STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,
Petitioner,
vs. — Case No. 10-1526
ELIZABETH STUGLIK,
Respondent.

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on May 19, 2010, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Elizabeth McBride, Esquire
Palm Beach County School Board
Post Office Box 19239
West Palm Beach, Florida 33416

For Respondent: Matthew E. Haynes, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Petition for Suspension Without Pay and Dismissal from Employment, as clarified at hearing, and, if so, what disciplinary action should be taken against her.

PRELIMINARY STATEMENT

On March 18, 2010, the Palm Beach County School Board (School Board), through its counsel, issued and served on Respondent, then an annual contract teacher, a Petition for Suspension Without Pay and Dismissal from Employment (Petition). The Petition described, in some detail, statements that Respondent had made during a "School Police investigation into allegations that she had engaged in sexual misconduct with [fellow teacher] Heath Miller on the campus of H. L. Watkins Middle School, during normal working hours and while students were on campus." According to the Petition, the contents of these statements established that the School Board had "just cause" to terminate Respondent's contract. Specifically, the Petition alleged that "Respondent's actions [as described in her statements] constitute[d] a violation of The Code of Ethics, Florida Administrative [Code] Rule 6B-1.001(2)"; "Respondent's actions constitute[d] a violation of The Code of Ethics, Florida Administrative [Code] Rule 6B-1.001(3)"; "Respondent's actions also violated . . . Florida Administrative Code Rule 6B-

1.006(3)(a)"; "Respondent's actions violate[d] [Florida Administrative Code] Rule 6B-4.009(3)"; "Respondent's conduct evidenced a violation of [Florida Administrative Code] Rule 6B-4.009(2)"; "Respondent's actions showed a failure to exercise best professional judgment and unprofessional conduct"; and "Respondent's behavior made her ineffective in the school system."

Respondent requested "a hearing conducted by an administrative law judge appointed by the Division of Administrative Hearings" on the these allegations. Respondent's hearing request was referred to DOAH on March 22, 2010.

As noted above, the hearing requested by Respondent was held on May 19, 2010. At the outset of the hearing, counsel for the School Board explained that the School Board was seeking to discipline Respondent for engaging in sexual conduct with Mr. Miller on school grounds during the regular school day and for allowing Mr. Miller to "routinely remove[]" students from her classroom, adding that "the charges against [Respondent were] premised on [Respondent's] sexual activities with Mr. Miller having been consensual." School Board counsel stated later in the hearing, consistent with this earlier clarification, that if the investigation conducted by the School Board had revealed that Respondent had "truly [been] a rape victim," charges would not have been brought against Respondent.

Four witnesses testified at the hearing: Respondent; Detective Vincent Mintus; Ann Wark; and Rachael Haskell, LCSW. In addition to the testimony of these four witnesses, the following exhibits were offered and received into evidence: Petitioner's Exhibits 1 and 3 through 16; and Respondent's Exhibits 1 and 2.

At the conclusion of the hearing, the undersigned announced on the record that the parties would have 30 days from the date of the filing of the hearing transcript with DOAH to file their proposed recommended orders.

The hearing Transcript (consisting of two volumes) was filed with DOAH on June 11, 2010.

Petitioner and Respondent timely filed their Proposed Recommended Orders on Monday, July 12, 2010.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. The School Board is responsible for the operation, control and supervision of all public schools (grades K through 12) in Palm Beach County, Florida (including, among others, H. L. Watkins Middle School (HLWMS)), and for otherwise providing public instruction to school-aged children in the county.

2. The School Board has entered into a collective bargaining agreement with the collective bargaining representative of its instructional staff. Pursuant to Article II, Section M., of that agreement, the School Board "has the burden to prove each and every charge by clear and convincing evidence" in disciplinary proceedings such as the instant one.[2]

3. At all times material to the instant case, Respondent was employed as an annual contract teacher by the School Board. The last day for which she was paid by the School Board was March 3, 2010. From March 4, 2010, until June 4, 2010, Respondent was under suspension (without pay) pending the outcome of these disciplinary proceedings. By letter dated March 22, 2010, Respondent was advised by the School Board's Chief of Human Resources that she would not be "reappointed" and that, as a result, her employment with the School Board would terminate "on the last day of [her] current contractual period" (which was June 4, 2010).

4. During the 2007-2008 and 2008-2009 school years, Respondent taught Spanish at HLWMS (to seventh and eight graders during the 2007-2008 school year; and to sixth, seventh, and eighth graders during the 2008-2009 school year). Respondent was responsible, not only for the delivery of instruction to her students, but also for the management of her classroom. Furthermore, she was expected to be a "role model" for her

students and to conduct herself accordingly, particularly when on campus.

5. At all times that Respondent was teaching at HLWMS, Ann Wark was the principal of the school, and Respondent's department head was Ann Panse.

6. In each of the two annual evaluations Ms. Wark gave her, Respondent received an "overall" rating of "satisfactory" and was rated "acceptable" in each of the 15 performance categories listed on the evaluation form. In the "comments" section of the 2007-2008 school year evaluation, Ms. Wark wrote:

> Beth has been such a positive addition to the Watkins Team. She does a great job working with her students. She is also a wonderful team player, assisting others whenever needed.

The "comments" section of the 2008-2009 school year evaluation (which Ms. Wark signed on May 13, 2009) contained the following remarks made by Ms. Wark:

> Ms. Stuglik is a very creative teacher. She always has detailed lesson plans that are effectively presented in the classroom.

7. Respondent was a 22-year-old beginning teacher when she arrived at HLWMS in August 2007. She and her husband had just moved from Indiana, away from the family[3] and friends who comprised her "support system." Aside from her husband (who was not supportive of her decision to teach at HLWMS),[4] Respondent was not close with anyone at the school or in the area.

8. Respondent's classroom her first year at HLWMS was the "chorus room," which was located in a building (Auxiliary Building) that was separate from the main school building.

9. There were only two other teachers with classrooms in the Auxiliary Building (which also housed the school's cafeteria): an ESE teacher and a band teacher.

10. The ESE teacher was infrequently in her room, having one class there every other day. The remainder of her teaching time was spent servicing the school's exceptional education students in their general education settings.

11. The band teacher was Heath Miller. Mr. Miller taught his students in the "band room." Mr. Miller's classroom (the "band room") and Respondent's classroom (the "chorus room") were connected by an unoccupied office.

12. Mr. Miller was a popular and "well respected" member of school's instructional staff, as evidenced by the multiple "teacher of the year" awards he had received. Before classes started that school year (the 2007-2008 school year), during orientation, Respondent was told by other teachers that Mr. Miller "was the go-to guy; that if [Respondent] ever needed help with students, [Mr. Miller] was the guy to see; that he was just absolutely wonderful."

13. Acting on this advice, Respondent sought out Mr. Miller's assistance on various occasions, and he became her

trusted, informal teaching mentor (albeit one without any supervisory authority over her).

14. Over a period of approximately a month, Respondent's relationship with Mr. Miller, which began as a purely professional one, evolved into a sexual relationship, against Respondent's will.

15. From the end of September 2007, until sometime in November that year before the Thanksgiving break, Mr. Miller and an unwilling Respondent engaged in sexual intercourse a handful of times in a large storage closet in the "chorus room." These incidents (numbering approximately three or four altogether) occurred during the morning (sometime between 8:45 a.m. and 9:30 a.m.) before classes started.[5]

16. On each occasion, over Respondent's verbal protestations, Mr. Miller, who was "very muscular" and physically stronger than Respondent, forcefully maneuvered Respondent to the desired location in the closet, undid her clothes, and then directed her what to do. At no time did Mr. Miller strike Respondent, nor did he make any express verbal threats of harm to Respondent if she resisted his advances. Respondent, however, did not know what Mr. Miller would do to her if she did resist. She therefore complied with Mr. Miller's demands.

17. Respondent did not tell anyone about these nonconsensual sexual encounters with Mr. Miller until approximately a year and half later, on April 27, 2009, when she was interviewed a second time during the "School Police investigation" described in the Petition.

18. Respondent's post-encounter silence was the product of her wanting to forget about what had happened, coupled with her conviction that, if she did report what had happened, no one would believe her because Mr. Miller was so "well respected."

19. Notwithstanding what Mr. Miller had done to her, Respondent continued to be "cordial" towards him, acting as if, at least to the casual, lay observer, nothing untoward had happened. In addition to conversing in person with Mr. Miller during the course of the school day, Respondent communicated with him by text and telephone, and several times even socialized with him outside of school (but always in a group situation where there were others present).

20. Respondent's conduct following Mr. Miller's transgressions against her (as described above) was not atypical for a sexual assault victim.[6]

21. During the 2007-2008 school year and, to a lesser extent, during the 2008-2009 school year (when Respondent occupied the classroom in the Auxiliary Building that the ESE teacher had been in the year before[7]), an unaccompanied

Mr. Miller, on occasion, came into Respondent's classroom while she was teaching a class (towards the end of the period,[8] when the students were working, independently, on class assignments) and, with Respondent's permission, removed students from her class, a practice not prohibited by any School Board rule or policy. The students he removed were all female band students. Respondent would let the students go with Mr. Miller only if they were done with their work.[9] The students would be gone from Respondent's class for approximately ten to twenty minutes.

22. Allegations were subsequently made that Mr. Miller had (at various unspecified times) engaged in sexual misconduct with three of the students he had removed from Respondent's class (plus another student whom Respondent did not teach), and criminal charges were filed against Mr. Miller based on these allegations.[10] Mr. Miller is currently in jail and is being held without bond on these criminal charges.

23. At the time of the removals, however, Respondent had no knowledge, nor even any idea, that Mr. Miller was engaging in any inappropriate conduct with students. She believed (based on what Mr. Miller had told her when he came into her room to get the students) that he was taking them from her class so they could participate in band-related activities.[11]

24. Mr. Miller was arrested on April 20, 2009.[12] The following day, School Police Detective Vincent Mintus

interviewed Respondent as part of his ongoing investigation of the allegations that had been made against Mr. Miller.

25. During this April 21, 2009, interview, Respondent was not forthright with Detective Mintus. She was asked about her relationship with Mr. Miller and, in response, failed to disclose that there was a sexual component to the relationship.

26. Following the interview, Detective Mintus discovered information causing him to question whether Respondent had been entirely truthful with him. He therefore made arrangements to interview Respondent again.

27. This second interview was conducted on April 27, 2009. When told by Detective Mintus that he had reviewed text messages and telephone records and, based upon this review, had doubts concerning how honest she had been during her April 21, 2009, interview,[13] Respondent acknowledged that, contrary to what she had intimated in her previous interview, she had had a sexual relationship with Mr. Miller. She added, however, that this relationship had been a nonconsensual one in which she had not been a willing participant. The interview was cut short when Respondent asked for a union representative to be present.

28. Following her April 27, 2009, interview, Respondent, with Detective Mintus' assistance, made contact with the Palm Beach County's Victim Advocate's Office, through which she subsequently received therapy and counseling enabling her to

better deal with the emotional and psychological effects of having been sexually victimized by Mr. Miller.

29. Upon being advised by Detective Mintus of what Respondent had related to him during the April 27, 2009, interview, Ms. Wark went to see Respondent. She tried to console Respondent and offered Respondent her support.

30. Aided by newspaper articles on the subject, word quickly spread through the school and the community about Detective Mintus' investigation of Mr. Miller's on-campus sexual activity with HLWMS students and teachers. As a result, "things at the school came to a standstill."

31. Students openly discussed Respondent's having been sexually involved with Mr. Miller and expressed their anger with Respondent for her having engaged in such activity.[14]

32. Ms. Wark sensed that Respondent had lost the respect of the student population as a whole, and their parents.

33. Because it was towards the end of the school year, Ms. Wark took no action to have Respondent removed from her classroom assignment while Detective Mintus' investigation was still ongoing; however, she did instruct Respondent not to attend any school functions (including graduation) to which parents were invited. It was not until the beginning of the following school year (the 2009-2010 school year) that

Respondent was taken out of the classroom and assigned administrative duties.[15]

34. Respondent had left the April 27, 2009, interview with the understanding that Detective Mintus would contact her to make arrangements for a follow-up interview. Detective Mintus, though, expected Respondent to contact him. After not hearing from Respondent for a couple of months, he sent Respondent a letter, dated July 1, 2009, asking her to get in touch with him so that he could set up another interview.

35. Respondent did not receive Detective Mintus' letter until July 20, 2009.[16] She immediately contacted her attorney and read the letter to her. Respondent's attorney then contacted Detective Mintus.

36. Respondent was interviewed a third time by Detective Mintus on July 29, 2009. She was accompanied to the interview by her attorney.

37. Immediately before the interview began, Respondent's attorney told Detective Mintus, on Respondent's behalf, that Respondent did not want to press charges against Mr. Miller because she desired "to get on with her life and not have any notoriety."

38. During the interview, Respondent gave details regarding her relationship with Mr. Miller. She acknowledged that she had engaged in sexual activity with Mr. Miller on the

HLWMS campus, but continued to maintain (truthfully) that she had not willfully participated in this activity.

39. After completing his investigation, Mr. Mintus issued an Investigative Report, in which he found, among other things, that Respondent and Mr. Miller had had "mutually agreed upon sexual intercourse together on multiple occasions" on the HLWMS campus.

40. On August 14, 2009, Detective Mintus' Investigative Report was forwarded to the School Board's Department of Employee Relations.

41. The matter ultimately was brought to the attention of the School Superintendent, who, on February 12, 2010, advised Respondent that a determination had been made that there was "sufficient evidence to warrant [her] termination from [her] position as Teacher" and that he therefore would "recommend her suspension without pay and termination at the March 3, 2010 School Board Special Meeting."

42. The School Board followed the School Superintendent's recommendation, and it suspended Respondent without pay effective March 4, 2010, pending the outcome of termination proceedings.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

44. "In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards [have the authority to] operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law." § 1001.32(2), Fla. Stat.

45. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

46. A district school board is deemed to be the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school district." § 447.203(2), Fla. Stat. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons," provided it exercises these powers in a manner that is consistent with the requirements of law. § 447.209, Fla. Stat.

47. An annual contract teacher employed by a district school board has no right to continued employment beyond the term of the contract.

48. Pursuant to Section 1012.33(6)(a), Florida Statutes, the teacher "may be suspended or dismissed at any time during the term of the contract," but only "for just cause as provided in paragraph (1)(a)" of the statute.

49. Section 1012.33(1)(a), Florida Statutes, defines "just cause," as including, "but . . . not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude." The "but . . . not limited to" language in the statute makes abundantly clear that the list of things constituting "just cause" was intended by the Legislature to be non-exclusive and that other wrongdoing may also constitute "just cause" for dismissal. See Dietz v. Lee County School Board, 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994)(Blue, J., specially concurring)("We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins [set forth in Section 231.36(1)(a), Florida Statutes (2001), the predecessor of Section 1012.33(1)(a), Florida Statutes] constituting just

cause,[[17]] would also be grounds for dismissal. . . . In amending section 231.36 and creating a new contract status for teachers (professional service) and by failing to further define just cause, the legislature gave school boards broad discretion to determine when a teacher may be dismissed during the contract term. . . . I agree with the majority--that the legislature left that determination to the respective wisdom of each school board by providing no definite parameters to the term 'just cause.'").

50. "Immorality" has been defined "by rule of the State Board of Education" (specifically Florida Administrative Code Rule 6B-4.009(2)[18]) as follows:

> Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

51. "Misconduct in office" has been defined "by rule of the State Board of Education" (specifically Florida Administrative Code Rule 6B-4.009(3)) as follows:

> Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to

> impair the individual's effectiveness in the school system.

52. The Code of Ethics of the Education Profession (as set forth in Florida Administrative Code Rule 6B-1.001) provides as follows:

> (1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.
>
> (2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.
>
> (3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

53. The Principles of Professional Conduct for the Education Profession in Florida (set forth in Florida Administrative Code Rule 6B-1.006), requires a teacher, as part of the teacher's "obligation to the student," to "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/ or physical health and/or safety."

54. "Immorality and "misconduct in office" may be established, even in the absence of "specific" or "independent" evidence of impairment, where the conduct engaged in by the teacher is of such a nature that it "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's service and effectiveness. In such cases, proof that the teacher engaged in the conduct is also proof of impaired effectiveness. See Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000); Walker v. Highlands County School Board, 752 So. 2d 127, 128-29 (Fla. 2d DCA 2000); Summers v. School Board of Marion County, 666 So. 2d 175, 175-76 (Fla. 5th DCA 1995); Brevard County School Board v. Jones, No. 06-1033, 2006 Fla. Div. Adm. Hear. LEXIS 287 *17 (Fla. DOAH June 30, 2006)(Recommended Order)("[T]he need to demonstrate 'impaired effectiveness' is not necessary in instances where the misconduct by a teacher speaks for itself, or it can be inferred from the conduct in question."); and Miami-Dade County School Board v. Lefkowitz, No. 03-0186, 2003 Fla. Div. Adm. Hear. LEXIS 675 **23-24 (Fla. DOAH July 31, 2003)(Recommended Order)("The School Board failed to prove by a preponderance of the direct evidence that Mr. Lefkowitz's actions were so serious that they impaired his effectiveness as a teacher. Nonetheless, based on the findings of fact herein, it may be inferred that Mr. Lefkowitz's conduct impaired his effectiveness as a teacher

in the Miami-Dade County public school system.")(citation omitted).

55. A teacher's engaging in consensual sexual activity on school grounds during the school day is an example of such conduct that "speaks for itself" and constitutes "immorality" and "misconduct in office," as those terms are used in Section 1012.33, Florida Statutes.

56. "[U]nder Florida law, a [district] school board's decision to terminate [the contract of] an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a formal hearing under section 120.57(1) if material issues of fact are in dispute."[19] McIntyre v. Seminole County School Board, 779 So. 2d 639, 641 (Fla. 5th DCA 2001).

57. Pursuant to Section 1012.33(6)(a), Florida Statutes, the hearing may be conducted, "at the district school board's election," either by the district school board itself or by a DOAH administrative law judge (who, following the hearing, makes a recommendation to the district school board).

58. The teacher must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, or policy] the [district

school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

59. The teacher may be suspended without pay pending the outcome of the termination proceeding; "but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid." § 1012.33(6)(a), Fla. Stat. An annual contract teacher whose contract, at the time the "charges are not sustained," has expired and not been renewed is entitled only to a "back salary" award (for the period from the date the teacher's suspension without pay began to the expiration date of the teacher's annual contract).

60. At the termination hearing, the burden is on the district school board to prove the allegations contained in the notice. Ordinarily, the district school board's proof need only meet the preponderance of the evidence standard. See, e.g., Cisneros v. School Board of Miami-Dade County, 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008)("As the ALJ properly found, the School Board had the burden of proving the allegations of moral turpitude by a preponderance of the evidence."). Where, however, the district school board, through the collective bargaining process, has agreed to bear a more demanding standard, it must honor, and act in accordance with, its

agreement. See Chiles v. United Faculty of Florida, 615 So. 2d 671, 672-73 (Fla. 1993)("Once the executive has negotiated and the legislature has accepted and funded an agreement [with its employees' collective bargaining representative], the state and all its organs are bound by that [collective bargaining agreement] under the principles of contract law."); Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So. 2d 358, 363 (Fla. 1988)("[W]e hold that a public employer must implement a ratified collective bargaining agreement with respect to wages, hours, or terms or conditions of employment . . . ."); and Palm Beach County School Board v. Auerbach, No. 96-3683, 1997 Fla. Div. Adm. Hear. LEXIS 5185 **13-14 (Fla. DOAH February 20, 1997)(Recommended Order)("Long-standing case law establishes that in a teacher employment discipline case, the school district has the burden of proving its charges by a preponderance of the evidence. . . ."). Such is the situation in the instant case. The collective bargaining agreement between the School Board and Respondent's collective bargaining representative requires that the School Board present clear and convincing evidence to prove its case against Respondent.

61. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a

reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), citing with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

62. In determining whether the district school board has met its burden of proof, it is necessary to evaluate the district school board's evidentiary presentation in light of the specific allegation(s) made in the written notice of charges. Due process prohibits a district school board from terminating a teacher's annual contract before its expiration date based on

matters not specifically alleged in the notice of charges, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Pilla v. School Board of Dade County, 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995)("The pending proceeding was brought against the teacher by the School Board to discharge him from employment. Plainly, in such circumstances the teacher must have fair notice and an opportunity to be heard on each of the charges against him. Here, after the School Board had already completed its case-in-chief, it sought leave to amend to add two additional charges to its administrative complaint. We agree with the hearing officer that this request for amendment came too late.").

63. In the instant case, the School Board, in its Petition, as clarified (by School Board counsel) at hearing, alleged that it had "just cause" to terminate Respondent's annual contract with the School Board for the 2009-2010 school year because Respondent, when she was teaching at HLWMS, had engaged in consensual sexual activity with Mr. Miller on school grounds during the school day and had allowed Mr. Miller, on a regular basis, to remove students from her class. According to the allegations made by the School Board, as a result of having engaged in this conduct, Respondent was guilty of "immorality,"

as defined in Florida Administrative Code Rule 6B-4.009(2), and "misconduct in office," as defined in Florida Administrative Code Rule 6B-4.009(3).

64. While it is undisputed that Respondent engaged in sexual conduct with Mr. Miller in a storage closet in Respondent's classroom on a handful of occasions during the first semester of the 2007-2008 school year, the record evidence does not clearly and convincingly establish that she did so consensually. In fact, the undersigned, relying on Respondent's testimony concerning the matter,[20] has affirmatively found that Respondent unwillingly participated in this activity. Her having done so constituted neither "immorality," as defined in Florida Administrative Code Rule 6B-4.009(2), nor "misconduct in office," as defined in Florida Administrative Code Rule 6B-4.009(3).

65. The School Board did clearly and convincingly establish that Respondent routinely allowed Mr. Miller to remove female students from her class if they had finished their work. It has failed, however, to advance a theory, consistent with the allegations made in the Petition, as clarified at hearing, and with the evidentiary record as a whole, which would support the conclusion that Respondent's having permitted these removals (which were not prohibited by any School Board rule or policy) amounted to disciplinable conduct.[21]

66. In view of the foregoing, the School Board has failed to sustain its charges against Respondent.

67. Accordingly, in accordance with Section 1012.33(6)(a), Florida Statutes, the Palm Beach County School Board must pay Respondent's "back salary" for the period she was under suspension without pay pending the outcome of the instant termination proceeding.[22]

RECOMMENDATION

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

RECOMMENDED that the Palm Beach County School Board issue a final order finding that the charges against Respondent have not been sustained and awarding Respondent "back salary" for the period she was under suspension without pay.

DONE AND ENTERED this 2nd day of August, 2010, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of August, 2010.

ENDNOTES

[1] Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2009).

[2] The parties so stipulated in paragraph G.4. of their Joint Pre-Hearing Stipulation (filed on May 10, 2010).

[3] Respondent had an aunt and uncle who lived in Palm Beach County (in Wellington), but she was not close to them.

[4] Respondent and her husband divorced in the summer of 2008.

[5] Although classes started at 9:30 a.m., students were on campus before then. Students transported to school by bus generally arrived by 9:10 a.m., the time that breakfast was served in the school cafeteria.

[6] This finding is based upon the unrebutted expert testimony of Rachael Haskell, LCSW, the Clinical Supervisor of Trauma Treatment at the Crisis Center of Tampa Bay, as well as a part-time instructor at the University of South Florida. See The Florida Bar v. Clement, 662 So. 2d 690, 696 (Fla. 1995)("[C]aselaw indicates that a fact-finder should not arbitrarily reject unrebutted testimony."); Wiederhold v. Wiederhold, 696 So. 2d 923, 924 (Fla. 4th DCA 1997)("[W]hile the trial court can reject unrebutted expert testimony, it must offer a reasonable explanation for doing so. In other words, the trial court as fact-finder cannot arbitrarily reject unrebutted expert testimony.")(citation omitted); and Long v. Moore, 626 So. 2d 1387, 1389 (Fla. 1st DCA 1993)("The trial court should accept unrebutted expert testimony on highly technical matters, unless it is so palpably incredible, illogical and unreasonable as to be unworthy of belief or otherwise open to doubt from some reasonable point of view.").

[7] A newly hired chorus teacher was in the "chorus room" for the 2008-2009 school year.

[8] Each period lasted an hour and a half.

[9] There were occasions when Respondent told Mr. Miller that he could not take a student out of her class because the student still had work to do.

[10] The proof submitted in the instant case is insufficient to support a finding that Mr. Miller actually engaged in such criminal conduct with these students. See Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985)("An indictment or information is not evidence against an accused, but, rather, is nothing more or less than the vehicle by which the state charges that a crime has been committed. The standard jury instructions point this up in the pretrial instructions by stating that the charging document is not evidence and that the jury is not to consider it as any proof of guilt."); Pines v. Growers Service Co., 787 So. 2d 85, 90 (Fla. 2d DCA 2001)("Allegations are just that-allegations; they are not proof. A party cannot assume proof, it must offer competent, substantial proof."); and Clark v. School Board of Lake County, 596 So. 2d 735, 739 (Fla. 5th DCA 1992)("The charge of abuse is certainly not evidence of the commission of the act in our system of justice.").

[11] No student ever told Respondent anything that would reasonably lead her to believe otherwise.

[12] Following Mr. Miller's arrest, Respondent communicated with him by telephone and asked him how he was doing.

[13] In fact, Detective Mintus had not conducted such a review.

[14] The record is unclear as to whether the newspapers accurately reported that Respondent had engaged in such activity against her will.

[15] Respondent remained on annual contract status the entire 2009-2010 school year.

[16] Respondent was on a Mediterranean cruise with her family from July 1, 2009, through July 18, 2009. She had her mail held during this time. Delivery resumed on July 20, 2009.

[17] "Immorality" was added to the "non-exclusive list of sins" in Section 1012.33(1)(a), Florida Statutes, by Section 28 of Chapter 2008-108, Laws of Florida, effective July 1, 2008.

[18] Florida Administrative Code Rule 6B-4.009 "define[s]" the "basis for charges upon which dismissal action against instructional personnel may be pursued."

[19] "A county school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993); see also School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1231 (Fla. 2009)("No one disputes that a school board is an 'agency' as that term is defined in the APA."); Volusia County School Board v. Volusia Homes Builders Association, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006)("[T]he School Board is an agency subject to the Administrative Procedure Act."); and Witgenstein v. School Board of Leon County, 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977)("It was obviously the legislative intent to include local school districts within the operation of Chapter 120.").

[20] Respondent was the only witness at hearing with personal knowledge about what had happened on these occasions. She testified with apparent candor, sincerity, and honesty, and there is no persuasive reason to disbelieve her testimony, particularly when it is considered in light of the unrebutted expert testimony of Ms. Haskell referenced above in endnote 6 (which the undersigned has also credited).

[21] The School Board has alleged that Respondent's sexual encounters with Mr. Miller were consensual and not coerced. Therefore, even though the undersigned has rejected this allegation and found that Respondent was an unwilling participant in these encounters, Respondent may not be disciplined based on the theory that she allowed female students in her class to go with Mr. Miller knowing that he had sexually victimized her and that he therefore posed a potential threat to these students' safety and well-being. Such a theory is beyond the scope of the charges against Respondent, and thus it has not been considered by the undersigned in making his recommendation to the School Board in the instant case. Cf. Arce v. Wackenhut Corp., No. 3D08-3029, 2010 Fla. App. LEXIS 9869 **5-6 n.2 (Fla. 3d DCA July 7, 2010)("Arce has expressly rejected, both here and below, reliance upon any other hearsay exception in this case, including--most emphatically--the business records exception. A court's promise of strict neutrality among those who place their confidence in it for resolution of their differences counsels us against consideration of a ground for a decision that a

contestant--in this case, Arce--has expressly stated he does not wish to be considered.").

[22] Respondent is not entitled to reinstatement because her last annual contract with the School Board (for the 2009-2010 school year) has expired and not been renewed.

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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.