STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA,	)	
Petitioner,	)	
vs.	)	Case No. 12-2009TTS
PAULA PRUDENTE,	)	
Respondent.	)	

RECOMMENDED ORDER

On September 21, 2012, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Shawn N. Bernard, Esquire
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For Respondent: Jeffrey Sirmons, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner has just cause to dismiss Respondent for misusing School District technology, harassing, intimidating or bullying School Board employees, committing

professional or ethical misconduct or gross insubordination, or failing to follow a policy, rule or directive.

PRELIMINARY STATEMENT

By Notice of Suspension and Recommendation for Termination from Employment dated April 16, 2012, Petitioner's superintendent informed Respondent that he had determined that, by clear and convincing evidence, just cause existed to terminate Respondent's employment as a teacher. The superintendent advised that he would recommend that, at its next meeting, the School Board suspend Respondent for 15 days without pay and terminate her employment.

The April 16 letter states that Respondent misused School District technology, bullied and harassed School Board employees, committed professional misconduct, ethical misconduct and gross insubordination, and failed to follow a policy, rule, or directive. The letter states that these alleged acts and omissions violate School Board policies 1.013(1), 3.02(4)(a), (d) and (e) and (5)(c), 3.10(6), 3.29(10)(d), and 5.002(3) and Florida Administrative Code Rules 6B-1.001(3), 6B-1.006(4)(a) and (b) and (5)(a), (d), (e) and (h), and 6B-4.009(3) and (4). The April 16 letter alleges that just cause for dismissal exists under sections 1012.22(1)(f), 1012.27(5) and 1012.33, Florida Statutes; School Board policies 1.013 and 3.27; and article II, section M of the collective bargaining agreement.

The April 16 letter gives Respondent the choice of filing a grievance or requesting a formal administrative hearing. Respondent timely requested a formal administrative hearing.

By Petition filed June 7, 2012, Petitioner alleged the factual bases for the proposed dismissal of Respondent. The earliest alleged incident took place on July 12, 2011, when Deneen Wellings, Petitioner's Equal Employment Opportunity (EEO) Coordinator, asked Sandra Gero, Petitioner's former Director of Employee Relations, for help in stopping Respondent's harassment of Ms. Wellings. The Petition alleges in some detail Ms. Wellings' characterization of Respondent's communications, but does not refer to the timeframe of the communications themselves, which is late June 2011. The apparent purpose of the reference to these communications is explain why, on July 13, 2011, Darron Davis, Petitioner's former Chief of Human Resources, issued a warning to Respondent not to send unprofessional emails and telephone messages.

The Petition alleges that, on November 8, 2011, Respondent sent the first of multiple emails to Diane Howard, Petitioner's Director of Benefits and Risk Management, and Ms. Howard's staff. These emails were allegedly so numerous and disruptive that Ms. Howard directed Respondent to stop emailing her. But Respondent continued to email Ms. Howard until January 23, 2012.

At the start of the hearing, Petitioner moved for leave to amend the Petition in three respects. As to paragraph 10, Petitioner requested leave to amend the fourth word of the first sentence from "four" to "eight," so as to allege that, over the past eight years, Respondent had engaged in unprofessional conduct and ignored directives to stop using School Board email to harass, intimidate, and bully School Board employees. And, as to paragraph 11, Petitioner requested leave to amend the first sentence by adding "counseled and" immediately before "disciplined" and adding to the end of this sentence: "dating back to 2003." The purposes of the second and third amendments were to identify the period over which Respondent had been counseled and disciplined.

Respondent objected to the first and third amendments. The Administrative Law Judge overruled the objections and allowed all three amendments. The amendments do not alter the timeframe of alleged harassment and insubordination on which Petitioner relies for dismissal. The amendments merely identify the longer period during which incidents involving Respondent might provide context, such as to show that subsequent acts were more likely intentional insubordination or conscious harassment.

At the hearing, Petitioner called 11 witnesses and offered into evidence 47 exhibits: Petitioner Exhibits 1-41, 43, and

53-57. Respondent called one witness and offered into evidence one exhibit: Respondent Exhibit 1. All exhibits were admitted.

The court reporter filed a transcript on October 8, 2012. On October 18, 2012, the court reporter filed a second transcript, which corrected undisclosed errors in the first transcript. On separate occasions, the court reporter and parties requested the Administrative Law Judge to discard the first transcript, so he has done so, and the second transcript is the official transcript of the proceeding.

The parties filed proposed recommended orders on November 19, 2012.

FINDINGS OF FACT

1. Respondent has been employed by the Palm Beach County School Board from 1978 through May 2, 2012; for nearly all of these 24 years, she has been employed as a classroom teacher. Respondent holds a continuing contract, although the parties have stipulated that this is a "just cause" case, pursuant to the collective bargaining agreement between Petitioner and the Palm Beach County Classroom Teachers Association, July 1, 2011-June 30, 2014 (CBA). CBA, Article II, Section M.1 authorizes dismissal of an instructional employee if Petitioner proves just cause by clear and convincing evidence. (In an abundance of caution, for reasons explained in the Conclusions of Law, this Recommended Order relies on the continuing contract for the

limited grounds for dismissal and the CBA for the clear and convincing standard of proof for dismissal.)

2. Petitioner has previously transmitted to the Division of Administrative Hearings (DOAH) two adverse employment proceedings against Respondent. In DOAH Case 10-0371 (Prudente I), Petitioner proposed, in December 2009, to suspend Respondent without pay for ten days for using School District email to send to her coworkers emails that, among other things, depicted a presidential candidate in a negative fashion. In DOAH Case No. 10-10835 (Prudente II), Petitioner proposed the termination of Respondent for sending to her coworkers inappropriate emails under circumstances that established gross insubordination and harassment, intimidation, and bullying of other School Board employees.

3. Prudente I covers acts and omissions from February 2007 through November 2008 (Tr. 186); Prudente II covers alleged acts and omissions from 2009 through June 30, 2010 (Tr. 189); and the present case covers acts and omissions from July 12, 2011 through February 2012 (Petition, paragraph 20, and Tr. 15, 20, 22, 27, and 150).

4. After an administrative hearing in Prudente I, on January 24, 2011, DOAH Administrative Law Judge June C. McKinney issued a Recommended Order urging that the School Board enter a Final Order rescinding the proposed ten-day suspension and

awarding Respondent back pay. After transmittal to DOAH, Prudente II was assigned to the undersigned Administrative Law Judge, but this case never went to hearing.

5. By Settlement Agreement dated March 30, 2011, Respondent and Petitioner disposed of Prudente I and II. The Settlement Agreement provides for: a) Respondent to be suspended for ten days without pay; b) Petitioner to withdraw its exceptions and issue a Final Order adopting the Recommended Order in Prudente I; and c) the parties not to reopen Prudente II after it had been closed without prejudice. Given the adoption of the Prudente I Recommended Order, the basis for the ten-day suspension without pay must have been Prudente II, although this is unclear from the Settlement Agreement.

6. The reference to back pay in the Prudente I Recommended Order implies that Respondent served her suspension prior to the November 2010 hearing. However, the record in the present case suggests otherwise. First, after the execution of the Settlement Agreement, Respondent served the ten-day suspension mentioned in the agreement; if she had already served the ten-day suspension that had been proposed in Prudente I, she presumably would have been credited for this suspension in the Settlement Agreement. Second, at the hearing, a discussion among counsel and the Administrative Law Judge suggested that

the ten-day suspension ordered by the Settlement Agreement arose under Prudente II. (Tr. 190-93.)

7. Although Prudente II is thus the source of prior discipline, which is relevant if Respondent is subject to discipline in the present case, Prudente I, not Prudente II, provides a source of facts that may be useful in the present case establishing, for instance, Respondent's state of mind or knowledge while sending the emails from July 12, 2011, through February 2012. By adopting the Prudente I Recommended Order, the School Board, in its Final Order, adopted the findings of Judge McKinney--many of which were unfavorable to Respondent--as well as her ultimate recommendation, which was, of course, favorable to Respondent. By contrast, Prudente II does not establish any facts because, prior to the hearing, the parties settled the case without admitting to any guilt.

8. After serving her ten-day suspension without pay, Respondent resumed teaching duties on April 7, 2011. She received a temporary assignment at Dreyfoos High School for what remained of the 2010-11 school year. Undeterred by her recent suspension, Respondent quickly returned to her emailing ways.

9. In May and June 2011, Respondent sent a series of rambling, sometimes-incoherent emails complaining of various forms of mistreatment directed to her. Respondent sent these emails to various persons, including members of the School

Board, the Central Area superintendant, Ms. Gero, and an EEOC investigator. But Respondent's preferred recipient appears to have been Ms. Wellings, evidently due to her EEO responsibilities and Respondent's self-identification as a victim of employment discrimination.

10. Respondent evidently had filed a discrimination complaint against Petitioner with the Equal Employment Opportunity Commission (EEOC). The EEOC complaint appears to have alleged that Petitioner had failed, after the Settlement Agreement, to pay the back pay ordered by Judge McKinney in Prudente I; to reinstate certain medical, dental, and vision benefits; to grant Respondent a preference for her permanent teaching assignment at Dreyfoos; and to redress miscellaneous, earlier grievances. Appearing to have become dissatisfied with what she viewed as Petitioner's intransigence in the EEOC proceeding, Respondent evidently decided to bring pressure on Ms. Wellings by announcing her list of grievances directly or indirectly to third parties who, Respondent assumed, had some influence over Ms. Wellings.

11. For example, on June 20, 2011, Respondent sent to Ms. Wellings, with copies to an EEOC representative and others, the following email:

> Please, DO NOT CONSIDER PBCSD DECEITFUL DENEEN WELLINGS EEO DISCRIMMINATION [sic], Retalliation [sic] and Legal Dept Cafeteria

> Style Misrepresentations with her Negligence & Failure to Follow EEO, Ethics & DOAH Judges' Recommended Orders she requested to overturn with Unethical Agreement Malpractices as she has written in her letter of June 13, 2011.

12. On the same day, Respondent left a three-minute voicemail on the office telephone of Ms. Wellings. The voicemail began:

> Hello this is a message for the deceitful Deneen Wellings. This is Paula Prudente . . .. I have . . . sent an EEOC, an EEO and Ethics complaint and a pending lawsuit against you and you do not have a right to file a motion to dismiss it. You are not dismissed Deneen. You are very deceitful and you still have a pending lawsuit against you. . . . [Y]ou are not excused and you are not dismissed. . . . Give me my back pay for November, my health insurance and my reinstatement of my position at Dreyfoos School of the Arts, my ADA accommodation and you are going to have to cease and desist your cafeteria style of . . . law and agreements cause . . . you are very wrongful in your misrepresentations . . . you are very deceitful Deneen. I will also be out of town but . . . the lawsuit is still going against you. You are not dismissed. Thank you.

The message continues, essentially restating the statements set forth above.

13. When Ms. Wellings returned from vacation on July 12, 2012, and found the hostile email and voicemail of June 20 and other emails of similar tone, Ms. Wellings emailed Ms. Gero about Respondent. Ms. Wellings described the tone of the

voicemail as "threatening" and the email and voicemail as "insulting and offensive." Ms. Wellings characterized the email as unprofessional and unethical because Respondent had provided false information about Ms. Wellings to School Board members and employees, Administrative Law Judges, and representatives of state and federal agencies. Ms. Wellings wanted Respondent to stop this "harassing behavior" and asked Ms. Gero to take whatever action she deemed necessary and appropriate.

14. Listening to the June 20 voicemail, Ms. Gero agreed that the tone was "very threatening" and suspended Respondent's access to School District email. Since Respondent had been placed on temporary assignment, she was being supervised by Mr. Davis, so Ms. Gero referred the matter to him for further action.

15. On the next day, Mr. Davis sent Respondent a Specific Incident Memorandum and Administrative Directive. Noting the confrontational nature of the email to Ms. Wellings and the copying of the email to School Board members and others, Mr. Davis's memorandum reminds Respondent of Petitioner Policy 3.29(10)(d), which states that School District email shall be used for School District business and shall not be used to send abusive, threatening, or harassing messages.

16. Referring to the voicemail to Ms. Wellings, Mr. Davis's memorandum states that Respondent called

Ms. Wellings names that were unprofessional, malicious, insulting, and demeaning. The memorandum reminds Respondent of Florida Administrative Code Rule 6B-1.006(5)(d), which prohibits engaging in harassment or discriminatory conduct that creates a hostile, intimidating, abusive, offensive, or oppressive environment, and Rule 6B-1.006(5)(e), which prohibits malicious or intentionally false statements about a colleague. The memorandum refers to Petitioner Policies 5.002, which prohibits threatening, insulting, or dehumanizing gestures that are severe or pervasive enough to create an intimidating, hostile, or offensive educational environment, and 3.02(4), which requires each employee to treat all individuals with respect and to create an environment of trust, respect, and nondiscrimination.

17. Mr. Davis's memorandum concludes:

> **You are hereby directed to cease any and all improper use of District Technology . . .. Further you are directed to interact with *all* School District Personnel in a respectful and professional manner, as required by [the] Policies and [rules] described herein, including School Board Policies 3.02 and 5.002 and 6B-1.006, F.A.C.**
>
> Failure to abide by these directives will lead to the appropriate disciplinary action being taken against you. [Based upon the principle of progressive discipline contained in the CBA,] [a]s a provision of the Settlement Agreement [has already imposed] a ten day unpaid suspension[,] [t]herefore the next likely step, should you fail to adhere to this directive, may be Termination of Employment.

> It is understood that you have the right to file complaints with the appropriate authorities. However, you must adhere to School Board Policies and Directives and maintain professionalism. If you require assistance in this regard, I suggest that you direct communications regarding these matters through your attorney.

18. Meanwhile, on July 1, 2011, Respondent had been assigned to teach at Spanish River High School. Shortly after Respondent's arrival at Spanish River, William Latson was assigned to the school to serve as the new principal. Almost immediately after assuming his new responsibilities at Respondent's new school, Mr. Latson began to receive odd emails from Respondent, suggesting that Ms. Gero's suspension of Respondent's access to School District email was short-lived. With copies to various third parties, again in an apparent attempt to bring pressure upon the main addressee, Respondent sent to Mr. Latson and others confrontational emails telling the addressees what they should and should not do. Mr. Latson was nonplused because Respondent's emails addressed to him were often unrelated to anything going on at the time and were filled with so many directives and complaints as to be incomprehensible. Mr. Latson directed Respondent to discontinue sending such emails, but Respondent ignored Mr. Latson's directive.

19. To facilitate an investigation of an issue evidently unrelated to the present case, Mr. Latson, by letter dated September 20, 2011, reassigned Respondent to her residence, with pay, as of that date. The term of her reassignment was one day.

20. For reasons also apparently unrelated to the present case, by letter dated October 10, 2011, the Chief of School Police informed Respondent that, until further notice, she had been reassigned to a temporary duty location at the transportation department call center, effective the next day. Respondent remained in this temporary assignment for the remainder of the timeframe relevant to the present case.

21. The culmination of the email to Mr. Latson occurred on October 19, 2011. Responsible for delivering checks to various school employees, Mr. Latson sent emails to those employees who had not yet received their checks, including Respondent, inviting them to come by the office to pick them up or to provide mailing addresses where he could mail them. In her response, Respondent supplied her mailing address, but launched into a bewildering set of vitriolic directives, awkward references to herself in the third person, and head-turning claims that, at their most coherent, seem to confuse Mr. Latson with Ms. Wellings. The directives start with a demand not to refer to Respondent as "Mrs.,"

> which is in fact my Mother's & Sisters in Law marriage Titles; they did not apply to work as Mrs. Prudente at PBCSD--they always lived in NY. . . . Please cease & desist your Misrepresentations on my status & respectfully remove your unsubstantiated, defamatory opinions & hearsay from my Records & confirm corrections to PB Post & Sentinal [sic] Newspapers/TV & Radio Media Broadcasts. . . . "Please Resolve & Replace Misrepresentations with Ethical Corrections Officially Stated & Filed in Dept of Admin Hearing Judges McKinney & Meale's Decisions & EEOC Federal Investigators, Specifically: "PBCSD Petitions are inadequate & failed to prove insubordination of the teacher, Ms. Prudente. Rescind the 10 day suspension with 10 days Backpay."

22. Petitioner has not pleaded the Wellings email and voicemail, which precede the start date of July 1, 2011, and the Latson emails as grounds for dismissal in the present case. But these communications nonetheless serve at least two purposes. They establish that the emails described below were not isolated instances and tend to prove that Respondent's use of School District email was intentionally insubordinate and consciously harassing.

23. The emails that fall within the timeframe of July 12, 2011, through February 2012 concern Respondent's participation in the School District's wellness program. The wellness program offered eligible employees a discount of $50 from their monthly premium for medical insurance during the 2011-12 school year, provided they met certain criteria. The timeframe for

satisfying the eligibility criteria for this $500 benefit ran from January 1 through August 1, 2011.

24. A School District flyer announcing the wellness program identifies three eligibility criteria: a biometric health screening, an online personal health assessment, and an online tobacco user status form. Clearly stating that interested employees must complete all three criteria by August 1, 2011, the flyer warns that the program sponsor--United Health Care--is unable to verify completion of these criteria until the start of open enrollment in the fall of 2011.

25. It is neither clear, nor particularly important, which of these criteria that Respondent failed to submit on time. According to one of her emails, Respondent failed to timely submit the health screening and personal health assessment. Other emails suggest that Respondent failed to timely submit only the health screening.

26. Shortly before the midnight deadline, on the evening of July 31, Respondent tried to submit the needed form or forms online, but, due to some problems, she was unable to do so. It is possible that the error lie with Respondent's computer or with Petitioner's software program, but, again, this fact is not particularly important. In any event, due to the failure of Respondent to submit one or two of the required three forms, Petitioner's benefits department declined to credit Respondent

with the $500 premium discount that she sought for the 2012-13 school year.

27. When Respondent learned in the fall of 2011 that she had not qualified for the $500 benefit, she sent an email dated November 9, 2011, to Ms. Howard. In the email, Respondent claimed that she had experienced a "computer glitch" when trying to submit her paperwork online. Respondent's November 9 email is characterized by a measured tone and the lack of any inappropriate commentary. Unlike nearly all of Respondent's other emails, copies are not provided to third parties. This email, as well as all that follow it, were sent using the School District email system.

28. On the next day, Ms. Howard replied by email to Respondent that she was unable to make an exception for Respondent. Ms. Howard added, though, that Respondent could use the late-filed health assessment form toward her "2012 point requirements."

29. On November 11, 2011, Respondent sent an email in reply to Ms. Howard. In a more confrontational tone than the preceding email, Respondent's email starts:

> How humiliating, UNflexible and Unfair to NOT reciprocate PBCSC Professional Health Benefits Courtesy, regardless of my 33 years of A+ Classroom Teaching, my professional flexible years of health insurance computer glitches to be reciprocated with PBSC UNflexible Health Benefits Blocked with On-

> Going Unfair EEO ADA Labor Practices &
> Penalties for Veteran A+ Teachers.

30. The November 11 email concludes with a request to cancel the $50 monthly "Penalties for the UNFAIR PBCSD 70 minute glitch after midnight glitch OR cancel my Health Insurance Benefits so I can look for an ETHICAL NON-Discriminatory Health Ins Provider." In closing, Respondent struck a more reasonable tone, as she concluded: "I always appreciate your professional courtesy and consideration as I have also provided A+ to PBCSD since 1978."

31. By email dated on the morning of November 14 to Ms. Howard, a couple of union representatives, and Respondent's attorney, Respondent essentially restated the requests contained in the November 11 email. In an afternoon email on the same day, though, Respondent's tone became more strident and more confusing, as she addressed the "computer glitch" that supposedly prevented her timely filing of the wellness program form or forms and another issue involving benefits. This email was almost entirely in capital letters and boldface.

32. By email dated November 17 to Ms. Gero with copies to, among others, Respondent's attorney, Respondent addressed several issues. As to the wellness program, the email states:

> Diane Howard . . . willfully neglected my
> requests to correct the Google Glitched Date
> & blocked me from UHC Benefits & August 1st
> 50 Question monthly $50 Smoking Survey

> discount due to another frustrating Google Glitch. Fri., Nov 18 will be my final request for all parties to make corrections for Compensation w/o ADA Age discrimmination [sic].

33. Not hearing from Ms. Howard, Respondent sent several more emails to various recipients, such as her attorney, Ms. Gero, and, less frequently, Ms. Howard. These emails complained about the "computer glitch" and one or two other benefits issues that she had raised. Interspersed among these emails are occasional references to Respondent's EEOC case and EEOC complaints that she has filed over the years. A couple of emails refer to a School District police investigator's "promise" to contact Respondent to discuss her eligibility for the wellness program's monthly discount.

34. The police investigator became involved when he was summoned in mid-November to the benefits office where Respondent was loudly demanding that she be allowed to participate in the wellness program. To mollify Respondent, the investigator, who was the same investigator who had handled Respondent's case in Prudente I, told Respondent that he would help her set up an appointment for the following week. Respondent furnished the investigator a copy of some paperwork that she said supported her claim of unfair treatment in terms of her employee benefits.

35. Up to this point, the tone of Respondent's post-November 10 emails betrays more confusion than anger. It is

unclear why she thought that a police investigator, whose responsibilities obviously do not include employee benefits, would help her secure the $500 premium discount, but it is perfectly clear that Respondent believed that he would do so.

36. On November 22, 2011, Ms. Howard replied to several emails that Respondent had sent her, all in November. Ms. Howard's email states that she had previously told Respondent that she could not make an exception for her, but Respondent "continued to send these confusing, rambling, unprofessional and unethical emails to me and my staff, while copying [the teachers' union] and many other people." Ms. Howard's email states that Respondent was "highly disruptive" when she appeared in the benefits office on November 18 and concludes:

> Please stop sending these emails as they are offensive, threatening, harassing and insulting. Also do not come back into this office as you have been here 3 times already and we have repeated our response three times. . . .
>
> To be very clear, our response is:
>
> If you have medical bills that are not being paid by our health carrier, United, you need to fax these to our onsite United Healthcare representation [name and phone number omitted].
>
> The annual enrollment period ended Nov 18, 2011. You were able to go online anytime during a three week period and make your benefit selections for 2012.

> Our position is that you did not meet the requirements in order to comply with the [wellness-program discount.] Therefore you are not eligible for the premium discount in 2012. You may complete the requirements in 2012, by July 31, 2012, and then you will be eligible for the discount in 2013. The online health assessment that you completed on August 2, 2011, will apply towards the fulfillment of the requirements for the 2013 premium discount.
>
> To restate, do not continue to call, visit or send emails on these same issues. I find them offensive, insulting and harassing.

37. By reply email later the same day to Ms. Howard, with a copy to Ms. Gero, Respondent stated:

> Thank you for re-confirming your offensive opinions, false & abusive allegations against me as your choice to make threatening & confusing replies which have continued to frustrate me again today. I repeatedly requested your support assistance for appropriate annual adjustments [to Respondent's other benefits issue.] I never requested your humiliating misrepresented emails & phone call replies to me whenever I request sincere support assistance.
>
> I am constantly intimidated by your PBCSD Admin' Depts insulting, and inappropriate threatening letters, emails & phonecall responses 'including termination' because I have filed requests your Sworn Oath to Ethcal [sic] EEO HR Compliance. Your false allegations and misrepresentations are demonstrably contradictory to my A+ Appreciated, Awarded & Honored Professional 33 years of Classroom Excellence, which I am equally deserving of your reciprocal Ethical, EEO ER HR ADA & Ins Benefits Support.

> Your wrongful, rude, retalliative [sic] letters, emails & phonecall responses with Misrepresented false allegations for my requesting your consideration, support & advise [sic] is an ineffective and inflammatory excuse for your disgraceful Misconduct.

38. The next day, someone, probably Ms. Gero, forwarded to Respondent information about Petitioner's employee assistance program (EAP). Nine days later, Respondent replied by email to Ms. Gero, Mr. Howard, Ms. Wellings, and Mr. Davis, thanking them for sending her the EAP information, but adding:

> By the Way, Please help me to appropriate reinstate and reduce my documented 2009-2010-2011 EAP Diagnosed Manic Stress which was demonstrably induced & worsened by PBCSD workplace & District office Administrators whom have Google-Glitched or denyed [sic] and/or blocked me from continuing my Highly Qualified A+ Merit Teaching career with Equal Employment HR ER Opportunity, Voluntary transfer positions/applications, ADA Accommodations, and most importantly to reimburse/reinstate my earned & deserved United Health Care Medical, Dental & Vision Benefits without the $50 Smoker's Penalty in the New People Soft Google Glitch (as I have appropriately earned and updated annually over the last 33 years in PBCSD).
>
> Please reply & mail my DOAH Judge Recommended Order [sic] to Rescind the 10 days Nov 2010 Suspension with 10 days Backpaycheck, since My case was dismissed & Closed without Prejudice because PBCSD Failed to prove the Teacher's Insubordination (Please remove your defamatory Misrepresentations & unsubstantiated False Allegations."[)]

39. On December 2, the interim executive director of the union, Tony Hernandez, informed local union representatives that teachers would need to sign new contracts by December 16. On December 5, Respondent sent an email to Mr. Hernandez about signing a new contract and addressing some aspect of her employee-benefits claims, possibly the appeal that is discussed below. Later the same day, Melinda Wong, Petitioner's Director of Human Resources Customer Relations, sent an email to Respondent advising her that she was under a still-valid continuing contract, which she had signed in January 1982, so she would not be receiving a contract that year. Ms. Wong added that she did not have any knowledge about the benefits appeal, so she could not respond to that part of Respondent's email.

40. On December 6, Respondent sent a reply email to Ms. Wong, with copies to Ms. Howard, Ms. Gero, and Mr. Hernandez, thanking Ms. Wong for her "prompt & professional" reply. This email states, "fyi," that the School District's imposition of

> unfair, excessive $50 monthly charges & willful complacency to make corrections on hundreds of New Insurance Surveys/Non-Smokers--regardless of repeated requests & reports to UHC [United Healthcare]/Employee Benefits Directors & Classroom Teachers Association Offices. Watch TV News Investigations coverage today on . . . Channel 5.

> **I informed UHC & Risk Mgt that our PBCSD Tech Support IT upstairs (specifically, a few of our former JILHS Tech Academy students) can fairly resolve PBCSD UHC Risk Mgt Survey Gli8tches in less than 10 minutes--**
>
> Whomever [sic] does not make professional efforts to offer sensible Employee Solutions is part of the on-going problems.

41. In early December, an automated email notified School District employees that the benefits enrollment period had ended and they could view their choices online. In response, on December 7, Respondent emailed Ms. Howard, a staffperson in Ms. Howard's department, Ms. Gero and Ms. Wong asking for their help because the deadline for appeals was December 9, and she had to address the "computer glitch" that had prevented her from receiving the $500 premium discount and another employee-benefits problem. This email thanks the recipients for their anticipated assistance. When no one responded, Respondent re-sent this email on December 8, adding her attorney to the recipients.

42. On December 22, Ms. Howard sent an email to Respondent and apparently other similarly situated employees:

> Your appeal for the Wellness rewards credit was not able to be granted. We are sorry the decision could not be more favorable. You will receive information in the mail in January about the requirements to be completed in 2012 for the discount to be applied in 2013.

> We will have [benefits] representatives available to sit with employees at their work sites from Jan 24 to Feb 18, 2012. They can assist you in navigating the myuhc site so that you will be able to successfully complete the requirements in 2012 for the discount in 2013. Please be sure to follow the instructions in the home mailing you will receive in January if you would like an appointment with one of thes [sic] representatives.
>
> Also we communicate benefits information throughout the year by emails from "Benefits Buzz" so be sure to look for them and read them.
>
> Again we are sorry that our decision could not be more favorable.

43. To this email, Respondent responded, the same day, by email:

> As we all know, For 33 years I have promptly and professionally achieved A+ Merited School Awards and submitted by Lab Corp Bloodwork and Survey for Wellness Rewards again with [my attorney] from last Nov 2010 through December 2011 and re-submitted again from July 15 through August 1, 2011 on Google Glitched People Soft & UHC Self Service WebSites, [sic] However, PBCSD Benefits/Risk Management/UHC willfully continues to BLOCK & GLITCH & DENY my Payroll Deductions and Out of Pocket Expenses & Appeals in order to receive my Professional Health Benefits over this past year Nov 2010-Dec 2011.
>
> Please APPROPRIATELY RE-SUBMIT and CREDIT my HEALTH CARE WITHOUT the PBCSD $50 MONTHLY PENALTY SCAM to United Health Care and Risk Management Benefits Directors, which UI have also reported to Elected School Board Officials, DOJ/EEOC Federal Investigator and [the website of a labor lawyer].

(Respondent's reference to a "scam" may be connected to a warning email that Respondent and other School District employees had received concerning an online scam supposedly from the "College Board"--a warning that prompted a brief response by Respondent suggesting that the School District IT person add to the list of scams the "computer glitch" scam.)

44. On January 10, 2012, Respondent sent another email to Ms. Wellings, Ms. Gero, Ms. Howard, and her attorney demanding the $50 monthly discount. Although the entire email is underlined and possibly in boldface, it is not inappropriate or confrontational in tone. The addition of Ms. Wellings appears to be due to Respondent's statement that she will "visit Payroll Tues or Wed. again in order to follow up on your mandatory HR/EEO & Insurance Compliance as you have been advised by the DOJ EEOC Federal Investigator . . . Letter to Deneen Wellings in July 2011."

45. On January 11, Respondent sent an email to an EEOC investigator, Ms. Gero, Ms. Wellings, Ms. Wong, Mr. Hernandez, and her attorney. The email starts:

> I did NOT 'miss the deadline.' As you know, PBCSD GLITCHED and ACCESS BLOCKED for hundreds of Employees, including me, in Spring & Summer months of 2011 due to their District Technology System switching overhaul of a "NEW UPDATED VERSION of Google" which is an understandable GLITCH that WE ALL KNOW CAN BE APPROPRIATELY

ADJUSTED in the School District Technology Offices.

PLEASE RE-SUBMIT my Reasonable Request for Amicable Adjustment to REMOVE the capricious monthly $50 penalties and/or FILE ADDITIONAL EEOC, EEO HR GRIEVANCE Case CLAIMS, with [union attorney] who diligently assisted me in my Civil Rights to to [sic] retrieve and reinstate my PBCSD Benefits BLOCKED & DENIED ACCESS for my Medical, Vision, St. Mary's Hospital Breast Cancer Followup Appts & Dental BENEFITS REIMBURSEMENTS REINSTATEMENTS in April thru October 2011 and in December-January 2012 for their willful, wrongful Complacency, Non-Compliance & now OVERCHARGING me monthly $50 penalty.

Remember, I filed and completed by LabCorp Blood Labs & SURVEYS after my SEVERAL MONTHS of my Risk Mgt UHC BENEFITS were ACCESS BLOCKED and Oct-December my Professional Development TDE Inservice Sessions Opportunities to Re-Certification are also willfully BLOCKED & Denied by Admin Wellings, Latson & Gero.

PLEASE RE-SUBMIT to REMOVE Discriminatory, Retalliative [sic] Penalties & Blocks or FILE ADDITIONAL GRIEVANCE COMPLAINT in my EEO HR Case against PBCSD for Professional Career Discrimmination [sic] Damages & Losses.

46. Later the same day, a union representative replied to Respondent's email by saying that she and Mr. Hernandez "appealed to the district on your behalf regarding the August 1, 2011 Health Survey timeline that you missed. Unfortunately, we have been unsuccessful in getting them to grant credit for

completing the survey." The union representative copied Respondent's attorney, so he would be aware of their efforts.

47. On January 12, Respondent sent an email to Ms. Howard without copies to anyone else. The email states:

> How consistently stressful that since I've re-submitted 2008 EEO ADA HR Concerns & Ethics Complaints that none of the infamous "PBC School Board Admin Specialists" have ever been capable of favorably following any of the lawfully sensible ethical CTA FEA Contract Dr's & DOAH Judge's Recommendations nor Conflict Resolutions for any of my respectfully re-submitted Claims to EEO ADA HR & Risk Mgt Ins Benefits Legal Dept Appeals, except by wrongfully writing false reports & filing their threatening letter containing false, defamatory allegations for me to drop my EEOC Claims or I will be suspended and/or terminated for insubordination.
>
> Thankfully, the DOJ/EEOC has been lawfully capable of re-submitting Investigations for the infamous PBCSD Administrative Specialists in order to clear up their consistent, Collaborative Complacency & Non-Compliance.
>
> I have learned to "Never give up & never give in" (Vince Lombardi) . . . As Always, Truth, Justice & Perseverance Prevails from now on 2012.

48. On January 17, Ms. Howard emailed Ms. Gero. This email states:

> I wrote to [Respondent] on Nov 22 via email asking her to stop sending these harassing emails. Since then she is continuing to send me these emails. In addition, they are rambling and confusing.

49. By letter dated February 21, 2012, Mr. Davis suspended Respondent's access to School District email for misuse of School District technology. The letter notes that he had warned her to discontinue improper use of School District email.

50. In addition to the above-noted Latson and Wellings emails, Respondent has misused School District email in the past. Respondent had received and defied several warning memoranda from two past principals not to use School District email to harass coworkers.

51. In the more recent of these situations, at John I. Leonard Community High School, Respondent used a code to email all school employees when she did not have permission to communicate by these means to all school employees, Respondent addressed an email to a female coworker named "Continent" as "Cuntinent," and Respondent sent the above-mentioned emails ridiculing presidential candidate.

52. Respondent's emails involving the $500 premium discount constitute harassment and gross insubordination.

53. Respondent's emails constitute harassment due to their large number over a relatively brief period of time, their confrontational tone, and the relatively modest benefit involved. Ms. Howard did not ignore Respondent. Upon receipt of Respondent's first email, Ms. Howard immediately contacted the appropriate person at United Health Care. The United Health

Care representative researched the matter with the company's information management personnel responsible for online filings and later assured Ms. Howard that nothing indicated a problem at the company's end of the attempted transaction. Unfortunately, Ms. Howard did not communicate these efforts to Respondent, so a few more emails were justifiable from Respondent's perspective.

54. Although Ms. Howard may not have told Respondent about the appeal process, it seems, from Ms. Wong's response to one of Respondent's emails, that Respondent was aware of this process. Approximately 100 other employees had complained about problems with online filing. By mid-December, as the new plan year was about to start, Ms. Howard was forced to cobble together an appeal process for the employees. Ms. Howard and the teachers' union entered into a memorandum of understanding under which they jointly examined, employee-by-employee, all of the online registration files and applied uniform standards to each redetermination.

55. Respondent must be permitted some email communication with Ms. Howard prior to disposition of her appeal on December 22. Some employees won their appeals, so it may be inferred that the online filing system was flawed. But, even prior to December 22, Respondent crossed the line between pressing her rights and harassing Ms. Howard. These pre-December 22 emails include baseless claims of discrimination and wilful neglect of

duty by Ms. Howard and irresponsible claims that Ms. Howard has abused, threatened, and lied to Respondent. Absolutely nothing in the record suggests that these claims by Respondent are true, or, more importantly, that Respondent had any reason whatsoever to believe that they were true, except for the simple fact that she had been denied a $500 benefit due to a computer problem for which, in the final analysis, Respondent had no more reason to assign responsibility to United Health Care or Petitioner than she had to assign to herself.

56. Additionally, the four emails that Respondent sent to Ms. Howard after the December 22 email announcing the unfavorable outcome of the appeal also compel a finding of harassment. Petitioner had made its final decision concerning eligibility for this $500 benefit. Nothing whatsoever can be gained from further emails to Ms. Howard. At this point, Respondent's only option was litigation of some form. Although the tone of these post-December 22 emails is relatively muted, their very existence constitutes nothing more than an attempt to hector and harangue Ms. Howard.

57. In sending these harassing emails to Ms. Howard, Respondent committed gross insubordination. Mr. Davis had warned Respondent that further misuse of School District technology to abuse School District employees could result in Respondent's termination. Mr. Davis's directive was reasonable

in nature, and Mr. Davis had proper authority over Respondent to issue the directive. By harassing Ms. Howard with the above-described emails in November, December, and January, Respondent exhibited a constant or continuing refusal to obey Mr. Davis's directive.

58. In sending these harassing emails to Ms. Howard, Respondent committed misconduct in office. Respondent's emails unreasonably interfered with Ms. Howard's performance of her professional or work responsibilities and created a hostile, abusive, and offensive environment. Given Respondent's history of abusing School District email repeatedly--despite directives to stop--her harassing emails to Ms. Howard were so serious as to impair Respondent's effectiveness in the school system. Harboring grudges for actual or perceived slights, Respondent has displayed, repeatedly, a torch-the-earth approach to emailing in which, with copies to various third parties and vague threats to go to the media or file another EEOC complaint, she has cast herself as a force of disruption to the educational process that is the mission of the School District and its instructional, noninstructional, and administrative employees and agents. As such, Respondent's effectiveness in the school system is null.

59. As noted in the Conclusions of Law, the definition of "gross insubordination" requires an "intentional" refusal to

obey a directive. Implied in the harassment prohibited by the Principles of Professional Conduct, also noted in the Conclusions of Law, may be some notion of conscious, if not intentional, conduct.

60. The record contains hints of some mental or emotional impairment suffered by Respondent. Testifying that she felt an urge to nurture Respondent, Ms. Gero ordered that Respondent enter the EAP, which she attended from September 28, 2011 to January 3, 2012, at which time she "successfully" completed the program. But Respondent sent three of the four post-appeal emails to Ms. Howard in the ten days after completing the EAP. Because Respondent did not testify to any impairment at the hearing, the Administrative Law Judge is left to infer that the therapy may have addressed a different issue; if addressing a relevant issue, the therapy may not have provided much relief; or, of course, after the therapy, Respondent consciously chose to continue to harass Ms. Howard.

61. Clearly, Respondent's thinking is, at times, disordered. But she has repeatedly abused School District email in a fashion similar to the present case, and she has repeatedly been ordered to stop. Respondent's thinking does not appear to have been so disordered to have prevented her from understanding that, if she continued to harass coworkers by way of School District email, she could be fired, as Mr. Davis clearly warned.

For a $500 benefit, Respondent took this risk. She is not dismissed for a rude email or two. She is dismissed because, for months, she subjected Ms. Howard to a barrage of emails that were not intended to communicate, except in their number and hostility. Along the way, several persons, including the police investigator, Ms. Gero, and Ms. Howard, gently tried to direct Respondent from the disastrous path that she was on, but she was grimly determined to pursue this matter to its obvious conclusion: win the $500 benefit or be fired trying.

62. CBA Article II, Section M.7 provides:

> Except in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered as follows:
>
> a. Verbal Reprimand With A Written Notation--Such written notation shall not be placed in the employee's personnel file and shall not be used to the further detriment of the employee after twelve (12) months of the action/inaction of the employee which led to the notation.
>
> b. Written Reprimand--A written reprimand may be issued to an employee when appropriate in keeping with the provisions of this Section. Such written reprimand shall be dated and signed by the giver and the receiver of the reprimand and shall be filed in the affected employee's personnel file in keeping with the provisions of Article II, Section B of this Agreement.

> c. Suspension Without Pay--A suspension without pay may be issued to an employee, when appropriate, in keeping with the provisions of this Section, including just cause and applicable laws. The length of the suspension also shall be determined by just cause as set forth in this Section. The notice and specifics of the suspension without pay shall be placed in writing, dated and signed by the giver and receiver of the suspension. . . .
>
> d. Dismissal--An employee may be dismissed (employment contract terminated or non-renewed) when appropriate in keeping with provisions of this Section, including just cause and applicable laws.

CONCLUSIONS OF LAW

63. DOAH has jurisdiction over the subject matter. § 120.57(1), Fla. Stat.

64. An instructional employee under a continuing contract may be suspended or dismissed for a limited number of specified reasons:

> Any member of the . . . instructional staff, . . . 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.

§ 1012.33(4)(c). Compare § 1012.33(6)(a) (requiring "just cause" for suspension or dismissal of instructional employee not described in § 1012.33(4)).

65. As indicated by Ms. Wong in the Findings of Fact, Respondent remains subject to her continuing contract. However, the CBA "may operate within the penumbra of those statutes and rules [governing continuing contracts]." School Board of Seminole County v. Morgan, 582 So. 2d 787, 788-89 (Fla. 5th DCA 1991).

66. Because the outcome remains the same, even if the more rigorous standard of proof from the CBA is applied with the more limited set of grounds for suspension or termination from section 1012.33(4)(c), this Recommended Order applies the clear-and-convincing standard of proof to the limited grounds for suspension or dismissal set forth in section 1012.33(4)(c).

67. As it existed during the relevant timeframe, Florida Administrative Code Rule 6B-4.009(4) defines "gross insubordination" as "a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."

68. As it existed during the relevant timeframe, Rule 6B-4.009(3) defines "misconduct in office" as a violation of "the Principles of Professional Conduct for the Education Profession . . . as adopted in Rule 6B-1.006 . . ., which is so

serious as to impair the individual's effectiveness in the school system." As it existed during the relevant timeframe, Rule 6B-1.006(5)(d) provides that an educator

> Shall not engage in harassment . . . which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment . . ..

69. Petitioner has proved by clear and convincing evidence that Respondent has committed gross insubordination and misconduct in office within the relevant timeframe.

70. As Respondent concedes in her proposed recommended order, the prior discipline that Respondent has received for past abuses of School District email to harass coworkers constitutes the written reprimand described in the CBA. But Respondent attempts to distinguish this prior discipline from the ten-day suspension in the Settlement Agreement on the ground that she admitted to guilt in the former, but not the latter. (Respondent Proposed Recommended Order, paragraphs 61-66.)

71. The key is that Petitioner has previously imposed upon Respondent a ten-day suspension without pay, not whether she admitted to any guilt in receiving this discipline. Compare Anusavice v. Bd. of Registration in Dentistry, 451 Mass. 786, 796-98, 889 N.E. 2d 953, 961-93 (2008); Marek v. Bd. of Podiatric Medicine, 16 Cal. App. 4th 1089, 20 Ca. Rptr. 2d 474

(Cal.App.2d 1993). The ten-day suspension without pay was for the abuse of School District email in harassing coworkers, and the Settlement Agreement does not remove this discipline from consideration under the CBA progressive discipline provisions. The important fact is that Respondent had every opportunity to learn from this prior discipline, but failed to do so. As Mr. Davis warned her in his July 13 letter, the next logical step was and is dismissal.

RECOMMENDATION

It is

RECOMMENDED that the School Board enter a Final Order dismissing Respondent from employment, effective as of the first day of the 15-day suspension proposed in the April 16, 2012, notice from the Superintendent.

DONE AND ENTERED this 7th day of December, 2012, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of December, 2012.

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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.