

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,            )  
  )  
          Petitioner,                                )  
  )  
vs.    )    Case No. 12-1601  
  )  
RICHARD ALLEN,                                 )  
  )  
          Respondent.                             )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on June 27 and 28, 2012, at video teleconferencing sites in Fort Lauderdale and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in sections 120.569 and 120.57(1), Florida Statutes (2010).<sup>1/</sup>

APPEARANCES

For Petitioner: Mark A. Emanuele, Esquire  
Lydecker, Diaz, P.A., LLC  
1221 Brickell Avenue, 3rd Floor  
Miami, Florida 33131

For Respondent: Jeffrey Scott Sirmons, Esquire  
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510 Vonderburg Drive, Suite 309  
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STATEMENT OF THE ISSUE

The issue in this case is whether there is just cause to terminate Richard Allen's employment with the Broward County School Board based upon the allegations made in its Amended Administrative Complaint dated March 6, 2012.

PRELIMINARY STATEMENT

By letter dated June 28, 2011, Richard Allen ("Respondent" or "Allen") was notified that Superintendent James F. Notter would recommend to the Broward County School Board ("Petitioner" or "School Board") termination of Respondent's employment.

Respondent timely elected to dispute the reasons for the termination and requested a hearing. Because he requested a formal proceeding, the matter was referred to the Division of Administrative Hearings ("DOAH"). An Administrative Complaint was filed on November 14, 2011, and a final hearing was scheduled to start February 15, 2012. Petitioner voluntarily dismissed the complaint before DOAH on February 13, 2012.

The School Board filed an Amended Administrative Complaint with DOAH on May 3, 2012, in which it charged Allen with violation of sections 1002.20, 1002.22, and 1012.33, Broward County School Board policies 5100.1 and 5306, 20 U.S.C.A. section 1232(g), and Florida Administrative Rules 6(B)-1.001, 6(B)-1.006(3)(f),(h),(i), 4(b),(c), 5(a), and 6(A)-1.0955, 6(B)-4.009(1)(2)and (3). On May 16, 2012, the case was scheduled for

hearing on June 27 and 28, 2012. The matter proceeded as scheduled.

At hearing, Petitioner presented the testimony of three witnesses: Enid Valdez ("Valdez"), Principal; David Golt, Executive Director of Professional Standards and of the Special Investigative Unit; and Katherine Francis, Executive Director of Student Support Services. Petitioner's Exhibits numbered 1 through 26 were admitted into evidence. Respondent testified on his own behalf. Respondent's Exhibit 1 was admitted into evidence.

At the close of the hearing, the parties stipulated that the proposed recommended orders would be due 30 days after the filing of the transcript. The proceedings were transcribed and the parties availed themselves of the right to submit proposed recommended orders after the filing of the transcript. The Transcript of the final hearing was filed with DOAH on August 24, 2012. The due date for the proposed recommended orders was originally September 24, 2012. Both parties filed timely Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within Broward County Florida. Article IX, Florida

Constitution; § 1001.32, Fla. Stat. Specifically, the School Board has the authority to discipline employees.

§ 1012.22(1)(f), Fla. Stat.

2. Allen started his employment with Petitioner in 2002. He was employed pursuant to a professional services contract.

3. During the 2010-2011 school year, Respondent was assigned to Piper High School ("PHS") as an American government teacher.

4. For the school year, Allen received all relevant policies and procedures including the PHS Faculty Handbook, Computer Acceptable Use Policy, Instructional Performance Assessment System Policy, Code of Ethics, and Principles of Professional Conduct. The handbook also covered ethics for computer networking, online communication, and professional standards as well as provided directions to obtain website locations for the Code of Ethics, Principles of Professional Conduct for the Education Profession in Florida, School Board policy 5306, and rules regarding confidentiality of records.

5. During the prior 2009-2010 school year, Allen had been investigated by Petitioner and the Florida Department of Education ("DOE") for failing to follow district policy regarding collection of student funds when Respondent collected money from his students and obtained a personal magazine subscription that he used in his classroom without going through

the bookkeeper ("magazine incident"). Written student statements were obtained during the investigation. Ultimately, Allen contested the proposed discipline, a five-day suspension, for his actions in DOAH Case No. 10-9262, and the charges were dismissed with an award of back salary.

6. By certified letter dated May 13, 2010, Petitioner notified Respondent of Disciplinary Action and provided a General Release Agreement. The letter also stated:

This is your notice pursuant to Florida Statute 1012.31 that the material contained in the investigative file is now a part of your personnel file and is a public record and it will become available for inspection by the public ten (10) days from receipt of this letter. Any request made by the public for the documentation referred to above will be provided in accordance with the laws of the State of Florida.

7. The Disciplinary Action & General Release Agreement attached to the letter also read in section 3:

This Agreement and the action taken herein will become a part of the employee's employment history with the Broward County School Board. This document and the investigative file on which it is predicated will become public record within ten (10) days from the execution of this Agreement, in accordance with Florida law and Administrative Code.

8. By letter dated August 10, 2010, Petitioner sent Respondent a letter notifying him that a hearing would take place regarding the magazine incident. The letter also stated:

This is your notice pursuant to Florida Statute 1012.31 that the material contained in your investigative file, is a public record and it will become available for inspection by the public ten days from receipt of this letter. Any request made by the public for the documentation referred to above will be provided in accordance with the laws of the State of Florida.

9. By letter sent certified mail dated August 16, 2010, Petitioner notified Respondent that he was going to be suspended without pay for the magazine incident. The letter also stated:

This is your notice pursuant to Florida Statute 1012.31 that the material contained in the investigative file is now a part of your personnel file and is a public record and it will become available for inspection by the public ten (10) days from receipt of this letter. Any request made by the public for the documentation referred to above will be provided in accordance with the laws of the State of Florida.

10. In the middle of August 2010, Allen also received the investigative file from DOE containing all the student statements from the magazine incident. In the beginning of September 2010, Allen opened the read only investigative file and reviewed it.

11. In September 2010, Respondent also read two articles in the paper claiming that he had stolen money from the students for the magazine incident.

12. In order to defend his honor, on October 5, 2010, Respondent disseminated an email through CAB, the school's

intranet e-mail system, to all of the school's approximately 232 staff members, including teachers, custodial personnel, cafeteria personnel, technicians, and clerical staff, requesting support as teacher for the year. The email stated:

Dear Piper Family:

We hope that you all will come out and vote for me for Teacher of the Year in the election to be held shortly.

Attached are two documents of some very important information which outline my Campaign Platform. These documents summarize the kinds of things that need to be changed here at Piper.

Cordially Submitted,

Richard S. Allen

13. Attached to the email was Respondent's platform and six handwritten student statements. The student statements spoke positively about Allen as a teacher and contained students' names, their parents' names, students' home addresses, students' phone numbers, students' dates of birth and students' description of events, which occurred within Respondent's class that had been the subject of School Board of Broward County and DOE magazine incident investigations.

14. Allen obtained the students' statements he attached to the email from the DOE investigatory file from the magazine incident sent to Allen in September 2010. Allen believed the documents were public since they had been released to him.

15. Both PHS instructional and non-instructional personnel received the email and attachments.<sup>2/</sup> Approximately 103 members of PHS faculty and staff opened the email including a custodian and the cafeteria manager.

16. When Principal Valdez found out the email was on the PHS email system, she contacted the special investigative unit ("SIU") to see how to proceed because she believed the six student statements that had been distributed were confidential. During the magazine incident investigation, Valdez had promised the students and parents that their statements provided for the investigation would remain confidential. SIU instructed Valdez to file a Personnel Investigation Request regarding the email.

17. On or about October 11, 2010, Valdez requested an investigation from the SIU and provided the information about Allen's October 5, 2010, email to all the PHS staff with the campaign platform and student statements attached. Subsequently, District Investigator JoAnn Carter was assigned to investigate the allegations against Respondent.

18. After Carter completed the investigation, she sent the report to the Professional Standards Committee ("PSC"). PSC reviewed the investigation and determined what policies, procedures, and statutes Respondent's actions may have violated. It was determined that Respondent's actions were egregious and PSC recommended discipline to the superintendent.



19. Prior to the October 5, 2010 email, Respondent's only prior discipline had been two written reprimands. One written reprimand was for failure to properly prepare lesson plans and the other one was for inappropriate conduct at a student-parent conference.

20. By letter dated June 28, 2011, Allen was notified that Superintendent James F. Notter would recommend to the School Board that Respondent should be terminated from his employment for the October 5, 2010, email he disseminated that the School Board determined disclosed confidential student information.

#### CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1).

22. In this proceeding, the Collective Bargaining Agreement ("CBA") sets the parameters for Respondent's employment.

23. Section 1021.33(6)(a), Florida Statutes, provides that the teacher "may be suspended or dismissed at any time during the term of the contract," but only "for just cause as provided in paragraph (1)(a)" of the statute.

24. The burden of proof in this proceeding is on the School Board to prove by the preponderance of the evidence that just cause exists to terminate the employment of Allen. McNeill

v Pinellas Cnty. Sch. Bd. 678 So. 2d 476, 477 (Fla. 2d DCA 1996)("The School Board bears the burden of proving by a preponderance of the evidence, each element of the charged offense which may warrant dismissal.") Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883 (Fla. 3d DCA 1990). Preponderance of the evidence that more likely than not tends to prove the proposition set forth by the proponent. Gross v. Lyons, 763 So. 2d 276 (Fla. 2000).

25. Petitioner contends in the Amended Administrative Complaint that Respondent should be terminated for violating the following School Board policies, procedures, regulations, and statutes either collectively or individually: sections 1002.20, 1002.22, and 1012.33; Broward County School Board policies 5100.1 and 5306; 20 U.S.C.A. section 1232(g); and rules 6(B)-1.001, 6(B)-1.006(3)(f),(h),(i), 4(b),(c), 5(a), and 6(A)-1.0955, 6(B)-4.009(1),(2),(3).

26. This is a de novo proceeding for the purpose of formulating agency action, and not to determine whether the School Board's decision was correct at the time that it made the decision. The findings of fact "shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j) and (k), Fla. Stat.

27. Section 1012.33 provides:

(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, 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.

\* \* \*

(4)(c) Any member of the district administrative or supervisory staff and any member of the instructional staff, including any school principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against an employee of the district school board, the district school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of

suspension by the district school board or by the district school superintendent, the district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full membership of the district school board and the employee is discharged, his or her contract of employment shall be canceled. Any decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided the appeal is filed within 30 days after the decision of the district school board.

28. School Board of Broward County policy 5100.1 states in pertinent part:

STUDENT RECORDS ARE OFFICIAL AND CONFIDENTIAL DOCUMENTS PROTECTED BY FLORIDA STATUTE 1002.22 AND THE FEDERAL FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA). FERPA, ALSO KNOWN AS THE BUCKLEY AMENDMENT, DEFINES EDUCATIONAL RECORDS AS ALL RECORDS THAT SCHOOLS OR EDUCATION AGENCIES MAINTAIN ABOUT STUDENTS.

29. The definition of "educational records" and personally identifiable information" are in policy 5100.1I, which provides in pertinent part:

**A. Educational Records** are records maintained by a school district or by an individual acting for the school district that contain information directly related to a student. Educational records include school health records, a student's social security number; academic work completed; level of achievement records including grades and standardized achievement test scores; interim reports; transcripts;

academic improvement plans; intervention records; attendance data; evaluation reports that include standardized intelligence, aptitude and psychological test scores; interest inventory results; psychological files; ESE files; disciplinary records, including suspension and expulsion records; family background information; parent/teacher conference reports; special program eligibility; teacher or counselor ratings and observations; verified reports of serious or recurrent behavior patterns; and any other evidence, knowledge, or counselor information recorded in any medium, including media, video or audio tape, microfilm and microfiche.

\* \* \*

**D. Personally identifiable information**

includes, but is not limited to, a student's name, parents' names, street address or email address of the student or student's family, personal identifier such as a social security number or student number, photographs, and a list of personal characteristics or other information that would make the student's identity easily traceable.

30. Rule 6A-1.0955 also defines "educational records" and states in pertinent part:

(1) Purposes. This rule applies to education records maintained to facilitate the instruction, guidance, and educational progress of pupils and adult students in programs operated under the authority and direction of a district school board or other agency or institution as defined in Section 1002.22(1), F.S. This rule is intended to further the intent of Section 1002.22(2), F.S., that the rights of students and their parents with respect to education records created, maintained, or used by public educational institutions and

agencies shall be protected in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. s. 1232g, the implementing regulations issued pursuant thereto, and Sections 1002.22 and 1002.221, F.S. For the purpose of this rule, the term "education records" refers to those records that are included in the definition of "education records" found in 34 CFR § 99.3.

31. Policy 5306 6(b)1 governs use of the School Board's electronic intranet system and provides in pertinent part:

a. Use of computer network and online telecommunications is a privilege and must support teaching, learning, and research.

\* \* \*

f. Any use of telecommunication services or networks for illegal, inappropriate, obscene, or pornographic purposes shall be prohibited, illegal activities shall be defined as a violation of local state, and/or federal laws. Inappropriate use shall be defined as a violation of the intended use of the district's mission, goals, policies or procedures. Obscenity and/or pornography shall be defined as a violation of generally accepted social standards for use of a publicly owned and operated communication vehicle, and as defined by School Board policy.

g. All use of telecommunication services or networks for the promotion of an individual's personal or political agenda or commercial initiatives shall be prohibited.

32. The Faculty Handbook under Confidentiality of Records states in pertinent part:

Teachers must maintain confidentiality of student or any records. At no time should a student, parent, or guardian see the grades

of other students. **Teachers are not to post or orally repeat to the class any grade(s) earned by students. Only the grades and attendance records of the specific student with whom a conference is being conducted may be displayed for viewing.**

33. Student confidentiality and privacy rights are delineated section 1002.22, which reads in pertinent part:

(2) RIGHTS OF STUDENTS AND PARENTS.—The rights of students and their parents with respect to education records created, maintained, or used by public educational institutions and agencies shall be protected in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. s. 1232g, the implementing regulations issued pursuant thereto, and this section. In order to maintain the eligibility of public educational institutions and agencies to receive federal funds and participate in federal programs, the State Board of Education shall comply with the FERPA after the board has evaluated and determined that the FERPA is consistent with the following principles:

(a) Students and their parents shall have the right to access their education records, including the right to inspect and review those records.

(b) Students and their parents shall have the right to waive their access to their education records in certain circumstances.

(c) Students and their parents shall have the right to challenge the content of education records in order to ensure that the records are not inaccurate, misleading, or otherwise a violation of privacy or other rights.

(d) Students and their parents shall have the right of privacy with respect to such records and reports.

(e) Students and their parents shall receive notice of their rights with respect to education.

34. The Family Education and Privacy Rights Act ("FERPA"),  
20 U.S.C.A. section 1232g states in pertinent part:

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which--

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include--

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made,



maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5) (A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

35. The Code of Ethics Principles of Professional Conduct for the Education Profession, SBR-6B-1/1006 provides that the "obligation to the student requires that the individual . . . shall not intentionally violate or deny a student's legal rights."

36. Florida Administrative Code Rule 6B-1.001 is entitled, "Code of Ethics of the Education Profession in Florida," and it provides in relevant part:

\* \* \*

(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) Awareness 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.

37. Florida Administrative Code Rule 6B-1.006 contains the Principles of Professional Conduct for the Education Profession in Florida and provides in pertinent part:

\* \* \*

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

\* \* \*

(f) Shall not intentionally violate or deny a student's legal rights.

\* \* \*

(h) Shall not exploit a relationship with a student for personal gain or advantage

(i) Shall keep in confidence personally identifiable information obtained in the course of professional service, unless

disclosure serves professional purposes or is required by law.

(4) Obligation to the public requires that the individual:

\* \* \*

(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

(c) Shall not use institutional privileges for personal gain or advantage

\* \* \*

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

38. School Board Policy 5306 Web Page Procedural Guidelines provides "web page documents may not include a student's phone number, address, or complete names of any family members and/or friends. Web pages may not include any information, which indicate the physical location of a student at a given time, other than attendance at a particular school or participation in activities."

39. Code of Ethics for Computer Network and Online Telecommunications Users section 6(b) states in pertinent part:

1. All users are expected to read and understand the following privileges, rights, and responsibilities when using property or facilities (WAN, LAN, networks, Internet, Intranet, etc.)

\* \* \*

f. Any use of telecommunication services or networks for illegal, inappropriate, obscene, or pornographic purposes shall be prohibited, illegal activities shall be defined as a violation of local state, and/or federal laws. Inappropriate use shall be defined as a violation of the intended use of district's mission, goals, policies or procedures. Obscenity and/or pornography shall be defined as a violation of generally accepted social standards for use of a publicly owned and operated communication vehicle, and as defined by School Board policy.

g. All use of telecommunication services or networks for the promotion of the individual's personal or political agenda or commercial initiatives shall be prohibited.

h. Use of or engaging in offensive or inflammatory speech, profanity, or obscene language is not permitted at any time.

i. Hate mail, harassment, discriminatory remarks, and other antisocial behaviors shall be prohibited.

40. In the instant case, the School Board, alleged that it had "just cause" to terminate Respondent because he sent an email that had six handwritten student statements attached, which violated the students' rights with respect to privacy and confidentiality in Florida and federal statutes, and such actions also constitute a violation of the Principles of Professional Conduct. Additionally, Petitioner alleges that Respondent used the school's technology information system for personal gain.

41. It is undisputed that Respondent sent the email with the six student statements attached through the PHS email system

to both PHS instructional and non-instructional staff. However, the record lacks sufficient credible evidence to demonstrate Allen disseminated confidential information or violated any student's rights with respect to privacy.

42. The student statements sent in this matter by email are not educational records just because they contained "personally identifiable" information as defined in 5100.1ID and "directory information" as defined in 20 U.S.C.A. section 1232g. Petitioner's assertion that such information is an educational record and confidential according to policy 5100.1IA, 20 U.S.C.A. 1232g, and rule 6A-1.0955 is not persuasive.

43. In Rhea v. District Board of Trustees of Santa Fe College, 37 Fla. L. Weekly D 1722 (Fla. 1st DCA 2012), the court held that if the fundamental character of the email relates to the teacher and is only tangentially related to a student then the email is a teacher record, which can be disclosed, not an educational student record under FERPA. "The fact that [the email] was authored by a student did not convert it into an 'education record.'" Applying Rhea to the case at hand, the email subject matter was a request to support Allen's nomination for teacher of the year and the attached platform and student statements were to bolster his candidacy as letters of support. The statements were only incidentally related to the student authors who wrote them and therefore are not educational

records. Accordingly, Respondent did not violate policy 5100.1IA, 20 U.S.C.A. 1232g, and rule 6A-1.0955.

44. The undersigned is also not persuaded by Petitioner's other claim that the student statements were confidential because DOE informed Allen that they were confidential. The record lacks sufficient credible evidence to demonstrate DOE sent the investigative file to Allen prohibiting him from distributing it as alleged by Petitioner.

45. Petitioner also contends that Allen violated the policy "Teachers must maintain confidentiality of student or any records" contained in the Confidentiality of Records policy of the Faculty Handbook. Petitioner alleges the violation in its Proposed Recommended Order on page 12 as a charge in and of itself. The undersigned is not persuaded Allen violated the section because when the policy is read completely in context, the paragraph provides for specific prohibitions for teachers posting grades or attendance records of students, which Respondent did not do. Accordingly, it is not applicable in this matter.

46. It should also be noted that at hearing, Petitioner did not present a scintilla of evidence that even one child was upset, harassed, or humiliated by the email distribution, nor was a relationship proven between Respondent and any of the students. Further, the record lacks evidence that the email was

disseminated to the public or media. Moreover, Valdez testified that she did not contact the children or parents after the email was disseminated. Additionally, the record is void of evidence to demonstrate that any individual complained about the student statements being sent out, or that any parents had problems with the disseminated email. Further, no findings were made that any federal funds were lost for Allen, PHS, or Broward County for allegedly violating FERPA relating to the email incident.

Therefore, Petitioner has failed to present sufficient credible evidence to sustain the following charges against Respondent:

that he violated or denied a student's legal rights pursuant to rule 6B-1.006(3)(f); that he exploited a relationship pursuant to rule 6B-1.006(3)(h); that he received the DOE investigative file in the course of his professional service of teaching pursuant to rule 6B-1.006(3)(i); and that he intentionally distorted or misrepresented facts concerning an educational matter pursuant to rule 6B-1.006(4)(b). Finally, Petitioner failed to show Respondent to be dishonest regarding the email and therefore Respondent did not violate 6B-1.006(5)(a).

47. Petitioner also contends that Respondent violated policy 5306. The record is clear that this matter stems from an email Respondent sent on October 5, 2010, not a web page. Accordingly, Allen did not violate policy 5306 because it only pertains to web page documents, which is not the issue at hand.

48. Petitioner has met its burden and demonstrated that Respondent did use his PHS institutional privileges of having access to the PHS email system to campaign, which is not the intended use of the system. The intended use of the system is for educational purposes, learning, or research. The record demonstrates Allen's campaign email was not a legitimate educational purpose and that the email even went to cafeteria workers and custodians. Therefore, Respondent's intended use was inappropriate and for a personal gain in violation of rule 6B-1.006(4)(c) and the School and District Technology Usage policy 5306 sections 6(b)1(f) and (g). However, Petitioner's evidentiary presentation fell short in demonstrating Allen's actions violate policy 5306 sections 6(b)1(h) and (i).

49. To establish the existence of "just cause" for termination as alleged in the Amended Administrative Complaint, the School Board must prove not only that Respondent violated school policy, but by doing so, he engaged in "misconduct in office" and/or "immorality" as those terms are used in section 1012.33(1)(a) and defined in rule 6B-4.009.<sup>3/</sup>

50. The State Board of Education has defined the term "immorality" by rule [6B-4.009(2)], which provides in pertinent part:

(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.

51. The State Board of Education has defined the term "Misconduct in office," rule [6B-4.009(3)], provides in pertinent part:

(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.

52. In this matter, the School Board has failed to make the required showings. Petitioner did not prove Respondent's conduct was ever brought to the public or community's knowledge so there was neither any notoriety nor public disgrace brought to the teaching profession that could impair Respondent's service to the community. Further, Allen's actions fail to be "so serious as to impair his effectiveness in the school system." No finding, therefore, can be made that Allen's violation of school policy committed by Respondent amounted either to "misconduct in office" or "immorality." Hence, no grounds have been established for Respondent to be disciplined as a suspension or dismissal pursuant to rule [6B-4.009], under the Criteria for Suspension and Dismissal.

53. Therefore, the question remaining for the undersigned is the discipline Respondent should receive for his violating rule 6B-1.006(4)(c) and the School and District Technology Usage policy 5306 section 6(b)1(f),(g). The CBA outlines the system for discipline. The CBA provides that teachers should receive progressive discipline.

54. Article Eighteen Section B1 of the CBA provides:

a. Progressive Discipline: Any discipline of an employee shall be for just cause. The parties agree that the concept of just cause embodies the principles of progressive discipline appropriate under the circumstances. Disciplinary procedures may include but are not limited to: verbal/written reprimand, suspension, demotion and termination. The decision of the district not to renew an annual contract employee shall not be subject to this section. In addition the parties agree that the principles of progressive discipline do not apply to employees who are placed in the 90-day process described in Florida Statutes 1012.34.

55. In view of the foregoing, the School Board has only sustained three violations, rule 6B-1.006(4)(c), and policy 5306 sections 6(b)1(f) and (g), of the 18 violations it charged against Respondent. Petitioner concedes that prior to the October 5, 2010, incident, Respondent had not been reprimanded for any email related activities or any actions related to student records. Further, all three violations Petitioner proved against Respondent fail to relate to either of

Respondent's previous two written reprimands alleging policy violations. Since Petitioner failed to prove the essential allegations of "misconduct in office" or "immorality" by the preponderance of the evidence, Respondent's violations fall outside of the parameters for either termination or suspension and the only proper discipline for Allen is a written reprimand. Consequently, all other charges should be dismissed and Respondent should be reinstated with back pay.

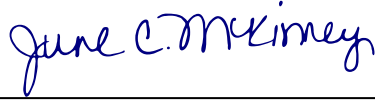
#### RECOMMENDATION

Upon consideration of the Findings of Fact and the Conclusions of Law reached, it is

RECOMMENDED that Petitioner enter a final order that:

1. Sustains Respondent's charges of violating rule 6B-1.006(4)(c) and the School and District Technology Usage policy 5306 sections 6(b)1(f)and(g);
2. Provides Respondent a written reprimand for the three violations;
3. Dismiss Respondent's charges sections 1002.20, 1002.22, and 1012.33, Broward County School Board policy 5100.1, 20 U.S.C.A. section 1232(g), and rules 6(B)-1.001, 6(B)-1.006(3)(f),(h),(i), 4(b), 5(a), and 6(A)-1.0955, 6(B)-4.009(1)(2) and (3);
4. Immediately reinstates Respondent Richard Allen; and
5. Issues Respondent back salary.

DONE AND ENTERED this 31st day of October, 2012, in  
Tallahassee, Leon County, Florida.



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JUNE C. MCKINNEY  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day October, 2012.

ENDNOTES

<sup>1/</sup> Unless specifically stated otherwise herein, all references to the Florida Statutes are to the 2010 codification.

<sup>2/</sup> Petitioner's Exhibit 8.

<sup>3/</sup> 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 ([ ]).

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.