

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NASSAU COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 12-2309
)
D. LYNN OWEN,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 27, 2012, in Fernandina Beach, Florida, before Lawrence P. Stevenson, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Ray Poole, Esquire
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For Respondent: Harrison Wesley Poole, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner, the Nassau County School Board, has just cause to terminate the employment of Respondent, D. Lynn Owen, a teacher on a professional services contract.

PRELIMINARY STATEMENT

On June 18, 2012, Petitioner Nassau County School Board ("School Board") sent written notice, signed by John L. Ruis as Superintendent of Schools, to Respondent, D. Lynn Owen, of its intent to terminate Ms. Owen's employment. The notice stated as follows, in relevant part:

Pursuant to section 1012.33(6)(a), Florida Statutes and Nassau County School Board Rule 3.19, please be advised that I intend to recommend to the Nassau County School Board at its meeting on Thursday, June 28, 2012, that it suspend you without pay pending the termination of your employment with the Nassau County School District. The proposed suspension and termination of your employment is due to misconduct in office, incompetency, and willful neglect of duty under section 1012.33(1)(a), Florida Statutes, as defined by Florida Administrative Code Rule 6B-4.009^[1/] and violation of Nassau County School Board Rule 3.49. Specifically, during the fall semester of the 2011-2012 school year, it appears that you falsified and/or negligently failed to maintain accurate records pertaining to your fifth period Debate 4 class. Moreover, during that time period it does not appear that you had established or followed any discernible academic standards for that class. Pursuant to section 1012.33(6)(a), Florida Statutes, should you wish to contest the charges against you, you shall have fifteen (15) days in which to submit a written request for a hearing. . . .

On June 22, 2012, counsel for Respondent timely requested a hearing pursuant to section 1012.33(6)(a). On July 5, 2012, the School Board forwarded Respondent's hearing request to the

Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal evidentiary hearing.

On July 11, 2012, the School Board filed a formal Administrative Complaint at DOAH that made the same essential allegations as found in the June 18, 2012, notice to Respondent.

On August 13, 2012, the School Board filed a motion for leave to file an Amended Administrative Complaint based on documentation discovered after the filing of the Administrative Complaint. Respondent objected to the motion but filed no written statement in opposition. By order dated August 16, 2012, the motion was granted.

The Amended Administrative Complaint alleged, in addition to the allegations regarding Respondent's fifth-period Debate 4 class during Fall Semester of the 2011-2012 school year, that Respondent "falsified and/or negligently failed to maintain accurate grading records for her fourth-period Speech I class" during the Spring Semester of the 2011-2012 school year.

The matter was set for hearing on August 27, 2012, on which date the hearing was convened and completed.

At the hearing, the School Board presented the testimony of Cynthia Grooms, assistant principal at West Nassau High School; Julie Brown, a technology integration specialist for the School Board; William Eason, a teacher and band director at West Nassau

High School; C.P., a student at West Nassau High School; John L. Ruis, Superintendent of Schools for the Nassau County School Board; and Respondent. The School Board's Exhibits 1 through 8, 11 through 13, and 17 through 27 were admitted into evidence. School Board Exhibits 1, 2, 7, 8, 11, and 17 through 25 contain the unredacted names of students at West Nassau High School and have therefore been placed under seal.

Respondent testified on her own behalf and presented the testimony of Ronald Booker, former principal of West Nassau High School; Iris Coleman, a retired teacher, administrator, and behavior analyst for the School Board; Tammy Roberts, a teacher at West Nassau High School; Robin Sparkman, a data entry operator at West Nassau High School; Melody Spruell, an English teacher at West Nassau High School; and Maureen Lullo, an English teacher at West Nassau High School. Respondent's Exhibits 5 through 8 were admitted into evidence.

At the close of the hearing, the parties agreed to a period of 20 days after the filing of the transcript within which to file their proposed recommended orders. The two-volume Transcript of the hearing was filed at DOAH on September 18, 2012. On October 3, 2012, Respondent filed an unopposed motion for enlargement of time, requesting an additional 14 days within which to file proposed recommended orders. The motion was granted by order dated October 3, 2012. In accordance with the

order granting the extension of time, the parties filed their Proposed Recommended Orders on October 22, 2012.

FINDINGS OF FACT

1. The School Board employs Respondent D. Lynn Owen as a teacher. Dr. Owen holds a professional service contract with the School Board pursuant to section 1012.33, Florida Statutes.^{2/}

2. During the 2011-2012 school year, Dr. Owen taught at West Nassau High School ("West Nassau") in Callahan.

Fall 2011-2012 Debate 4 class

3. During the 2011-2012 school year, West Nassau operated on a four-period block schedule rather than the six-period schedule followed by most Florida public schools. Under the block schedule, the school year consisted of two semesters, fall and spring. Students took four classes per day, each class lasting 90 minutes. Students received a full credit per semester for each of the four classes.

4. In addition to her qualifications as an English teacher, Dr. Owen is a nationally ranked speech and debate coach. During the 2010-2011 school year, Dr. Owen started a debate team at West Nassau. She taught Debate 3 during the 2010-2011 school year with a class consisting largely of freshmen recruited from her honors English class. The debate team enjoyed some success in debate competitions and the students wanted to continue taking a debate class in the 2011-2012 school year.

5. West Nassau Principal Ronald Booker was amenable to establishing a Debate 4 class, but was concerned that Dr. Owen's other duties would preclude her teaching the class given the limits of a four-period school day. After some discussion, Dr. Owen volunteered to teach Debate 4 class as a "fifth-period" class to be held after the close of the regular school day. The regular school day began at 9:05 a.m. and ended at 3:25 p.m.

6. Thus, during the Fall Semester of the 2011-2012 school year, Dr. Owen taught Debate 4 as an elective honors class that convened daily from 3:30 until 4:15. In the block schedule system, this class was referred to as a "skinny" block. Unlike the regular block courses, a skinny block met every day for 45 minutes for the full 180 days of the school year. The skinny block class was graded in quarters rather than semesters, and a full credit was earned only if the student remained in the class for the entire school year.

7. Because the Debate 4 class was taught outside of regular school hours, Dr. Owen was not paid to teach the course.

8. West Nassau had several "zero-period" classes that met before the start of the regular school day. Mr. Booker testified that Debate 4 was the only fifth-period class he knew of at the start of the 2011-2012 school year. He testified that he only learned about another fifth-period class, Band 2, after the school year began.

9. William Eason, the band director at West Nassau, testified that he taught Band 2 as a fifth period class during the Fall Semester of the 2011-2012 school year. Mr. Eason testified that Mr. Booker approved the class for credit during the summer before the start of the school year. Mr. Eason stated that he was paid for the class, receiving a stipend for after-school instruction.

10. Mr. Eason's testimony regarding the provenance of the Band 2 class is credited. Both Mr. Eason and Mr. Booker appeared to be testifying honestly, but Mr. Booker's recollection on this point was imprecise. Mr. Booker clearly recalled his approval of Debate 4 but was fuzzy as to when Band 2 came about, though he recalled discussions about the need for the class. Mr. Eason taught the class and naturally had a more specific recollection of the approval process than did the principal.

11. Band 2 met daily at 3:45 p.m. until roughly 5:00 p.m. This was the time during which the marching band rehearsed for its appearances at West Nassau football games and for band competitions. Mr. Eason testified that he had no attendance problems with his Band 2 students. He took regular attendance at the start of the class. Also, if a student were missing, the hole in the marching band formation would be obvious.

12. Three students, A.H., L.C., and C.P., were enrolled in Dr. Owen's Debate 4 class and in Mr. Eason's Band 2 class. It

fell to Dr. Owen to fashion a solution to this conflict because it was critical that these students attend band practice every day after school, particularly A.H., who was the band's drum major. No flexibility could come from the Band 2 side of the conflict.

13. Mr. Booker asked Dr. Owen to "work with" these students to provide a way for them to make up missed class time in Debate 4. If they had to miss two days because of band, then Dr. Owen should meet with them for a longer class period on the remaining three days to make sure they met the seat time requirement.^{3/}

14. Dr. Owen testified that she understood Mr. Booker's instruction to mean that she should be flexible regarding regular class attendance for her Debate 4 students, provided they put in the time required to receive credit for the course. Eight students were in the course at the start of the year, and three dropped out. Dr. Owen stated that the five who remained in Debate 4 met their seat time requirement for the 2011-2012 school year.

15. C.P., now a tenth grader at West Nassau, was in the marching band during Fall Semester of the 2011-2012 school year. He was enrolled in Band 2 and stated that the marching band practiced every day at 4:00 p.m., except for Thursdays when band practice convened at 4:30. C.P. enrolled in Debate 4 during

September 2011, on Dr. Owen's recommendation, creating a conflict with his attendance at Band 2.

16. On a few occasions, C.P. split his time at Band 2 and Debate 4. On most days, he would attend Debate 4 from 3:30 until 4:00 p.m. and then go to band practice. If there was no band practice, he would stay in Debate 4 until 5:00 p.m. On Thursdays he was able to stay in Debate 4 for a full hour, but on Fridays during the football season he was not able to attend Debate 4 at all due to his band commitments.

17. C.P. testified that Dr. Owen allowed him to make up the missed time by coming in early in the morning, before first-period began at 9:05 a.m. In this way, C.P. was able to put in at least 30 minutes daily on his Debate 4 assignments.

18. C.P. estimated that 95 percent of his class time was spent performing research on debate topics with his debate partner, which facilitated working independently of the regular class period. C.P. testified that his grade in Debate 4 was based on class participation, including debate practice once a week, and that there were no term papers or written assignments in the conventional sense.

19. Dr. Owen testified that sixty percent of the grade for Debate 4 was based on class work, twenty percent was based on writing, and twenty percent was based on her assessments of the students. She stated that C.P. was not doing things that he

would normally do in an English class for "writing," but that she graded the students based on their research, their notes, and their debate outlines, all of which are components of "writing" under the Sunshine State Standards. Her assessments were based on weekly practice debates.

20. C.P. stated that his classmates A.H. and L.C. eventually dropped out of Debate 4 because they were unable to keep up with the requirements of the class in addition to their Band 2 commitments.

21. The School Board has alleged that although C.P., A.H., and L.C. attended fifth-period band practice virtually every day during the Fall Semester of the 2011-2012 school year, and although band practice directly conflicted with Dr. Owen's fifth period Debate 4, those students were marked "present" in the Debate 4 class when they were not present.

22. In fact, the fifth-period classes overlapped but did not conflict at all points. Mr. Eason testified that the band class began at 3:45, but C.P. testified that in practice the class did not commence until 4:00 p.m. C.P. was able to attend debate for thirty minutes, from 3:30 until 4:00 p.m., and then attend the band class starting at 4:00 p.m. C.P.'s testimony was entirely credible on this point. The evidence establishes that it was possible for the three students enrolled in both classes to attend at least portions of both classes. Assuming that the

"flexibility" urged by Mr. Booker included the ability for students to make up class time at other times of the day, it was possible for C.P., A.H., and L.C. to meet the seat time requirements for Debate 4 while also maintaining their attendance at the fifth-period Band 2 class.

23. A.H. and L.C. dropped out of Debate 4 halfway through the school year, each receiving a half-credit for the class. C.P. remained in Debate 4 for the entire school year. C.P. testified that A.H. and L.C. dropped the debate class because they were unable to put in the time to meet the seat requirements for the class while maintaining their level of participation in band.

24. Dr. Owen's handwritten attendance sheets for August 29 through October 13, 2011, indicate a total of 16 absences from Debate 4, including five absences for A.H., the band's drum major. However, the attendance records submitted by Dr. Owen for the school's official records show no absences at all from Debate 4 until October 19, 2011. Dr. Owen did not have an adequate explanation for this discrepancy. In response to a direct question as to whether she had marked the students absent on the official attendance sheet, Dr. Owen said, "I don't know. Probably not."

25. Because Dr. Owen was teaching the Debate 4 class voluntarily, without pay, the school would not pay for a

substitute teacher. Therefore, Dr. Owen did not have a substitute teacher to fill in for her when she missed Debate 4.

26. Records produced at the hearing indicated that Dr. Owen was absent from the West Nassau campus on September 14 and 23, October 4, November 9, December 8 and 9, and December 14 through 16, 2011.

27. However, Dr. Owen's handwritten attendance sheets show that on September 14, when Dr. Owen was at the hospital for her husband's surgery, four students spent the entire class period in Debate 4 and four others at least checked in with Dr. Owen. The attendance sheets show that on September 23, when Dr. Owen was attending a conference in Baltimore, three students spent the entire fifth-period in Debate 4, three other students checked in, and two were absent. Dr. Owen had no adequate explanation for these discrepancies.

28. On October 4, Dr. Owen was out of school for AVID professional training. Dr. Owen was the AVID coordinator for West Nassau. AVID, or Advancement Via Individual Determination, is the curriculum component of GEAR UP (Gaining Early Awareness and Readiness for Undergraduate Programs), a grant program established by the U.S. Department of Education to increase the number of low income students who are prepared to enter and succeed in postsecondary education. West Nassau was part of a three-year GEAR UP grant.

29. Dr. Owen's handwritten attendance sheets for October 4 indicate that six students were present for the entire class period and two others checked in with Dr. Owen. In this instance, Dr. Owen explained that the AVID training session in Jacksonville concluded at the end of the school day and that she immediately drove to Callahan to be there for the Debate 4 class.

30. As to Dr. Owen's other listed absences, the record contains no handwritten attendance sheets with which to compare them. In her deposition, Dr. Owen testified that she kept handwritten attendance sheets for the entire school year, but that during its initial investigation the School Board asked only for her attendance sheets for the first quarter of the 2011-2012 school year. She was subsequently suspended and barred from the West Nassau campus and therefore unable to provide the rest of the attendance sheets in response to the School Board's discovery request.

31. West Nassau also generated a daily "subsequent period absentee report." The first-period teacher would take the roll of the students in her class and send the results to the school office. The office would then generate a report of absent students that would be distributed the next day to teachers of subsequent classes. Those teachers would check their own attendance record against the report and mark whether the students were present or absent for their classes.

32. The subsequent period absentee reports for November 9, and December 14 and 15, 2011, each indicate that A.H. was marked absent for her first period class but was marked "present" for Debate 4. On all three of these dates, Dr. Owen was not present at the school.

33. West Nassau maintains a "teacher sign-in sheet for payroll" that is treated as the official record of when a teacher comes into and leaves the school every day. Several of these sheets for the 2011-2012 school year were submitted into evidence. The sheets indicate that on most days, Dr. Owen worked well in excess of eight hours, often well into the evening hours. However, the sheets also indicate several days during the Fall semester on which Dr. Owen signed out of the school at 3:30 p.m. or before, indicating that she could not have been present to teach Debate 4: August 16, September 1, October 26 and 27, and November 2, 2011. There were also a few dates on which Dr. Owen left school after 3:30 but before the 4:15 dismissal time for Debate 4: September 20, October 25, and November 3, 2011.

34. The handwritten attendance sheets for Debate 4 indicate that the class convened on August 16 and September 1, 2011, despite the fact that Dr. Owen had signed out of the school at 3:30 p.m.

35. The evidence indicated that on at least two occasions Dr. Owen chaired meetings of the West Nassau AVID teachers at

3:45 p.m., in conflict with Debate 4. Dr. Owen testified that the AVID meetings occurred 15 minutes after the start of Debate 4, and that she was able to take roll and get the class started on independent work before the AVID meeting started. The AVID meetings were in the same connected suite of classrooms in which Dr. Owen conducted her classes, so that she was at all times within earshot of the Debate 4 class. She could not, however, state with certainty that the students were in the class and working during the class period.

36. The School Board has also alleged that Dr. Owen did not establish or follow any discernible academic standards for the Debate 4 class. The School Board offered little evidence to support this allegation.^{4/} Dr. Owen provided a detailed course syllabus that included cognitive and behavioral objectives, targets for subject matter mastery, and the specific Sunshine State Standards met by the course. She also provided the students with a classroom management plan with clear rules for the functioning of the classroom and a set of student, parent and teacher expectations requiring the signatures of all parties.

37. Regarding the lack of traditional writing assignments in the Debate 4 class, Dr. Owen testified as follows:

If I had any less experience, maybe I would have to have a piece of paper for every single thing that they did. But I didn't have to have that because I have been trained to assess everything a student has learned in

ten minutes or less. And the minute they start talking, whether it's a national competition or in my classroom, in ten minutes or less I can tell you whether they've done any or all of the work that they have been given to do. It's part of knowing how to judge and coach debate.

38. Dr. Owen's testimony on this point is credible. Debate 4 was a performing arts class, and as such did not fit the profile of a standard academic classroom course. To prepare for debates, students were required to perform extensive research and to demonstrate complete mastery of the materials they compiled. At the suggestion of the West Nassau principal, Dr. Owen provided the students some flexibility in making up their seat time due to the recognized conflict during the fifth-period. C.P., for example, made up his seat time by coming in early in the mornings and staying past 4:15 on afternoons when he could be in the class. Dr. Owen estimated that C.P. put in 130 hours of seat time during fourth quarter alone as he prepared for a national competition, when only 135 hours were required to obtain credit for the entire school year.

39. Dr. Owen's clear mastery of the subject matter entitled her to some deference as to the extent to which the students were able to work independently of her. However, on this point, Superintendent of Schools John Ruis testified persuasively that regardless of how much independent study the student is responsible for, there is an expectation that instruction will

occur in the classroom and that the students will be under the supervision of the teacher who is responsible for them. Dr. Ruis believed that some arrangement should have been made for supervision of the class in Dr. Owen's absence, regardless of the time the class convened.

40. In summary, as to the allegations regarding the Debate 4 class, the School Board failed to demonstrate that Dr. Owen did not establish or follow any discernible academic standards for the class during the Fall Semester of the 2011-2012 school year.

41. The School Board did demonstrate that Dr. Owen falsified records pertaining to the fifth-period Debate 4 class. It is understood that "falsification" carries a connotation of intentional action. Based on all the evidence, there is simply no way to find that Dr. Owen's actions constituted anything other than an intentional misreporting of student attendance in her Debate 4 class. Dr. Owen submitted attendance reports that were clearly incorrect, showing students present for classes that could not have taken place because Dr. Owen was not present on the West Nassau campus at the time in question.^{5/} When she filled out the attendance reports, Dr. Owen had to know that she was submitting inaccurate records.

Spring 2011-2012 Speech 1 class

42. During the Spring Semester of the 2011-2012 school year, Dr. Owen taught an AVID Speech 1 class at West Nassau.

43. As noted above, AVID is the curriculum component of the federal GEAR UP grant program, the purpose of which is to increase the number of low-income students who are prepared to succeed in postsecondary education. The program's emphasis is on students who show the potential to do college work but who lack the financial and family resources to prepare in the manner available to their more well-to-do classmates. The elective AVID program aims to nurture these students and inculcate in them a desire to succeed in college.^{6/}

44. The final exam for the Spring Semester AVID Speech 1 class consisted of four parts, each worth 200 points. The 800-point final exam counted for roughly one quarter of the student's grade for the nine-week period.^{7/}

45. One of the 200-point segments of the final exam was a written essay test. The exam's instructions provided as follows:

Please choose ONE (1) essay question. Your essay response should be a minimum of three (3) pages, and a maximum of four (4) pages. Please include an introduction, body, and conclusion. Your response is based off of your own experiences, not just the class's as a whole. Write your responses on a separate sheet of notebook paper.

46. There followed a list of five essay questions:

1. Compare and contrast your 1st semester at WNHS to your 2nd semester. What has changed? How have you improved, and what can you do to continue to improve?

2. What recommendations would you give to the freshman class next year to prepare them for high school?

3. Describe your experience with your first AP/Honors class. What do you think you could have done differently to help your grade? How do you think you could have been prepared in 8th grade, to be ready to go, when the class started?

4. Describe what you think your life is to be like in 15 years. Where do you see yourself? Be as descriptive as possible.

5. Do you believe that a person is born with individual determination, or is it acquired over time? What makes individual determination such a good thing but also a very bad thing? Give examples.

47. Twenty-two students took the essay test. Twenty-one of the students received the same grade, 186 points out of a possible 200. The remaining student received a grade of 160.^{8/}

48. Dr. Owen made no marks on any of the exams, most of which were replete with spelling errors, grammatical errors and sentence fragments. Three of the essays did not meet the three page minimum, and one of the essays was five and one-half pages long, in excess of the four-page maximum.

49. In explaining her actions, Dr. Owen testified that some of the students were very concerned about their grades as they approached the written essay portion of the exam. Two parts of the final exam had been completed and were "non-negotiable as far as AVID was concerned," in Dr. Owen's words. One of these was

the Tutorial Request Form, which Dr. Owen described as a "very stylized Socratic methodology form that they have to use Costa's higher-level order of thinking in order to put together."^{9/} And that is a killer sheet that they had to do twice a week all year." The second "non-negotiable" part of the final exam was a grade for the binders that the students were required to keep all year.

50. Dr. Owen testified that some of the students had not done well on these two portions of the final exam, for which the AVID program allowed her no leeway to adjust the grades. She testified that these students "needed something to mitigate the damage that had been done in . . . the other two parts of the exam." Some of the students were further concerned that they could not write three pages on the essay test. Therefore, she orally amended the exam instructions, telling the class, "I will look at your essays to determine if you have addressed the prompt and if you have reflected on what you're doing. And if you've worked the whole period and you're working hard and I can tell, then I don't think anyone will be disappointed with their grades."

51. Dr. Owen testified that she had taken this essay test, including the instructions, from an AVID website. She stated that she had never written an exam that called for a minimum or maximum number of pages, and that she did not believe that such a

requirement should be strictly enforced. Dr. Owen noted that she had one student whose handwriting became larger and larger as she became more nervous, which caused her to fill more than four pages on the essay test. Another student's primary language was Spanish, but he managed to write a page and a half in English that addressed the prompt. In both of these instances, Dr. Owen declined to discount the students' grades for failure to meet the three-page minimum or four-page maximum.

52. Dr. Owen testified that she has been trained as a professional test scorer and did not need to place marks on the papers. She stated that she took notes on a separate note pad to assist her in grading the papers, though she was unable to produce these notes at the hearing. She also knew that this was the last exam before summer break and that the students would not be coming back for the tests. She intended to place the exams in the students' permanent AVID folders to use as part of their first project for the next school year. The project was to involve peer editing, and she did not want the students to be influenced by marks she had placed on the papers. The essay exam was not intended to be "punitive." It was meant to be "reflective," something she could use at the beginning of the next year as a starting point for further study of the students' personal growth.

53. Dr. Owen noted that the essay test was only one-fourth of the AVID Speech 1 final exam. This part of the exam did not change anyone's grade average because it amounted to so little of the total grade.

54. Dr. Owen testified that it is appropriate to give all the students the same grade provided they "put into it what I ask them to put into it." In her deposition, when asked why 21 out of 22 students received the same score, Dr. Owen replied, "Probably because I liked what they wrote and they maintained the rubric."^{10/} She testified that she read every word of every essay.

55. The fourth part of the final exam, also worth 200 points, was a "mandala autobiography" project. Each student was required to draw a mandala, or circle, containing five symbols that represent unique and varied aspects of the student and/or his life. According to the written rubric for the project, a "very effective" mandala would demonstrate its symbolic purpose, would be visually appealing, and would have a purposeful and unifying connecting design. Accompanying the mandala would be an essay that "thoroughly describes and explains the symbols contained in the mandala. The essay would use "strong sensory details to bring each symbol to life." The "very effective" essay should be well-organized, use "well-crafted transitions to

propel the reader forward," contain varied sentence structure and have "few, if any, mechanical errors."

56. All 22 students in the AVID Speech 1 class received a grade of 190 out of 200 on the mandala autobiography project. Dr. Owen made no marks of any kind on any of the project materials submitted by the students.

57. Dr. Owen explained that this project was the culmination of "an entire year's worth of reflection through AVID." As well as writing explanatory essays, the students were required to present the mandalas to the class and explain each symbol and color used in the drawings.

58. Dr. Owen testified that the mandala autobiography was something of a group project, with all of the students working on the rubric together. Again, she did not make marks on the papers because the mandalas were going to be used during the next school year. Dr. Owen testified:

[A]t the beginning of this year, we were going to take those mandalas, and we were going to turn that into the second project, which was: over the summer, how have you changed? How have your collages changed? How did the symbols change? Are they still valid? And so I wasn't going to mark on anybody's artwork, and I didn't need to mark on any of them because the students' rubrics and things . . . I had them all together in one place.

59. Dr. Owen conceded that some students produced more materials than others and that some projects appeared to have had

more effort put into them, based on the detail of the written materials. Nonetheless, Dr. Owen testified that each one of the students in the class "absolutely" earned the grade he or she received.

60. Dr. Cynthia Grooms, the assistant principal at West Nassau who conducted the initial investigation into the allegations against Dr. Owen, testified that she found it unusual that so many students received the same grades on the essay test and the mandala project, especially because there were no marks on the papers. These facts raised concerns as to whether Dr. Owen reviewed the exams, graded them properly, documented her grading process, and provided feedback to the students.

61. Dr. Ruis also found it "highly irregular" for 22 students in a class to receive an identical grade on a written assignment. Dr. Ruis believed the probability of such an occurrence "would normally be very slim." As to the essay test in particular, Dr. Ruis stated:

It would be difficult not to read these essays and make some distinctions between them with regard to quality of the product that the students produced. However, that was not reflected in the scores that they were assigned . . . It suggested that they were not reviewed objectively, that they were not graded in accordance with the guidelines that were issued, and done haphazardly.

62. Even Mr. Booker, the former West Nassau principal who testified on behalf of Dr. Owen, stated that it would be unusual

for all 22 students in a class to receive the same grade on a written project. If he were shown 22 written essays, all of which received the identical grade and none of which had a mark on them, Mr. Booker would conclude that the teacher had not graded them.

63. The School Board's allegation is that Dr. Owen "falsified and/or negligently failed to maintain accurate grading records for her fourth period Speech I class."

64. It is found that Dr. Owen did not "falsify" records for the class because there is no evidence that Dr. Owen intended to create inaccurate or misleading grading records.

65. The undersigned finds Dr. Owen to be a dedicated teacher and a sympathetic witness, and has attempted to give her the benefit of every doubt in this proceeding. The AVID Speech 1 class was an elective class designed to encourage potential first-generation college students to pursue higher education. The class was designed more to encourage reflection and self-examination than to exert academic pressure on the students. It is found that, given the nature and goals of the class, Dr. Owen had some measure of discretion to apply a more relaxed grading standard.

66. However, by her own admission, Dr. Owen negotiated with her students the terms of the AVID Speech 1 essay test after the students saw the written instructions to the test, essentially

telling them to disregard the instructions and promising them a good grade if she believed they were working hard. She then proceeded to give 21 of 22 students a score of 186 out of 200, or a solid "A," without apparent regard to the manifest differences in quality among the essays. She made no marks on any of the papers, failing to correct for spelling and grammatical errors. Dr. Owen testified that she took notes in a separate note pad that she was unable to produce at the hearing. She stated that the students received the same score because they all wrote according to her undisclosed personal "rubric." The undersigned credits Dr. Owen's testimony that she read every word of every essay, but cannot credit her conclusion that all of these essays were of precisely the same quality meriting precisely the same grade. Based on these facts, it is found that Dr. Owen negligently failed to maintain accurate grading records for her fourth-period Speech I class as to the essay portion of the final exam.

67. As to the mandala autobiography, there are factors apart from those discussed as to the essay test that incline the decision toward Dr. Owen. The mandala project had an objective rubric against which the finished product could be judged. Though each student produced an individual mandala, the overall project was visualized as a group effort, providing some justification for Dr. Owen's decision to award all 22 students

with a grade of 190. A reasonable person could disagree with Dr. Owen's method of grading the mandala autobiography project, but her grading decision cannot be found to constitute a negligent failure to maintain accurate grading records.

Evidence as to Dr. Owen's fitness and effectiveness

68. Mr. Booker was the principal of West Nassau and Dr. Owen's direct supervisor throughout her tenure at the school. He described Dr. Owen as a "fabulous teacher," a "master" at keeping her students "highly engaged and involved in the educational process." Mr. Booker stated that he had no concerns about Dr. Owen's professionalism and had never known her to neglect any of her duties. His only concern was as follows:

I've had concerns about her work ethic, because she works, you know, nonstop pretty much every day, every day, every night, weekends. She's a very dedicated teacher, puts in more hours as one teacher probably than three or four other teachers do. I used to have to try to kick her out of the building.

69. Dr. Owen received the highest score possible on her annual evaluation for the 2011-2012 school year. She received an overall score of 97 out of 100 possible points on her 2010-2011 annual evaluation. She was subject to two evaluations during the 2009-2010 school year, for which she received scores of 94 and 100 out of a possible 100 points.

70. Iris Coleman is a retired teacher and administrator for the School Board. In the 2008-2009 school year, Ms. Coleman was acting principal at the Student Educational Alternative School ("SEAS") at which Dr. Owen was a teacher. Ms. Coleman testified that her performance evaluations of Dr. Owen were very good, and that Dr. Owen was "one of the most competent teachers that I have ever observed." Ms. Coleman never knew Dr. Owen to neglect her duty, stating that, "I have never seen anything but the finest of performance academically, professionally, and socially."

71. Melody Spruell, the former English department head and AP coordinator at West Nassau, testified that she had observed Dr. Owen's Debate 4 class 15 or 16 times and her AVID Speech 1 class about a dozen times. She noted that Dr. Owen's students posted "stellar" scores on the FCAT exam. Dr. Spruell stated that Dr. Owen "makes the rest of us kind of look like, you know, chopped liver." Dr. Spruell testified that if she had ninth-grade children, "my kids would be in her class."

72. Maureen Lullo is an English teacher who shared the same suite of classrooms with Dr. Owen and worked closely with her in the AVID program. Ms. Lullo described Dr. Owen as "a brilliant mind and really one of the best teachers that I have been exposed to in my 24 years of teaching."

73. Dr. Ruis testified as to the factors that led him to recommend Dr. Owen's dismissal:

Well, I think to go back to the Code of Ethics of the teaching profession of the State of Florida, teachers have an obligation to present information honestly; they have an obligation to the profession and to the students and to the parents to not produce information that would misrepresent the facts or be submitted fraudulently.

I think that's a very serious breach of the Code of Ethics. And my expectation for all of our teachers would be that they perform and that they act in a manner that's of the highest character, as exemplifying the Code of Ethics, because that is certainly something that we need to model for our students. And when that does not happen, I think it -- you know, it reduces the effectiveness of someone in the instructional position with students under their supervision.

74. Dr. Ruis concluded that it would be "very, very difficult" for Dr. Owen to remedy her impaired effectiveness at West Nassau or in the Nassau County School District.

CONCLUSIONS OF LAW

75. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to section 120.569 and subsections 120.57(1) and 1012.33(6)(a)2., Florida Statutes.

76. Respondent is an employee of the School Board, and holds a professional service contract pursuant to section 1012.33(3)(a).

77. The School Board has the burden to establish by a preponderance of the evidence the grounds for disciplining

Respondent. See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

78. There are two statutory mechanisms by which a school board may terminate the employment of an employee working under a professional service contract: termination for cause pursuant to section 1012.33, Florida Statutes, and termination for failure to correct performance deficiencies within the 90-day probation period pursuant to section 1012.34, Florida Statutes. In this case, the School Board chose to proceed exclusively under section 1012.33.

79. Subsection 1012.33(1)(a) provides that a teacher's contract must contain provisions for dismissal during the term of the contract for "just cause," which includes but is not limited to "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," as those terms are defined by rule of the State Board of Education. The School Board in this case has argued that Respondent's incompetency, misconduct in office, and willful neglect of duty

provide just cause for the termination of her employment contract.

80. At the time this matter was initiated, Florida Administrative Code Rule 6A-5.056(1) defined "incompetency" as follows:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, F.S.);^[11/] (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.^[12/]

81. Based on the findings of fact set forth above, the School Board has demonstrated Dr. Owen's "repeated failure to

perform duties prescribed by law" through her multiple failures to keep accurate records of class attendance in her fall 2011-2012 Debate 4 class. There is just cause for the School Board to dismiss Dr. Owen from employment due to "incompetency" as that term is defined in former rule 6A-5.056(1).

82. This conclusion as to Dr. Owen's "incompetency" is limited to her unfortunate submission of false attendance records. By all accounts, Dr. Owen's skill and dedication as a classroom teacher, AVID team leader, and debate coach were exemplary.

83. At the time this matter was initiated, rule 6A-5.056(3) defined "misconduct in office" as follows:

(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.^[13/]

84. Rule 6A-10.080, Code of Ethics of the Education Profession in Florida,^[14/] provides as follows, 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) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

85. Rule 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida, provides, in pertinent part, that:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

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

* * *

(d) Shall not intentionally suppress or distort subject matter relevant to a student's academic program.

* * *

(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.

* * *

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

(a) Shall maintain honesty in all professional dealings.

* * *

(h) Shall not submit fraudulent information on any document in connection with professional activities.

86. Based on the findings of fact set forth above, the School Board has demonstrated that Dr. Owen failed to exercise the best professional judgment and integrity; failed to sustain the highest degree of ethical conduct; intentionally distorted subject matter relevant to a student's academic program; intentionally misrepresented facts concerning an educational matter in direct public expression; failed to maintain honesty in all professional dealings; and submitted fraudulent information on a document in connection with professional activities. All of these conclusions are premised upon Dr. Owen's multiple failures to keep accurate records of class attendance in her Fall 2011-2012 Debate 4 class, and her submission of attendance reports that she knew to be inaccurate. There is just cause for the School Board to dismiss Dr. Owen from employment due to "misconduct in office" as that term is defined in former rule 6A-5.056(3).

87. At the time this matter was initiated, rule 6A-5.056(4) defined "gross insubordination or willful neglect of duties" as

"a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."^{15/}

88. Based on the findings of fact set forth above, the School Board has failed to demonstrate that Dr. Owen committed a "willful neglect of duties" as defined in former rule 6A-5.056(4). It could be argued that Dr. Owen, and all teachers at West Nassau, operated under a "direct order" to submit accurate attendance records, but such an argument strikes the undersigned as an effort to bootstrap an additional violation onto those already clearly proven.

89. The above findings of fact also established that Dr. Owen's grading of the essay portion of the final exam for the Spring 2011-2012 Speech 1 class constituted a negligent failure to maintain accurate grading records. The undersigned concludes that this failure does not rise to the level of incompetency, willful neglect of duty, or misconduct in office. Dr. Owen's questionable grading of exams would be a performance evaluation issue to be addressed under section 1012.34, if the School Board intended to retain Dr. Owen in its employ.

90. In its Proposed Recommended Order, the School Board suggests Nassau County School Board rule 2.11 as an additional ground for Dr. Owen's dismissal. The rule provides as follows:

RECORDS AND REPORTS -- CONTRACTUAL AND OTHER
EMPLOYEE OBLIGATIONS--

I. All employees of the School Board shall faithfully and accurately keep such records and make such reports as may be required by law, State Board of Education Rules, and Rules of the School Board, or as the Superintendent may deem necessary for the effective administration of the school system. Such records shall include student attendance, property inventory, school funds, and other types of information.

II. Reports shall be submitted on forms prescribed for such purposes at designated intervals or on specified dates. All such reports shall be made by the designated time. The Superintendent shall have the right to withhold any warrant due an employee who is delinquent in filing a report until the required report is submitted in an acceptable form. All reports are to be officially checked and brought up-to-date before a teacher or other employee who resigns receives final pay.

III. The Superintendent is authorized to withhold any warrant due an employee who has not fulfilled all contractual or other obligations due the system until these obligations are met.

91. While the findings of fact set forth above demonstrate Dr. Owen's failure to "faithfully and accurately" keep student attendance records, School Board rule 2.11 provides its own remedy: the Superintendent may withhold any warrant due an employee who has not submitted timely and accurate records. It is concluded that the rule does not address dismissal of an employee for violation of its provisions.

92. In summary, the School Board has demonstrated by a preponderance of the evidence that Dr. Owen intentionally submitted inaccurate attendance records, and that Dr. Owen's actions constitute incompetency and misconduct in office sufficient to establish just cause for disciplinary action to be taken against her.

93. At the outset of this proceeding, the School Board sought to terminate Dr. Owen's employment contract. This remedy was premised on all the allegations of the Amended Administrative Complaint. In fact, the only allegation proven at hearing that constitutes a disciplinary violation addressable pursuant to section 1012.33 was the submission of inaccurate attendance records.

94. In considering the proper sanction in this case, the School Board should consider the overall exemplary quality of Dr. Owen's work as a teacher and debate coach. The School Board should consider Dr. Owen's dedication to her students and her willingness to volunteer to teach Debate 4 even though the class had to be convened after regular school hours and she would not be paid for teaching it. Though her violation was serious, it also appears to have been an aberration in an otherwise remarkable teaching career. Based on Dr. Owen's basic integrity and value to the school system, the School Board should consider a penalty short of termination. The undersigned recommends that

she be suspended without pay for the 2012-2013 school year, then reinstated at West Nassau or another school in the Nassau County School District.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Nassau County School Board enter a final order finding D. Lynn Owen guilty of incompetency and misconduct in office and imposing the sanction of suspension without pay for the 2012-2013 school year.

DONE AND ENTERED this 5th day of February, 2013, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2013.

ENDNOTES

^{1/} Effective July 8, 2012, rule 6B-4.009 has been transferred to rule 6A-5.056.

^{2/} Unless otherwise indicated, references to the Florida Statutes are to the 2012 edition.

3/ Regular classes on a six-period schedule require 135 hours of classroom instruction, or "seat time" as the witnesses called it, in order for the student to receive one full credit. This amounts to 3.75 hours per week (a 45-minute class period multiplied by five days) during a 36-week school year. Classes structured according to block scheduling require 120 hours of seat time in order for the student to obtain full credit. § 1003.436(1)(a), Fla. Stat.

4/ The main evidence mustered in support of this allegation was that Dr. Owen's syllabus and course management materials could not be found on Edline, the computer program that West Nassau teachers used to record grades, lesson plans, grading standards, and daily assignments. Dr. Owen explained that she did not use Edline to post class materials for Debate 4 because only students enrolled in a given class have access to its Edline page, meaning that the seven students who were participating as debate club members would have been denied access. Dr. Owen testified that the school's webmaster, Tammy Roberts, helped her set up a web page that made the class materials accessible by all participants in the debate class and the debate club. (Ms. Roberts recalled setting up a web page for Dr. Owen's AVID Speech 1 class but not for the Debate 4 class.) In any event, the evidence produced at the hearing established that Dr. Owen in fact had a complete syllabus and classroom management plan for Debate 4 containing clear criteria for student progress in the class.

5/ The evidence established during the spring semester of the 2011-2012 school year, when she began to feel that she was under scrutiny by assistant principal Cynthia Grooms, Dr. Owen began having her Debate 4 students sign in to the class.

6/ In her deposition, Dr. Owen explained the AVID program as follows:

AVID is not a curriculum as much as it is . . . a foundational support for all the other classes in the school or all of the other core subjects in the school. So the point is to get the students and help them with the skills they need to succeed in all of their college readiness courses so that they can go to college. That's the whole point of the program.

^{7/} The maximum point total for the nine-week period was 3,000 points, making the final exam worth 26.67 percent of the total.

^{8/} Twenty of the twenty-two written exams were admitted into evidence. One of the missing exams was that of the student who received a grade of 160, making it impossible to compare the one outlier to the other exams. No explanation for the single score of 160 was offered at the hearing.

^{9/} Dr. Owen's reference is to Arthur L. "Art" Costa, an education professor who has developed a "mindful learning" process for thinking through complex problems. The goal is to teach higher-level problem solving and critical thinking behaviors to students at the high school level.

^{10/} When further pressed by counsel for the School Board, Dr. Owen stated that the "rubric" she was referencing was "my personal rubric for grading," not the instructions for the essay test.

^{11/} Prior to the repeal of chapter 231, Florida Statutes, by section 1058, chapter 2002-387, Laws of Florida, section 231.09, Florida Statutes (2001), set forth the duties of instructional personnel as follows:

(1) The primary duty of instructional personnel is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement requirements, and to master the skills required to graduate from high school prepared for postsecondary education and work. This duty applies to instructional personnel whether they teach or function in a support role.

(2) Members of the instructional staff of the public schools shall perform duties prescribed by rules of the district school board. The rules shall include, but are not limited to, rules relating to a teacher's duty to help students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully, using prescribed materials and methods, including technology-

based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the district school board. (Emphasis added.)

Prior to July 8, 2012, Florida Administrative Code Rule 6A-5.056, had not been updated to reflect the change in the statutes. The continuing validity of the rule has not been questioned in this proceeding.

^{12/} Effective July 8, 2012, Florida Administrative Code Rule 6A-5.056(3) provides as follows:

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;
2. Failure to communicate appropriately with and relate to students;
3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;
4. Disorganization of his or her classroom to such an extent that the health, safety or welfare of the students is diminished; or
5. Excessive absences or tardiness.

(b) "Incapacity" means one or more of the following:

1. Lack of emotional stability;
2. Lack of adequate physical ability;

3. Lack of general educational background;
or

4. Lack of adequate command of his or her
area of specialization.

^{13/} Effective July 8, 2012, Florida Administrative Code rule 6A-5.056(2) defines "misconduct in office" as follows:

(2) "Misconduct in Office" means one or more
of the following:

(a) A violation of the Code of Ethics of the
Education Profession in Florida as adopted in
Rule 6B-1.001, F.A.C.;

(b) A violation of the Principles of
Professional Conduct for the Education
Profession in Florida as adopted in Rule 6B-
1.006, F.A.C.;

(c) A violation of the adopted school board
rules;

(d) Behavior that disrupts the student's
learning environment; or

(e) Behavior that reduces the teacher's
ability or his or her colleagues' ability to
effectively perform duties.

^{14/} Effective January 11, 2013, Florida Administrative Code Rules 6B-1.001 and 6B-1.006 were transferred to rules 6A-10.080 and 6A-10.081, respectively. As the text of the rules was unchanged by the transfer, the current rules are cited for ease of reference.

^{15/} Effective July 8, 2012, Florida Administrative Code Rule 6A-5.056(5) defines "willful neglect of duty" to mean "intentional or reckless failure to carry out required duties."

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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.