

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case Nos. 12-2570TTS
12-4137TTS

SARENA STEWART,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in Lauderdale Lakes, Florida, on May 30 and 31, 2013, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Paul Gibbs, Esquire
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For Respondent: Melissa C. Mihok, Esquire
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STATEMENT OF THE ISSUES

As to Case 12-2570TTS, whether the Broward County School Board (School Board) has good cause to suspend the employment of

Sarena Stewart (Respondent), a classroom teacher, for three days as alleged in the Administrative Complaint filed by the School Board on July 30, 2012.

As to Case 12-4137TTS, whether the School Board has good cause to terminate Respondent's employment, as alleged in the Administrative Complaint filed by the School Board on December 21, 2012.

PRELIMINARY STATEMENT

At the times relevant to this proceeding, Respondent was employed by the School Board as a classroom teacher at New River Middle School (New River), a public school in Broward County, Florida.

At its regularly scheduled meeting on June 19, 2012, the School Board voted to accept the recommendation from Robert Runcie, as superintendent of schools (Superintendent), that Respondent's employment be suspended without pay for three days subject to her due process rights. Attached to the recommendation was an Administrative Complaint that contained certain factual allegations and, based on those factual allegations, charged that Respondent was guilty of gross insubordination. Respondent timely requested a formal administrative hearing; the matter was referred to DOAH, where it was assigned Case No. 12-2570TTS. On January 11, 2013, the

instant case was transferred to the undersigned for all further proceedings.

At its regularly scheduled meeting on December 18, 2012, the School Board voted to accept the recommendation from the Superintendent that, subject to Respondent's due process rights, her employment be suspended without pay and terminated. Attached to the recommendation was an Administrative Complaint that contained certain factual allegations and, based on those factual allegations, charged in three consecutively-numbered counts that Respondent was guilty of immorality, misconduct in office, and violating the School Board's anti-bullying policy. Respondent timely requested a formal administrative hearing; the matter was referred to DOAH, where it was assigned Case No. 12-4137TTS.

On Respondent's unopposed motion, the undersigned consolidated the two cases. Separate findings of fact and separate recommendations are set forth in this Recommended Order.

At the final hearing, the School Board presented the testimony of Taina Sierra (New River assistant principal), Melinda Wessinger (New River principal), Stephanie Tegreeny (New River math teacher), Nicole Armstrong (former New River substitute teacher coordinator), Tommy Moore (New River language arts teacher), Robin Terrill (New River volunteer), and two former New River students. Petitioner offered the following

pre-numbered exhibits, each of which was admitted into evidence: 2-7, 11, 13, 14, 16-21, 25, 27, 28, and 32-34.

Respondent testified on her own behalf and offered the following pre-numbered exhibits, each of which was admitted into evidence: 2-4, 6, 14 (page 77 only), 16, and 17. On July 9, 2013, Respondent substituted Respondent's pre-marked Exhibits 3 and 4 with the correct versions of Articles 18 and 23 of the Collective Bargaining Agreement (CBA) between the School Board and the Broward Teacher's Union.

A Transcript of the proceedings, consisting of two volumes, was filed on June 13, 2013. On a joint motion, the deadline for filing proposed recommended orders was extended to July 10, 2013. The parties timely filed proposed recommended orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2011), and all references to rules are to the version thereof in effect when the conduct described below occurred.

FINDINGS OF FACT

1. At all times material hereto, the School Board has been the constitutional entity authorized to operate, control, and supervise the public schools in Broward County, Florida. New River is a public school in Broward County, Florida.

2. During the 2011-2012 school year, Respondent was employed as a math teacher at New River pursuant to a professional service contract. Prior to the 2011-2012 school year, Respondent was assigned to teach math at McArthur High School (McArthur).

3. Respondent has been employed by the School Board since 2006. Respondent received satisfactory performance evaluations for each school year of her employment prior to the 2011-2012 school year.

4. During the 2011-2012 school year, Melinda Wessinger was the principal of New River, and Taina Sierra was an assistant principal. Ms. Sierra's administrative responsibilities included oversight of the math department. The 2011-2012 school year was Ms. Wessinger's first year at New River. Ms. Sierra has been at New River for six school years.

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5. For the 2011-2012 school year, August 22, 2011, was the first day of school for students. Teachers were required to report to work on August 15, 2011, for a week of preplanning. During the preplanning week, teachers attended faculty meetings and readied their classrooms for the coming school year.

6. On August 15, 2011, the work hours for the preplanning week and for the upcoming school year were discussed at a faculty meeting. Also discussed was the sign-in and sign-out

requirements for the preplanning week. Teachers were required to sign-in when they arrived at school and sign-out when they left the facility for any reason.

7. On August 16, 2011, Respondent asked for and received permission from Ms. Sierra to leave New River so she could go to McArthur to retrieve certain materials she had left at her former school. Respondent did not follow the sign-out procedure when she left New River.

8. On either August 16 or 17, 2011, Respondent again asked for, and received, permission from Ms. Sierra to leave New River so she could go to McArthur to retrieve other materials. Respondent did not follow the sign-out procedure when she left New River.

9. One day during the preplanning week, Respondent was tardy arriving to school.

10. On August 19, 2011, the last day of preplanning, Ms. Sierra had a conference with Respondent during which Ms. Sierra told Respondent to adhere to the sign-in and sign-out procedures and to arrive at work on time. Ms. Sierra did not consider that conference to be disciplinary. After this conference, Respondent knew, or should have known, New River's leave policies and its sign-out policy. Respondent had ready access to the faculty handbook through a link on the CAB (Communication Across Broward) system.

11. When school started on August 22, 2011, teachers did not have to sign-in when they arrived at school. However, they were required to sign-out if they left school early. The New River faculty handbook contained the following as to signing out before the end of the school day:

All personnel must get permission from the grade level assistant principal before leaving campus for any reason. This includes school related in-service, county meetings, school visits, etc. To leave campus for any personal reason, permission must be obtained from an assistant principal in advance.

An emergency sign in/out sheet will be available at Office Manager's desk.

If you are leaving during the day for personal reasons/doctor's appointments, it is your responsibility to obtain coverage for your classes. Please notify your administrator in the front office, via CBA, the teacher(s) who will cover your classes. The time you take off will be deducted from your accumulated personal sick or personal leave time.

12. On September 16, 2011, Ms. Sierra met with Respondent to discuss complaints from parents and students. Ms. Sierra directed Respondent to cease and desist any inappropriate behavior toward students as a violation of the code of ethics and that she was to treat students with respect at all times.

13. On October 28, 2011, Ms. Sierra had a pre-disciplinary conference with Respondent based on Respondent's continued failure to follow directives, including directives to comply with

all processes and procedures regarding class coverage, absences, and embarrassing and/or disparaging students. As a result of that meeting, Ms. Sierra recommended that Respondent be suspended for one day without pay. That recommendation was approved by the School Board on December 6, 2011. Respondent served that one-day suspension without requesting a formal administrative hearing to challenge that action.

14. Article 23 of the CBA pertains to "Leaves," including sick leave and personal leave. Section A.2 of Article 23 provides that employees shall be granted up to six days each school year for personal reasons. That provision also provides that personal reasons leave shall not be granted on the day preceding or following a holiday.

15. On November 30, 2011, Respondent put in for personal leave beginning on December 14 through 16, 2011. These dates immediately preceded a school holiday (school winter break was December 19 through 30).

16. Ms. Sierra and Ms. Wessinger explained the CBA provision to Respondent and told her that she could not have personal leave. Respondent then explained that she was having a medical procedure performed.^{1/} They told her to change her leave from personal leave to medical leave. Ms. Sierra and Ms. Wessinger also told her that they needed a doctor's note

excusing the absence. There was no particular form required for the doctor's note.

17. On January 3, 2012, Ms. Sierra sent a follow-up email to Respondent informing her that she had not changed the leave request from personal leave to sick leave as she had been directed. Respondent responded that she had changed the leave request and stated that the change could be verified through the School Board's "smartfind" computer program. Respondent's representation to Ms. Sierra was false. Respondent had not changed her leave request.^{2/}

18. In addition to her planned absences from December 14 through 16, 2011, Respondent called in sick on December 12 and 13, 2011.^{3/} On these two days, Respondent called into the smartfind system at 8:00 a.m. and 8:21 a.m., respectively. Despite having been repeatedly told to comply with policies and procedures relating to absences, these calls were not in compliance with New River's faculty handbook. A teacher who called in sick after 6:00 a.m. was required to call the substitute coordinator's (Nicole Armstrong) direct line, which gives a caller her voicemail should the coordinator not be at the school or at her desk. Respondent's failure to comply with the call-in procedure resulted in Ms. Armstrong's having to scramble with very little time to find coverage for Respondent's classes on December 12 and 13, 2011.

19. Teachers at New River are required to leave emergency lesson plans with Ms. Armstrong in case of unplanned absences. Respondent had provided emergency plans earlier in the year, but as of December 12 and 13, 2011, those emergency plans had been used and not replaced. Consequently, there were no emergency plans for December 12 and 13. Moreover, Respondent did not comply with the procedures for leaving lesson plans for planned absences for her absences on December 14 through 16.

20. Prior to January 5, 2012, Respondent had brought in two notes addressing her need to be absent December 12-16, 2011, for medical reasons. Both notes were vague. On January 5, Ms. Wessinger and Ms. Sierrra met with Respondent to discuss with her the need for a clear doctor's note. During this meeting, they repeated that Respondent was to follow all policies, procedures, and directives given by the New River administration.

21. Later that day, Respondent left New River before the end of the school day without following the sign-out policy. Respondent left early to get an acceptable note from her doctor, which she brought in the next day. Notwithstanding her need to obtain a doctor's note, Respondent failed to comply with the directives given her by Ms. Wessinger and Ms. Sierra earlier that day.

22. Thereafter, Ms. Sierra recommended that Respondent be suspended without pay for three days for gross insubordination. That recommendation underpins Case No. 12-2570TTS.

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23. On January 23, 2012, Respondent confiscated a cell phone from N.D., a male student, during her fifth-period class. Respondent placed the cell phone in her desk drawer with the intention of turning the cell phone in to the office after class. At the end of that class, N.D. removed the cell phone from Respondent's desk without permission and reported to his sixth-period language arts class taught by Tommy Moore.

24. After the start of sixth period, Respondent realized that the cell phone had been removed from her desk drawer. Respondent went to Mr. Moore's class. There is a conflict in the evidence as to what occurred next. The greater weight of the credible evidence established that Respondent knocked on the door to Mr. Moore's classroom. Mr. Moore opened the door for Respondent. Respondent entered the classroom where she remained by the doorway. Respondent tried to get N.D. to come to her, but he refused to do so. Respondent asked N.D. in a loud voice to give her the cell phone. A loud argument broke out between Respondent and N.D. Another male student joined in the argument. Respondent and the students engaged in name calling with the terms "bitch" and "bum" being used. Petitioner failed to

establish that Respondent used either term. Respondent retrieved the cell phone and left Mr. Moore's classroom. The argument lasted at least ten minutes and completely disrupted Mr. Moore's class. Mr. Moore was unable to regain control of his class and was unable to complete the lesson he had started before Respondent came to his classroom.

25. Mr. Moore did not try to stop the argument between Respondent and the two students. N.D. did not appear to be embarrassed or upset because of the argument he had with Respondent. None of the students appeared to be frightened or upset during the argument.

26. After leaving Mr. Moore's class, Respondent went to a math department meeting chaired by Ms. Stephanie Tegreeny. Ms. Tegreeny had completed her presentation to the other math teachers by the time Respondent arrived. Ms. Tegreeny repeated her presentation for Respondent. After that meeting, Respondent took N.D.'s cell phone to the office.

27. Prior to the start of school on the morning of January 24, 2012, Robin Terrill, a school volunteer, and Mr. Moore were in the media center making copies. Respondent came into the media center and in a loud, rude, and vulgar fashion criticized the school administration. Respondent described the school administration in profane terms, including the "f" word. There was a conflict in the evidence as to whether students

overheard Respondent's rant. The greater weight of the credible evidence established that students were present in an area that they could have overheard Respondent.

28. Later in the morning of January 24, 2012, Mr. Moore contacted Ms. Sierra to inform her of Respondent's conduct in his classroom the day before. Later that day Ms. Sierra asked Respondent about her conduct in Mr. Moore's classroom, and she discussed with Respondent what had been reported to her.

29. Prior to the start of school on January 25, 2012, Mr. Moore was walking down the stairs from his classroom to the main level with a student he had been tutoring. Respondent confronted Mr. Moore about his report to the administration of the incident in his classroom on January 23. This confrontation was clearly unwelcomed by Mr. Moore, who testified that he felt "agitated," "stressed," and "uncomfortable."

30. After that meeting on the stairs, Respondent stopped Mr. Moore again to ask what he knew about the administration's investigation into the incident in his classroom. Mr. Moore thereafter altered his schedule to avoid Respondent.

31. The School Board and the teacher's union have entered into a CBA applicable to this proceeding. Sections A.1.a. and A.1.b of Article 18 of the CBA provides for progressive discipline, in part, as follows:

- a. Progressive Discipline: Any discipline of an employee shall be for just cause. The parties agree that the concept of just cause embodies the principles of progressive discipline under the circumstances.
- b. Disciplinary procedures may include but are not limited to: verbal/written reprimand, suspension, demotion and termination. . . .

32. The School Board's Policy 4.9 provides certain "Disciplinary Guidelines" and is part of the record of this proceeding as Respondent's Exhibit 2. Those guidelines are hereby incorporated in this Recommended Order by reference.

33. The School Board's Policy 5.9 prohibits bullying, which is defined by the policy as follows:

"Bullying" means systematically and chronically inflicting physical hurt or psychological distress on one or more students or employees. It is further defined as: unwanted purposeful written, verbal, nonverbal, or physical behavior, including but not limited to any threatening, insulting, or dehumanizing gesture, by an adult or student, that has the potential to create an intimidating, hostile, or offensive educational environment or cause long term damage; cause discomfort or humiliation; or unreasonably interfere with the individual's school performance or participation, is carried out repeatedly and is often characterized by an imbalance of power. Bullying may involve, but is not limited to:

- 1. unwanted teasing
- 2. threatening
- 3. intimidating
- 4. stalking
- 5. cyberstalking
- 6. cyberbullying
- 7. physical violence
- 8. theft

9. sexual, religious, or racial harassment
10. public humiliation
11. destruction of school or personal property
12. social exclusion, including incitement and/or coercion
13. rumor or spreading of falsehoods

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the subject matter of and the parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

35. Because the School Board seeks to terminate Respondent's employment, which does not involve the loss of a license or certification, the School Board has the burden of proving the allegations in its administrative complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

36. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American

Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

37. This is a de novo proceeding designed to formulate final agency action. See Hamilton Cnty Bd. of Cnty. Comm'rs v. Dep't Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991), and section 120.57(1)(k), Fla. Stat.

38. Section 1012.33(1)(a), Florida Statutes, sets forth "just cause" for disciplining Respondent's employment, which includes "immorality," "misconduct in office," and "gross insubordination," as those terms are defined by rule of the State Board of Education. The definitions utilized below are the definitions that were in effect at the time of the conduct described in this Recommended Order. The definitions of "misconduct in office" and "gross insubordination" have been amended. The definitions of "immorality," "misconduct in office," and "gross insubordination" have been transferred to Florida Administrative Code Rule 6A-5.056.

THE ALLEGED VIOLATION: CASE 12-2570TTS

GROSS INSUBORDINATION

39. Florida Administrative Code Rule 6B-4.009(4) defined "gross insubordination" to mean "a consistent or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."

40. The School Board proved that Respondent was guilty of gross insubordination by repeatedly failing to follow applicable policies pertaining to absences from school after being specifically instructed to adhere to those policies by her principal and assistant principal.

THE ALLEGED VIOLATIONS: CASE 12-4137TTS

41. The Administrative Complaint alleged that Respondent was guilty of:

(Count I) Immorality,
(Count II) Misconduct in Office, and
(Count III) Bullying

IMMORALITY

42. Rule 6B-4.009(2) defined the term "immorality" as follows:

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

43. While Respondent's use of the "f" word should be considered to be inconsistent with the standards of public conscience and good morals, that use is not sufficiently notorious to bring Respondent or the education profession into public disgrace or disrespect. There was no evidence that Respondent's service in the community has been impaired. Her other conduct did not rise to the level of immorality.

Consequently, the undersigned has concluded that Respondent is not guilty of immorality as alleged in Count I of the Administrative Complaint.

MISCONDUCT IN OFFICE

44. Rule 6B-4.009(3) defined the term "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.

45. The Code of Ethics of the Education Profession in Florida, now found at rule 6A-10.080, provides as follows:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's

colleagues, students, parents, and other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

46. The Principles of Professional Conduct for the Education Profession in Florida, now found at rule 6A-10.081, provide, in relevant part, as follows:

(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:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's physical health and/or safety.

* * *

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

* * *

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

* * *

(d) Shall not engage in harassment or discriminatory conduct 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; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

47. The School Board proved that Respondent engaged in "misconduct" within the meaning of former rule 6B-4.009(3) by interrupting Mr. Moore's class, by confronting N.D. in open class, by confronting Mr. Moore after he reported Respondent's conduct to the administration, and by using profane language to describe the school administration.

48. Once N.D. refused to come to Respondent, Respondent should have left Mr. Moore's classroom and reported the incident to an administrator. Respondent should not have disrupted Mr. Moore's class by engaging in an argument with N.D. and the other student.

49. The definition of "misconduct" requires that the conduct is so serious "as to impair the [Respondent's] effectiveness in the school system." Impaired effectiveness in the school system can be found based on the conduct alone if the conduct is sufficiently serious. See Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492 (Fla. 5th DCA 2000). Respondent's conduct as found in this Recommended Order is sufficient without other proof to establish that Respondent's effectiveness in the school system has been impaired.

BULLYING

50. Respondent engaged in misconduct by confronting Mr. Moore as she did, but she did not bully him as alleged in Count III. The School Board's definition of bullying includes

repeated behavior and an imbalance of power between the bully and the victim. Respondent asked Mr. Moore, who is her peer, once what he told the administration about her conduct in his classroom and, on a second occasion, what he knew about the administration's investigation. Those two incidents do not constitute bullying.

PENALTY

51. As to Case 12-2570TTS, the School Board seeks to suspend Respondent's employment without pay for a period of three days. That action is reasonable and will be incorporated in the recommendation that follows.

52. As to Case 12-4137TTS, the School Board seeks to terminate Respondent's employment. That proposed discipline is too harsh under the circumstances of this case. In reaching this conclusion, the undersigned has considered the factors set forth in the School Board's Policy 4.9, including the severity of the offense, the length of Respondent's employment, and her prior evaluations.

RECOMMENDATION

The following recommendations are based on the foregoing Findings of Fact and Conclusions of Law:

As to Case 12-2570TTS, it is RECOMMENDED that the School Board of Broward County, Florida, enter a final order adopting the Findings of Fact and Conclusions of Law set forth in this

Recommended Order. It is FURTHER RECOMMENDED that the final order uphold the suspension without pay of employment of Sarena Stewart for a period of three school days.

As to Case 12-4137TTS, it is RECOMMENDED that the School Board of Broward County, Florida, enter a final order adopting the Findings of Fact and Conclusions of Law set forth in this Recommended Order. It is FURTHER RECOMMENDED that the final order uphold the suspension without pay of employment of Sarena Stewart for a period of 30 school days.

DONE AND ENTERED this 8th day of August, 2013, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of August, 2013.

ENDNOTES

^{1/} Respondent planned to undergo in vitro fertilization in the Czech Republic during the winter break.

^{2/} Respondent testified at the formal hearing that she considered attempting to become pregnant to be personal, as opposed to

medical. Be that as it may, Respondent failed to comply with direct orders from her principal and assistant principal, and wrote a false email in response to Ms. Sierra's email.

^{3/} The finding by the undersigned that Respondent failed to comply with the policies as to unplanned absences should not be construed to suggest that Respondent was abusing sick leave. The undersigned accepts Respondent's testimony that she was sick on December 12 and 13, 2011.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.