

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 11-3339TTS
)
MICHELE GABRIELE,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 6, 2011, in Bradenton, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Erin G. Jackson, Esquire
Chris Bentley, Esquire
Thompson, Sizemore, and Gonzalez, P.A.
Post Office Box 639
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

For Respondent: Melissa C. Mihok, Esquire
Kelly and 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 suspend Respondent for 15 days without pay and return her to an annual contract.

PRELIMINARY STATEMENT

By letter dated June 3, 2011, Tim McGonegal, as superintendent of the Manatee County School District (School District), notified Respondent, Michele Gabriele (Ms. Gabriele), that he intended to recommend to the Manatee County School Board (School Board) her suspension without pay for a period of 15 days from employment and her return to an annual contract for employment as a teacher for the reasons set forth in an Administrative Complaint (AC) served with the letter. The AC alleged that Ms. Gabriele engaged in misconduct and gross insubordination in violation of several cited statutes, rules or School Board policies by: failing to make reasonable efforts to protect students from conditions harmful to learning and/or harmful to the student's mental and/or physical health and/or safety; failing to ensure that students were not intentionally exposed to unnecessary embarrassment or disparagement; and/or exhibiting gross insubordination or willful neglect of duties through the intentional refusal to obey a direct order, reasonable in nature, and given by a person in authority. The

AC asserted that these alleged violations provided just cause to discipline Ms. Gabriele.

Ms. Gabriele timely requested an administrative hearing to contest the allegations in the AC. On July 6, 2011, the case was forwarded to the Division for assignment of an Administrative Law Judge to conduct the hearing.

Pursuant to section 1012.33(6)(a)2., Florida Statutes (2011),^{1/} the parties were entitled to proceed to final hearing within 60 days after Ms. Gabriele's request for an administrative hearing was received. The parties jointly waived the 60-day hearing provision, and the final hearing was scheduled for October 6 and 7, 2011. Only one day, October 6, 2011, was necessary to conduct the hearing.

Prior to the final hearing, the School Board filed a motion to amend the AC through the addition of an allegation that, on at least two occasions during the school year, Ms. Gabriele confronted students regarding complaints made to the school principal. On September 29, 2011, a telephonic hearing was conducted with both parties represented. An Order was entered granting the motion to amend the AC (now known as AAC) and specifically allowing Ms. Gabrielle to have three students and their parents testify at the hearing.

Both parties executed a Joint Pre-hearing Stipulation in which they stipulated to certain facts. To the extent relevant,

those facts have been incorporated into this Recommended Order at paragraphs 1 through 8 below.

At the final hearing, the parties jointly offered the following students' testimonies via deposition: B.G., D.M., D.R., E.R., and C.W. The School Board presented the testimony of Joshua Bennett, Barbara Twinem, Debra Horne, and parent, E.B. The School Board offered the following students' testimony via deposition: G.A., A.B., J.D., and B.J. Petitioner's Exhibits 1 through 3 and 7 through 17 were received into evidence. Ms. Gabriele testified on her own behalf. Ms. Gabriele provided the following students' testimony via deposition: N.A., S.M., and J.A. Respondent's Exhibits 1 through 14 were received into evidence.

The Transcript was filed on October 20, 2011. By agreement of the parties, their respective proposed recommended orders (PROs) were due ten days after the Transcript was filed. Prior to October 30, 2011, the parties filed a joint motion for an extension of time in which to file their respective PROs. The motion was granted. Both parties timely filed their PROs, and each has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. Gabriele has been employed by the School Board since October 13, 1997. As a member of the School Board's

instructional staff, Ms. Gabriele's employment was subject to section 1012.33, which provides that her employment will not be suspended or terminated except for just cause.

2. During the 2010-2011 school year, Ms. Gabriele was a teacher at Bashaw Elementary School (Bashaw).

3. As a teacher, Ms. Gabriele was required to abide by all Florida Statutes which pertain to teachers, the Code of Ethics and the Principles of Conduct of the Education Profession in Florida, and the Policies and Procedures Manual of the School Board.

4. On February 17, 2011, an Office of Professional Standards (OPS) file was opened regarding Ms. Gabriele based upon allegations that, on February 9, 2011, Ms. Gabriele asked a teacher's aide, Brenda Twinem (Ms. Twinem), in the presence of students, "Can I kill a kid today?", and, on February 16, 2011, Ms. Gabriele called a female student to the front of the classroom and yelled at her in the presence of other students and a parent.

5. On April 18, 2011, another OPS file was opened regarding Ms. Gabriele based upon an allegation that she made intentional contact with a witness (Ms. Twinem) who was involved in a recent OPS investigation into the alleged misconduct of Ms. Gabriele.

6. On April 19, 2011, the School Board notified Ms. Gabriele of its intent to place her on paid administrative leave pending the OPS investigation.

7. On June 3, 2011, the superintendent notified Ms. Gabriele of his intent to recommend the suspension of her employment for 15 days without pay, the dates of which to be determined by her principal, and a return to annual contract status.

8. The June 2011 AC notified Ms. Gabriele of the School Board's intent to suspend her employment and set forth the basis of the superintendent's recommendation for suspension. In the AC, the School Board charged that Ms. Gabriele had engaged in actions which constituted just cause under Section 6.11 of the Policies and Procedures Manual of the School Board. These actions included: immorality, misconduct in office, corporal punishment, excessive force, and violation of Florida Administrative Code Rules 6B-1.006(3)(a) and 6B-1.006(3)(e).

9. Joshua Bennett (Principal Bennett) became the principal of Bashaw in September 2010. Among his many other duties during the 2010-2011 school year, Principal Bennett was responsible for the supervision of the Bashaw teachers, including Ms. Gabriele, who was a fifth-grade teacher.

10. Ms. Gabriele's class size fluctuated from 18 to 22 students during the 2010-2011 school year. It was noted

that, during the math instruction period, there were changes in the number of students in her classroom, and it changed when Principal Bennett moved a student out of her class.

11. Principal Bennett received some parent complaints and concerns regarding Ms. Gabriele shortly after he became Bashaw's principal. Based on these complaints, Principal Bennett collected information from the parents and decided to have an informal conversation with Ms. Gabriele. He also determined to walk through her classroom more frequently during the school year. Further, Principal Bennett recommended to Ms. Gabriele that she take some behavior management classes.

12. Ms. Gabriele had the services of a paraprofessional (a/k/a a teacher's aide), Ms. Twinem, for a specific amount of time (40 to 50 minutes) during a particular day each week. While working for Ms. Gabriele as a paraprofessional, Ms. Twinem would check off homework, sort papers, grade papers, or work with groups of students as she was directed.

13. In February 2011, Ms. Twinem approached Ms. Gabriele to provide her information. There were several students engaged in conversations in close proximity to Ms. Gabriele as she sat at her desk. According to Ms. Twinem, Ms. Twinem was standing beside Ms. Gabriele's desk when Ms. Gabriele looked at her and, in a frustrated tone, stated, "Can I kill a kid?" (Gabriele's Statement). Ms. Twinem was speechless because she thought it

was inappropriate for Ms. Gabriele to make that statement in front of students. Ms. Twinem told Principal Bennett of Gabriele's Statement shortly thereafter. Ms. Twinem wrote her own account of Gabriele's Statement. Ms. Twinem's account contained her thought that Ms. Gabriele was joking, but she (Ms. Twinem) did not "know how it [Gabriele's Statement] was interpreted by the students." Clearly, at that time, Ms. Twinem had concerns about what the students thought of Gabriele's Statement.

14. Ms. Gabriele admitted to making Gabriele's Statement. At hearing, she testified that, at the time she made the statement, the students were working with their partners, and it was loud in the classroom. After a student had asked her the same question several times, Ms. Gabriele made Gabriele's Statement. Although Ms. Gabriele testified that she was not frustrated, mad or upset when she made the statement, that she just made the statement "off-the-cuff kind of thing," this is not credible. According to Ms. Gabriele, the student's question involved a long-standing classroom practice of the students placing their completed assignments in a pink bin. If the student was indeed asking or questioning this long-standing practice, it would be natural for some type of frustration or exasperation to be expected. Ms. Gabriele conceded that, even

if Gabriele's Statement had been made in jest or in a joking manner, it was inappropriate.

15. Also in February 2011, Principal Bennett had a specific complaint involving a parent's (E.B.) observation during a visit to Ms. Gabriele's classroom.

16. With Ms. Gabriele's knowledge that she was in the classroom, E.B. had come to pick up her student and to search for some misplaced homework in the classroom. E.B. observed a female student (later identified by the initials N.A.) go to the front of the classroom where Ms. Gabriele was yelling at her. E.B. described Ms. Gabriele's actions as ". . . really reaming the kid, . . . And she just didn't seem like she was letting up, and the child was just very distraught." E.B. observed N.A. to be "really teary eyed . . . Not in a full cry, but looked like she would break down." E.B. thought Ms. Gabriele's behavior was "pretty harsh," loud in a real demanding way, and fierce. E.B testified that, had Ms. Gabriele been yelling at E.B.'s student, she "probably would have yanked her in the hall and had a few words."

17. E.B. was appalled at Ms. Gabriele's behavior and reported her observation to Principal Bennett. As a result of her conversation with Principal Bennett, E.B. followed up with a letter to the principal detailing what she had witnessed in Ms. Gabriele's classroom, as well as other observations she had

while chaperoning a school field trip with Ms. Gabriele's class. E.B. requested to be kept informed of what action was being taken and volunteered to be in the classroom when her scheduled permitted.

18. Shortly thereafter, an OPS investigation was opened regarding Ms. Gabriele. Debra Horne (Ms. Horne) is a specialist in the OPS. Ms. Horne conducted an investigation of E.B.'s classroom observation and Gabriele's Statement by interviewing Ms. Twinem; 11 students from Ms. Gabriele's class, including N.A.; and Ms. Gabriele. Ms. Twinem and the students' statements were taken on February 18, 2011, making them almost contemporaneous with the events.

19. During the OPS interviews with the 11 students, all 11 stated that Ms. Gabriele yells at the students, and one student said her yelling was "extreme." Five of the students stated Ms. Gabriele embarrassed them or other students by her actions; four stated Ms. Gabriele called students different names, such as "toads," "toadettes," "hillbilly," or "baby"; and three said she made them cry or other students cry. During her OPS interview, N.A. stated that Ms. Gabriele had made her cry and that it embarrassed her a lot. N.A. further stated that Ms. Gabriele yelled at her and other students a lot.^{2/}

20. During Ms. Twinem's OPS interview regarding Gabriele's Statement, she described Ms. Gabriele as being frustrated and

using a frustrated tone when it was spoken. At the hearing Ms. Twinem also testified that she thought Gabriele's Statement was made "out of frustration," but that it was "inappropriate" nonetheless.

21. Ms. Gabriele's OPS interview occurred on March 17, 2011. Ms. Horne conducted the OPS interview and followed her standard procedures in telling Ms. Gabriele the substance of the investigation. Aside from being told what her rights and duties were regarding the investigation, Ms. Gabriele was also reminded of the School Board policy regarding her cooperation with the investigation and her responsibility to not interfere with it or communicate with any witnesses to the investigation. Ms. Gabriele's interview included questions about E.B.'s letter, including E.B.'s classroom observations, and Gabriele's Statement.

22. Ms. Gabriele confirmed she was aware that E.B.'s letter was sent "downtown." Ms. Gabriele maintained that she thought the only issue in the initial investigation was E.B.'s letter. This position is thwarted when one reviews her OPS interview wherein Ms. Gabriele was questioned about both E.B.'s letter and Gabriele's Statement. Although during the OPS interview Ms. Gabriele stated she did not remember the incident with N.A. crying, she did admit that if E.B.'s recollection of the incident with N.A. was correct that she, Ms. Gabriele, could

"have handled it differently" by calling the student off to the side to discuss the issue. Also, during the OPS interview, Ms. Gabriele admitted that Gabriele's Statement was inappropriate when made to a coworker in the presence of students.

23. Ms. Gabriele received a copy of the School Board's initial OPS investigative report in April 2011. Within that report, and through Ms. Gabriele's testimony, she acknowledged receipt of that investigative file,^{3/} which included all the information obtained during the initial OPS investigation, including her own interview regarding E.B.'s letter and Gabriele's Statement.

24. In Section III of the initial OPS investigative report (for E.B.'s letter and Gabriele's Statement) and through her hearing testimony, Ms. Horne detailed her standard routine with respect to the description given to each witness at the start of his/her interview. Further, Ms. Horne advised School Board employees of their obligation to cooperate with the investigation as well as the School Board's Policy 6.13.^{4/} Ms. Gabriele testified that she was aware of the policies.

25. On Monday morning, April 18, 2011, when Ms. Twinem reported to Ms. Gabriele's classroom to sort papers and check homework, she was subjected to questions by Ms. Gabriele regarding whether or not Ms. Twinem had, in fact, reported

Gabriele's Statement to Principal Bennett. Ms. Gabriele testified she found out that Ms. Twinem was upset or bothered by Gabriele's Statement during one of her meetings with Principal Bennett. However, neither her testimony nor Principal Bennett's testimony reflected upon any meeting between those two on that Monday morning or the week prior for Ms. Gabriele to make that connection. Further, as Ms. Gabriele testified, she "obviously" knew that Ms. Twinem was the person who reported Gabriele's Statement, as she was the only other adult in the classroom at the time it was uttered.

26. Ms. Twinem testified that she felt like "a deer in the headlights" when Ms. Gabriele asked her about reporting Gabriele's Statement. Ms. Twinem admitted to Ms. Gabriele that she had reported Gabriele's Statement to the principal "a long time ago." Ms. Twinem testified she was "anxious and nervous and like just didn't feel good" when Ms. Gabriele confronted her. Ms. Twinem reported this first encounter to Principal Bennett because she thought it should not have occurred.

27. Later that same morning, Ms. Gabriele came into Ms. Twinem's office and told Ms. Twinem that she shouldn't tell anyone about their prior conversation because Ms. Gabriele could get in trouble. Ms. Twinem reported this second encounter to Principal Bennett.

28. Still, later that same day when Ms. Twinem was in her office, Ms. Gabriele stood at the door and said that Ms. Twinem had gotten her (Ms. Gabriele) in trouble, because she had reported the second contact to the principal. Ms. Twinem reported this third contact to Principal Bennett.

29. Principal Bennett testified that, after Ms. Twinem reported the first contact by Ms. Gabriele, he conferred with the OPS personnel as to what he should do. Based on direction from OPS, Principal Bennett hastily attempted to arrange a meeting with Ms. Gabriele to give her a verbal directive about contacting any witnesses involved with the investigation. Before the meeting could occur, Ms. Twinem reported that Ms. Gabriele had contacted her again.

30. Prior to the third encounter, Principal Bennett issued a verbal directive to Ms. Gabriele about contacting any witnesses involved in the investigation. His directive included an admonishment "to cease and desist talking to the other employees about the OPS matter." Principal Bennett recounted that he told Ms. Gabriele that she was "not to talk to any other employees about the open investigation."

31. Ms. Gabriele admitted she spoke with Ms. Twinem three times on April 18, 2011. Ms. Gabriele claimed that she did not understand who she could or could not talk to with respect to the investigation and that she only wanted to apologize for

making Ms. Twinem upset about Gabriele's Statement.

Ms. Gabriele admitted she knew it was Ms. Twinem who reported Gabriele's Statement to the principal. In the event Ms. Gabriele had questions about who she could or could not talk to, she had the opportunity to ask either Principal Bennett or Ms. Horne. Such dialogue apparently did not occur.

CONCLUSIONS OF LAW

32. The Division has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), & 1012.34(3)(d), Fla. Stat.

33. In this proceeding, the School Board seeks to discipline Ms. Gabriele's employment by instituting a 15-day suspension without pay and returning Ms. Gabriele to an annual contract. The School Board bears the burden of proof, and the standard of proof is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; 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. A "preponderance of the evidence" is the "greater weight of the evidence," or evidence that more likely than not tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

35. Section 1012.01(2) (a) provides:

As used in this chapter, the following terms have the following meanings:

* * *

(2) INSTRUCTIONAL PERSONNEL.--
"Instructional personnel" means any K-12 staff member whose function includes the provision of direct instructional services to students. Instructional personnel also includes K-12 personnel whose functions provide direct support in the learning process of students. Included in the classification of instructional personnel are the following K-12 personnel:

(a) Classroom teachers.--Classroom teachers are staff members assigned the professional activity of instructing students in courses in classroom situations, including basic instruction, exceptional student education, career education, and adult education, including substitute teachers.

36. Section 1012.27(5) provides:

The district school superintendent is responsible for directing the work of the personnel, subject to the requirements of this chapter, and in addition the district school superintendent shall perform the following:

* * *

(5) SUSPENSION AND DISMISSAL.--Suspend members of the instructional staff and other school employees during emergencies for a period extending to and including the day of the next regular or special meeting of the district school board and notify the district school board immediately of such suspension. When authorized to do so, serve notice on the suspended member of the instructional staff of charges made against

him or her and of the date of hearing.
Recommend employees for dismissal under the terms prescribed herein.

37. Section 1012.22 provides, in pertinent part:

The district school board shall:

(1) Designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees as follows, subject to the requirements of this chapter:

* * *

(f) Suspension, dismissal, and return to annual contract status.--The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in this chapter.

38. Section 1012.33 provides, in pertinent part:

(1) (a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of

unsatisfactory under s. 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s. 1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, 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.

* * *

(6) (a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1) (a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. Such hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

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

2. A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment. Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the district school board.

39. Section 1012.40 provides, in pertinent part:

(2)(c) In the event a district school superintendent seeks termination of an employee, the district school board may suspend the employee with or without pay. The employee shall receive written notice and shall have the opportunity to formally appeal the termination. The appeals process shall be determined by the appropriate collective bargaining process or by district school board rule in the event there is no collective bargaining agreement.

40. School Board Policy 6.11(1) provides:

Any employee of the School Board may be temporarily suspended, with or without pay, or permanently terminated from employment, for just cause including, but not limited to, immorality, misconduct in office, incompetence, gross insubordination, willful neglect of duty, drunkenness, or conviction of crime involving moral turpitude, violation of the Policies and Procedures

Manual of the School District of Manatee County, violation of any applicable Florida Statute, violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.

41. Rule 6B-1.006 provides, in pertinent part:

(3) Obligation to the student requires that the individual:

(a) Shall 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.

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

42. Florida Administrative Code Rule 6B-4.009 provides, in pertinent part:

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:

* * *

(3) 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.

(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.

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

44. Rule 6B-1.001 provides:

(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. (emphasis added).

45. School Board Policy 6.13 provides, in pertinent part:

Policy

The Office of Professional Standards shall conduct investigations into alleged employee misconduct or other matters concerning the school district and make recommendations as to the disposition of such complaints or

matters and report legally sufficient complaints to the Education Practices Commission.

* * *

(3) Subjects of an Investigation:

(a) Any employee who is the subject of an investigation shall not directly or indirectly contact, intimidate, threaten, harass or retaliate against any witness or complaining person related to or associated with the investigation, or in any way interfere with an investigation.

* * *

(5) Conclusion of Investigation:

(a) At the conclusion of the investigation and determination of appropriate action, a copy of the contents of the investigation file will be offered to the employee as provided in 5B or 5C below and said contents will become part of the employee's personnel file and a public record 10 days after offering or providing said copies to the employee.

(b) The contents of the investigation file will be numbered sequentially. The employee will be offered a complete copy of the investigative file and will sign for receipt of the file or sign a waiver of the right to receive a copy. Signature only signifies receipt and does not necessarily indicate agreement with its content.

46. The statute, rules, and School Board policies which provide the grounds for the discipline of Ms. Gabriele's employment are penal in nature; therefore, they must be

construed in favor of the employee. Rosario v. Burke, 605 So. 2d 523, 524 (Fla. 2d DCA 1992).

47. 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.

48. The superintendent is authorized to suspend instructional staff members and to recommend to the School Board that an employee of the School Board be disciplined. The School Board, in turn, has the authority to suspend or terminate School Board employees pursuant to section 1012.22(1)(f).

49. Pursuant to section 1012.01(2)(a), Ms. Gabriele is a "classroom teacher," who may be terminated by the School Board pursuant to standards provided in the applicable collective bargaining agreement. The undersigned did not receive into evidence a copy of the applicable collective bargaining agreement, nor was there any testimony about it.

50. 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), Fla. Stat. (authorizing

district school boards to adopt rules governing personnel matters, except as otherwise provided by law or the State Constitution).

51. The School Board has exercised its discretion by promulgating School Board Policy 6.11(1), which provides that any employee may be disciplined for just cause, which among other things includes but is not limited to "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."

52. The School Board proved by a preponderance of the evidence that Ms. Gabriele violated rule 6B-1.006(3)(a) when she uttered the words "Can I kill a kid?" to Ms. Twinem in the classroom. Whether said in frustration, anger or jest, it makes no difference, there is no place for this language in a school setting.

53. The School Board proved by a preponderance of the evidence that Ms. Gabriele violated rule 6B-1.006(3)(e) when she yelled at student N.A., in the presence of the classroom, and N.A. cried and was embarrassed by the incident. Additionally ten other students stated that Ms. Gabriele yells at them and/or embarrasses them on a near daily basis. This behavior is unacceptable to a classroom learning environment.

54. Ms. Gabriele's conduct is an affront to rule 6B-1.001(2), in that she did not exercise the best professional judgment or maintain her integrity with respect to N.A. and Gabriele's Statement.

55. The School Board's next allegation is that Ms. Gabriele violated School Board Policy 6.13, when she talked with a witness involved with an OPS investigation and continued to talk with a witness after being verbally advised to stop. During her initial OPS interview, Ms. Gabriele was informed as to her obligations and rights with respect to the investigation, including who she could or could not contact. The testimony substantiates that Ms. Gabriele knew Ms. Twinem had reported Gabriele's Statement to the principal when Ms. Gabriele was interviewed by OPS. For approximately a month, Ms. Gabriele did not approach Ms. Twinem to apologize or discuss the investigation. After receipt of the OPS investigative report in April, Ms. Gabriele then spoke with Ms. Twinem not once, not twice, but three times, with the third time following a verbal directive from her principal to stop all contact. Even giving Ms. Gabriele the benefit of the doubt that she did not understand who she could or could not contact regarding the investigation, the fact that she approached Ms. Twinem twice on the morning of April 18, 2011, and again after Principal Bennett specifically told her not to talk with any witnesses to the

investigation substantiates an intentional refusal to obey a direct order, given by her supervisor.

56. The School Board proved that Ms. Gabriele's actions with respect to contacting Ms. Twinem, a witness in an OPS investigation, constituted gross insubordination. As found above, the more credible evidence established that Ms. Gabriele intentionally refused to comply with the principal's directive that she refrain from talking with or approaching Ms. Twinem. Adequate warning was provided not only by Principal Bennett, but also Ms. Horne. Instead of waiting for the investigation to be completed, Ms. Gabriele not once or twice, but three times, contacted a witness about the investigation.

57. The AAC also included a charge that Ms. Gabriele 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 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, which is so serious as to impair the individual's effectiveness in the school system.

58. The School Board proved by a preponderance of the competent, substantial, and more credible evidence that there is ample just cause for Ms. Gabriele's discipline.

RECOMMENDATION

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

RECOMMENDED that Manatee County School Board enter a final order suspending Ms. Gabriele for 15 days without pay and returning her to an annual contract.

DONE AND ENTERED this 8th day of December, 2011, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
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 8th day of December, 2011.

ENDNOTES

^{1/} Unless otherwise noted all statutory references are to the Florida Statutes (2011). It is noted that the events giving rise to this disciplinary action occurred in the first half of 2011, prior to any statutory changes becoming effective.

^{2/} N.A.'s deposition was taken on September 16, 2011, approximately seven months after the incident. N.A.'s recollection of events obtained during the OPS investigation interview in February 2011 is more credible.

^{3/} Ms. Gabriele testified that her union representative received the initial OPS report and provided it to her within a few days of April 4, 2011. It is inconceivable that a professional, subject to such an investigation, would fail to read the investigative report to understand the allegations that were being examined.

^{4/} The same routine is described in the second OPS investigative report dated May 5, 2011.

COPIES FURNISHED:

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

Erin G. Jackson, Esquire
Chris Bentley, Esquire
Thompson, Sizemore, and Gonzalez, P.A.
Post Office Box 639
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

Charles M. Deal, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

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

Tim McGonegal, Superintendent
Manatee County School Board
215 Manatee Avenue, West
Bradenton, Florida 34205

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.