COUNTY

MANATEE COUNTY SCHOOL BOARD,

Petitioner/Employer,

vs.

DOAH: Case No. 09-5880

LAUREL DAVIS,

Respondent/Employee.

_____ /

**FINAL ORDER
APPROVING RECOMMENDED ORDER**

THIS CAUSE, having come before the School Board of Manatee County, Florida, on September 13, 2010, for final action on the RECOMMENDED ORDER of the Administrative Law Judge, Daniel M. Kilbride, dated August 19, 2010, and the Board, having reviewed and considered the entire record, hereby adopts the RECOMMENDED ORDER as the Board's Final Order and incorporates such order fully herein by reference.

DONE AND ENTERED this 15th day of September, 2010, in Bradenton, Manatee County, Florida.


Jane Pfeilsticker, Chair

- COPIES FURNISHED:
- Erin Jackson, Esq.
- Scott Martin, Esq.
- Melissa C. Mihok, Esq.
- Brian Ussery, Esq.
- Payroll Department
- Personnel Department
- Risk Management
- Technology Service Desk
- Computer Information Specialist

NOTICE

All parties have the right of judicial review of this Order in accordance with section 120.68, Florida Statutes. In order to appeal, a party must file a notice of appeal with Lyn Lego, the Agency Clerk of the School Board of Manatee County, Florida, at 215 Manatee Avenue West, Bradenton, Florida 34205, within thirty (30) days of the rendition of this order and must also file a copy of the notice, accompanied by filing fees, with the Clerk of the Second District Court of Appeal, 1005 East Memorial Blvd., Lakeland, Florida 33801, telephone number (863)499-2290. Review proceedings shall be conducted in accordance with the Florida Appellate Rules, and specifically, Rule 9.110 of such Florida Appellate Rules.

08-24-10A11:02 FILE

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS



AGENCY CLERK
SCHOOL BOARD OF MANATEE COUNTY

MANATEE COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.)
)
LAUREL DAVIS,)
)
Respondent.)
_____)

Case No. 09-5880

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on May 10 and 11, 2010, in Bradenton, Florida.

APPEARANCES

For Petitioner: Brian Ussery, Esquire
Erin G. Jackson, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
Post Office Box 639
Tampa, Florida 33602

For Respondent: Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate Respondent's employment with Petitioner due to unsatisfactory performance in

accordance with Subsection 1012.34(3)(d), Florida Statutes (2009).¹

PRELIMINARY STATEMENT

By a charging letter, dated October 13, 2009, Superintendent Tim McGonegal notified Respondent, Laurel Davis, that he was recommending the termination of her employment with Petitioner, Manatee County School Board, pursuant to Subsection 1012.34(3)(d)2.b., Florida Statutes. Respondent timely requested an administrative hearing. Thereafter, this matter was transferred to the Division of Administrative Hearings to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses and had Exhibits 1 through 25 admitted into evidence. Respondent presented the testimony of four witnesses, testified on her own behalf, and presented the Deposition Transcript of Megan Murray in lieu of live testimony. Respondent had Exhibits 1 through 19, 22 through 25, and 27 through 29 admitted into evidence.

A Transcript of the hearing was filed on May 27, 2010. Both parties timely filed Proposed Recommended Orders on June 14, 2010. Each of the parties' proposals has been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the duly-authorized entity responsible for providing public education in Manatee County, Florida.

2. Respondent is employed as a teacher by the Petitioner, pursuant to a professional services contract. At the beginning of the 2007-2008 school year, Respondent began working as a sixth-grade mathematics teacher at Buffalo Creek Middle School (Buffalo Creek). The principal of Buffalo Creek was Scott Cooper (Cooper). During the 2007-2008 school year, Janet Roland (Roland) was the assistant principal at Buffalo Creek.

3. In or around December 2007, Respondent met with Cooper to discuss a parent telephone call. Cooper received a complaint from a parent about the grade the parent's child received in Respondent's class. During the meeting, Cooper asked Respondent to detail her grading system. Respondent informed Cooper that she used a point system and explained how the system was beneficial to the students in her class, most of whom were below grade level and did not test well.

4. During the meeting in December 2007, Cooper logged into Respondent's Pinnacle account in her presence and changed the weighting of her grades in various ways to see how the change would affect the students' grades. Respondent did not agree to weight her grades and continued to use a point system.

5. Later in December, Respondent noticed that some of her grades were changed. She did not tell anyone of the alterations, but merely changed the grades back to be accurate. However, Respondent noticed that her grades were changed a second time and contacted the Manatee County School District's (District) grade book administrator, Don Taylor (Taylor), out of concern. Taylor looked into the matter and, eventually, referred it to the District's Office of Professional Standards, which conducted an investigation. The result of the investigation, which concluded in or around July 2008, showed that Cooper logged into Respondent's Pinnacle account, without her knowledge or consent, and altered many of her grades.

6. Cooper was responsible for counseling teachers regarding performance issues. He walked through Respondent's class every two-to-four weeks, but did not discuss with Respondent any other alleged performance deficiencies during the 2007-2008 school year.

7. Cooper was found guilty of misconduct by the District and was given a letter of reprimand. Cooper was soon thereafter demoted to a teaching position. During the first week of school of the 2009-2010 school year, Cooper apologized to Respondent for altering her grades.

8. Prior to becoming employed at Buffalo Creek, Respondent taught language arts at Lincoln Middle School (Lincoln). During

her tenure at Lincoln, Respondent received all positive evaluations and was not informed of any perceived deficiencies in her performance.

9. During the 2008-2009 school year, Petitioner adopted the Manatee Core Curriculum (MCC) as a standardized curriculum to be implemented in the District's four core subjects: math, language arts, social studies, and science. The MCC aimed to promote a consistent curriculum among the schools within the District, many of whom serve a transient population. The MCC is composed of prescribed units of study intended to promote student achievement of specific educational benchmarks, which are established by the state and assessed through statewide FCAT testing. Each unit is prescribed a specific duration of study to ensure that all units are covered during the course of the academic calendar and to ensure that the students are provided an opportunity to learn the skills and information required for promotion to the next grade level. In addition to traditional assessments such as homework, quizzes, and tests, students are required to complete a Unit Performance Assessment (UPA) at the end of each unit to assess progress and understanding of the covered concepts.

10. Petitioner has also adopted a standardized grade book, called Pinnacle, which all teachers in the District are required to maintain. Pinnacle is a computerized grade book system, in

which teachers are required to enter all grades, assignments, and assessments provided to the students during the school year. Pinnacle can be accessed by both parents and administrators and was adopted by Petitioner as a means of communicating students' progress to parents by providing instant and up to date access to their students' grading history throughout the various stages of the MCC. The main benefit of Pinnacle is that it provides both teachers and parents a tool for identifying, in a timely manner, those students who may be having difficulties achieving the benchmarks evaluated by the MCC. Teachers are required to enter all of the students' assessments in a timely manner in order to maintain an accurate and up-to-date picture of the students' progress. District policy does not require weighting, but does require that grades be input into Pinnacle. Petitioner's expectation is that teachers enter grades within two weeks of a given assessment. Thus, Pinnacle became a source of communication between parents and teachers.

11. Unfortunately, very few of the parents of Petitioner's teachers requested a username, and other identifiers, and, thus, did not have access to the tool.

12. During the 2008-2009 school year, Petitioner employed Respondent, under a professional services contract, as a sixth-grade mathematics teacher at Buffalo Creek. The principal of Buffalo Creek during the 2008-2009 school year continued to be

Cooper, and the newly-appointed assistant principal was Sharon Scarbrough (Scarbrough). Scarbrough was assigned the responsibility of evaluating the performance of certain teachers, including Respondent. Respondent was included in Scarbrough's responsibility in order to avoid the appearance of impropriety.

13. During the first quarter of the 2008-2009 school year, Scarbrough identified certain issues relating to Respondent's performance, including the inordinately high failure rate among students in Respondent's class. Several parents requested the transfer of their students out of Respondent's class due to concerns that the students were not learning.

14. In grading her students, Respondent assigned different point values to each type of student assessment. Tests and UPAs were worth 100 points each, quizzes were worth 50 points each, and homework was worth ten points. As a teacher, Respondent had discretion as to how many tests and quizzes to administer, as well as how much homework she assigned and what point value to assign each assessment.

15. UPAs are project-based assessments given at the end of each unit of the MCC. UPAs are required by the MCC.

16. Respondent generally assigned homework to her students two or three times a week. When the students returned to class, they would grade their own homework for accuracy, while

Respondent went over the answers on an overhead (ELMO) projector. Respondent required that the students redo the problems that they got wrong on the homework while they were reviewing it. The students then passed the homework forward to Respondent, who would grade the homework for effort, and would eventually log the grades in Pinnacle. Only the students who completely failed to complete the assignment were given a zero.

17. In addition to Pinnacle, Respondent communicated with the parents of her students through an agenda (initialed daily by Respondent and parents), progress reports, grading their own homework, and grade reports sent home every couple of weeks for parents' signature.

18. All teachers at Buffalo Creek are required to prepare and have available for inspection, on the Friday before the next week, weekly lesson plans. They are critical not only as an established agenda to assist the teacher in maintaining pace with the MCC, but also as a mechanism to assist the administration in identifying those teachers who are not maintaining the required pace.

19. Scarbrough noted that Respondent was not submitting lesson plans in a timely fashion. Scarbrough engaged Respondent in informal conversations concerning these issues on at least three occasions in the fall of 2008. Respondent admitted to turning in her lesson plans late on occasions, but explained

that she was always prepared for class and that she kept more detailed plans in her own lesson plan book.

20. During this same time period, Petitioner's mathematics curriculum specialist, Joseph McNaughton (McNaughton), noted that Respondent had fallen well behind the pace for instruction established by the MCC. The MCC prescribed ten units of curriculum to be covered in sixth-grade math classes at set times during the school year. By the end of the first quarter, Respondent had completed only one of the ten units and had fallen 25 to 30 days behind the instructional pace established by the MCC. Respondent explained that she was behind in the curriculum due to the fact that: (1) it was her second year teaching math, (2) it was the first year of the MCC, (3) the unit itself included many components, and (4) many of her students lacked the requisite basic skills to comprehend the lesson.

21. On October 28, 2008, Scarbrough held a formal conference with Respondent, identifying various concerns with Respondent's performance and addressing her expectations for improvement. Scarbrough noted that Respondent submitted untimely lesson plans eight of the ten weeks and informed Respondent that she was expected to submit her lesson plans the Friday before the week's lessons are taught. Scarbrough addressed the fact that Respondent only completed Unit 1 of the

MCC during the first quarter and that Respondent was well behind the required pace of instruction. McNaughton was asked to assist Respondent in getting caught up with the curriculum. Respondent expressed a concern to McNaughton that the students did not possess the requisite knowledge coming in from fifth grade to complete the unit.

22. Scarbrough noted various omissions and inconsistencies in Respondent's Pinnacle grade book entries and informed Respondent of the expectation that her grade book be timely and accurately maintained. Respondent admitted to failing to input the grades of approximately 23 students who had recently transferred to her class. However, she explained that the failure to input the grades was due to the failure of the original teachers to give the grades to Respondent, despite her repeated requests for the information.

23. Scarbrough noted that 59 percent of Respondent's students received a "D" or "F" for the first quarter, which Scarbrough characterized as "an excessively high number of students not being successful" in comparison with other sixth-grade classes. Many of the students receiving failing, or near failing, grades in Respondent's class were successful in their other subjects. Respondent admitted that she occasionally failed to comply with the District's policy requiring teachers to input grades within two weeks of the assessment, but she

generally adhered to the policy. Further, teachers often used an X or Z to represent grades not assigned a numeric value in their grade books. Respondent explained to Scarbrough that in certain reports, the X or Z did not print and appeared to be blank.

24. Scarbrough noted that Respondent had failed to enter a grade for Unit 1, which was a requirement of the MCC. Respondent administered the UPA Unit 1 during the last week of the first quarter and input the grades into Pinnacle. Scarbrough also informed Respondent that grading and record-keeping are essential to basic teacher skills. Respondent denied having 59 percent of her students receiving a "D" or "F" in her class. She explained that the grades were inaccurate, due, at least in part, to the lack of transfer grades from the other teachers.

25. As a result of these concerns, Scarbrough issued Respondent a formal notice of return to documentation, dated October 28, 2008. Documentation is a procedure utilized by Petitioner to allow administration to formally observe its professional service contract employees at a date and time determined by the employee and to draft performance evaluations. The purpose of observing Respondent was to identify the root cause of her performance issues, so that Scarbrough could assist Respondent to improve upon them. Respondent understood that she

was being placed on documentation due to the issues outlined in the letter, dated October 28, 2008, from Scarbrough. She began an attempt to remedy the perceived deficiencies immediately by working with two resource teachers. Respondent also amended her policy of not accepting late work from students in an effort to boost the students' grades. She also put together a packet of work and sent it home with the students over winter break, conducted an academic "boot camp," asked administration to meet with parents, and asked Scarbrough to send out an automated telephone message to parents to make them aware of the makeup work. In addition, Respondent input her grades into Pinnacle in a timely manner.

26. Petitioner also provided Respondent professional development coaching with Specialist Amy Booth (Booth), who was hired by Petitioner to assist instructional staff with various issues relating to grade book maintenance, organization, time management, and execution of daily lessons, and Peggy Wolfe (Wolfe), who was hired by the Manatee Education Association (MEA) for the same purpose. Upon Wolfe's request, Scarbrough agreed to delay formal observation of Respondent, until March of 2009, to allow Booth and Wolfe additional time to assist Respondent in improving her performance issues before being formally observed.

27. Petitioner also provided Respondent the opportunity to work directly with McNaughton to develop strategies and techniques for maintaining the instructional pace required by the MCC. McNaughton assisted Respondent in making revisions to the MCC in an effort to cover all the instructional units before the end of the school year.

28. McNaughton intended to present a "model lesson" to Respondent's classes while Respondent observed. The model lesson would provide Respondent the opportunity to observe beneficial instructional techniques demonstrated by McNaughton, while providing McNaughton an opportunity to assess whether any nuances existed within the classroom, or among Respondent's students, that might reveal the cause of the issues related to the instructional pacing and lack of student achievement.

29. At the request of Respondent, however, the model lesson was cancelled. Instead, Respondent accompanied McNaughton to another middle school within the District to observe another teacher present a lesson.

30. In January or February of 2009, Scarbrough conducted her first formal observation of Respondent. Students are assigned "bell work" at the start of each class, which is "start up" work for students to complete while the teacher performs administrative tasks such as attendance. Bell work assignments should typically take five-to-ten minutes to complete.

Respondent spent nearly half of the class period assisting her students complete bell work, which left only half of the class period for the scheduled instruction. Respondent did not complete the scheduled instruction.

31. On February 24, 2009, Cooper and Scarbrough held a formal conference with Respondent to discuss continued concerns with her performance. Respondent's Pinnacle grade book entries indicated that 66 percent (69/104) of the students in Respondent's combined classes were receiving an "F" at the time of third-quarter progress reports. Respondent's Pinnacle grade book entries also revealed that Respondent was not recording student assessments in a timely manner and that Respondent failed to enter grades of any type for the first half of the third quarter. Cooper and Scarbrough reiterated Petitioner's expectation that students' grades be entered within two weeks of a given assignment and that frequent and ongoing assessment of students' progress and timely feedback to students are essential components of effective teaching and vital for student learning. Cooper and Scarbrough also reiterated the expectation that lesson plans be submitted in a timely manner, as Respondent continued to fall short of this expectation.

32. On March 2, 2009, Scarbrough conducted another formal observation of Respondent. Scarbrough noted that Respondent was still well behind the required MCC pacing, despite McNaughton's

assistance and revision of the curriculum. Respondent's Pinnacle grade book entries demonstrated a lack of variety in the type of assessments utilized by Respondent to monitor students' progress and failure on the part of Respondent to record assessments in a timely manner. However, on the appraisal form, Scarbrough indicated that Respondent had successfully demonstrated each of the requisite areas, except Area 7, regarding using technology in instruction. Scarbrough marked they are "not yet demonstrated" due to a question as to how often Respondent entered her grades into Pinnacle.

33. On March 24, 2009, Scarbrough conducted a third formal observation of Respondent. Respondent took nearly the entire class period to review one problem and held the students after the end of class to assign homework. During their post-observation conference, Scarbrough emphasized the need for Respondent to utilize a lesson plan as a schedule of topics to cover to assist Respondent in maintaining pace with the MCC.

34. On March 25, 2009, Cooper issued Respondent a formal written reprimand for "failure to meet expectations for curriculum implementation, and for lack of adequate, timely and appropriate student assessment, and grade reporting." Respondent remained three units behind the pacing required to successfully complete the MCC by the end of the school year, which placed her students at risk of not acquiring the math

skills needed to advance to the next grade level. Respondent failed to record expected UPA grades in her Pinnacle grade book. Cooper reiterated that completion of a UPA for every unit is a "non-negotiable requirement for implementation of the [MCC]." Respondent failed to adequately assess student progress through tests and quizzes and continued to record grades in an untimely manner. Cooper stated that the high failure rate among students in Respondent's classes was directly related to these deficiencies and that further recurrence of the actions identified would result in further discipline.

35. On April 2, 2009, Scarbrough placed Respondent on a 90-day probation, due to unsatisfactory performance. Despite instruction and modification of the curriculum from McNaughton, Respondent failed to complete required UPAs and remained three units behind the pacing required by the MCC. Respondent demonstrated poor time management, lesson planning, and lesson execution, as evidenced by her observed inability to complete her daily lessons within the allotted class time and her failure to maintain pace with the MCC. Respondent performed little or no assessment of her students' progress during the third quarter through homework, quizzes, and tests, as evidenced by her Pinnacle grade book entries.

36. Respondent's students continued to receive an inordinate number of failing and nearly failing grades. In the

first quarter of the 2008-2009 school year, 59 percent of Respondent's students received a final grade of "D" or "F." In the second quarter of the 2008-2009 school year, 62 percent of Respondent's students received a final grade of "D" or "F." In the third quarter of the 2008-2009 school year, 47 percent of Respondent's students received a final grade of "D" or "F." The inordinate number of students failing to succeed was particularly troubling since Respondent's class load was the lowest on campus, and her class size average was the smallest in comparison to other core classes. Numerous parents indicated that Respondent was not keeping them adequately informed of students' progress and requested that their students be transferred from Respondent's class. Parents complained that Respondent failed to respond to telephone calls and e-mails in a timely manner.

37. Scarbrough provided Respondent written notice of these deficiencies and of the procedural requirements relating to the probationary period. Scarbrough also provided Respondent a Formal Improvement Notice, reiterating her performance deficiencies and expectations for improvement and identifying the assistance available to her, including continued coaching and instruction from Booth, Wolfe, and McNaughton. Scarbrough met with Respondent, Booth, and Wolfe to formulate strategies for Respondent's continued evaluation.

38. On April 24, 2009, Scarbrough conducted a fourth formal observation of Respondent. Respondent again took nearly half of class to complete bell work and utilized only minimal time for actual instruction. Scarbrough noted in her post-observation conference that Respondent needed to reduce/eliminate this time management issue. Respondent also failed to maintain her Pinnacle grade book entries in a timely manner.

39. On May 20, 2009, Scarbrough conducted a fifth formal observation of Respondent. Respondent failed to continue to adequately assess students' progress and to provide a variety of assessments, as evidenced by the fact that she had given only one quiz and completed only one UPA at the time of the observation. Respondent continued to enter assessments in her Pinnacle grade book in an untimely manner and failed to enter any grade for UPA Unit 7. Respondent continued to submit her lesson plans in an untimely manner.

40. Scarbrough observed Respondent on May 20, 2009, and made notations on the teacher appraisal form. After this observation, Scarbrough marked Respondent demonstrated all of the requisite areas aside from Areas 10 and 14, regarding demonstrating improvement in students' performance through assessment and adhering to the Code of Ethics and Principles of Professional Conduct, respectively. Scarbrough felt Respondent

did not demonstrate Area 10, because Respondent had administered only one quiz and one UPA in a month, and the quiz grades were not entered into Pinnacle timely. Scarbrough marked Respondent deficient in Area 14, because she did not turn in all of her lesson plans in a timely manner.

41. On June 2, 2009, Scarbrough completed the Teacher Performance Appraisal Feedback Summary Form, summarizing Respondent's performance during probation. Scarbrough found that Respondent demonstrated all areas with the exception of Areas 10 and 14. She noted that Respondent still has some areas to improve upon such as lesson planning, assessments, and grading. Scarbrough gave her opinion that Respondent had not improved upon her identified deficiencies and that her performance remained unsatisfactory.

42. However, on cross-examination, Scarbrough reluctantly agreed that Respondent did improve in many areas outlined in the probation notice, including proper use of daily agenda and bell work. The number of "D's" and "F's" in Respondent's classes decreased. Scarbrough also admitted that Respondent completed the MCC by the end of the year, without skipping any units. She also admitted that after receiving only two complaints from teachers whose classrooms were located a far distance from Respondent, she spoke to Respondent about letting her students out on time, and the situation was remedied. Scarbrough

admitted that she did not compare the amount of assessments administered by other sixth-grade mathematic teachers when deciding that Respondent did not administer enough tests or quizzes.

43. Effective August 18, 2009, Respondent voluntarily transferred to Electa Lee Magnet Middle School (Electa Lee), upon the retirement of another teacher. Respondent received approval for transfer up the chain of command to the superintendant.

44. The law provides that a teacher who holds a professional services contract may request a transfer to another appropriate position with a different supervising administrator; however, a transfer does not extend the period for correcting performance deficiencies.

45. In light of Respondent's transfer, Scarbrough met with Scot Boice (Boice), principal of Electa Lee, and Darcy Hopko (Hopko), Petitioner's director of Human Resources, to review Respondent's performance issues, the process associated with the statutory probationary period, and the deadline for the end of probation. Teachers were required to report for the 2009-2010 school year on August 18, 2009. At the meeting, Scarbrough, Boice, and Hopko determined that Respondent's probation expired on September 19, 2010. When Respondent transferred to Electa Lee, she had completed 58 of the 90 days' probation. He also

reviewed only the letter placing Respondent on probation. He did not review her personnel file or other relevant documents.

46. Boice assigned Respondent a position as a sixth-grade math teacher at Electa Lee. On August 25, 2009, Boice and Electa Lee Assistant Principal Wally Hunter met with Respondent to discuss her continued formal observation and the remaining probationary process.

47. On September 3, 2009, Boice again met Respondent to schedule her formal observation. Respondent chose September 10, 2009, at 1:30 p.m., as the date and time for Boice to observe her.

48. Prior to the September 10, 2009, formal observation, Boice did a few walkthroughs of Respondent's classroom, but never for more than five minutes.

49. On September 10, 2009, Boice conducted his formal observation of Respondent. Boice noted that Respondent took 26 minutes to complete administrative tasks and to assign bell work at the start of class. Respondent did not begin the scheduled lesson until the final ten minutes of class. Boice also observed Respondent releasing students from class late, because they were unable to complete the lesson during the allotted class time.

50. Boice was unable to sufficiently observe some of Respondent's identified performance deficiencies due to the

limited time Respondent worked at Electa Lee prior to the end of her probation. For example, Boice was not able to sufficiently observe the manner, variety, and adequacy of the assessment tools used by Respondent to evaluate student progress, such as homework, quizzes, and tests. Respondent had not yet completed UPA Unit 1 at the time of the formal observation. Respondent provided Boice, as an example of her assessment of the students, a short, handwritten quiz composed of only four or five questions. Boice determined that the quiz was not adequate, but did not give her an opportunity to correct the problem.

51. Boice was also unable to sufficiently observe Respondent's performance in communication with parents, including her timely maintenance of the Pinnacle grade book. Boice informed Respondent that training on proper use of technology in assessment of students, including Pinnacle training, would be provided to all staff at Electa Lee during in-service on September 25, 2009, six days after the 90-day probationary period ended.

52. Despite her prior observed deficiencies, during her probation, in the area of Pinnacle, Respondent failed to attend the in-service training. However, Respondent also failed to schedule her absence in advance, but stated that she was on campus that day, but did not have access to a computer, so she did not attend the in-service.

53. On October 1, 2009, Scarbrough and Boice authored a letter to the superintendent of schools, detailing Respondent's continued unsatisfactory performance. Based on their combined observations and assessments, Scarbrough and Boice concluded that Respondent was still not competent in planning, implementing, and presenting effective lessons and communicating effectively with parents.

54. On October 13, 2009, the superintendent recommended the termination of Respondent's employment pursuant to Subsection 1012.34(3)(d), Florida Statutes.

55. In the letter to the superintendent, Boice and Scarbrough relied almost exclusively on Respondent's past performance, in coming to the conclusion that Respondent had not satisfactorily corrected her performance deficiencies. The reasons cited in the letter were those identified in the initial April 2, 2009, probation letter, including lesson planning, students' assessment, instruction/presentation of subject matter, and communication. The basis for purported deficiencies was Respondent's behavior at Buffalo Creek and, to a much lesser degree, the short observations while Respondent was at Electa Lee.

56. Boice conducted a single observation of Respondent, of less than one class period, on September 10, 2009. Boice took notes regarding the observation on a Teacher Performance

Appraisal Feedback Summary Form and provided a copy of that form to Respondent at a meeting the following day. Boice marked that Respondent had demonstrated four of the 14 areas and that she did not demonstrate three areas. Boice felt he did not have enough information in the short time he observed Respondent to form an opinion as to the other seven areas.

57. Boice marked that Respondent did not demonstrate Area 1 because the bell work her students completed took a long time to complete, due, in part, to the fact that Respondent walked up and down the aisles to initial the students' agendas. Boice also marked Respondent deficient in Area 7, regarding using technology in instruction, because she only employed the use of an ELMO and Pinnacle. Finally, Boice marked Respondent as not having demonstrated knowledge and enthusiasm for the subject matter based upon his understanding that she told a student that she did not know how to complete a problem.

58. At the meeting with Boice to discuss his notes regarding the observation, Respondent told Boice that she believes she promotes the students' independent development and learning and that she is extremely enthusiastic about math. Respondent denied having told a student that she did not know how to complete a problem, but explained that she told the class she would calculate an answer and have it for them in the next class period. Respondent further explained that she used an

ELMO and Pinnacle during the class and that she did not have computers present in the classroom to use other types of technology. While working at Electa Lee, Respondent received only one parent concern. After a parent-teacher conference, the parent appeared satisfied. Respondent requested that Boice observe her for a second time, but Boice declined and indicated that they were on a timeline.

59. The administrators at Buffalo Creek and Electa Lee had never put any other teacher on performance probation other than Respondent. Cooper and Roland each testified that they did not believe Respondent was incompetent during the 2007-2008 school year. Cooper stated that during his walkthroughs during the 2008-2009 school year, he did not witness any behavior by Respondent that made him feel she was ineffective or having any problems. McNaughton also testified that he did not observe any behavior by Respondent that would lead him to believe she was incompetent or ineffective.

60. The District expected the FCAT math scores of sixth-grade students to be lower after implementation of the MCC. Students at Electa Lee in 2008-2009 followed that pattern, and their scores were lower than the previous years' scores. The summaries provided by the District showed that the number of students ranked at a level one, who were in fifth grade in 2008, increased by 13 percent by the time they took the FCAT in 2009.

Also, the number of students in that same group who were ranked at level four decreased 11 percent during that same time.

Further, the Student Dashboard reports showed that overall, Respondent's students at Eletra Lee were improving their math FCAT scores from the previous year (comparing previous FCAT scores to first-quarter benchmark scores).

61. Many other teachers turned their lesson plans in late while working at Buffalo Creek. Further, Respondent did not teach any advanced classes during 2008-2009 or 2009-2010 school years. Of all of Respondent's students during the 2008-2009 school year, she had two students who were ranked at a level four on a scale of one to five. The rest of the students were ranked at a three or lower.

62. Other mathematics teachers in the District fell behind during the first year of the MCC, including every mathematics teacher at Electa Lee. Pacing, although it was described as "suggestive," was treated as mandatory to Respondent.

63. The purpose of performance probation is to allow a teacher an opportunity, through coaching and other assistance, to remedy any performance deficiencies.

64. At the hearing, under cross-examination, Boice testified that he had no problem with Respondent inputting grades or otherwise using the Pinnacle online grade book. Boice also testified that Respondent's grade distribution was

acceptable and that he did not have a problem with her not having her lesson plans complete in a timely manner.

65. Respondent weighted her grades while working at Electa Lee. The Grade History Verification report dated September 1, 2009, shows that ten of 80, or 12 percent, of Respondent's students were earning a "D" or "F" at that point.

66. Boice testified that Respondent did not have any problems in her assessment of students and that Respondent was not having trouble keeping up with the MCC during her time at Electa Lee. In general, Boice found that Respondent's grading and recordkeeping were acceptable. He also found that Respondent was working within the guidelines of the UPA Unit 1 and the MCC.

67. Boice did not consider extending the probationary period to allow Respondent an opportunity to establish that she had remedied all of the perceived deficiencies in her performance. Instead, he deferred to the information provided to him by Scarbrough for the prior year and related Respondent's present performance in August and September 2009 to her past performance at Buffalo Creek. This was clearly wrong. Respondent appeared to have made significant progress in remedying her performance deficiencies. Boice's conduct short-circuited that progress and did not permit a thorough observation to be complete before recommending termination.

CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57 and Subsection 1012.34(3), Florida Statutes.

69. In accordance with the provisions of Article IX, Subsection 4(b), Florida Constitution, and Chapter 1001, Florida Statutes, district school boards have the authority to operate, control, and supervise all free public schools in their respective districts. A school board's authority extends to personnel matters and includes the power to suspend and dismiss employees. §§ 1001.32(2), 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat. Pursuant to Subsections 1012.22(1)(f) and 1012.40(2)(c), Florida Statutes, a school board has the authority to terminate or suspend school personnel without pay and benefits.

70. Under Subsection 1012.34(3)(d), Florida Statutes, a school board has the authority, upon recommendation by the district school superintendent, to terminate the employment of an employee holding a professional service contract for failure to correct unsatisfactory performance within the 90-day probation period prescribed by statute.

71. When an employee contests a superintendent's recommendation of dismissal, the ensuing hearing must be

conducted in accordance with Chapter 120, Florida Statutes. § 1012.34(3)(d)2.b.(II), Fla. Stat. A Chapter 120, Florida Statutes, proceeding entails a de novo hearing intended to 'formulate final agency action, not to review action taken earlier and preliminarily.' Young v. Department of Community Affairs, 625 So. 2d 831, 833 (Fla. 1993), quoting McDonald v. Department of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Thus, Petitioner's burden was to persuade the undersigned Administrative Law Judge to find, independently, that Respondent's performance was deficient. Compare: Miami-Dade County School Board v. Rojas, Case No. 05-0942 (DOAH July 29, 2005), and Miami-Dade County School Board v. Escalona, Case No. 04-1654 (DOAH November 23, 2004), 2004 WL 2683123, *8 (Fla. Div. Admin. Hrgs. 2004); See generally Haines v. Department of Children and Families, 983 So. 2d 602, 606-607 (Fla. 5th DCA 2008).

72. The burden of proof applicable to this proceeding is preponderance of the evidence. Pinellas County School Board v. Brown, Case No. 08-3985 (DOAH January 23, 2009); Miami-Dade County School Board v. Gomez, Case No. 04-2335 (DOAH October 29, 2004). A "preponderance of the evidence" is the "greater weight of the evidence," or evidence that more likely than not tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 N.1 (Fla. 2000).

73. Because the statutes and rules providing the grounds for the termination of a teacher's employment are penal in nature, they must be construed in favor of the employee.

Rosario v. Burk; 605 So. 2d 523, 524 (Fla. 2d DCA 1992); Lester v. Dept. of Professional & Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

74. Subsections 1012.34(3)(a) through (c), Florida Statutes, provide for the pertinent methodology for teacher performance assessment and evaluation to be followed by local school districts. Subsection 1012.34(3)(d), Florida Statutes, provides for the manner of notice of performance deficiencies for instructional personnel, opportunities for corrective action for a probationary period, and hearing procedures for contesting performance-related issues. Subsection 1012.34(3)(d)2.b.(II), Florida Statutes, provides proceedings before an Administrative Law Judge in accordance with Section 120.569 and Subsection 120.57(1), Florida Statutes, in the event a recommendation for termination of a contract is disputed.

75. Section 1012.34, Florida Statutes, states, in relevant part:

(1) For the purpose of improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures for assessing the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel

employed by the school district. The Department of Education must approve each district's instructional personnel assessment system.

* * *

(3) The assessment procedure for instructional personnel and school administrators must be primarily based on the performance of students assigned to their classrooms or schools, as appropriate. Pursuant to this section, a school district's performance assessment is not limited to basing unsatisfactory performance of instructional personnel and school administrators upon student performance, but may include other criteria approved to assess instructional personnel and school administrators' performance, or any combination of student performance and other approved criteria. The procedures must comply with, but are not limited to, the following requirements:

(a) An assessment must be conducted for each employee at least once a year. The assessment must be based upon sound educational principles and contemporary research in effective educational practices. The assessment must primarily use data and indicators of improvement in student performance assessed annually as specified in s. 1008.22 and may consider results of peer reviews in evaluating the employee's performance. Student performance must be measured by state assessments required under s. 1008.22 and by local assessments for subjects and grade levels not measured by the state assessment program. The assessment criteria must include, but are not limited to, indicators that relate to the following:

1. Performance of students.
2. Ability to maintain appropriate discipline.

3. Knowledge of subject matter. The district school board shall make special provisions for evaluating teachers who are assigned to teach out-of-field.
 4. Ability to plan and deliver instruction and the use of technology in the classroom.
 5. Ability to evaluate instructional needs.
 6. Ability to establish and maintain a positive collaborative relationship with students' families to increase student achievement.
 7. Other professional competencies, responsibilities, and requirements as established by rules of the State Board of Education and policies of the district school board.
- (b) All personnel must be fully informed of the criteria and procedures associated with the assessment process before the assessment takes place.
- (c) The individual responsible for supervising the employee must assess the employee's performance. The evaluator must submit a written report of the assessment to the district school superintendent for the purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the assessment takes place. The evaluator must discuss the written report of assessment with the employee. The employee shall have the right to initiate a written response to the assessment, and the response shall become a permanent attachment to his or her personnel file.
- (d) If an employee is not performing his or her duties in a satisfactory manner, the evaluator shall notify the employee in writing of such determination. The notice must describe such unsatisfactory

performance and include notice of the following procedural requirements:

1. Upon delivery of a notice of unsatisfactory performance, the evaluator must confer with the employee, make recommendations with respect to specific areas of unsatisfactory performance, and provide assistance in helping to correct deficiencies within a prescribed period of time.

2.a. If the employee holds a professional service contract as provided in s. 1012.33, the employee shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, a transfer does not extend the period for correcting performance deficiencies.

b. Within 14 days after the close of the 90 calendar days, the evaluator must assess whether the performance deficiencies have been corrected and forward a recommendation to the district school superintendent. Within 14 days after receiving the evaluator's recommendation, the district school superintendent must notify the employee who holds a professional service contract in writing whether the performance deficiencies have been satisfactorily

corrected and whether the district school superintendent will recommend that the district school board continue or terminate his or her employment contract. If the employee wishes to contest the district school superintendent's recommendation, the employee must, within 15 days after receipt of the district school superintendent's recommendation, submit a written request for a hearing. The hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

(I) A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of ss. 120.569 and 120.57. A majority vote of the membership of the district school board shall be required to sustain the district school superintendent's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment; or

(II) A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

(4) The district school superintendent shall notify the department of any instructional personnel who receive two consecutive unsatisfactory evaluations and

who have been given written notice by the district that their employment is being terminated or is not being renewed or that the district school board intends to terminate, or not renew, their employment. The department shall conduct an investigation to determine whether action shall be taken against the certificate holder pursuant to s. 1012.795(1)(c).

(5) The district school superintendent shall develop a mechanism for evaluating the effective use of assessment criteria and evaluation procedures by administrators who are assigned responsibility for evaluating the performance of instructional personnel. The use of the assessment and evaluation procedures shall be considered as part of the annual assessment of the administrator's performance. The system must include a mechanism to give parents and teachers an opportunity to provide input into the administrator's performance assessment, when appropriate.

76. Petitioner has demonstrated by a preponderance of the evidence that it has complied with the procedural requirements of Subsection 1012.34(3)(d), Florida Statutes, but for the conclusion of the process.

77. Following assessment of her performance, Scarbrough notified Respondent in writing, dated April 2, 2009, that she was not performing her duties in a satisfactory manner. Scarbrough issued Respondent a formal improvement notice and conferred with her to identify the assistance available to assist Respondent in correcting her performance deficiencies within a prescribed period of time. Petitioner provided Respondent the opportunity for assistance and support

contemplated by the statutes, and Scarbrough observed and evaluated Respondent periodically and apprised her of progress achieved.

78. In accordance with the statutes, Petitioner permitted Respondent to voluntarily transfer to an identical position at Electa Lee under the supervision of Boice. Respondent transferred on her own free will; however, Subsection 1012.34(3)(d), Florida Statutes, makes clear that an employee's voluntary transfer does not extend the probationary period. Respondent was only employed at Electa Lee under Boice's supervision for 32 days prior to the end of her probationary period. Boice continued to observe Respondent and apprise her of progress achieved.

79. Within 14 days of the end of the probationary period, Boice, with the help of Scarbrough, informed the superintendent that Respondent failed to correct certain performance deficiencies that were identified. Within 14 days after receiving the report, the superintendent notified Respondent, in writing, of his recommendation that her employment be terminated under the statutes.

80. However, the authority to make the determination of whether performance deficiencies have been corrected is vested in the administrator conducting the observations at, or near, the end of the probationary period. Section 1012.34, Florida

Statutes, contemplates subjectivity in the evaluator's determination, because it requires the superintendent to notify the employee in the event that the deficiencies have not been "satisfactorily" corrected. In other words, the deficiencies must be corrected to the "satisfaction" of the evaluator. So long as the assessment criteria relate to the indicators listed in the statutes (i.e. student performance, student discipline, knowledge of the assigned subject matter, ability to plan and deliver instruction, the use of technology in the classroom, ability to evaluate instructional needs and to establish and maintain a positive collaborative relationship with students' families to increase student achievement, or other professional competencies), an unsatisfactory performance determination is justified. Pinellas County School Board v. Brown, Case No. 08-3985 (DOAH January 19, 2009).

81. However, in this case, the evidence was inconclusive that Respondent failed to improve her unsatisfactory performance related to planning and effective delivery of instruction.

82. The evidence was inconclusive that Respondent failed to improve her unsatisfactory performance related to her ability to evaluate instructional needs through appropriate assessment of the students' performance. Boice did not observe whether Respondent failed to provide adequate and varied assessment of

the students through homework, quizzes, and tests, and whether Respondent failed to complete UPAs required under the MCC.

83. The evidence was inconclusive that Respondent failed to improve her unsatisfactory performance related to her ability to establish and maintain a positive collaborative relationship with the students' families to increase the students' achievement.

84. Boice testified reluctantly that Respondent did, in fact, remedy a great majority of the issues cited in the probation notice. The few issues that were not remedied are minor, not sufficient to establish cause for termination of Respondent's employment. Unfortunately, Boice did not rely on his own observations of Respondent. He relied too heavily on Scarbrough's appraisals of Respondent and did not form his own.

85. Further, the District must make the FCAT scores of Respondent's students the primary consideration when evaluating her performance. Young v. Palm Beach County School Board, 968 So. 2d 38, 39 (Fla. 4th DCA 2006); Sherrod v. Palm Beach County School Board, 963 So. 2d 251, 252 (Fla. 4th DCA 2006). The FCAT data shows that Respondent's students were making forward progress and increasing their FCAT scores at the same time the district-wide scores of sixth-grade math students generally declined. The absence of evidence from Petitioner that Respondent's students were scoring lower on the FCAT or similar

local assessments prohibits the District from dismissing Respondent based upon performance concerns. Young v. Palm Beach County School Board, supra.

RECOMMENDATION

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

RECOMMENDED that the Manatee County School Board enter a final order that: (a) finds that Petitioner has not proven that Respondent has not satisfactorily corrected the performance deficiencies noted against her; that, (b) Respondent's contract be reinstated; and that (c) Respondent be awarded back salary, plus benefits, to the extent these accrued during the suspension period.

DONE AND ENTERED this 19th day of August, 2010, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of August, 2010.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2009), unless otherwise noted.

COPIES FURNISHED:

Melissa C. Mihok, Esquire
Kelly & McKee, P.A.
1718 East Seventh Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

Brian Ussery, Esquire
Erin G. Jackson, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
Post Office Box 639
Tampa, Florida 33602

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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

Tim McGonegal, Superintendent
Manatee County School Board
215 Manatee Avenue, West
Bradenton, Florida 34206-9069

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.