

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 11-1078
)
DAREKI DANIELS-YOUMANS,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 9, 2011, by video teleconference at sites in Sarasota and Tallahassee, Florida, before Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott A. Martin, Esquire
Manatee County School Board
215 Manatee Avenue West, Second Floor
Post Office Box 9069
Bradenton, Florida 34206-9069

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

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has just cause to terminate Respondent's employment.

PRELIMINARY STATEMENT

By letter dated February 17, 2011, the superintendent of Schools for Manatee County, Tim McGonegal (Superintendent), notified Dareki Daniels-Youmans (Respondent) that he intended to recommend her termination from employment as a teacher's aide for the reasons set forth in an Administrative Complaint served with the letter. The Administrative Complaint, issued by the Manatee County School Board (School Board or Petitioner), alleged that Respondent engaged in misconduct and gross insubordination in violation of several cited statutes and rules by refusing to comply with her school principal's written directive to sign in at the front office upon arriving at school (issued in connection with a 2009 written reprimand for excessive absenteeism) and by repeatedly refusing to comply with oral and written directives by the teacher of record in Respondent's classroom. It was also alleged that Respondent was guilty of excessive absenteeism in the then-current school year and the two preceding school years, in violation of the School Board's rules. The Administrative Complaint asserted that these alleged violations provided just cause to terminate Respondent's employment.

Respondent timely requested an administrative hearing to contest the allegations in the Administrative Complaint. The case was forwarded to the Division of Administrative Hearings

for assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

Prior to the final hearing, the parties entered into a Joint Prehearing Stipulation in which they stipulated to a few facts. The parties' stipulations have been incorporated into this Recommended Order.

At the final hearing, Petitioner presented the testimony of Debra Horne, Carla Slagle, Sheryl Zuniga, Leslie Litten, Scott Boyes, Cheryl Bennett, and Respondent. Petitioner's Exhibits 1 through 7 and 9 through 11 were received into evidence. Respondent testified on her own behalf. Respondent's Exhibits 1 through 7 were received into evidence.

The one-volume Transcript of the final hearing was filed on July 1, 2011. Petitioner timely filed its Proposed Recommended Order. Respondent filed her Proposed Recommended Order one day late, along with an unopposed motion to accept the late-filed submittal. The motion was granted, and both parties' Proposed Recommended Orders have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent has been employed by the School Board since November 28, 2006. Respondent is a teacher's aide in a voluntary pre-kindergarten (VPK) class at Samoset Elementary School.

2. Respondent's job responsibility, as the VPK teacher's aide, is to assist the VPK teacher of record for the classroom to which she was assigned. Respondent understood that was her job--that she was required to work at the teacher's direction and that the teacher had the authority to issue directives to her aide.

3. The school day started at 8:00 a.m., but the instructional part of the school day did not start until 8:30 a.m. Between 8:00 and 8:30, each morning, the VPK teacher's aide's job was to set up the classroom, greet the students, and supervise their breakfast, while the teacher used the time for planning the classroom activities of the day and beyond.

4. Ms. Slagle was assigned as the teacher of record for the VPK classroom to which Respondent was the assigned teacher's aide, beginning in the fall of 2009.^{1/} At first, Ms. Slagle would discuss with Respondent what she needed Respondent to do in the classroom, but after a short period of time, some of the tasks Ms. Slagle had assigned to Respondent were not always getting done. In addition, Ms. Slagle had problems with Respondent missing whole work days or arriving late.

5. To address the problem with Respondent not always completing all of her assigned tasks, Ms. Slagle made a list of regular tasks that Respondent was to complete daily and hung the

list up in the classroom to assist Respondent to remember everything that was supposed to be done daily. Examples of these tasks included taking the student chairs down from the tables in the morning, taking equipment such as bicycles out of the locked storage shed and then returning the bikes after use and securing the shed, cleaning up after lunch in the classroom and taking the trash out, wiping/disinfecting the tables at the day's end and putting the chairs back up on the tables, and similar tasks for room set-up in the morning, facilitating activities during the day, and closing down the room at day's end.

6. Ms. Slagle also addressed her concerns about Respondent's attendance lapses with her. For example, she spoke to Respondent about her frequent late returns from lunch. Respondent sought to excuse her tardiness by saying that there was nothing for her to do. In response, Ms. Slagle drew up a second list of additional tasks, beyond the daily assignments, that Respondent could turn to if she had finished all of the regular tasks and did not have anything else to do.

7. Respondent apparently took offense to these lists and reacted to them with some hostility, telling Ms. Slagle that she did not think they were necessary. Respondent claims that she did everything she was supposed to do. The more credible evidence was that Respondent did not regularly complete all of

her assigned tasks and, generally, had a bad attitude about being given assignments and being told what to do.

8. Apparently at the core of Respondent's hostility was the misimpression that she and Ms. Slagle were "co-workers" with the same job descriptions and same qualifications. This was shown not to be true. Respondent's official job description was "VPK Teacher's Aide." Ms. Slagle's official job description was "Child Development Associate (CDA)/Teacher's Assistant." Though these titles may sound similar, the CDA position held by Ms. Slagle required a certification equivalent as a qualification to be the teacher of record for VPK classes. Ms. Slagle met this qualification and was, in fact, the assigned teacher of record for this classroom. Respondent did not hold the same qualification; she was not a CDA, nor was she the teacher of record for the VPK classroom; instead, as she acknowledged, she was the aide to the teacher of record. The positions were not equal. Respondent and Ms. Slagle were not co-workers, if that description implies equivalent status.

9. When Ms. Slagle first developed the assignment lists for Respondent, she posted them as reminders. However, Respondent did not take the hint and regularly failed to complete all of the required tasks. At that point, Ms. Slagle instructed Respondent to check off the daily tasks, and Ms. Slagle posted a new copy of the list daily so that

Respondent could check off tasks as she did them. Respondent refused to comply. She never checked a single task off of any list.

10. Ms. Slagle started keeping the lists with her own notes indicating which of the tasks had been left undone. On several occasions, Respondent would add her own comments to Ms. Slagle's annotated lists. For example, on one list dated in early December 2010, where Ms. Slagle indicated that Respondent failed to take the student chairs down in the morning, Respondent added the following note: "But you get to work every day at 7:30 and can't take down the chairs." Respondent acknowledged that she thought Ms. Slagle should be doing some of the tasks she assigned to Respondent, but Respondent admitted that comments such as this were sarcastic and unprofessional.

11. On several occasions, Respondent ripped the checklist off of the wall where it was posted and threw it in the trash. Once again, Respondent acknowledged that she probably should not have done that, but that she was offended by the list and believed that Ms. Slagle posted it on the wall where everyone could see to humiliate Respondent. There were no adults regularly in the classroom besides Ms. Slagle and Respondent. The four-year-old VPK students were not able to read.

12. Although Respondent was offended by the checklists, all other witnesses, including two other teacher's aides and a

teacher who taught the other VPK class, uniformly testified that the use of checklists was not unusual and that they had used similar lists before, at least until all assigned tasks were done every day. The aides testified that they were not offended by the lists, but, rather, appreciated the reminders that the lists provided. None of the specific tasks on the lists used by Ms. Slagle was unreasonable or unexpected assignments for a VPK teacher's aide. Instead, the consistent, credible testimony was that Respondent's assigned tasks were reasonable and appropriate, that Ms. Slagle's checklists were reasonable and appropriate tools routinely used by VPK teachers, and that the posting of such lists was the norm for elementary school where the classroom walls were always filled with all kinds of information, pictures, lists, and graphics.

13. When Respondent's attendance problems were not solved early on in the 2009-2010 school year by Ms. Slagle's raising the problems directly with Respondent, the principal of Samoset Elementary School, Mr. Boyes, got involved. Mr. Boyes spoke with Respondent more than once about her attendance in the short period between the start of that school year on August 19, 2009, and the beginning of October 2009. When Respondent continued to be tardy and continued to be out for whole school days, Mr. Boyes took the next step of issuing a written reprimand to Respondent on October 7, 2009. At a meeting attended by

Respondent and her union representative, Mr. Boyes read the written reprimand letter to Respondent, which Respondent signed to acknowledge she received it. In pertinent part, the written reprimand stated:

The purpose of this letter is to reprimand you for your actions from August 19, 2009 through October 1, 2009. During this time you have been late to work at least three times and have been absent 15 days, one of which on August 19, 2009, whereby you did not call the automated absentee system (Smart Find) or contact anyone at the school site to report your absence. You abandoned your position without leave.

These behaviors constitute willful neglect of duty and misconduct in office . . . [and] excessive absenteeism . . .

It is expected that there will be no recurrence of the above behaviors on your part that necessitated this reprimand. In the event there is a recurrence, you will subject yourself to further disciplinary measures, up to and including termination of your employment.

14. To help ensure there were no recurrences, Mr. Boyes issued a written directive along with the written reprimand, reiterating Respondent's duty hours and the requirement for requesting and receiving prior appropriate leave to be excused from reporting to work each day on time and remaining at work for the entirety of her work shift. As an additional check on Respondent's compliance, the written directive stated: "I am

directing you to sign in each day at the front office as you did this morning."

15. Rather than ensuring compliance to avoid recurrences, the sign-in directive became another requirement that Respondent failed to meet. Respondent readily admits that her attendance did not improve at all after the written reprimand. Instead, the records show that Respondent's attendance worsened. For the entire school year of 2009-2010, Respondent was absent for the whole school day 20 percent of the time; in 2010-2011 through January 24, 2011 (the period of time documented by the investigation leading up to the recommended termination), Respondent was absent for the whole school day 25 percent of the time.

16. Respondent admits she only occasionally followed Mr. Boyes' written directive to sign in every day in the front office. Indeed, the records show only seven times between October 7, 2009, and January 24, 2011, when Respondent signed in as she was required to do, and she was late two of those seven times.

17. Respondent's testimony that she simply "forgot" to sign in on the vast majority of days is not credible. Mr. Boyes testified that he gave Respondent verbal reminders on several occasions that he expected her to be signing in. On one such occasion, Respondent responded to the reminder by asking

Mr. Boyes whether anyone else was required to sign in every day. The reasonable inference from Respondent asking this question is that, just as with Ms. Slagle's checklist directive, Respondent took offense with Mr. Boyes' sign-in directive and knowingly chose to refuse to comply with her superior's directive.

18. Respondent was also required to put a "slash" mark on an attendance roster known as the "slash sheet," which was used to account for daily attendance for payroll purposes. Respondent did not forget to comply with this requirement. The "slash sheet" book was kept right near the front office sign-in/sign-out book, no more than 25 feet away. Respondent failed to explain how she managed to remember to fill out the slash sheet so she would get paid, while "forgetting" to sign in as Mr. Boyes required in the written directive. The more credible evidence shows that Respondent was well aware of the requirements, but made poor choices in repeatedly refusing to comply with the reasonable directives of her superiors.

19. Respondent's defiance and poor attendance had a significant adverse impact on not just the VPK classroom, but the elementary school as a whole.

20. VPK classes are unique in that they are subject to specific regulatory requirements and frequent inspections by the Early Learning Coalition, which monitors VPK compliance. For example, Ms. Slagle testified that the reason Respondent's

assigned tasks included emptying the trash after lunch is because the Early Learning Coalition inspectors will cite the school if the trash is overflowing and that the students make a big mess at lunch because they eat in the classroom, so the trash almost always has to be emptied after lunch. Respondent was offended by this requirement, saying she was not a custodian and that another aide had told her that taking out the trash was the custodian's job. While that may be true for end-of-day cleaning, Ms. Slagle explained that her aide had to take the trash out after lunch, because they would not make it to the end of the day without the trash overflowing. The bottom line is that Respondent should not have met every assigned task with defiance and refusals, but she did. In this instance, her refusal put the VPK classroom at risk of being written up if they were inspected at the wrong time.

21. Ms. Slagle testified that another result of Respondent's failure to perform the morning set-up tasks, such as taking the chairs down from the tables, was that Ms. Slagle had to spend her time doing the tasks assigned to Respondent, instead of using the time for planning. Sometimes Respondent's failure to perform the morning set-up tasks was because she was there, but not doing what she was supposed to; other times, it was because she was tardy. Regardless of the reason, the VPK class suffered because the teacher's aide was not doing her job.

22. Ms. Slagle's mornings were frequently disrupted because Respondent would not arrive on time and would not contact anyone to explain her absence, leaving Ms. Slagle and the front office guessing as to whether Respondent was just running late or whether she was going to be out the whole day.

23. Whether for all or part of the day, Respondent's absence from the VPK classroom during school hours was particularly disruptive because of the unique VPK regulatory requirements. VPK classes are required to have one adult present for every ten students, and Ms. Slagle's class had 18 students. As such, every time Respondent was not present, Ms. Slagle had to solve the mystery as to whether Respondent was just running a little (or a lot) late, or whether Respondent would be out the whole day; if the latter, then Ms. Slagle and others in the school system had to scramble to line up a substitute, which often was not possible at the last minute. As a result, the no-win choice caused by Respondent's failure to notify anyone was for Ms. Slagle's class to be out of compliance for part or all of a school day or for the VPK class to pull in someone else in the elementary school, who may or may not be used to working with VPK students, just to meet the adult-to-student ratio requirement. And, of course, when someone was pulled in from another position in the elementary school, a hole was left in the position from which they were taken.

24. One such "pinch hitter" who frequently was called in to cover the missing adult position in Ms. Slagle's VPK class when Respondent was absent was another teacher's aide who worked in the Educating Students of Other Languages (ESOL) program. The ESOL program is for students whose primary language spoken at home is not English. These students required the consistent efforts of someone working with them very intensively to attempt to keep the students on par with the instructional programming for their levels. The ESOL teacher's aide testified with great credibility that her work with the ESOL students suffered every time she had to drop everything to go cover for Respondent, and this occurred frequently.

25. Respondent's defiance of Ms. Slagle's authority in the VPK classroom plainly had an adverse impact on the classroom environment there. Both Respondent and Ms. Slagle attested to the increasingly tense atmosphere in the classroom, not at all conducive to warming up these youngsters for early learning activities. Either Respondent was present, with her strong feelings of resentment and defiance, or else Respondent was missing, and there was a hole to be filled by someone appropriate, someone inappropriate, or no one at all--either way, the VPK students were at the losing end of this bargain.

26. Respondent acknowledged that her absences for whole and part days were many, but asserted that they were all excused

and that she did not intentionally refuse to go to work. Instead, she explained that she had six children, including triplets born during the 2008-2009 school year. During that school year, Respondent was granted 60 days of leave under the Family Medical Leave Act (FMLA), followed by an additional 40 days for child care leave. Petitioner excluded these 100 days of FMLA and child care leave (more than half of the school year) from consideration in the "excessive absenteeism" charge. Instead, Petitioner only considered Respondent's absences over and above the 100 days of leave. Respondent was absent an additional 31.4 days, or 17 percent of the school year in the 2008-2009 school year.

27. As previously noted, Respondent's attendance track record progressively worsened in the 2009-2010 and 2010-2011 school years. And as made clear in the written reprimand in October 2009, Respondent's absences were not always excused, as required. Nonetheless, even if Respondent's absences were always excused or always were for legitimate reasons, at some point the focus must shift away from the legitimacy of Respondent's reasons. Regardless of reasons, at some point the absences become excessive and intolerable because of the adverse impact they have on the school system.

28. Respondent also claimed that other instructional personnel at Samoset Elementary had similar problems with

attendance, but were not terminated. Respondent failed to prove that any other person had an attendance record as bad as hers or that any other person had an attendance record that got worse instead of better after receiving a written reprimand. More to the point, Respondent did not demonstrate that any other person was similarly situated with a distinctive combination of excessive absenteeism and continuing refusal to comply with the reasonable directives of superiors.^{2/}

29. In December 2010, Petitioner's Office of Professional Standards ("OPS") initiated an investigation into allegations that Respondent has been grossly insubordinate and excessively absent. The resulting report and documentation was presented to a committee, which unanimously recommended to the Superintendent that action be initiated to terminate Respondent's employment. The Superintendent concurred in the recommendation, and the Administrative Complaint at issue in this case was prepared and served.

30. The School Board generally adheres to the practice of progressive discipline, although whether each step in the progression of discipline will occur in a given case will depend on the nature of the violations and the circumstances of the case. The possible steps in the progression of disciplinary actions are verbal reprimand, written reprimand, suspension with or without pay, and then termination.

31. At one point during the investigation, Respondent's written reprimand was overlooked and, therefore, a draft of a written reprimand was prepared. The October 7, 2009, written reprimand, with written directive, was then discovered and taken into account. As a result, the School Board determined that the appropriate action to be taken was termination. As Mr. Boyes explained, suspension was considered inappropriate as a next step in this particular case, in that one of the charges was excessive absenteeism, and suspension would be tantamount to a reward by giving Respondent more time off as a consequence of taking too much time off. Petitioner's decision to skip the suspension step in the progression of disciplinary action was reasonable under the circumstances of this case.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).^{3/}

33. In this proceeding, Petitioner seeks to terminate Respondent's employment. Petitioner bears the burden of proof, and the standard of proof is by a preponderance of the evidence. § 120.57(1)(j); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

34. 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., implementing Art. IX, § 4(b), Fla. Const.

35. Pursuant to section 1012.27(5), Florida Statutes, the Superintendent is authorized to recommend to the School Board that an employee of the School Board should be suspended or dismissed from employment. The School Board, in turn, has the authority to suspend or terminate School Board employees pursuant to section 1012.22(1)(f).

36. Pursuant to section 1012.40, Respondent is an "educational support employee," who may be terminated by the School Board pursuant to standards provided in the applicable collective bargaining agreement.

37. "Just cause" is the undefined standard adopted by the applicable Paraprofessional Collective Bargaining Agreement for termination of School Board paraprofessional employees such as Respondent. School Board Policy 6.11 adopts the same "just cause" standard for disciplinary action against School Board employees, including Respondent.

38. The School Board has discretion in defining what constitutes "just cause" for taking disciplinary action against employees, including suspension or termination. See Dietz v.

Lee Cnty. Sch. Bd., 647 So. 2d 217, 218 (Fla. 2d DCA (1994) (Blue, J. concurring); see also § 1012.23(1) (authorizing district school boards to adopt rules governing personnel matters, except as otherwise provided by law or the State Constitution).

39. The School Board has exercised its discretion by promulgating School Board Policy 6.11(1) and 6.11(12)(c), which provide that just cause for termination from employment includes, among other things, "misconduct in office, . . . gross insubordination, . . . violation of the Policies and Procedures Manual of the School District of Manatee County, violation of any applicable Florida statute, [or] violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida."

40. The first charge in the Administrative Complaint alleges that Respondent violated School Board Policy 6.2(2)(B)(2), which provides as follows:

Any absence from work without leave or excessive absence with notice may be considered grounds for termination. All employees are expected to be in attendance at work sites at all times. Excused absences are the only exception to this. Excessive absences even though excused, have an adverse impact.

41. The School Board's policy regarding excessive absenteeism is reflected in other sections of the Policies and

Procedures Manual, with a slightly different emphasis. The introductory language to Policy 6.2 under the heading "Procedures" states as follows: "Excessive absenteeism, even though excused, has an adverse impact on performance and is an issue to be addressed in performance evaluation affecting continuing employment." Similar language is set forth in Policy 6.11(3) (d) (District Rules of Work, Absence of Employees).

42. Respondent focuses only on the latter policy language to argue that the School Board was required to raise Respondent's excessive absenteeism in performance evaluations, but failed to do so. But, Policy 6.2(2) (B) (2), which is the one Respondent is charged with violating in the Administrative Complaint, plainly provides that excessive absenteeism may be grounds for termination. Respondent's argument that the School Board was required to first raise Respondent's absenteeism in a performance evaluation before applying the discipline authorized by Policy 6.2(2) (B) (2) is rejected under the circumstances proven in this case, where Respondent's excessive absenteeism, including many whole days of absences from work, plus chronic tardiness, was the subject of a written reprimand and a written directive which Respondent chose to ignore even after several verbal reminders by the principal.

43. Petitioner proved by a preponderance of the evidence that Respondent's excessive absenteeism had a substantial

adverse impact on the school system. Respondent was given more than adequate notice of what was expected of her and more than adequate opportunity to conform her conduct to the requirements of her position. Rather than seeing any improvement in Respondent's attendance after her written reprimand and written directive, Respondent's attendance worsened, causing great disruption to those left scrambling to cover for Respondent's absences.

44. Respondent's attempt to excuse her absences because she had legitimate conflicts, with sick children or other legitimate reasons to be absent, is not fully supported by the record, but in any event, would be inadequate to outweigh the magnitude of her absences and the adverse impacts uniquely caused by Respondent's position as a VPK teacher's aide.

45. Petitioner proved that Respondent violated the School Board's promulgated policy against excessive absenteeism and that under the circumstances of this case, such violation constitutes just cause to terminate Respondent's employment.

46. The next charge in the Administrative Complaint is that Respondent was grossly insubordinate, both in refusing to comply with Mr. Boyes' written directive issued in conjunction with the October 7, 2009, written reprimand, even after verbal reminders were given; and in repeatedly refusing to comply with the oral and written assignments given to her by the VPK teacher

of record in the class to which Respondent was assigned as a teacher's aide.

47. Gross insubordination is "a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority." Fla. Admin. Code R. 6B-4.009(4); Dolega v. Sch. Bd. of Miami-Dade Cnty, 840 So. 2d 445, 446 (Fla. 3d DCA 2003).

48. Petitioner proved that Respondent's actions with respect to Mr. Boyes' written directive constituted gross insubordination. As found above, the more credible evidence established that Respondent knowingly refused to comply with Mr. Boyes' written directive that she sign in daily, a requirement that was enlisted as a tool to ensure that Respondent's attendance improve. For well over one full school year after Respondent received her written reprimand and directive, Respondent refused to sign in as her superior directed her to do, in writing. When Mr. Boyes reminded her that she was supposed to be signing in, Respondent did not respond with dismay that she had forgotten; instead, she defiantly questioned the school principal about whether any other employee was required to sign in as she was. Respondent was grossly insubordinate.

49. Petitioner also proved that Respondent was grossly insubordinate to the teacher of record in the VPK classroom,

whom Respondent was supposed to be aiding and whose directives and assignments Respondent was supposed to be following. The credible competent substantial evidence overwhelmingly established that Respondent was openly defiant in her continual refusal to accept assignments given to her by Ms. Slagle. There could not be a more openly defiant display of insubordination than Respondent's performance in ripping checklists of assignments off the wall and throwing them in the garbage.

50. Petitioner proved that Ms. Slagle was the authority in the VPK classroom, entitled to give directives to Respondent, her aide, and that the directives Ms. Slagle gave to Respondent were reasonable. Respondent's reactions to those directives were not reasonable; they were, as Respondent admitted, sarcastic, unprofessional, and uncalled for. Respondent was repeatedly, continually, and grossly insubordinate.

51. The Administrative Complaint also included a charge that Respondent had engaged in "misconduct in office." School Board Policy 6.11 uses, but does not define "misconduct in office." That phrase is defined for similar purposes in Florida Administrative Code Rule 6B-4.009(3) and that rule definition is instructive. "Misconduct in office" is defined as a violation of the Code of Ethics of the Education Profession or the Principles of Professional Conduct for the Education Profession

in Florida (Code of Ethics), which is so serious as to impair the individual's effectiveness in the school system.

52. Although paragraph 22 of the Administrative Complaint charges this violation, there is no citation to a specific provision of the Code of Ethics allegedly violated by Respondent. Therefore, this charge was not sufficiently pled to be the basis for disciplinary action.

53. Petitioner proved by a preponderance of the competent, substantial, and more credible evidence that there is ample just cause for Respondent's termination.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Manatee County School Board, enter a final order terminating the employment of Respondent, Dareki Daniels-Youmans.

DONE AND ENTERED this 22nd day of August, 2011, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August, 2011.

ENDNOTES

^{1/} No evidence was presented with regard to Respondent's position, responsibilities, or work experience in the 2008-2009 school year. The only evidence regarding that year was Respondent's attendance records. No evidence was presented regarding Respondent's prior work history with the School Board, other than that her performance had been satisfactory, and she had no prior disciplinary record.

^{2/} Respondent claimed that two other instructional personnel had similar absentee records, but were not terminated, suggesting that Respondent was singled out unfairly. Respondent failed to prove her claim. The evidence showed that one teacher was late by five or ten minutes twice a week, which is within her planning time before the instructional part of the school day begins. No evidence was presented that in addition to these minor incidents of tardiness, the teacher had substantial absences or that on top of excessive absenteeism, the teacher had been continually insubordinate to her superiors.

Respondent identified another instructional employee that Respondent claimed was excessively absent during the 2009-2010 and 2010-2011 school years, but was not terminated. While Mr. Boyes testified that he thought this other employee was absent more than Respondent during those years, he also was under the impression that Respondent's attendance had improved after her written reprimand. He was incorrect on both counts. Respondent's attendance evidence shows that the other employee singled out for excessive absenteeism was absent some 50 hours less than Respondent in 2009-2010. The 2010-2011 school year cannot easily be compared, because the employee used for comparison was on medical leave for December. Respondent's evidence also shows that in mid-November 2010, Mr. Boyes spoke with this other employee to express concerns about excessive absences. And after the employee returned from medical leave, in early March 2011, she was issued a written reprimand for excessive absenteeism. Thus, insofar as Respondent's attendance track record can be compared, it appears that this other employee was being treated similarly, in that the problem was being addressed by written reprimand after signs of excessive absences continued over a period of a year-plus. Moreover, no

evidence was presented that this other employee had continually refused to follow reasonable directives issued by her superiors, a substantial aggravating factor in Respondent's case that would justify different treatment, even if the absentee record was similar.

^{3/} All statutory references are to the Florida Statutes (2010), the law in effect when the hearing took place. It is noted that the events giving rise to this disciplinary action occurred at least, in part, when the 2008 and 2009 statutes were still in effect, but there were no material changes during these years to the statutory and rule provisions relied on in the charges against Respondent.

COPIES FURNISHED:

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

Lois Tepper, Interim General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Tim McGonegal, ED.D., Superintendent
Manatee County School Board
215 Manatee Avenue West
Post Office Box 9069
Bradenton, Florida 34205-9069

Scott A. Martin, Esquire
Manatee County School Board
215 Manatee Avenue West, Second Floor
Post Office Box 9069
Bradenton, Florida 34205-9069

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

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.