STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 12-0801TTS

ANNE J. WAMPOLE,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 25, 2012, in Bradenton, Florida, before Administrative Law Judge Linzie F. Bogan of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Erin G. Jackson, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner established, pursuant to section 1012.33(1)(a), Florida Statutes (2011),[1/] "just cause" to terminate Respondent from employment based on a breath alcohol

level of 0.112, as alleged in the Administrative Complaint dated February 8, 2012.

PRELIMINARY STATEMENT

On or about February 8, 2012, Petitioner, Manatee County School Board (Petitioner), through Timothy McGonegal, as superintendent of Schools, served on Respondent, Anne J. Wampole (Respondent), an Administrative Complaint and recommended therein Respondent's termination from employment. Respondent timely filed her request for administrative hearing, and on February 29, 2012, the matter was referred to the Division of Administrative Hearings for a disputed fact hearing. The disputed fact hearing was held on May 25, 2012.

During the final hearing, Petitioner offered the testimony of Dr. Craig Trigueiro, Penny Thien-Schwartz, David Underhill, Ginger Collins, and Baron McCombs. In addition to testifying on her own behalf, Respondent offered the testimony of A.M., a minor, and Michele Neathery. Petitioner's Exhibits 1 through 20 were admitted into evidence. Respondent did not offer any evidentiary exhibits.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on June 14, 2012. By agreement, each party filed its Proposed Recommended Order (PRO) on July 24, 2012. The respective PROs were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In January 2003, Petitioner hired Respondent to teach exceptional student education courses. Since commencing her employment with Petitioner, Respondent has always received an annual performance evaluation rating of no less than fully satisfactory.

2. Respondent has a bachelor's degree in exceptional student education and, most recently, received a master's degree with an endorsement in reading and special education.

3. For the 2011-2012 academic school year, Respondent was employed by Petitioner pursuant to a professional services contract. Respondent's professional services contract provides that "THE TEACHER SHALL BE BOUND TO SERVE AS PROVIDED IN SECTION 1012.33, FLORIDA STATUTES," and "SHALL NOT BE DISMISSED DURING THE TERM OF THIS CONTRACT EXCEPT FOR JUST CAUSE AS PROVIDED IN SECTION 1012.33(1)(a), FLORIDA STATUTES." (Capitalization in original). The contractual term of Respondent's contract covered the period of August 16, 2011, through June 8, 2012.

4. On the morning of January 13, 2012, Respondent began her day by dressing both herself and her two-year-old daughter. Respondent safely drove her daughter to daycare and then proceeded to safely drive herself to Bayshore High School. Respondent arrived at school around her customary time of between 7:15 a.m. and 7:25 a.m., parked her car in the school's parking

lot, without incident, and then entered the school building where she checked her mail, walked to her classroom, and made general preparations for the school day, which included briefly exchanging pleasantries with her colleague, Michele Neathery. Although the exchange between Respondent and Ms. Neathery was brief, at no time during the encounter did Ms. Neathery smell alcohol about Respondent's person or observe Respondent behaving in a way that would suggest impairment.

5. Respondent's first instructional period of the day on January 13, 2012, started at 8:50 a.m., and ended at 10:20 a.m. A.M. was a student in Respondent's first class and also served as Respondent's classroom aide. At the time of the final hearing, A.M. was 19 years old.

6. A.M. testified that on January 13, 2012, Assistant Principal Ginger Collins came to Respondent's classroom and asked her to step into the hallway. Before this occurred, A.M. had conversed with Respondent for about ten minutes, and during this time, he did not notice anything unusual about Respondent's appearance or her behavior.

7. At approximately 10:20 a.m., on the day in question, Ms. Collins had gone to the classroom occupied by Respondent to discuss with her a situation from the previous day that involved one of Respondent's students. Ms. Collins entered the classroom occupied by Respondent and asked Respondent to step into the

hallway with her so that they could discuss the situation from the previous day.

8. Respondent complied with the request from Ms. Collins, exited the classroom, and positioned herself outside of her classroom door so that she could speak with Ms. Collins and simultaneously monitor her students through the window of the door to the classroom. Respondent, while speaking with Ms. Collins in the alcove to her classroom, observed that two of her students were not on-task. Ms. Collins, from her vantage point, did not observe the two students that Respondent saw who were off-task and otherwise did not witness any "rambunctiousness or loud behavior" in Respondent's classroom. Respondent, in an attempt to alert the two students to the fact that they were being monitored and to otherwise get them back on-task, slapped her hand against the door three times. Ms. Collins had never observed Respondent use this student management technique.

9. Because Ms. Collins did not see that two of Respondent's students were off-task during the time when she conversed with Respondent, Ms. Collins thought it was odd and out of character for Respondent to have slapped the classroom door for what to Ms. Collins, was no apparent reason. Although Ms. Collins thought it "odd" when Respondent slapped the door, Respondent's student, A.M., credibly testified that prior to January 13, 2012, he had

witnessed Respondent slap her hand against the door a "couple of times before" as a technique for refocusing her students.

10. There was no evidence offered during the hearing that slapping a door with one's hand is an inappropriate classroom management technique. Respondent's act of slapping the door with her hand is not evidence of Respondent's normal faculties being impaired but is instead, under the circumstances, evidence that her faculties were intact. Respondent was able to observe and appreciate that two of her students were off-task and she responded by taking appropriate corrective action to redirect the errant students. Had Respondent not taken such corrective action, it would certainly make for a more credible assertion that her normal faculties were impaired because, then, it could be said that Respondent was unable to appreciate the need to correct her students because of alcohol-related influences on her judgment. This, however, is not the case.

11. Furthermore, the evidence establishes that all of Respondent's students were on-task until Respondent was asked to step into the hallway by Ms. Collins. The fact that all of Respondent's students were on-task when Ms. Collins initially entered Respondent's room is further indication that Respondent was in control of her classroom and not suffering from diminished faculties related to alcohol consumption.

12. When Ms. Collins conversed with Respondent outside of Respondent's classroom, Ms. Collins became concerned about allowing Respondent to return to the classroom because Ms. Collins observed that Respondent "was covering her mouth" with her hand when she spoke, was shifting her body "from side to side," had a strong smell of alcohol emanating from her person, and was speaking louder than usual. Although Ms. Collins had concerns about Respondent's ability "to return to the classroom," Ms. Collins did not monitor Respondent's performance in the classroom upon completion of their conversation.

13. According to evidence stipulated to by the parties, one of the behaviors associated with alcohol-related impairment is "decreased inhibition." The word "inhibition" is defined as "a mental process imposing restraint upon behavior or another mental process." Merriam-Webster Online Dictionary. Respondent's act of covering her mouth while speaking is not evidence of decreased inhibition, but is, instead, evidence of heightened inhibition. Respondent was cognizant of the smell of her breath and by covering her mouth with her hand, she was taking steps which were reasonably designed to deflect any offending breath-related odor. Had Respondent suffered from "decreased inhibition," then it is certainly more likely that Respondent would have spoken to Ms. Collins in such a way as to not have shielded Ms. Collins

from any smells that may have been emanating from Respondent's mouth.

14. After completing her initial conversation with Respondent, Ms. Collins immediately shared her concerns about Respondent with Assistant Principal Baron McCombs, Respondent's supervisor. Within a few minutes of being alerted to the situation by Ms. Collins, Mr. McCombs went to Respondent's classroom.

15. Mr. McCombs entered Respondent's classroom and asked Respondent to accompany him to his office. The total time that Mr. McCombs was in Respondent's classroom was "[j]ust a matter of seconds." During the few seconds that Mr. McCombs observed Respondent in her classroom, he noticed that Respondent "was acting very out of character . . . sort of flamboyantly, [and] [h]er voice was sort of boisterous, and her hands were sort of flailing, and her speech patterns were sort of elongated." Mr. McCombs described Respondent as usually being a very reserved person. Although Mr. McCombs observed Respondent behaving in a manner that he considered "out of character," he did not believe that Respondent's behavior was detrimental to her students. Respondent admits the behaviors described by Mr. McCombs, but credibly testified that the observed behaviors were intentionally orchestrated because she was trying to get her students excited about learning about President George Washington and his false

teeth. Mr. McCombs and Respondent exited her classroom and walked together to his office.

16. During the walk to his office, Mr. McCombs did not observe Respondent staggering or otherwise having difficulty ambulating. Once in Mr. McCombs' office, Respondent and Mr. McCombs spoke briefly about an incident from the previous day involving one of Respondent's students. Respondent did not elongate her words while speaking with Mr. McCombs in his office, and according to Mr. McCombs, Respondent's demeanor at the time was "reserved."

17. Ms. Collins entered Mr. McCombs office within a few minutes of Respondent's arrival, and once Ms. Collins took her seat, the conversation shifted to the real reason why Respondent had been summoned to the office by Mr. McCombs. Mr. McCombs informed Respondent that she was suspected of being under the influence of alcohol. Respondent's initial response to the accusation was to say, "Oh my God, I can't believe that this is happening," and she then became emotional and started to cry. When questioned, Respondent admitted that she had been drinking the night before. Specifically, Respondent admitted that she had her last drink "somewhere around 1:00 or 1:30 in the morning." Mr. McCombs left the room to report the matter to school Principal David Underhill.

18. While waiting for Mr. Underhill to arrive, Respondent continued to converse with Ms. Collins. Respondent asked questions about the protocols and procedures related to the allegations and also wanted to know the impact of the situation on her employment. While discussing these issues with Respondent for more than an hour, Ms. Collins did not detect that Respondent's "speech was slowed or sluggish." Mr. Underhill eventually arrived and explained to Respondent the procedures and protocols associated with suspected impairment testing.

19. At about 12:30 p.m. Ms. Collins, who had been with Respondent the entire time since entering Mr. McCombs' office, prepared to transport Respondent to the medical clinic for suspected impairment testing. Before leaving for the clinic, Ms. Collins escorted Respondent to her car to retrieve some items. The walk to Respondent's car took about five minutes. During the walk, Ms. Collins observed that Respondent did not experience any difficulty walking and that Respondent was coherent. Ms. Collins drove Respondent to the medical clinic for suspected impairment testing.

20. Once at the medical clinic, Respondent provided two breath samples for a breathalyzer testing machine that measured Respondent's breath-alcohol level at 0.112. Since commencing employment with Petitioner, this was Respondent's first positive, confirmed alcohol test. The testing protocol at the medical

clinic was such that Respondent met with a nursing assistant and stayed in the presence of the nursing assistant throughout the testing process. During the 20 or so minutes that Respondent was with the nursing assistant, it was observed by the nursing assistant that Respondent was coherent, she understood instructions that were given to her, and her speech was not sluggish. The nursing assistant did observe that Respondent had glassy eyes. After completing her final breathalyzer test, Respondent met with medical doctor Craig Trigueiro for about five to ten minutes.

21. Dr. Trigueiro has been a physician for 37 years. When Dr. Trigueiro evaluates patients for suspected alcohol impairment, he described his process for face-to-face evaluation as follows:

> I look at them. I smell their breath. I observe their behavior. I ask them various questions, and then I document everything on the drug testing forms. [T-17]

22. When Dr. Trigueiro met with Respondent, he noted the following on her drug testing form:

> Admits to last p.m. drinking until 1:00 a.m. In Alcoholics Anonymous. Glassy eyed. Has alcohol on breath. Breath alcohol, 0.112 and 0.112. Assistant principal. Ginger Collins here. Legally under the influence. Acutely intoxicated and cannot drive.

23. Dr. Trigueiro stated that he noticed that Respondent was "a little unsteady on her feet," but on cross-examination,

admitted that Respondent's apparent unsteadiness could have been related to causes other than alcohol consumption. Dr. Trigueiro, contrary to his stated practice of "document[ing] everything on the drug testing form," did not note on Respondent's drug-testing form that she was "a little unsteady on her feet."

24. Dr. Trigueiro also testified that he noticed that Respondent was "sluggish in her speech." On cross-examination Dr. Trigueiro admitted that he did not mention on Respondent's drug-testing form that Respondent was "sluggish in her speech."

25. Dr. Trigueiro testified that the reason why he did not note on Respondent's drug-testing form his observations of Respondent's sluggish speech and her being unsteady on her feet, was because he "didn't think that this type of situation would end up in court."

26. Dr. Trigueiro stated that had the instant case been one involving "great bodily harm or death," as opposed to one merely involving an employer for-cause breath test, he would have performed a higher level of medical examination that would have included diagnostic exams, such as the "finger to nose" and "heel to toe" test. In Dr. Trigueiro's opinion, Respondent's intoxication was "cut and clear" because she had a breath-alcohol test which showed that Respondent was "legally intoxicated."

27. Contrary to Dr. Trigueiro's conclusion that Respondent was "legally intoxicated," a breath-alcohol level of 0.08 or

higher does not establish, ipso facto, "legal intoxication," but instead merely establishes a rebuttable presumption, as it relates to the operation of a motor vehicle, that a person is under the influence of alcoholic beverages to the extent that his normal faculties are impaired. § 316.1934(2)(c), Fla. Stat. Specifically, section 316.1934(2) provides that the presumptions created therein do "not limit the introduction of any other competent evidence bearing upon the question of whether the person was under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired." Id.

28. Ms. Collins was with Respondent when she was seen by Dr. Trigueiro. According to Ms. Collins, when Dr. Trigueiro spoke to Respondent "he was very upset" and treated Respondent quite harshly. When Respondent told Dr. Trigueiro that she had been drinking until about 1:00 a.m., Dr. Trigueiro said to Respondent: "Do you think I'm a fool?" Dr. Trigueiro went on to state that he had been practicing medicine for over 30 years and that Respondent could not have consumed her last drink at the stated hour and then some twelve hours later have a breath-alcohol level of 0.112. Despite this initial assertion by Dr. Trigueiro, he, nevertheless, admitted on cross-examination that some people are more tolerant of alcohol than others and

that not all individuals metabolize alcohol at the same rate. According to Dr. Trigueiro:

> The more alcohol someone drinks, the more enzymes in the liver exist to detoxify alcohol, which is why someone who drinks all the time has to drink more alcohol to . . . get a buzz to become--you know, feel the central nervous system effects of the alcohol. So someone who drinks a lot has to drink more alcohol simply because the liver enzymes are revved up to detoxify alcohol; whereas someone who doesn't drink much alcohol would become intoxicated at a much lower beverage intake, alcohol intake because the liver enzymes are not induced by chronic drinking.

Dr. Trigueiro did not perform any tests on Respondent to determine that rate at which her body metabolizes alcohol.

29. Dr. Trigueiro's medical opinion establishes that Respondent had glassy eyes, but does not establish that Respondent's normal faculties were impaired. When asked specifically if Respondent's "normal faculties were impaired," Dr. Trigueiro could only state that Respondent was "clinically impaired." Petitioner did not offer any evidence as to whether "clinical impairment" is synonymous with impairment of one's normal faculties, and Dr. Trigueiro's response suggests that the two standards are not synonymous.

30. Dr. Trigueiro was more concerned with lecturing Respondent about her alcohol consumption, as opposed to conducting a thorough assessment of Respondent's level of

functional impairment. Dr. Trigueiro obviously believed that a more thorough evaluation of Respondent's level of cognitive functioning was unwarranted because in his opinion, Respondent's case was "cut and clear" due to her breath-alcohol level of 0.112 and the fact that this was merely a case involving an employer for-cause evaluation.

31. The greater weight of the competent substantial evidence establishes that when Respondent reported to school on January 13, 2012, and through and including the time that she met with Dr. Trigueiro, she was coherent, she was able to process information that was communicated to her and provide appropriate responses thereto, she was oriented to time and place, her speech was not sluggish or slurred, and she did not have any difficulty ambulating. The greater weight of the competent substantial evidence also establishes that during all times relevant hereto, the glassy appearance of Respondent's eyes was the only objective manifestation of the alcohol that was in Respondent's system and that the presence of "glassy eyes" does not establish in and of itself that a person's normal faculties are impaired.

32. Respondent admits to being a recovering alcoholic. She is actively involved in an alcoholics support group and consults with her sponsor regularly.

33. Near the end of the 2010-2011 academic school year, Respondent was experiencing difficulty in maintaining sobriety.

There was no evidence presented that Respondent's challenges with maintaining sobriety during the previous school year negatively impacted her performance in the classroom. In recognition of her challenges, Respondent self-disclosed to the school principal, Mr. Underhill, her challenges with alcohol and requested a leave-of-absence so that she could receive in-patient treatment. Respondent's request for leave-of-absence was granted, and she attended and completed a rehabilitation program.

34. Mr. Underhill, when asked about whether he had concerns about Respondent being in the classroom with students with alcohol in her system, testified that he "would be extremely concerned when a teacher in a classroom has to make multiple decisions, all at any given time, that any type of circumstances can arise [and Respondent's] level of [breath] alcohol is going to impair good judgment." Petitioner did not offer any credible evidence establishing that on January 13, 2012, Respondent's judgment was impaired or that she had difficulty, or would likely have difficulty, making appropriate decisions while in her classroom.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

36. Petitioner seeks to terminate Respondent's employment. Petitioner bears the burden of proving by a preponderance of the evidence that just cause exists for Respondent's termination. 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).

I. Drunkenness

37. Paragraph 12 of the Administrative Complaint alleges that "Wampole's actions violated Rule [6A-5.056(5)(a)], F.A.C.,[2/] in which drunkenness is defined as the condition which exists when an individual publicly is under the influence of alcoholic beverages or drugs to such an extent that his or her normal faculties are impaired."[3/]

38. For instructional staff employed pursuant to a professional services contract, section 1012.33(1)(a) provides that just cause for dismissal during the term of the contract, as defined by the State Board of Education, includes "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." There is no express reference to "drunkenness" contained in section 1012.33(1)(a). There is, however, an express reference to "drunkenness" in section 1012.33(4)(c), which applies only to certain district

employees that are employed pursuant to a "continuing contract." Respondent is not employed pursuant to a continuing contract.

39. In Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994), Judge Blue (specially concurring) stated the following:

> I agree section 231.36, Florida Statutes (1991), provides no objective standard by which school boards are required to judge the conduct of instructional staff, resulting in school boards exercising a nearly pure subjective analysis when deciding to terminate a teacher during the term of a professional service contract. I write because I am not sure the legislature intended to endow school boards with this absolute discretion. If not, section 231.36 should be amended to clarify the conduct that would warrant the dismissal of teachers holding a professional services contract.
>
> Section 231.36 appears to provide for three status categories for instructional staff: continuing contract, professional service contract, and probationary status. Each category carries a separate standard for dismissal. Probationary status provides no rights to continuing employment and is required for three years preceding either a continuing contract or a professional service contract.
>
> A continuing contract applies only to instructional staff attaining their contract status before July 1984. Persons holding continuing contracts are subject to dismissal for conduct constituting one of the so-called 'seven deadly sins:' immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude. § 231.36(4)(c).

> By statute, all contracts except continuing must contain provisions allowing dismissal during the term only for just cause. § 231.36(1)(a). The statute then defines 'just cause' as including but not limited to: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude. Just cause therefore includes but is not limited to five of the seven deadly sins. We assume that drunkenness and immorality, which are not included in the non-exclusive list of sins constituting just cause, would also be grounds for dismissal.

40. Five years after Dietz was decided, the Legislature, in 1999, amended section 231.36(1)(a). The 1999 amendment took from local school boards the "absolute discretion" to define just cause as it relates to the dismissal of instructional staff during the term of the employee's professional services contract and vested with the State Board of Education the authority to define by rule what constitutes just cause.

41. In 2002, the "Florida K-20 Education Code" was created by chapter 02-387, Laws of Florida. Though section 231.36 was repealed by the adoption of the Florida K-20 Education Code, the provisions found in section 231.36(1)(a) and (4)(c) were re-established in section 1012.33(1)(a) and (4)(c).

42. In 2008, section 1012.33(1)(a) was amended and "immorality" was added to the list of five deadly sins. The Legislature did not, however, expand the original five deadly sins to expressly include "drunkenness."

43. Effective July 1, 2011, section 1012.33(1)(a) was again amended to expand the definition of "just cause" to include matters related to unsatisfactory performance evaluations. As in previous years, the Legislature, with respect to section 1012.33(1)(a), did not enumerate drunkenness as one of the grounds for just cause.

44. Rule [6A-5.056], as it existed at the time of the alleged violation asserted herein, stated as follows:

> The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, F.S. The basis for each of such charges is hereby defined:
>
> (1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis on testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:
>
> (a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, F.S.); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum education experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the

educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

(2) 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.

(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.

(5) Drunkenness is defined as:

(a) That condition which exists when an individual publicly is under the influence of alcoholic beverages or drugs to such an extent that his or her normal faculties are impaired; or

(b) Conviction of the charge of drunkenness by a court of law.

(6) Moral turpitude is a crime that is evidenced by an act of baseness, vileness or

> depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

45. Effective July 8, 2012, Florida Administrative Code Rule 6A-5.5056 was amended by the Florida Department of Education. Paragraph (6) of Rule 6A-5.5056 provides, in part, that "[d]runkenness applies only to persons who hold a contract issued on or before July 1, 1984. . . ." Although recently amended rule 6A-5.5056 is not applicable in the instant dispute because it substantively amends the previous rule and was not in effect when the alleged violation occurred herein, it is, nevertheless, instructive because the recently amended rule contains the Department of Education's interpretation of section 1012.33; a statute for whose administration the agency is responsible. See Bd. of Podiatric Med. v. Fla. Med. Ass'n, 779 So. 2d 658, 660 (Fla. 1st DCA 2001)(an agency is accorded deference in the interpretation of statutes which it administers).

46. When the Legislature reenacts a statute, it is presumed to know the construction placed thereon by courts or administrators. Peninsular Supply Co. v. C.B. Day Realty of Fla., Inc., 423 So. 2d 500, 502 (Fla. 3rd DCA 1982)(citing Nat'l Lead Co. v. U.S., 252 U.S. 140, 147 (1920); State ex rel. Szabo

Food Servs., Inc. of N. Carolina v. Dickinson, 286 So. 2d 529 (Fla. 1974)). Furthermore, when the Legislature amends a statute, it is presumed that "it intended the statute to have a different meaning than that accorded it before the amendment." State v. Mark Marks, P.A., 698 So. 2d 533, 541-42 (Fla. 1997).

47. It has been 18 years since Judge Blue authored his special concurrence in Dietz. During this period, the Legislature has amended section 1012.33(1)(a) and its predecessor, section 231.36, several times. By the Legislature, in 2008, adding "immorality" to the list of five deadly sins found in section 1012.33(1)(a) and three years later in 2011, making other significant amendments to section 1012.33(1)(a), while simultaneously electing to not expressly enumerate "drunkenness" as grounds for just cause, it is reasonable to conclude that the Legislature intended to exclude "drunkenness" as an independent basis for establishing just cause in cases involving professional services contracts. The Department of Education has obviously reached a similar conclusion given the language in rule 6A-5.5056, effective July 8, 2012, which limits "drunkenness" as a basis for just cause to contracts "issued on or before July 1, 1984." Accordingly, there is no legal basis for charging Respondent with "drunkenness" as alleged in the Administrative Complaint.

48. The above notwithstanding, even if "drunkenness" were a permissible basis for terminating Respondent's employment contract, Petitioner failed to meet its burden of establishing that Respondent's conduct on January 13, 2012, satisfies the definition of "drunkenness."

49. In order to meet the definition of drunkenness as defined by rule [6A-5.056(5)(a)], an individual must:

> 1) Be in a public place;
>
> 2) While under the influence of alcoholic beverages or drugs; and
>
> 3) The influence of alcoholic beverages or drugs must be to such an extent that the individual's normal faculties are impaired.

50. Rule [6A-5.056(5)(a)] actually uses the word "publicly" to denote the place where an individual must be while under the influence of alcoholic beverages or drugs. Rule [6A-5.056(5)(a)] does not offer a definition for the word "publicly." According to Black's Law Dictionary, a public place is "a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community." Black's Law Dictionary 1107 (5th ed. 1979). Bayshore High School is a public high school in Manatee County and is clearly a place where the citizens of the community have a legally recognizable interest. The evidence establishes that Respondent was in a

public place when she was observed by school officials on January 13, 2012.

51. Respondent reported to work on January 13, 2012, at approximately 7:30 a.m., and remained at work until such time as she was transported for reasonable suspicion testing. When tested at 1:29 p.m. and 1:46 p.m., Respondent's breathalyzer test results, for both tests, was 0.112 percent by weight of alcohol. Without question, Respondent had alcohol in her system when she was at work January 13, 2012.

52. However, there was insufficient evidence offered by Petitioner establishing that Respondent's normal faculties were impaired while she was at work. See, e.g., Cannon v. State, 91 Fla. 214, 217 (Fla. 1926)("Though all persons intoxicated by the use of alcoholic liquors are 'under the influence of intoxicating liquors,' the reverse of the position is not true, for a person may be under the influence of intoxicating liquors without being intoxicated.").

53. Neither rule [6A-5.056(5)(a)] nor any policy of the School Board defines the phrase "normal faculties" as used in rule [6A-5.056(5)(a)]. In Florida, the issue of impairment to a person's "normal faculties" routinely arises in the context of operating a vehicle or vessel while alleged to be under the influence of an intoxicant. Recently, the Florida Supreme Court, In re: Std. Jury Instructions in Crim. Cases, No. SC10-2434,

37 Fla. L. Weekly S94 (as revised May 3, 2012), recognized a definition of "normal faculties" which provides that "'[n]ormal faculties' include, but are not limited to, the ability to see, hear, walk, talk, judge distances . . . make judgments, act in emergencies and, in general, to normally perform the many mental and physical acts of our daily lives." This jury instruction tracks the language found in section 316.1934(1).

54. Petitioner did not submit sufficient evidence to establish that on January 13, 2012, Respondent's normal faculties were impaired while she was at school. To the contrary, the greater weight of the competent substantial evidence presented during the final hearing actually demonstrates that Respondent was in control of her faculties during all times relevant hereto.

II. Misconduct in Office

55. Paragraph 10 of the Administrative Complaint alleges as follows:

> Wampole engaged in misconduct in office as defined in Rule 6B-4.009(3), F.A.C. which provides that misconduct in office is a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1001, 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.

56. Related to paragraph 10 of the Administrative Complaint is paragraph 13. This paragraph alleges, as to the allegation

that Respondent committed misconduct in office, that "Wampole's actions violated Rule 6B-1.006(3)(a), F.A.C., which requires that the individual make a 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."

57. As stated in Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758, 2007 Fla. Div. Adm. Hear. LEXIS 122 at *42 n.12 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007):

> Rule [6A-5.5056(3)] plainly requires that a violation of both the Ethics Code and the Principles of Professional Education be shown, not merely a violation of one or the other. The precepts set forth in the Ethics Code, however, are so general and so obviously aspirational as to be of little practical use in defining normative behavior. It is one thing to say, for example, that teachers must "strive for professional growth." See Fla. Admin. Code R. 6B-1.001(2). It is quite another to define the behavior which constitutes such striving in a way that puts teachers on notice concerning what conduct is forbidden. The principles of Professional Conduct accomplish the latter goal, enumerating specific "dos" and "don'ts." Thus, it is concluded that while any violation of one of the Principles would also be a violation of the Code of Ethics, the converse is not true. Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of a broad ideal articulated in the Ethics Code be proved, whereas it is both necessary and sufficient that a violation of a specific rule in the Principles of Professional Conduct be

> proved. It is the necessary and sufficient condition to which the text refers.

58. As noted in the Findings of Fact, the only impact that Respondent's alcohol consumption had on her system during times relevant hereto was that the alcohol caused Respondent to experience glassy eyes. Respondent's act of being in class with glassy eyes is not sufficient proof that Respondent exposed her students to conditions harmful to their learning, health, or safety as contemplated by rule 6B-1.006(3)(a). Accordingly, Petitioner failed to meet its burden of establishing that Respondent engaged in misconduct in office.

III. <u>Drug-Free Workplace Act</u>

59. Florida's Drug-Free Workplace Act (hereinafter the "Act") is found in Part I of chapter 112, Laws of Florida. Section 112.0455(8)(n)1 of the Act provides, in part, that "no employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test. . . ." The Act defines "employer" as "an agency within state government that employs individuals for salary, wages, or other remuneration." § 112.0455(5)(h). Respondent asserts that Petitioner is "an agency within state government" as defined by section 112.0455(5)(h) and that she is, therefore, entitled to the protections afforded by the Act. Respondent's argument is not persuasive.

60. In addition to the Drug-Free Workplace Act, Part I of chapter 112 contains other provisions that are instructive as to this issue. One of these provisions is section 112.042(1), which makes it unlawful "for the governing body of any county or municipal agency, board, commission, department, or office" of this state to discriminate in employment decisions against certain individuals. Another provision is section 112.044, which defines "employer" to mean "the state or any county, municipality, or special district or any subdivision or agency thereof." (emphasis added).

61. In comparing the definition of "employer" found in section 112.0455 with the definitions found in sections 112.042 and 112.044, it is clear, for purposes of Part I of chapter 112, that "an agency within state government" does not include within its definition the governing board of a "county." According to section 1000.30, Florida Statutes, "[e]ach county shall constitute a school district. . . ."

62. Respondent, in support of her contention that the Manatee County School Board is an agency within state government, relies upon Hernando Cnty. Sch. Bd. v. Provost, Case No. 09-2259 (Fla. DOAH Sept. 9, 2009), rejected in part, Case No. ED09-0001 (Sch. Bd. Hernando Cnty. Dec. 8, 2009). In Provost, the Recommended Order concluded that the Hernando County School Board was an agency within state government as contemplated by section

112.0455(5)(h). In its Final Order, the school board rejected, on essentially two grounds, the legal conclusion that the school board is an agency within state government. First, the school board found that in reviewing the statutory framework, there is no indication that the Legislature intended for the term "agency" to include school boards and, second, that the jurisdiction of school boards, unlike state agencies, does not extend throughout the State of Florida. The undersigned finds persuasive the rationale espoused by the Hernando County School Board in Provost.

63. In further support of her contention that the Manatee County School Board is an agency within state government, Respondent relies on McIntyre v. Seminole County School Board, 779 So. 2d 639 (Fla. 5th DCA 2001). In McIntyre, the school board terminated an employee working under an employment contract after the employee tested positive for marijuana. The central issue before the court was whether the employee was improperly denied a chapter 120 administrative hearing. As part of the opinion, the court addressed the school board's drug-free policy and stated that it was unclear whether the employee "violated the School Board's policy against any employee 'using . . . marijuana . . . before, during or after school hours at school or in any other school district location,' because there is nothing in the record which indicates where [the employee's] alleged drug use

took place." Id. at 644. Additionally, the court noted that the "School Board's drug-free policy does not provide for termination, but states: '[a]ny School Board employee who violates this policy shall be treated in accordance with appropriate Florida Statutes and/or appropriate Contract Agreement." The court concluded that "this language does not make it clear that McIntyre violated the School Board's drug-free policy." Id.

64. The court's holding in McIntyre relating to the Act presumes the applicability of the act, but does not address whether county school boards fall within the act's definition of "employer." Contrary to Respondent's assertion, the court's holding in McIntyre does not resolve the question of whether the Act applies to county school boards.

65. The Manatee County School Board is not an "agency within state government" as defined by section 112.0455(5)(h). Cf. Dunbar Electric Supply, Inc. v. The Sch. Bd. of Dade Cnty., Fla., 690 So. 2d 1339 (Fla. 3rd DCA 1997)("School boards do not fall within the executive branch of the state government."); Op. Att'y. Gen. Fla. 84-68 (1984)(school boards "are not a part of the executive branch of state government and therefore are not 'state agencies' for the purposes of the fiscal affairs of the state. . . ."). Because Petitioner is not an "employer" within the meaning of the Act, Petitioner is free to discipline

Respondent, as appropriate, for her first positive, confirmed alcohol test.

IV. Violation of School Board Policy and Procedure

66. Paragraph 11 of the Administrative Complaint alleges that Respondent "violated Section 2.20 of the Policies and Procedures Manual of the School Board of Manatee County which provides that no person shall be in possession of or under the influence of an intoxicating beverage on school board property." As drafted, the Administrative Complaint does not assert that Respondent's alleged violation of section 2.20 of the Policies and Procedures Manual of the School Board of Manatee County constitutes just cause pursuant to section 1033.12(1)(a). In other words, the Administrative Complaint asserts that the violation of Policy 2.20 is itself a sufficient basis for terminating Respondent's professional services contract.

67. As previously noted, Respondent's professional services contract expressly provides that Respondent "SHALL NOT BE DISMISSED DURING THE TERM OF [HER] CONTRACT EXCEPT FOR JUST CAUSE AS PROVIDED IN SECTION 1012.33(1)(a), FLORIDA STATUTES."

68. The violation of a local school board rule or policy may not, standing alone, establish just cause for terminating a professional services contract during its term. There must be a nexus between an alleged violation of a local school board rule, section 1012.33(1)(a) and rule [6A-5.5056]. See Broward Cnty.

Sch. Bd. v. Allen, Case No. 10-9262, pg. 24-25 (Fla. DOAH July 26, 2011, Broward Cnty. Sch. Bd., Dec. 15, 2011)("To establish the existence of 'just cause' . . . it was incumbent upon the School Board to prove, not only that Respondent committed this violation of school policy, but also that, in so doing, he engaged in 'misconduct in office' . . . as [this] term [is] used in section 1012.33 and defined in Florida Administrative Code Rule [6A-5.056]."). To allow otherwise, would render meaningless that portion of section 1012.33(1)(a) which grants to the State Board of Education the authority to define by rule what constitutes just cause for dismissing instructional staff.

69. Additionally, charging Respondent with violating Policy 2.20 without linking the charge to section 1012.33(1)(a) and rule [6A-5.5056] is inconsistent with the ejusdem generis canon of statutory construction which, as applied to Policy 2.20, "requires that for 'just cause' to be found based upon an unexemplary instance (i.e. Policy 2.20), the unexemplary instance must bear a close affinity to one of the exemplary instances (i.e. § 1012.33(1)(a))." Miami-Dade Cnty. Sch. Bd. v. Singleton, Case No. 07-0559, 2006 Fla. Div. Admin. Hear. LEXIS 614 *51 (Fla. DOAH Oct. 26, 2006; Miami-Dade Cnty. Sch. Bd., Aug. 10, 2007). In considering Policy 2.20, it is evident that the policy imposes a significantly lesser standard for termination than that found

in section 1012.33(1)(a) and rule [6A-5.056] because the policy does not require any evidence of impairment whatsoever, whereas section 1012.33(1)(a) and rule [6A-5.056] do require such evidence of impairment.

70. Also, by charging Respondent with a violation of the lesser standard found in Policy 2.20, Petitioner is impermissibly attempting to do indirectly that which it is unable to do directly; to wit, charge Respondent with "drunkenness" as previously explained. See generally N. Port Rd. & Drainage Dist. v. W. Vills. Improvement Dist., 82 So. 3d 69, n.4 (Fla. 2012)(the drainage district "cannot do indirectly what it cannot do directly.").

71. Policy 2.20 does not provide just cause for terminating Respondent's employment. A violation of Policy 2.20 does, however, provide Petitioner with just cause for suspending Respondent as authorized by section 1012.33(6)(a). See Abrams v. Seminole Cnty. Sch. Bd., 73 So. 3d 285 (Fla. 5th DCA 2011)(Just cause did not exist for termination, but did exit for lesser disciplinary sanction of suspension without pay.).

72. Although there was insufficient evidence to establish that Respondent's normal faculties were impaired on the day in question or that she exposed her students to conditions harmful to their learning, the evidence, nevertheless, established that Respondent had a considerable amount of alcohol in her system and

that her glassy eyes were related to her consumption of alcohol. Respondent violated Policy 2.20 by being under the influence of alcohol while on school property, and she should, therefore, be disciplined.

RECOMMENDATION

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

1. The violations alleged in paragraphs 10, 12, 13, and 14 of the Administrative Complaint should be dismissed.

2. The violation alleged in paragraph 11 of the Administrative Complaint should be dismissed to the extent that it seeks to establish just cause for termination of Respondent's employment.

3. Paragraph 11 of the Administrative Complaint should be sustained to the extent that it establishes grounds for imposing non-terminable discipline against Respondent.

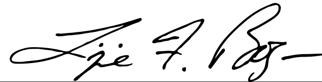
4. Respondent shall be suspended, without pay, for a period of 60 calendar days. Respondent shall not be eligible to use any accrued leave during her period of suspension.

5. Upon return from her suspension, Respondent, during the remainder of the 2012-2013 academic year, shall at her expense be subject to random alcohol testing as determined by the Manatee County School Board or its designee. A positive alcohol test shall result in further disciplinary action.

6. Upon return from her suspension, Respondent, during the remainder of the 2012-2013, shall be assigned to a position where she does not have responsibility for the supervision of students.

7. During Respondent's period of suspension, she shall remain eligible to participate in the Employees' Assistance Program and shall enroll in and successfully complete an alcohol dependency program. Respondent may be subject to disciplinary action should she fail to successfully complete the alcohol dependency program.

DONE AND ENTERED this 16th day of August, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of August, 2012.

ENDNOTES

[1/] All subsequent references to Florida Statutes will be to 2011, unless otherwise indicated.

[2/] Effective April 5, 1983, Florida Administrative Code Rule 6B-4.009 was transferred to Florida Administrative Code Rule

6A-5.056. The Administrative Complaint correctly references the substance of the rule and corresponding numbered paragraphs, but incorrectly references the chapter number for the rule. Consequently, rule 6A-5.056 will be substituted herein and designated by the utilization of brackets ([]).

3/ As written, paragraph 12 of the Administrative Complaint merely charges Respondent with violating the definition of drunkenness and omits therefrom any reference to section 1012.33(1)(a), which provides the statutory authority for terminating a professional services contract during its term. In disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of Respondent. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Consistent with this principle, it is improper to charge Respondent with simply violating a definition. See Dep't of Bus. & Prof'l Reg. v. Rhea, Case No. 11-3009PL, RO at 30 (Fla. DOAH Feb. 17, 2011)("[T]he undersigned cannot conclude that Respondent may be found guilty of violating a definition.").

COPIES FURNISHED:

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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.