

with School Board policies authorizing adverse employment action for incompetence, failure to perform the duties of his position, insubordination, and harassment of coworkers and students.

PRELIMINARY STATEMENT

By Request for Approval (ID #2271) dated February 23, 2010, the Superintendent proposed to Petitioner the dismissal of Respondent on the grounds stated immediately above.

On March 9, 2010, Respondent filed a written request for a hearing. On March 16, 2010, the hearing was set for April 23, 2010. On March 22, 2010, the parties filed a Joint Motion to Continue Hearing and Change Hearing Location. Both sides stated that they needed additional time to prepare and offered June 16 or June 17, 2010, as available dates. By Order entered March 30, 2010, the Administrative Law Judge granted the joint motion and reset the final hearing for June 16, 2010. On June 8, 2010, the Administrative Law Judge issued an Amended Notice of Hearing extending the hearing to a second day, June 17.

On June 14, 2010, the parties filed a Pre-Hearing Stipulation restating the grounds for dismissal contained in the Request for Approval. As stated in the Pre-Hearing Stipulation, the grounds for dismissal are:

1. Whether Respondent corrected the performance deficiencies identified by his evaluator and, if not, whether the

superintendent's recommendation of termination under Section 1012.34, Florida Statutes, should be upheld.

2. Whether Respondent has failed to meet minimum performance expectations or otherwise failed to discharge the required duties of his position and, if not, whether such failure warrants dismissal under School Board Policy 3140(A)9.

3. Whether Respondent has discharged the required duties of his position and, if not, whether such failure warrants dismissal under School Board Policy 3140(A)9.a.

4. Whether Respondent corrected the performance deficiencies previously identified and, if not, whether such failure warrants dismissal under School Board Policy 3140(A)19.

5. Whether Respondent failed to obey directives given to him by his supervisors and, if so, whether dismissal is warranted under School Board Policy 3140(A)20.

6. Whether Respondent's harassed coworkers and students and, if so, whether such harassment warrants dismissal under School Board Policy 3140(A)12.

7. Whether Respondent's continued performance deficiencies constitute "just cause" for termination under Section 1012.33, Florida Statutes.

At the hearing, Petitioner called 19 witnesses and offered into evidence 29 exhibits: Petitioner Exhibits 1-29.

Respondent called no witnesses and offered into evidence five exhibits: Respondent Exhibits 1-5. All exhibits were admitted

except Petitioner Exhibit 27.a, which Petitioner did not offer into evidence.

The court reporter filed the transcript on July 8, 2010. The parties filed proposed recommended orders by July 23, 2010.

FINDINGS OF FACT

1. Petitioner hired Respondent as a substitute teacher in August 2002 and as a regular teacher in December 2002. During the 2002-03 school year, Respondent worked at Rawlings Elementary School. The record contains little about Respondent's teaching at Rawlings Elementary School except that, on April 26, 2005, Petitioner assigned Respondent a professional service contract.

2. Starting in the 2006-07 school year, Respondent was assigned to teach at Pinellas Park Middle School. He taught sixth grade science, math, and geography during his three years at Pinellas Park.

3. While at Pinellas Park, Respondent decided that administrators were underreporting student discipline problems at the school. Respondent had met the then-superintendent while shadowing him for a graduate class in education leadership that Respondent had taken. Believing that he had a special relationship with the superintendent, Respondent informed staff at Pinellas Park that he intended to notify the superintendent of unspecified "shady practices" at their school. The present

record does not support a finding of a special relationship between Respondent and the then-superintendent or "shady practices" at Pinellas Park.

4. On the other hand, the record supports a finding that Respondent's performance at Pinellas Park was barely acceptable. On a scale of 1-4, with 1 the lowest acceptable score, Respondent earned a 1 his first year and a 2 his second year at Pinellas Park. In his third year, he did not earn even a 1 and received an unsatisfactory evaluation.

5. As Respondent notes in his Proposed Recommended Order, these evaluations at Pinellas Park are flawed by a failure to incorporate meaningful information about student performance. Even so, Respondent's performance at Pinellas Park was marked by ineffective classroom teaching, repeated failures to respond to parents' communications, disorganization, and poor attendance at meetings. The record portrays a disturbing lack of insight by Respondent into his problems, although this is partially attributable to the failure of the administrators at Pinellas Park to deal competently with the task of teacher assessment. In a particularly painful moment, the assistant principal at Pinellas who assumed primary responsibility for evaluating Respondent admitted that the second-year evaluation was more an act of encouragement than honest evaluation.

6. Respondent lacked insight into his professional shortcomings. For the 2007-08 and 2008-09 school years, for instance, the Pinellas Park principal had to insist, over Respondent's objections, that he refrain from taking on coaching duties, so he could focus on his teaching duties. Respondent also ignored a suggestion that he obtain assistance from the district's professional development program.

7. The first day of the 2008-09 school year, Respondent appeared mid-day, missing a number of important meetings, and "explained" that he did not know when school started for teachers. As the year progressed, Respondent was late to school, missed class, failed to record grades correctly, appeared at parent conferences late and unprepared, and failed to respond timely to parents who tried to contact him. Although the principal found Respondent's classrooms to be satisfactory and that he had the "best intentions," she determined that Respondent could not overcome his lack of organization to perform the duties of teaching and failed to accept responsibility for his shortcomings.

8. By the end of Respondent's third year at Pinellas Park, due to Respondent's repeated disregard of his responsibilities at parent-teacher conferences, the principal had instructed her staff to document when Respondent missed a meeting, arrived

late, or was unprepared. Respondent chafed at this treatment, which he wrongly believed was unfair.

9. At one parent-teacher conference, Respondent told a guidance counselor that he knew what the principal and assistant principal were up to, although it was unclear what he meant. At another conference, two teachers arrived late--one with permission due to a conflict--and Respondent demanded that the guidance counselor include these teachers in her report to the principal documenting Respondent's longstanding problems with parent-teacher conferences.

10. The guidance counselor felt intimidated by Respondent's impolitic behavior and broke down in tears while telling the principal about Respondent's mistreatment of her. Three teachers who had attended one of the conferences reported the matter to Petitioner's Office of Professional Standards, which properly concluded that Respondent had not harassed the guidance counselor, but suggested that he "should" refrain from further contact with the three teachers for what little remained of the school year. Upon learning that he had been exonerated of harassment, Respondent sent a message to all of the teachers and staff, including those with whom he was directed to avoid contact, that the allegations "were proven to be untrue." For this, Respondent was reprimanded.

11. While the conclusory nature of the guidance counselor's testimony precludes a finding of harassment and the advisory language of the Office of Professional Standard's recommendation precludes a finding of insubordination, Respondent's announcement to the school teachers and staff betrays poor judgment and a remarkable lack of insight.

12. Respondent was involuntarily transferred to Seminole Middle School for the 2009-10 school year. Through counsel, as Respondent did not testify, Respondent claims that the new principal was biased against him, so as to deny him a fair chance to succeed at his new school. The principal denies this charge.

13. The Seminole principal assigned Respondent to honors classes. This act may have reflected confidence in Respondent, or it may have reflected the needs of the school for an honors teacher. It is not inconceivable that the principal, who presented himself as a capable, businesslike professional, may have assigned Respondent to the visible position of an honors-class teacher to raise the stakes and require Respondent either to teach or be fired. This does not constitute bias: after six and one-half years, Respondent should have been able to teach a middle-school honors science class. In the end, though, the charge of bias is irrelevant because, even if the Seminole principal had been assigned the task of doing what the

administration at Pinellas Park had failed to do--fire an incompetent teacher--Respondent provided the principal with ample reason to do so, as detailed below.

14. Respondent started off on two wrong feet. First, he missed the initial teachers' meeting and was late to a second, which was immediately prior to an open house that marked the start of the school year. At this meeting, the principal told the teachers to be positive and upbeat with the parents at the open house.

15. Respondent's second misstep was the open house itself. Badly misreading his audience and ignoring the advice of the principal, if Respondent were even aware of it, Respondent reduced his vision of the upcoming school year to one of the administration of firm, but fair, discipline. Despite the fact that Respondent was teaching an honors class, in which disciplinary issues were relatively few, and had little, if any, familiarity with his students, he warned the honors parents that they needed to discipline their children at home. When invited by a parent to discuss the scope of the curriculum for the eighth-grade science class, Respondent responded it would be broader than what was required--and quickly returned to his topic of choice, discipline. Lending his presentation what would otherwise have been an appealing specificity, had he been addressing academics, Respondent complained in particular about

students who loudly crumbled paper during class, denouncing this behavior for a full five minutes of his presentation.

16. As significant were the omissions from Respondent's open house presentation. Respondent never showed the parents a syllabus, because he did not have one, nor did he discuss the textbook, which he said he might not use. Haplessly, Respondent forged in the memory of the parents the unfortunate evening with two sound bites, as he assured them: "If you can teach in the Park [i.e., Pinellas Park Middle School], you can teach anywhere" and "If I can teach in the Park, I can put up with the crap here."

17. The parents in attendance at the open house were not assured. Some contacted the school to demand that the principal transfer their children to another class. Others thought that Respondent might have been nervous or had had a bad night. A broadly shared concern was that Respondent's students might not acquire the foundational information that they would need the next year for high school science.

18. Respondent's performance in class quickly lent credence to the more ominous of these concerns. He spent an inordinate amount of time--ranging from five minutes to the entire class period--discussing discipline and class rules. He hanged posters dealing with discipline and classroom behavior. Long after he had exhausted these topics, Respondent continued

to hector the students about behavior, down to how they were to walk into the classroom. Nothing in the record suggests that this emphasis on discipline was necessary or even reasonable. Respondent's obsession with classroom behavior was to avoid teaching.

19. Respondent engaged in other practices to avoid teaching. Many classes at Seminole begin with "bellwork," which is a brief assignment to be done at the start of class. Teachers use bellwork for a quick refresher of material previously covered. But Respondent used it for much longer periods of time--sometimes, nearly the entire class period--again, to avoid the necessity of teaching. For the same reason, Respondent relied excessively on classroom videos. The better of them focused on earth and space science, which, even though off-topic, as Respondent taught physical science--were at least informative. More frequently, Respondent played episodes of "Mythbusters," which is a television show that features scientific debunking of common beliefs. Perhaps appropriate as a one-time motivational device, "Mythbusters" instead was a time-waster for Respondent and his class.

20. Respondent assigned homework and tests, but his assignments were confused and confusing. Students turned in what they believed the assignments were, but Respondent routinely lost the work or returned it without a grade. Tests

were misadministered. Many times, Respondent revised the directions even after having given out the tests. Like the homework, tests were sometimes ungraded, misgraded, or lost.

21. Petitioner maintains a website called "Parent Connect." By this means, a parent tracks her child's academic progress through the course of a term, as the teacher uploads grades for each assignment and test. Many times, parents of Respondent's students found erroneous information, including ungraded assignments or tests that had been completed by the student, excessively low grades, or sometimes excessively high grades.

22. Many parents contacted the school with their concerns. The administration routinely referred these parents to the teacher, if they had not already spoken to the teacher, but it quickly became apparent that Respondent was not responding to parents' messages to contact them. The principal himself had to speak to Respondent on several occasions to tell him to get back with parents, but these directives had little effect.

23. In the critical area of parental communications, Respondent's pattern at Seminole conformed to his pattern at Pinellas Park. At both schools, Respondent routinely claimed that he had not received the phone or email message to contact a parent. When a parent succeeded in scheduling a conference,

Respondent often came late and almost invariably came unprepared.

24. In late September, the Seminole principal conducted a formal observation of Respondent--the first of three that he conducted for all teachers whom he evaluated. The principal found an unusually high number of areas that needed improvement. The principal found time-wasters, such as taking attendance without the use of a seating chart. The principal saw that Respondent failed to inform the class of the objective of each day's lesson. The principal watched Respondent conduct a lab that involved an appropriate subject--how much weight a bridge could hold--but was inappropriately simple because Respondent had obtained it from the sixth-grade science teacher, who had taught the same lab to the same students two years earlier.

25. Due to concerns raised by this observation, the principal claims that he looked into Respondent's background and learned that his concerns about Respondent were similar to concerns that the Pinellas Park principal had had the previous school year. The Seminole principal then placed Respondent on a 90-day probation period on September 28, 2009, with a "success plan" designed to help Respondent eliminate his various performance deficiencies.

26. From Respondent's perspective, his counsel argues, the principal acted too quickly, after only 20 class days, and this

is further evidence of his bias against Respondent. Again, it is unnecessary to determine such matters as whether the principal learned of Respondent's background after the first observation. Given Respondent's poor performance, the principal's actions were not hasty. From the students' perspective, 20 days is four weeks, or nearly ten percent, of the school year--a substantial period of time. From the principal's perspective, 20 class days is a long time to maintain a teacher who is not teaching, especially given his failings in responding to parental inquiries and complaints.

27. The day after Respondent was placed on probation, the district supervisor for secondary science, who is an experienced science teacher, observed Respondent. She found his class disorganized. Respondent was unable to find a test that one student had taken. He twice changed the directions, mid-stream, for an assignment, leaving at least two students obviously confused. The classroom walls were bereft of student work or subject-related materials. After class, the supervisor asked Respondent to show her his lesson plan, and he took her to the computer and showed her some ancillary materials tied to the textbook, not a lesson plan.

28. Later, the same supervisor informed all secondary science teachers to forward to her certain standardized testing

information by December 15. She did not receive the information from Respondent until January 6.

29. On October 2, the principal conducted a walkthrough, which is shorter and less structured than an observation. During this class, Respondent tried to hand out a test for the class to take, but he could not pull it off. At first, Respondent could not find the test. Then, one of the tests that he handed out had blank pages. The students became frustrated. Finally, Respondent said that he would not count the test, but would give them a new one the following Monday. On the appointed day, the principal walked through to see Respondent give the test, but instead found him conducting a review class.

30. On October 22, the principal conducted another walkthrough. He found Respondent preoccupied with a student who was sitting on his foot, which was not, according to the principal, a classroom-management issue with which Respondent should have been engaged. Despite having been told by the principal to do so, Respondent had not written on the board an objective for the day's class. Telling the class that they would be covering two key terms, Respondent wrote on the board three key terms.

31. The principal conducted another observation on October 28. He observed Respondent ask the students to take out graph paper, but had obviously failed to inform them in advance

that they needed graph paper for this class because no one had any. Respondent planned a good experiment showing a chocolate bar transition from solid to liquid under heat, but, after starting the experiment, failed to return to it by the end of class, demonstrating an inability to manage time in class.

32. The principal conducted another walkthrough on November 5 and found Respondent trying to hand out a test. Again, he could not find the test at first. When he handed tests out, students stated that they had not covered the material on the test. One student held her hand in the air for five minutes before Respondent recognized her and learned that he had not given her a test. By the time that Respondent had gotten tests to all of the students, there were only 15 minutes left in the class. At this point, the principal left.

33. On November 17, the principal conducted another walkthrough and found Respondent teaching a lesson without an objective posted on the board. Posing a question about distance, time, and speed, Respondent, unwittingly, posted the wrong answer from a student. Posing a second question, Respondent set up the formula incorrectly--a mistake pointed out by a student. After class, the principal asked Respondent about these mistakes, and Respondent said that he had been nervous because the principal had been in the classroom.

34. On December 1, the principal conducted another observation, which went better than the prior observations or walkthroughs, although Respondent had set the bar fairly low on these earlier occasions. One major problem, though, was that Respondent again failed to manage classroom time. The class featured student comments on the classroom material, but time ran out before Respondent could correct any erroneous comments, leaving the possibility that uncorrected comments might mislead the students.

35. On December 7, the principal conducted a walkthrough and found Respondent devoting 20 minutes to bellwork--an excessive amount of time to this teaching device.

36. On January 13, the principal conducted the final observation. On this date, Respondent returned a graded test to the students, but failed to review the material with the students or provide them with other feedback on the test.

37. All through the probationary period, the principal continued to receive negative comments from parents and students. Many of the complaints pertained to grades shown on Parent Connect. After analyzing the information for one student, the principal met with Respondent and found that he did not fully understand his own grading. One grade was obviously triple weighted, but, when asked why, Respondent acted as though he had not realized that the grade was triple weighted. In

another case, Respondent had assigned a student an A for homework based on her reputation, not the assignment, which Respondent had apparently mislaid. Discrepancies existed between Respondent's mid-term and final grades. The principal correctly determined that Respondent's grades contained many mistakes and were unreliable. Losing some of the homework and tests and unable to grade competently that which remained, Respondent resorted to assigning grades that were, at best, approximations, and, at worst, random.

38. Other parental complaints pertained more generally to the lack of instruction taking place in Respondent's classroom. One particularly poignant complaint involved a child who had secretly removed a workbook from the classroom, so she could self-teach and prepare herself for high school science. Many complaints were based on Respondent's failure to hand out textbooks. The principal repeatedly told him to do so and ensured that each student of a complaining parent in fact received a textbook. At no time did Respondent ever tell the principal that there were not enough textbooks, but, still receiving such complaints through mid-January, the principal finally commanded Respondent to follow through on this directive and ensure that each student received a textbook.

39. On January 19, the principal conducted the final evaluation of Respondent and found that he had not corrected the

performance deficiencies identified at the start of the probation period and, for a second consecutive year, had earned an unsatisfactory evaluation. By letter dated January 20, 2010, to the superintendent, the principal identified Respondent's deficiencies and recommended termination of his employment. Petitioner then proceeded with dismissing Respondent for the grounds stated above, including a failure to correct performance deficiencies.

40. There is one important feature that the 2009-10 evaluations at Seminole share with the three evaluations done at Pinellas Park--they are not based on measurements of student achievement. The Seminole principal at least tried to insert an element of student achievement by offering raw data of the results of a standardized test administered early in the 2009-10 school year, but the only point of comparison seems to be between the students in Respondent's class and the students in another science teacher's class. Petitioner offered no statistical interpretation of the raw data, so it is difficult to determine if the data show that the other teacher's students knew more than Respondent's students and, if so, why. Either way, these data fail to show the performance, over time, of Respondent's students, so as to provide an indication of Respondent's performance as a classroom teacher. Betraying a misunderstanding shared by the Pinellas Park assistant

principal, the Seminole principal felt that the ultimate burden was on the teacher to produce evidence of student performance, even though this burden in the ensuing dismissal proceeding based on student-performance deficits would be on Petitioner.

41. Although the Seminole principal failed to provide the capstone to Petitioner's case in the form of a lack of student performance, he did in terms of Respondent's utter lack of insight into his professional responsibilities and, more specifically, the seriousness of his situation during the probationary period. On January 22, the principal received an email from Respondent stating that he and the students would not be well served by a switch in teachers mid-year, agreeing to work with more experienced teachers on lesson plans, time-management skills and responding to parental concerns, and offering to "turn this around starting now." The principal had made these and other recommendations three months earlier, and Respondent's final chance to implement them and turn things around started then--not at the end of the probationary period.

42. This final lack of insight underscores the fact that, for four years, Respondent had continually failed to understand that he was underperforming as a teacher. When asked, the Pinellas Park assistant principal could not tell if he had been insubordinate or incompetent. The Seminole principal, who had nothing else favorable to report about Respondent, conceded that

he did not "fight" the principal during their interactions and was never insubordinate. After examining the record, it appears likely that Respondent lacks the insight necessary to form the defiance implicit in an act of insubordination. His failure to recognize his many shortcomings as a teacher, especially when coupled with his disorganization and apparent lack of effort or dedication, preclude subordination and insubordination alike.

43. As noted above, Petitioner failed to prove harassment or intimidation by Respondent at Pinellas Park. The only evidence of harassment at Seminole involves students in Respondent's class. The scant evidence on this point suggests that Respondent engaged in unseemly back-and-forth exchanges with some students, whom he could no longer control due to his failures at classroom management and instruction. However, these incidents were insubstantial and do not rise to the level of harassment or intimidation.

44. As discussed in the Conclusions of Law, Petitioner failed to prove a case of uncorrected performance deficiencies under Section 1012.34, Florida Statutes.

45. Petitioner has proved that Respondent is incompetent. It is impossible to devise a definition of incompetence that would exclude Respondent's performance during the 2009-10 school year, as well at least the preceding school year at Pinellas Park.

46. Petitioner has also proved that Respondent failed to perform the duties of his position. The professional duties of a classroom teacher are almost completely described by the following: preparing for class, teaching, managing the classroom and the clock, giving out homework and tests, grading students' work, maintaining and delivering the homework assignments, tests and grades, communicating with parents, and attending meetings with teachers and parents. During the 2009-10 school year, as well as at least the preceding school year at Pinellas Park, Respondent did not consistently perform any of these duties--and, most, if not all, of them, he routinely failed to perform.

47. Lastly, Petitioner has proved that it has just cause to dismiss Respondent for ongoing performance deficiencies. As recited in the preceding paragraph, for several years, Respondent demonstrated ongoing performance deficiencies that--even without the presence of corroborating evidence of student-performance deficits--constituted just cause for his dismissal due to the scope and depth of these deficiencies.

48. Through counsel, Respondent attempted to cast doubt upon his portrayal by students, parents, and administrators because of some sort of feedback loop in which each's dissatisfaction with Respondent reinforced the dissatisfaction of the others--implicitly without regard to the facts. This is

a case of an untalented teacher, who stumbled through his previous three years at another school, running into a buzzsaw of a no-nonsense principal, a core of involved parents, and a wide array of motivated students, some of whom may have seized on the relatively rare opportunity to flunk a teacher. (One schoolhouse lawyer among them even kept a folder that he marked, contemporaneous with the events described above, "evidence.") The result was regrettable for all concerned, including Respondent, who surely embarked on his teaching career in Pinellas County with high hopes for more success than he has experienced. Although mutual feedback may have resulted in some amplification of Respondent's shortcomings, it did not create them or substantially distort the ultimate findings--for which no contrary evidence exists--that Respondent was incompetent and failed to perform the duties of his position and that Petitioner has just cause to dismiss him due to his ongoing performance deficiencies.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1012.34(3)(d)2.b.(II), Fla. Stat. (2009).

50. Section 1012.33(1)(a), Florida Statutes, provides that Respondent's contract shall authorize dismissal during the term of the contract for "just cause." Section 1012.33(1)(a) defines

"just cause" to include "incompetency," "gross insubordination," and "willful neglect of duty."

51. Florida Administrative Code Rule S6B-4.009 defines "incompetency" and "gross insubordination," including "willful neglect of duty," as follows:

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational

background; or (4) lack of adequate command of his or her area of specialization.

* * *

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

52. Section 1012.34(3), Florida Statutes, authorizes the termination of contracts for the failure to correct performance deficiencies. Section 1012.34(1) and (2) requires each school district to develop assessment instruments for all teachers and administrators and establish procedures for school districts to follow in identifying a teacher's performance deficiencies and giving the teacher a chance to correct them. Section 1012.34(3) provides:

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.

* * *

53. Petitioner's Policy 3140(A) provides in relevant part:

The Superintendent retains the right and the responsibility to manage the work force. The School District generally follows a system of progressive discipline in dealing with deficiencies in employee work performance or conduct. Progressive discipline may include, but is not limited to, written counseling/conference summary, caution, reprimand, suspension without pay, and dismissal defined as follows:

A. Written Counseling/Conference Summary-- This is a written memorandum or letter memorializing an area of concern involving the performance or conduct of the employee. It is the first step in progressive discipline and is intended to counsel and advise the employee of best practices.

B. Letter of Caution--A letter of caution is given to an employee who has demonstrated problematic behavior or performance. It is the second step in progressive discipline and is intended to alert the employee that a problem has been identified and needs to be corrected.

C. Reprimand--A written reprimand is more serious than a caution. It is a formal censure or admonition given to an employee who has engaged in unacceptable behavior or demonstrated unacceptable performance.

D. Suspension Without Pay--A suspension without pay is the temporary release from duty of an employee for a stated number of calendar days without pay and applies when a violation or repetition of violations of policies, contractual provisions, laws, or District expectations are serious enough to warrant suspension.

E. Dismissal--This is the final step in progressive discipline and applies in cases where the employee misconduct is severe or in cases where the misconduct or unacceptable behavior or performance is repetitive and the progressive discipline procedures have not corrected the problems.

The severity of the problem or employee conduct will determine whether all steps will be followed or a recommendation will be made for suspension without pay or dismissal. When there is a range of penalties, aggravating or mitigating circumstances will be considered. The following offenses are subject to the penalties described below:

A. Offense	B. Penalty Range
*	*
9. Incompetence as evidenced by inability or lack of fitness to discharge the required duty	Reprimand- Dismissal
9.a. Failure to perform the duties of the position	Reprimand- Dismissal
*	*

12. Harassment or discrimination which interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment

Caution-
Dismissal

* * *

19. Failure to correct performance deficiencies

Conference
Summary-
Dismissal

20. Insubordination, which is defined as a continuing or intentional failure to obey a direct order, reasonable in nature, and given by and with proper authority

Caution-
Dismissal

* * *

54. Petitioner is required to prove the material allegations by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990).

55. The Pre-Hearing Stipulation predicates Respondent's dismissal on five issues: 1) a failure to correct a performance deficiency, under Section 1012.34, Florida Statutes, and Policy 3140(A)(19); 2) incompetence, under Policy 3140(A)9; 3) a failure to perform the duties of the position, under Policy 3140(A)9.a; 4) insubordination, under Policy 3140(A)20;

5) harassment of coworkers and students, under Policy 3140(A)12; and 6) ongoing performance deficiencies, under Section 1012.33, Florida Statutes, which authorizes dismissal for "just cause."

56. As noted above, Petitioner has failed to establish as grounds for dismissal harassment, insubordination, or a failure to correct a performance deficiency, as provided by Section 1012.34, Florida Statutes.

57. Much of the focus of the hearing was on whether Petitioner proved an uncorrected performance deficiency, within the meaning of Section 1012.34. This statute assigns a prominent role, in establishing a performance deficiency, to student achievement. The first sentence of Section 1012.34(3) states that the assessment instrument must be based "primarily" on student performance. The second sentence of this subsection acknowledges that the assessment instrument is not required to be limited to student performance, but may include other criteria. Leaving no doubt, though, Section 1012.34(3)(a) states that the assessment instrument "must primarily" use student data. These provisions require no elaboration and are entirely consistent with each other: for the purpose of establishing an uncorrected performance deficiency as the basis for terminating a teacher, a school district must assess the teacher based primarily, but not exclusively, on student

performance, which is measured by state tests and, where not available, local tests.

58. Petitioner's effort to terminate Respondent for the failure to timely correct a performance deficiency, under Section 1012.34, fails due to the absence of the necessary student-performance data.

59. Respondent mistakenly contends that Section 1012.34 is the sole means of dismissing a teacher for incompetence. This argument suggests that the enactment of Section 1012.34 implicitly repealed vast, but undefined, swaths of state and local law governing the dismissal of teachers and termination of their contracts. However, the language of Section 1012.34 does not support Respondent's broad reading of the scope of this statute.

60. Section 1012.33(1)(a) authorizes dismissal for just cause, which this statute defines illustratively, not exhaustively. Subject to judicial review, school boards may determine exactly what constitutes just cause for dismissal. Mitchell v. School Board of Miami-Dade County, 972 So. 2d 900 (Fla. 3d DCA 2007) (per curiam); Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2d DCA 1994) (per curiam) (Blue, J., concurring). Cf. Packer v. Orange County School Board, 881 So. 2d 1204 (Fla. 5th DCA 2004). Nothing in Section 1012.34 changes the law of just-cause dismissals.

61. Either Section 1012.34 provides another illustration of just cause within Section 1012.33, or Section 1012.34 coexists in peaceful harmony with Section 1012.33. There is no practical reason to treat the enactment of Section 1012.34 as the repeal of unspecified portions of preexisting law, and there are practical reasons not to do so. First, it would be necessary, in the absence of legislative guidance, to determine what should be repealed. If the rubber-to-the-road quality of Section 1012.34 is so compelling, perhaps Respondent would contend that it implicitly repeals, not merely the incompetency criterion of Rule 6B-4.009, but also other dismissal criteria, such as misconduct in office, gross insubordination, immorality, and the commission of a crime of moral turpitude. Second, if Respondent were not to argue for such a broad repeal, he would be unable to find anything in Section 1012.34 that provides the extent of the implicit repeal--again, because Section 1012.34 does not repeal anything implicitly.

62. Respondent's argument also means that the enactment of Section 1012.34 has repealed local attempts to impose teacher-performance standards, such as by means of collective bargaining agreements that authorize dismissal for conduct unbecoming an employee of the school district or, as here, by Petitioner's adoption of a rule that authorizes dismissal for a failure to perform the duties of the position. If something more is

required to show incompetence, as contrasted to a mere failure to perform the duties of the position, then Respondent's argument would add the difficult task of differentiating between local provisions, in contracts or rules, that "impermissibly" fall within the scope of competence and those that do not.

63. The proper role of Section 1012.34 is clear when compared to the operation of the predecessor statutory framework for not renewing the professional service contracts of teachers-which framework continues to apply to such contracts in existence on July 1, 1997. In 1997, the legislature amended former Section 231.36, Florida Statutes (1996), which set forth the grounds for the nonrenewal of professional service contracts at the end of a school year. The new law introduced what is essentially the termination framework contained in Section 1012.34 to professional service contracts issued after July 1, 1997. Laws of Florida, Chapter 97-310, §§ 1 and 2.

64. Teachers with professional service contracts issued on or before July 1, 1997, continue to be governed by the old framework, which is now set forth at Section 1012.33(3)(f), Florida Statutes. Teachers with continuing contracts are discussed below.

65. The old statutory framework established a more involved statutory process for not renewing professional service contracts at the end of a school year. Under this law, the

school had to give the teacher timely notice, prior to the end of the school year, of "deficiencies" and an opportunity to correct the deficiencies by the end of the following school year. This statutory framework for nonrenewal due to deficiencies existed beside all of the other provisions, such as incompetency, that continue to exist today for the immediate dismissal of a teacher with a professional service contract. This coexistence between the more-involved provisions for nonrenewal and the immediate provisions for dismissal are explicit when applied to teachers holding continuing contracts. § 1012.33(4)(b) and (c), Fla. Stat.

66. When compared to its predecessor, the new statutory framework, as now contained in Section 1012.34, reveals a legislative intent to make it easier to remove ineffective teachers with professional service contracts, as reflected by the grandmothing in of teachers with continuing contracts or professional service contracts prior to July 1, 1997. The new statutory framework simplified the notice requirements, reduced the probationary or corrective period from one school year to 90 days, and focused on the output of student performance, not the input of the teacher's effort or conformance to recognized professional standards.

67. Respondent's implicit-repeal argument is consistent with one subtle change in the new statutory framework. Prior to

1997, termination for performance deficiencies was technically a nonrenewal of the professional service contract at the end of a school year, and mid-term dismissal was reserved for the more dramatic events of incompetency, gross insubordination, misconduct, immorality, and the like. When the legislature shortened the probationary or corrective period from one school year to 90 days, it also transformed the adverse employment action from a nonrenewal at the end of a school year to a termination mid-year (except in the rare case when the end of the 90 days coincides with the end of the school year).

68. However, the current statutory framework for termination for uncorrected performance deficiencies continues to share with the predecessor statutory framework a focus on the more subtle shortcomings--still termed "deficiencies"--rather than the more dramatic failures inherent in gross insubordination, misconduct, immorality, or even incompetency. The former statutory framework established an orderly process for the routine identification of relatively subtle performance deficiencies that were amenable to correction and a measured opportunity for the tenured teacher to correct them. The same is true under the current statutory framework, although the brief 90-day probationary period is not inconsequential in terms of its effect of the process. Under both the old and current statutory frameworks, though, if a teacher were guilty of more

dramatic failings that required or supported more urgent interventions, a school district could dismiss the teacher without delay. This is why Section 1012.34 does not implicitly repeal any of these other provisions.

69. Petitioner has proved incompetence, a failure to perform the duties of the position, and just cause in the form of ongoing performance deficiencies. The last of these three grounds obviously borrows from Section 1012.34, and Petitioner has failed to justify termination under Section 1012.34 due to the absence of student-performance data. However, Section 1012.34(3)(a)1.-7. enumerates important skills for a teacher to possess, and Respondent proved, over time, to be deficient in nearly all of these skills--which, given the material impact of his deficiencies on instruction, constitutes just cause for termination.

70. Nothing about Respondent's shortcomings as a teacher was subtle. They permeated every aspect of the task of teaching and did so on a remarkably consistent basis, as Respondent lacked even intermittent insight into the extent and intensity of his problems. Respondent's failings interfered dramatically with student instruction and the administration's ability to maintain credibility with, and the support of, the parent community. In retrospect, Respondent's failures constituted a cessation of instruction--best described as a failure to perform

the duties of his position--that justified immediate dismissal, without notice, an opportunity to correct the failures and assistance and without the recourse to progressive discipline, given the enormity of Respondent's shortcomings.

71. A failure to identify daily instructional objectives, an excessive reliance on classroom videos, a mishandling of grades, a misadministration of homework assignments or tests, or a failure to attend teacher meetings or respond to parental communications: in isolation, these may be merely performance deficiencies that, lacking sufficient materiality to justify immediate dismissal, can result in termination only after compliance with all of the requirements of Section 1012.34. But all of these failures, and more, occurring as often as they did constitute more than mere performance deficiencies and call for urgent action, as much as does gross insubordination or misconduct in office. A teacher who ceases to instruct is not entitled to notice that he is not teaching, a 90-day opportunity to resume instruction and assistance in resuming his academic duties, nor is he entitled to return to the classroom because a

school district has neglected to prove, by state or local testing, a deficit in student performance.

RECOMMENDATION

It is

RECOMMENDED that the Pinellas County School Board enter a final order terminating Respondent's professional service contract and dismissing Respondent on the grounds of the failure to perform the duties of his position, incompetence, and just cause in the form of ongoing performance deficiencies.

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



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Filed with the Clerk of the
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this 29th day of July, 2010.

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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.