STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case Nos. 12-3603TTS
13-1177TTS

TAMARA SNOW,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in these cases pursuant to sections 120.569 and 120.57(1), Florida Statutes, (2013), before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on August 21, 2013, and on September 4, 2013, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Heather L. Ward, Esquire
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For Respondent: John A. James, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent without pay and terminate her employment as a teacher.

PRELIMINARY STATEMENT

On or about October 11, 2012, Petitioner suspended Respondent from her employment as a teacher, without pay, for 30 days, commencing on October 11, 2012, and ending on November 26, 2012. On October 22, 2012, Respondent requested an administrative hearing to contest her suspension. On November 5, 2012, the matter was referred to DOAH for conduct of a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes. This matter was assigned case number 12-3603TTS.

The final hearing initially was scheduled for January 20, 2013, but was rescheduled for February 21, 2013, pursuant to the parties' joint request. Pursuant to Petitioner's motion, the hearing subsequently was rescheduled for May 15, 2013.

On March 13, 2013, Petitioner took action to suspend Respondent without pay and to terminate her employment as a teacher. This matter was referred to DOAH on April 1, 2013, and was assigned case number 13-1177TTS.

On April 15, 2013, case numbers 12-3603TTS and 13-1177TTS were consolidated. Pursuant to Order, on April 23, 2013, Petitioner filed an Amended Notice of Specific Charges in these consolidated proceedings.

On May 7, 2013, Respondent moved to continue the final hearing. The motion was granted and the hearing was rescheduled for August 21, 2013. The final hearing was held on August 21, 2013, but was not completed that day, so a second day of hearing was conducted on September 4, 2013. The final hearing was concluded on September 4, 2013.

Petitioner presented the testimony of Rachelle Surrancy, Claire Warren, and Anne-Marie DuBoulay. Petitioner's Exhibits 1 through 6, 8 through 18, 22, 23, and 25 were admitted into evidence without objection. Respondent testified on her own behalf. Respondent's Exhibits A, B, C, D, E, F, and G were admitted without objection and Exhibits J, K, and K-1 were admitted over objection. Respondent's Exhibit E-1 was proffered but not admitted into evidence.

The three-volume Transcript was filed on January 21, 2014, and the parties were given ten days, until January 31, 2014, in which to file their proposed recommended orders. Pursuant to Petitioner's unopposed Motion for Extension of Time to File Proposed Recommended Orders filed on January 29, 2014, the parties were given until February 14, 2014, to file their proposed recommended orders. The parties timely filed their Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner is a duly constituted school board charged with operating, controlling, and supervising all free public schools within the School District of Miami-Dade County, Florida, pursuant to Florida Constitution Article IX, section 4(b), and section 1012.23, Florida Statutes.

2. At all times relevant to these proceedings, Respondent was employed as a teacher in the Miami-Dade County Public Schools District pursuant to a professional services contract. In the 2011-2012 school year, Respondent was employed as a science teacher at Homestead Middle School. In the 2012-2013 school year, until she was suspended pending the outcome of this proceeding, Respondent was employed as a math teacher at the Alternative Outreach Program, 5000 Role Models location.[1/]

3. At all times relevant to these proceedings, Respondent's employment with Petitioner was governed by Florida law, Petitioner's policies, and the collective bargaining agreement between Miami-Dade County Public Schools and the United Teachers of Dade ("UTD Contract").

II. Events Giving Rise to these Proceedings

The 2011-2012 School Year

4. Respondent began teaching eighth grade science at Homestead Middle School ("HMS") in August 2011. The 2011-2012

school year for students began on August 22, 2011.

5. The workday hours for teachers at HMS for the 2011-2012 school year were from 7:25 a.m. to 2:45 p.m., Monday through Friday. The persuasive evidence establishes that Respondent was informed of this schedule when she was interviewed for her teaching position, and again so informed during the first faculty meeting of the school year.

6. Pursuant to the UTD contract, the teacher work hours per day in the Miami-Dade Public Schools consist of seven hours and 20 minutes, including a one-hour planning period. The UTD Contract provides that teachers may, with the approval of the work-site administrator (i.e., the principal) modify their workday schedule, such as adjusting the beginning time of the teacher's workday, provided that such modification does not interfere with the overall number of hours worked. This provision affords a principal the authority and discretion to modify a teacher's workday schedule.

7. The student school day hours for HMS began at 7:35 a.m., when the first bell rang and students began entering their classrooms, and ended at 2:20 p.m. Students were to be in their classrooms by 7:40 a.m. for a homeroom period, immediately followed by the first instructional period consisting of a literacy block. The student school day schedule is set by the

Miami-Dade County School Board and the school principal is not authorized to change it.

8. Pursuant to HMS's established procedure, if a teacher was going to be absent, he or she must call the absence hotline at least 30 minutes prior to the start of the teacher workday.

9. Shortly after the beginning of the 2011-2012 school year, Respondent began being tardy to work.

10. HMS Principal Rachelle Surrancy or one of the HMS assistant principals would note Respondent's arrival time, either by being in the front of the school when she arrived[2/] or by having to open the door to her classroom to let her homeroom class students in if she arrived after the late bell had rung.

11. Surrancy verbally reminded Respondent of the school's starting time, then held an informal meeting with her on or about September 7, 2011, to remind her of the same.

12. Respondent's young son suffers from a range of significant health conditions, including asthma, gastrointestinal reflux, apnea, pneumonia, lactose intolerance, allergic rhinitis, and eczema. He requires extensive care for these conditions, and Respondent was required to administer breathing treatments and other care on a daily basis. During flare-ups of her son's conditions, Respondent needed to take medical leave to provide that care.

13. On or about September 20, 2011, Respondent submitted to Surrancy an Intermittent Leave Request Medical Certification form under the Family and Medical Leave Act ("FMLA") (hereafter "FMLA Form")[3/] requesting approval for Respondent to periodically take leave due to the intermittent illness of her young son. The FMLA form was completed and signed by Respondent's son's physician. Based on the child's medical history, the physician estimated that Respondent would need to take FMLA leave every two to three months, for a period lasting two to three days.

14. Notwithstanding Surrancy's admonitions, Respondent continued to be tardy to work. During the first 25 days of the school year, Respondent was tardy 16 of those days. Most of the tardies entailed an arrival time of between two and five minutes late, but some entailed arrival times as much as 25 to 35 minutes late. When Respondent arrived after 7:40 a.m. (15 minutes late), her colleagues in the science department were placed in the position of having to cover her class until she arrived.

15. As a result of Respondent's continued tardiness, on September 28, 2011, Surrancy issued a Punctuality to Work Directive ("Directive") to Respondent regarding her punctuality and attendance.[4/] The Directive reminded Respondent that punctuality and attendance were essential components of her teaching position, and that as a faculty member, she served as a role model to other employees and student. Respondent was

apprised that she was to arrive at work on time and sign in daily by 7:25 a.m. If she was going to be tardy, she was to communicate that to an assistant principal or to Surrancy. Surrancy explained that compliance with these directives was necessary to prevent adverse impact to the students and their academic progress, to ensure continuity of the educational program, and to maintain effective worksite operations. The memo advised Respondent that she could obtain assistance to facilitate her punctuality. Respondent was notified that noncompliance with the directives would be considered a violation of professional responsibilities and insubordination.

16. Respondent told Surrancy that the reason she was tardy was that she had to take her son to his daycare center. The daycare center did not open until 7:00 a.m., making it difficult for her to arrive at HMS by 7:25 a.m. due to the commute in morning traffic.

17. On October 5, 2011, Surrancy evaluated Respondent's instructional performance for the 2011-2012 school year pursuant to the Instructional Performance Evaluation and Growth System ("IPEGS"), the system used in the Miami-Dade County Public School District to evaluate instructional personnel. Surrancy rated Respondent as "effective" for each IPEGS standard other than Performance Standard ("PS") 7, "Professionalism."[5/] For that standard, she rated Respondent's performance as "unsatisfactory"

on the basis that due to her tardies, Respondent violated the School Board's Code of Ethics and Standards of Ethical Conduct policies.[6/]

18. After the September 28 meeting, Respondent continued to be tardy, so on October 10, 2011, Surrancy again met with her. Respondent explained that each day, her son required a breathing treatment regimen that she had to administer and that she had to take her son to daycare. Respondent told Surrancy that she planned to enlist the assistance of a friend to take her son to daycare so that may assist her to arrive on time.[7/] Surrancy offered to adjust Respondent's workday schedule to allow her to arrive five minutes later to accommodate her travel time from her son's daycare to HMS, contingent on Respondent arriving at work by 7:30 a.m.

19. However, Respondent continued to be tardy, at times arriving later than 7:30 a.m. Surrancy held a follow-up meeting with Respondent on October 25, 2011, at which she notified Respondent that the adjusted workday schedule no longer was in effect and that she was again required to arrive at 7:25 a.m.[8/]

20. In the meantime, Respondent sought to transfer to a school having a workday schedule with which she could more easily comply, given her son's daycare start time and her travel time. She was offered, but declined, a position at Redland Middle School, which entailed a teaching assignment that was out of her

field of certification. Respondent declined the position because it did not meet the condition of her loan forgiveness program that the assignment be in a critical subject area——such as science and math——and because she did not believe she would be as proficient a teacher in teaching out of her subject area.

21. Following the October 25 meeting, Respondent continued to be tardy. Several of these tardies necessitated coverage for her homeroom class.

22. On December 14, 2011, Surrancy held a Conference-for-the-Record ("CFR") with Respondent to address her continued tardiness. By that time, Respondent had been tardy 45 days since the beginning of the school year, and several of these tardies necessitated coverage of her homeroom class by her colleagues. Surrancy informed Respondent that her tardies had adversely affected the educational program and services provided to students. Respondent was again directed to be punctual and in regular attendance, to communicate any intent to be tardy before 7:00 a.m. by calling the assistant principals or her, and to provide physician documentation and/or recertification of her FMLA form as needed if she was going to use FMLA leave to cover her tardies. Respondent was provided copies of Petitioner's policies on Standards of Ethical Conduct, Code of Ethics, and Leaves of Absence; Department of Education rules 6B-1.001 and 6B-1.006; another copy of the FMLA for recertification by her

physician; and other documents to inform and assist Respondent in addressing her tardiness problem. Respondent was informed that noncompliance with the directives would constitute insubordination and compel district disciplinary action.

23. Respondent continued to be tardy. Again, several of these tardies necessitated coverage of her homeroom class.

24. On February 13, 2012, Surrancy conducted another CFR with Respondent. As of that date, Respondent had been tardy 69 days since the beginning of the 2011-2012 school year. Surrancy issued Respondent the same directives previously given and again furnished Respondent copies of pertinent School Board policies, applicable Department of Education rules, and other informational documents. Surrancy informed Respondent that failure to comply with these directives would constitute gross insubordination and necessitate further disciplinary action.

25. Respondent explained that her tardiness was due to a variety of factors, including having to perform breathing and other medical treatments on her son and taking him to daycare. She expressed concern at having to call in by 7:00 a.m. if she was going to be tardy because, for unforeseen reasons such as her son's daycare being late in opening, she may not know whether she was going to be tardy until after 7:00 a.m. Surrancy informed Respondent that under any circumstances, calling in did not excuse tardiness. Respondent requested that Surrancy assign her

homeroom to another teacher and allow her to report at 7:45 a.m., when her science classes commenced. Surrancy refused.

26. As a result of Respondent's continued tardies, Surrancy determined that her conduct constituted insubordination and noncompliance with applicable School Board policies. Surrancy issued a written Reprimand to Respondent on March 5, 2012. The Reprimand directed Respondent to adhere to school board policies, be punctual, and call Surrancy or an assistant principal before 7:00 a.m. if she were going to be tardy.

27. Respondent nonetheless continued to be tardy, necessitating another CFR, which was held on March 29, 2012. By this time, Respondent had been tardy 86 days and absent 8.5 days in the 2011-2012 school year.

28. During the CFR, Respondent provided two FMLA leave request forms completed by her son's treating physicians certifying the frequency and duration of her son's flare-ups that necessitated leave. One of these, dated March 6, 2012, stated that flare-ups occurred at a frequency of every one to two months for a duration of two to three days, while the other, dated February 20, 2012, stated that the flare-ups occurred approximately once a month and did not specify a duration.

29. Under any circumstances, Respondent was tardy more frequently than the number of days of leave documented as necessary by either of these FMLA forms.

30. Respondent again was given directives, which included those previously provided regarding punctuality and attendance, calling in by 7:00 a.m. if tardiness was anticipated, physician documentation for leave requests, performance of her teaching duties, comporting herself in a manner that reflected credit on herself and Miami-Dade County Public Schools, and adherence to School Board policies and applicable Department of Education rules. Respondent was again provided copies of the policies, rules, and other documents previously given to her. Respondent was offered the option of resigning her position but declined.

31. Surrancy recommended that Respondent be suspended from her teaching position. However, Respondent was not suspended during the 2011-2012 school year.[9/]

32. Although Respondent's tardiness during the 2011-2012 school year required coverage of her homeroom class by colleagues on several occasions, she did not miss any classroom instructional time.[10/]

2012-2013 School Year

33. For the 2012-2013 school year, Respondent was hired as a math and science teacher in the Educational Alternative Outreach Program's ("EAO") credit recovery program. She was assigned to the EAO's 5000 Role Models location. In this assignment, Respondent taught between 12 and 15 students in grades six through eight.

34. The 5000 Role Models facility was located between 35 and 40 miles from Respondent's home. She had a commute of between one hour ten minutes and two hours one way from her home to 5000 Role Models.

35. The teacher workday hours for this location were 8:20 a.m. to 3:40 p.m. Respondent was informed of this schedule when she was interviewed by EAO Principal Claire Warren, and by letter from Warren regarding her projected teaching assignment for the 2012-2013 school year. Warren credibly testified that at the time she was interviewed, Respondent did not express any concerns regarding this schedule.

36. The student school day at 5000 Role Models started at 9:00 a.m.

37. Shortly after the school year commenced, Respondent began being tardy. During the first week of the students' school year, Respondent was tardy twice, approximately 20 minutes each time.

38. On August 31, 2012, Warren issued Respondent a written memorandum reminding her of the directives that were issued the previous school year and directing her to be punctual and in regular attendance; call before 8:00 a.m. to notify either Warren or the assistant principal if she was going to be absent or tardy; provide physician documentation for absences and tardies due to illness; timely submit updated FMLA forms if anticipated

illness or tardies covered under the FMLA are anticipated; adhere to all School Board policies; and perform her job responsibilities. Respondent was placed on notice that noncompliance with these directives would constitute gross insubordination and would necessitate notification of the Office of Professional Standards for the imposition of discipline.

39. Respondent continued to be tardy. As of October 1, 2012, Respondent had been tardy eight times[11/] and absent three days.[12/] On some of the days she was tardy, Respondent did not call to notify the administration, as she had been directed to do; on other days, she sent text messages but did not call.

40. Warren conducted another conference with Respondent on October 1, 2012. She issued another memorandum documenting Respondent's tardies since the beginning of the 2012-2013 school year, reiterating the directives previously issued on August 31, and notifying Respondent that failure to comply with the directives would constitute gross insubordination.

41. Warren also provided a letter to Respondent regarding FMLA coverage of her tardies and absences. The letter informed Respondent that only absences, i.e., time away from the worksite, and not tardies were covered by the FMLA, and that it was her responsibility to notify the school if she were going to be absent pursuant to an FMLA-certified illness event. Attached to

the letter was an FMLA Form to enable Respondent to update her FMLA-covered illness certification as necessary.

42. Respondent's tardies continued. She was tardy on October 2, 5, 8, and 9——on some of these days as much as 45 to 70 minutes late. On the days when she was tardy by 40 or more minutes, she missed classroom instructional time and her students had to be placed in another teacher's classroom.

43. On October 10, 2012, Petitioner took action to suspend Respondent for 30 workdays without pay,[13/] for gross insubordination and for violating School Board policies regarding the Code of Ethics (policy 3210), Standards of Ethical Conduct (policy 3210.01), and Leaves of Absence (policy 3430), and rules 6B-1.001, 6B-1.006, and 6B-4.009.[14/]

44. Respondent served her suspension and returned to work on November 26, 2012. On that day, she was 11 minutes tardy; the following day, she was 40 minutes tardy.

45. On November 29, 2012, Warren issued another memorandum to Respondent reiterating the directives previously given on August 31 and October 1. Respondent was informed that her failure to comply with the directives would constitute gross insubordination and would necessitate referral to the Office of Professional Standards for further discipline.

46. Respondent continued to be tardy. In December 2012 and January 2013, Respondent was tardy 13 days, two of which required

coverage of her class. Respondent did not call in to the school to notify them of her anticipated tardiness but she did notify the school by text message on some of these occasions.

47. On February 1, 2013, Respondent was notified of a CFR scheduled for February 5, 2013.

48. On February 4, 2013, Respondent notified Warren by electronic mail that she would not be at school that day or the following day.

49. On February 6, 2013, Respondent notified Warren by electronic mail that she was taking a leave of absence "for at least the next few weeks." She also informed Warren that her absences the previous two days had been due to her own illness.

50. Respondent did not submit a leave request form to Warren prior to taking sick leave.

51. Respondent did submit a Leave of Absence Medical Documentation Form to the Miami-Dade County Public Schools Office of Retirement/Leave/Unemployment Compensation ("Leave Office") on February 5, 2013, containing her physician's certification that she was ill and recommending a leave of absence from February 4, 2013, to March 1, 2013.

52. Because she was requesting approval of leave for less than 30 days' duration, under the UTD Contract, Respondent should have filed her leave request with Warren rather than with the Leave Office. UTD Contract Article XIV, section 2, paragraph A.,

governing notification in the event of teacher absence, states in pertinent part:

> When a teacher, for whom an emergency temporary instructor is employed, will be absent from work, due to illness or injury or due to personal reasons, he/she shall notify the supervising administrator (or designee), as soon as possible, but no later than one hour before the start of his/her scheduled workday, in order that an emergency temporary instructor can be employed or other arrangements made. If said absence/leave is for a specified period of time, no further notice is necessary. In the event of a change in this specified period of absence, the employee will proceed, pursuant to the stipulations herein. Where an absent teacher does not notify his/her supervising administrator, as stipulated herein, and where there are not extenuating circumstances, as determined by the supervising administrator, such teacher will have the option to utilize personal leave or leave without pay. However, such determination by the supervising administrator shall not be made arbitrarily. UTD Contract, art. XIV, § 2.A. (emphasis added).

53. Article XIV, section 10, governs sick leave without pay for illness. Paragraph C. of that section states: "[e]mployees whose illness requires an absence of over 30 days must file an application for extended sick leave indicating the anticipated length of such absence and supported by a statement from competent medical authority." This leave request would be filed with the Leave Office. However, because Respondent did not

request sick leave for a period exceeding 30 days, this provision was not applicable to her leave request.

54. Notwithstanding, Respondent's leave request was reviewed by a medical consultant for Miami-Dade County Public Schools and ultimately was denied.

55. Apparently, some time elapsed before the Leave Office forwarded Respondent's leave request and denial decision to Warren. Warren testified: "I didn't get the request until much afterwards, you know, after she had been out several days ...."

56. Even after Warren received Respondent's leave request form and denial from the Leave Office, more time passed before she notified Respondent. It was not until March 1, 2013, that Warren sent Respondent a letter informing her that her leave request had been denied and that her absences for the entire month of February were unauthorized, thus warranting her dismissal on the basis of job abandonment.

57. At approximately the same time Warren notified Respondent that her leave request was denied, Warren also notified Respondent, by separate email, that she had incorrectly submitted her leave request to the Leave Office, instead of submitting it to her (Warren).

58. On the same day that Warren notified Respondent that her leave request had been denied, Respondent submitted another leave request form and a medical documentation form to Warren,

retroactively requesting approval of her sick leave taken between February 4 to March 18, 2013, due to her own illness. Warren denied the request that same day, citing the medical consultant's determination as the basis for the denial. Warren's letter did not cite an independent basis for the denial. Petitioner did not present any competent evidence regarding the specific basis for the medical consultant's determination to deny the request.

59. Respondent returned to work on March 4, 2013. She was tardy that day and the following day.

60. On March 6, 2013, a CFR was held. The CFR originally had been scheduled for February 5, 2013, but when Respondent took leave, it was rescheduled. At the meeting, Respondent was apprised that her tardies and absences were excessive and that they, along with her failure to adhere to the other previously issued directives, constituted gross insubordination.

61. On March 13, 2013, Petitioner took action to suspend Respondent without pay and terminate her employment as a teacher.

Respondent's Criminal History

62. Petitioner presented evidence that in August 2012, a records check for Respondent was generated after information was received from Petitioner's Fingerprinting Office indicating that Respondent had been arrested in January 2011 for violation of a protective injunction and in July 2011 for battery. However, this evidence consisted solely of hearsay. Petitioner did not

present any non-hearsay evidence establishing that these arrests occurred.

63. Respondent denied that she was arrested in January 2011. She acknowledged that she was arrested for battery in July 2011. She testified, credibly, that the arrest occurred over the July 4th holiday and that she timely reported this arrest by calling Petitioner's instructional staffing office. Respondent credibly testified that the charge was not prosecuted and ultimately was dismissed. Petitioner did not present any competent or credible evidence to refute Respondent's testimony on these points.

Respondent's Defenses

64. Respondent asserts that she was not tardy as frequently in the 2011-2012 school year as Petitioner asserts. She questions the accuracy of Surrancy's and others' recordkeeping regarding her tardiness. However, she did not present any specific evidence to show that Petitioner's records of her tardiness in the 2011-2012 were inaccurate; thus, her position on that point is essentially speculative.

65. She also claims that Surrancy did not treat her fairly or equitably during the 2011-2012 school year. Specifically, she asserts that Surrancy had the authority and flexibility to adjust her workday schedule so that she did not have to cover a homeroom class, thus allowing her to arrive at work later, but that

Surrancy unfairly chose not to do so. Respondent further asserts that Surrancy had provided such accommodation to another teacher in a previous school year. Thus, Respondent claims that Surrancy treated her unfairly.[15/] However, Surrancy testified, persuasively, that she could not have relieved Respondent of having a homeroom in order to enable her to arrive later in the workday because instructional personnel, other than coaches and co-teachers, were assigned homeroom or other professional duties that required them to be at school during regular workday hours. Thus, there was no one else available to assume Respondent's homeroom class responsibilities.[16/]

66. Respondent also asserts that Surrancy treated her disparately and unfairly by singling her out for discipline for her tardies, while not disciplining others who also were often tardy. However, even if that were the case, it does not excuse Respondent's tardies or provide a basis for Surrancy to decline to enforce school policies with respect to Respondent.

67. Respondent also asserts that she was not afforded the FMLA leave to which she was legally and contractually entitled. Specifically, she argues that she filed FMLA leave forms stating the need for intermittent leave to care for her son, so that for the days on which she was tardy, the number of minutes by which she was tardy should have been counted as leave under the FMLA.

68. Respondent testified, credibly, that she did not purposely refuse to follow the directives given her by Surrancy, Warren, and the Office of Professional Standards, and that her tardies during both school years were the result of her having to provide medical care for her young son and take him to daycare, then commute in heavy traffic to the worksites.

69. Moreover, to the extent Petitioner claimed that Respondent was insubordinate because she did not adhere to directives to call the school if she was going to be tardy, Respondent credibly countered that she often would call in, only to be put on hold for some time and then told that the administrator she was attempting to reach was not available; thus, she started sending text messages instead to ensure that her message was received.

70. Regarding the arrest reporting issue, Respondent denied that she was arrested in January 2011, and testified that she timely reported her July 2011 arrest to the appropriate authority.

III. Findings of Ultimate Fact

71. In these consolidated proceedings, Petitioner seeks to suspend Respondent without pay and terminate her employment[17/] as a teacher on the basis of just cause——specifically, gross insubordination and misconduct in office.[18/]

72. As more fully addressed below, Petitioner bears the burden of proof, by a preponderance of the evidence, to show that Respondent committed the violations of section 1012.33 and rules 6A-5.056; and 6B-1.001 and 6A-10.080; and 6B-1.006 and 6A-10.081.

Gross Insubordination

73. Pursuant to the foregoing findings of fact, it is determined that Petitioner proved, by a preponderance of the evidence, that Respondent's conduct in accruing an extensive number of tardies during the 2011-2012 and 2012-2013 school years constituted gross insubordination.

74. Although Respondent did submit leave request forms estimating the frequency and duration of FMLA-covered leave she would need in order to care for her son, the evidence shows that she was tardy far more frequently than supported by any of the forms she submitted. In order to accommodate an employee's FMLA request, Petitioner must be able to rely on the information the employee provides on the FMLA leave form. If the information provided on the form is inaccurate, Petitioner is neither required nor authorized to consider undocumented time away from the work site as leave covered under the FMLA.[19/] While it is admittedly difficult to precisely predict when illness will occur, under any circumstances, the forms Respondent submitted did not cover the frequency of her tardies incurred in the 2011-2012 and 2012-2013 school years.[20/]

75. As addressed above, it appears that Respondent was the victim of a coalescence of unfortunate personal circumstances that interfered with her employment. Nonetheless, the fact remains that she was repeatedly put on notice by Surrancy, Warren, and the Office of Professional Standards that her continued tardiness would constitute gross insubordination. Any measures that Respondent purportedly took to rectify the circumstances, such as enlisting the help of a friend to take her son to daycare, apparently were unsuccessful. Respondent had the option in the 2011-2012 school year to transfer to another school to address the morning commute issues, but she chose not to. Although she had legitimate personal and professional reasons for choosing to remain at HMS, the fact remains that she elected not to pursue a course of action that may have addressed the problematic circumstances she found herself in. Under these circumstances, the undersigned concludes, albeit reluctantly, that Respondent's conduct——which took place over a period of two school years, after frequent admonitions, and after she had been placed on notice several times that her continued conduct would constitute gross insubordination——does, in fact, constitute gross insubordination.

76. With respect to Respondent's absences in February 2013, the evidence indicates that Petitioner's Leave Office and Principal Warren unnecessarily delayed notifying Respondent that

her leave request for February 2013 had been denied. The evidence gives rise to the inference that Respondent may have cut her leave short and returned to the work site had she been timely informed that her request had been denied. Moreover, Petitioner presented no competent evidence regarding the specific basis for the Leave Office's denial of Respondent's request, or for Warren's denial of Respondent's retroactive request on the same basis. Under these circumstances, the undersigned determines that Respondent's absences for the month of February 2013 should not be considered unexcused.

77. However, even without considering these absences, Respondent's repeated tardiness over an extended period of time without proper leave documentation and after extensive prior notice of the consequences, is sufficient to establish gross insubordination.

Misconduct in Office

78. As more fully discussed below, Petitioner proved, by a preponderance of the evidence, that Respondent committed misconduct in office under both versions of rule 6A-5.056 in effect in the 2011-2012 and 2012-2013 school years, respectively.

79. Specifically, Respondent's frequent and repeated tardiness during the 2011-2012 school year violated the Code of Ethics in the Education Profession because her conduct caused her to lose the respect and confidence of her colleagues. In

particular, Respondent's frequent tardiness substantially undermined Surrancy's confidence in her reliability, and, thus, impaired her effectiveness in the school system.

80. Respondent's frequent and repeated tardiness over the course of the 2012-2013 school year also constituted misconduct in office. Again, she violated the Code of Ethics in the Education Profession by failing to maintain the respect and confidence of her colleagues. Respondent's frequent tardiness adversely affected Warren's confidence in her reliability. Additionally, on the days when Respondent's tardiness necessitated her students being moved to another teacher's classroom, her students' learning environment was disrupted, and her own ability and that of her colleagues to effectively perform their duties was reduced. As a result, Respondent's effectiveness in the school system was impaired.

81. Petitioner also charged Respondent with violating Policy 3210, Standards of Ethical Conduct, which provides that all employees are representatives of the Miami-Dade County School District and requires employees to conduct themselves in a manner that will reflect credit upon themselves and the school system. Respondent's frequent tardies over an extended period of time gave the appearance of disregard for school policies and did not reflect credit on her or on the school district. Moreover, Respondent did not protect her students from conditions harmful

to learning on the days when they had to be moved to another teacher's classroom due to her tardiness.[21/] Accordingly, Respondent violated Policy 3210.

82. Respondent also violated Policy 3210.01, Petitioner's Code of Ethics. As found above, she did not protect her students from conditions harmful to learning on the days when she was so tardy that they had to be moved to another classroom.

83. However, Respondent did not violate Policy 3430, Leaves of Absence. For the reasons discussed above, Respondent's absences in February 2013 should not have been determined unexcused; thus, she did not violate Policy 3430.

84. Respondent also did not violate Policy 3121.01, Employment Standards and Fingerprinting of Employees. To the extent Petitioner argues that Respondent lacks good moral character based on having been arrested, Petitioner did not present any competent evidence regarding her arrests or failure to timely report them as required by school board policy. Respondent acknowledged that she had been arrested in July 2011 but testified that she had timely reported it, and that the charge ultimately was dismissed. Petitioner did not offer any competent evidence[22/] to counter Respondent's testimony, which is deemed credible and persuasive.

Factual Basis for Recommended Sanction

85. The persuasive evidence establishes that Respondent did

not purposely set out to violate school policies and Department of Education rules, but that circumstances coalesced such that Respondent found herself in the extremely difficult position of having to care for her very ill son and take him to daycare, then undertake a lengthy commute in morning traffic, without enough time to accomplish both.

86. As unfortunate and trying as those circumstances were, they do not excuse Respondent from complying with the crucial and reasonable requirement that employees arrive to work on time.[23/]

87. Nonetheless, the evidence establishes that Respondent is an innovative, proficient teacher in the critical subject areas of science and math, and that she cares about performing her job well——to the extent that she declined an out-of-field teaching assignment, in part due to concern that she would not perform effectively in that assignment. As such, it is reasonable to infer that under less demanding circumstances, such as having a shorter commute or a later workday starting time, Respondent would perform her teaching duties proficiently and professionally.

88. The circumstances in this case warrant upholding Respondent's suspensions without pay commencing on October 11, 2012, and ending on November 26, 2012, and commencing on March 13, 2013, through the summer vacation following the 2013-2014 school year, and denying back pay for the full period of her

suspension. However, given the very trying circumstances Respondent faced in the 2011-2012 and 2012-2013 school years, and because the evidence indicates that under less oppressive circumstances Respondent likely would be an innovative, proficient, and professional teacher, the undersigned believes that terminating Respondent's employment would be excessively harsh and that Petitioner would lose a good teacher.

CONCLUSIONS OF LAW

89. DOAH has jurisdiction over the parties to, and subject matter of, these consolidated proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes.

90. These are consolidated disciplinary proceedings brought pursuant to sections 1012.33(1)(a) and (6), Florida Statutes, in which Petitioner alleges that just cause exists, pursuant to section 1012.33; Florida Administrative Code Rules 6B-1.001 and 10A-080, 6B-1.006 and 6A-10.081, and 6A-5.056; and School Board Policies 3210, 3210.10, 3430, and 3121.01 to suspend Respondent from her employment without pay for 30 days commencing on October 11, 2012, through November 21, 2012, and to suspend Respondent from her employment without pay commencing on March 13, 2013, through the resolution of this proceeding, and dismiss her from her employment as a teacher with Petitioner. These statutes and rules are penal and therefore must be strictly construed, with ambiguities resolved in favor of the person

charged with violating them. McCloskey v. Dep't of Fin. Servs., 115 So. 3d 1103 (Fla. 5th DCA 2013).

91. Respondent is an instructional employee, as that term is defined in section 1012.01(2). Petitioner has the authority to suspend and terminate instructional employees pursuant to sections 1012.22(1)(f) and 1012.33(1)(a) and (6)(a).

92. To do so, Petitioner must prove, by a preponderance of the evidence, that Respondent committed the alleged violations, and that such violations constitute "just cause" for dismissal. § 1012.33(1)(a), (6), Fla. Stat.; McNeil v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

93. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

94. Sections 1012.33(1)(a) and (6) provide in pertinent part that instructional staff may be terminated during the term of their employment contract only for "just cause." § 1012.33(1)(a), (6), Fla. Stat.[24/] "Just cause" is defined in section 1012.33(1)(a) to include "misconduct in office" and "gross insubordination." For the reasons discussed below,

Petitioner has proved, by a preponderance of the evidence, that just cause exists to suspend Respondent without pay and terminate her employment.

Gross Insubordination

95. Respondent's conduct alleged to constitute gross insubordination took place during a period spanning from August 2011 to March 2013. During that period——specifically, on July 8, 2012——Florida Administrative Code Rule 6A-5.056,[25/] titled "Criteria for Suspension and Dismissal," was amended to revise the definition of "gross insubordination."

96. Respondent's conduct alleged to constitute gross insubordination in office that took place between August 2011 and July 7, 2012, is governed by the version of rule 6A-5.056 in effect at that time.[26/] That rule 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."

97. Respondent's conduct alleged to constitute gross insubordination in office that took place during the period commencing on July 8, 2012, through March 13, 2013, is governed by the version of the rule in effect at that time.[27/] That rule defines "gross insubordination" as "the intentional refusal to obey a direct order, reasonable in nature, and given by and with

proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties."

98. Here, it is undisputed that Surrancy and Warren directly ordered Respondent to be punctual in her arrival at the work site, and that they possessed the authority to issue and enforce such orders.

99. Both versions of rule 6A-5.056 applicable to this proceeding contain the requirement that the refusal to obey the direct order be intentional. In Forehand v. School Board of Gulf County, 600 So. 2d 1187 (Fla. 1st DCA 1992), the court noted that the word intent denotes that "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Id. at 1193 (emphasis added).

100. In this case, Respondent testified, credibly, that she did not desire to cause the consequences of her actions. Nonetheless, the evidence inescapably leads to the inference that Respondent was aware of, and, thus, believed that the consequences of her actions were substantially certain to result. Here, Surrancy and Warren gave Respondent direct orders to be punctual on numerous occasions over an almost two-year period, and warned her that her repeated failure to do so would constitute gross insubordination and subject her to disciplinary action. Nonetheless, Respondent persisted in being tardy. Under

these circumstances, it is determined that the intent requirement in both versions of rule 6A-5.056 is met.

101. Thus, based on the foregoing findings of fact, it is determined that Respondent's frequent tardiness over two school years, in violation of the principals' direct orders and with notice of the consequences of her continued tardiness, constitutes gross insubordination. See Miami-Dade Cnty. Sch. Bd. v. McIntyre, Case No. 11-4922, 2012 Fla. Div. Admin. Hear. LEXIS 35 (Fla. DOAH Jan. 12, 2012)(finding that school employee's repeated unexcused absences due to illness of her children and other family responsibilities constituted gross insubordination). See also Miami-Dade Cnty. Sch. Bd. v. Hankerson, Case No. 11-3193, 2011 Fla. Div. Admin. Hear. LEXIS 1141 (Fla. DOAH Nov. 8, 2011)(finding that teacher's repeated tardies and unexcused absences constituted gross insubordination).

Misconduct in Office

102. Respondent's conduct alleged to constitute misconduct in office took place during a period spanning from August 2011 to March 2013. During that period——specifically, on July 8, 2012—— Florida Administrative Code Rule 6A-5.056,[28/] titled "Criteria for Suspension and Dismissal," was amended to revise the definition of "misconduct in office."

103. Respondent's conduct alleged to constitute misconduct in office that took place between August 2011 and July 7, 2012,

is governed by the version of rule 6A-5.056 in effect at that time.[29/] That rule defines "misconduct in office" as:

> [A] violation of the Code of Ethics of the Education Profession as adopted in [r]ule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in [r]ule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

To find Respondent guilty of misconduct under this version of the rule, not only must Respondent be determined to have violated rules 6B-1.001 and 6B-1.006, but the violations must be determined to be so serious as to impair her effectiveness in the school system. See McMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

104. Respondent's conduct alleged to constitute misconduct in office that took place during the period commencing on July 8, 2012, through March 13, 2013, is governed by the version of the rule in effect at that time.[30/] That rule defines "misconduct in office" as:

> (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.

Under this version of the rule, it is not necessary to find that rule violations were so serious as to impair Respondent's effectiveness in the school system.

105. For the reasons addressed herein, it is concluded that Respondent's frequent tardiness in the 2011-2012 school year constituted misconduct in office, in violation of the version of rule 6A-5.056 in effect at that time. It also is concluded that Respondent's frequent tardiness in the 2012-2013 school year constituted misconduct in office, in violation of the version of rule 6A-5.056 in effect at that time.

Code of Ethics

106. Also between August 2012 and March 13, 2013—— specifically, on January 11, 2013——Florida Administrative Code Rule 6B-1.001,[31/] titled "Code of Ethics of the Education Profession in Florida" was transferred to rule 6A-10.080. The rule's text was not amended. Accordingly, Rule 6B-1.001 governs Respondent's conduct alleged to have occurred between August 2011 and January 10, 2013, and rule 6A-10.080 governs her conduct alleged to have occurred after that date, but the applicable rule standards remained the same.

107. The Code of Ethics rule provides:

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

108. For the reasons set forth in the findings of fact, it is concluded that Respondent violated rules 6B-1.001 and 6A-10.080. The violation of rule 6A-10.080 constitutes misconduct in office, pursuant to the version of rule 6A-5.056 in effect during the 2012-2013 school year.

Principles of Professional Conduct

109. Between August 2012 and March 13, 2013, Florida Administrative Code Rule 6B-1.006,[32/] titled "Principles of Professional Conduct for the Education Profession in Florida," also was amended. On January 11, 2013, the rule was transferred to rule 6A-10.081 but its text was not amended. Accordingly,

rule 6B-1.006 governs Respondent's conduct alleged to have occurred between August 2011 and January 10, 2013, and rule 6A-10.081 governs Respondent's conduct alleged to have occurred on or after that date; however, the applicable rule standards remained the same.

110. The rule provides in pertinent part:

> (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:
>
> (a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.
>
> (b) Shall not unreasonably restrain a student from independent action in pursuit of learning.
>
> * * *
>
> (h) Shall not exploit a relationship with a student for personal gain or advantage.
>
> * * *
>
> (4) Obligation to the public requires that the individual:
>
> (a) Shall take reasonable precautions to distinguish between personal views and those

> of any educational institution or organization with which the individual is affiliated.
>
> (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.

111. For the reasons set forth in the findings of fact, above, it is concluded that Respondent did not violate rule 6B-1.006 or 6A-10.081.

Petitioner's Policies

112. School Board Policy 3210, Standards of Ethical Conduct, states in relevant part:

> All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.
>
> A. An instructional staff member shall:
>
> * * *
>
> 3. [M]ake a reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety;

> 4. [N]ot unreasonably restrain a student from independent action in pursuit of learning;
>
> * * *
>
> 8. [N]ot intentionally violate or deny a student's legal rights;
>
> * * *
>
> 17. [M]aintain honesty in all professional dealings;
>
> * * *
>
> 31. [S]elf-report within forty-eight (48) hours to appropriate authorities any arrest and final dispositions of such arrest other than minor traffic violations; (DUI is not considered a minor traffic violation.) Instructional staff members shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program, or entering of a plea of guilty or Nolo Contendere for any criminal offense other than a minor traffic violation within forty-eight (48) hours after the final judgment.

113. For the reasons addressed in the findings of fact, above, it is concluded that Respondent violated this policy. Pursuant to the version of rule 6A-5.056 in effect during the 2012-2013 school year, this violation constitutes a basis for determining that Respondent engaged in misconduct in office.

114. School Board Policy 3210.01, Code of Ethics, provides in pertinent part:

> I. INTRODUCTION
>
> All members of The School Board of Miami-Dade

County, Florida, administrators, teachers and all other employees of Miami-Dade County Public Schools, regardless of their position, because of their dual roles as public servants and educators are to be bound by the following Code of Ethics. Adherence to the Code of Ethics will create an environment of honesty and integrity and will aid in achieving the common mission of providing a safe and high quality education to all Miami-Dade County Public Schools students.

As stated in the Code of Ethics of the Education Profession in Florida State Board of Education Rule 6B-1.001(2) and (3):

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 a 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.

* * *

FUNDAMENTAL PRINCIPLES

The fundamental principles upon which this Code of Ethics is predicated are as follows:

• Cooperation – Working together toward goals as basic as human survival in an increasingly interdependent world.

• Fairness – Treating people impartially, not playing favorites, being open minded, and maintaining an objective attitude toward those whose actions and ideas are different from our own.

• Honesty – Dealing truthfully with people, being sincere, not deceiving them nor stealing from them, not cheating nor lying.

• Integrity – Standing up for your beliefs about what is right and what is wrong and resisting social pressure to do wrong.

• Kindness – Being sympathetic, helpful, compassionate, benevolent, agreeable, and gentle toward people and other living things.

• Pursuit of Excellence – Doing your best with the talents you have, striving toward a goal, and not giving up.

• Respect – Showing regard for the worth and dignity of someone or something, being courteous and polite, and judging all people on their merits. It takes three major forms: respect for oneself, respect of other people, and respect for all forms of life and the environment.

• Responsibility – Thinking before you act and being accountable for your actions, paying attention to others and responding to their needs. Responsibility emphasizes our positive obligations to care for each other.

Each employee agrees and pledges:

a. To abide by this Code of Ethics, making the well-being of the students and the honest

performance of professional duties core guiding principles.

b. To obey local, state and national laws, codes and regulations.

c. To support the principles of due process to protect the civil and human rights of all individuals.

d. To treat all persons with respect and to strive to be fair in all matters.

e. To take responsibility and be accountable for his or her actions.

f. To avoid conflict of interest or any appearance of impropriety.

g. To cooperate with others to protect and advance the District and its students.

h. To be efficient and effective in the delivery of job duties.

* * *

CONDUCT REGARDING STUDENTS

As set forth in the Principles of Professional Conduct for the Education Profession in Florida, each employee:

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

b. Shall not unreasonably restrain a student from independent action in pursuit of learning.

* * *

> e. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
>
> f. Shall not intentionally violate or deny a student's legal rights.

115. For the reasons addressed in the findings of fact, it is concluded that Respondent violated Policy 3210.01. This violation constitutes a basis for determining that Respondent engaged in misconduct in office under the version of rule 6A-5.056 in effect in the 2012-2013 school year.

116. School Board Policy 3430, Leaves of Absence, states: "[i]nstructional staff shall not be absent from their assigned duties except as authorized by the Superintendent. An instructional staff member who is willfully absent from duty without leave shall forfeit compensation for the time of such absence. Personal leaves shall be governed by the collective bargaining agreement."

117. For the reasons discussed in the findings of fact, it is concluded that Respondent did not violate Policy 3430.

118. School Board Policy 3121.01, Employment Standards and Fingerprinting of All Employees, states in pertinent part:

> The School Board shall employ only individuals of good moral character. Employees not found to be of good moral character will not be eligible for continued employment. This policy applies to all employees whether full-time, part-time, or temporary. Good moral character means exemplifying the acts and conduct that would

> cause a reasonable person to have confidence in an individual's honesty, fairness and respect for the rights of others and for the laws of the State and nation.
>
> A. Fingerprinting
>
> 1. Periodic re-fingerprinting of employees is required to remain employed. Personnel who have had a break in service shall also be required to be re-fingerprinted in order to be re-employed. Upon re-fingerprinting, any new criminal history that was not previously reported and appropriately addressed may result in nonreemployment, or disciplinary action up to and including dismissal.

119. For the reasons set forth in the findings of fact, it is concluded that Respondent did not violate Policy 3121.01.

120. In sum, it is concluded that Respondent's excessive tardiness over a period covering two school years constitutes gross insubordination and misconduct in office. Accordingly, just cause exists under section 1012.33 to suspend Respondent without pay and terminate her employment.

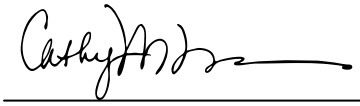
121. However, for the reasons previously discussed herein, the undersigned believes that termination of Respondent's employment is excessively harsh. Accordingly, the undersigned recommends that Petitioner uphold Respondent's suspensions without pay commencing on October 11, 2012, through November 26, 2012, and commencing on March 13, 2013, through the summer vacation following the 2013-2014 school year. Because the suspensions without pay are recommended to be upheld, Respondent

should not receive any back pay for the period for which she was and is suspended. The undersigned recommends that Respondent's employment as a teacher be reinstated at the start the 2014-2015 school year.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a final order upholding Respondent's suspensions without pay commencing on October 11, 2012, and ending on November 26, 2012, and commencing on March 13, 2013, through the summer vacation following the 2013-2014 school year; denying back pay for the full period of her suspension; and reinstating Respondent's employment as a teacher at the start of the 2014-2015 school year.

DONE AND ENTERED this 31st day of March, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2014

ENDNOTES

[1/] Respondent specializes in teaching science and math due to her undergraduate training in pharmacy and business.

[2/] Respondent's position that the documentation of her tardies in the 2011-2012 school year was inaccurate is based on speculation; she did not present any specific, persuasive evidence rebutting Petitioner's demonstration that her tardies were accurately determined.

[3/] Pursuant to the FMLA, teachers in the Miami-Dade County Public Schools district are entitled to 12 weeks' unpaid leave for specified reasons, including caring for a family member with a serious health condition. In order to obtain approval for leave under the FMLA, the teacher must complete an FMLA Form and the condition for which leave is requested must be certified by a healthcare provider. Information that must be certified by the provider includes the recommended intermittent leave of absence dates, which covers a specific time period for which intermittent leave is anticipated to be needed; whether episodic flare-ups of the condition are anticipated to prevent the employee from performing his or her job functions and whether absence is necessary during such flare-ups; and the estimated frequency and duration of flare-ups and related incapacitation over the subsequent six-month period. If leave is needed for a period spanning longer than six months, a new FMLA form must be completed certifying the conditions under which the leave is requested. If the conditions for which FMLA leave is requested change during the six-month effective period of the FMLA form, a new form certifying the changed conditions must be submitted.

[4/] As the principal of HMS, Surrancy had the authority to issue directives (orders) to Respondent.

[5/] The evidence shows that Respondent was an innovative teacher in her subject area of science.

[6/] Respondent's 2009-2010 school year performance evaluation, conducted while she taught at Norland Middle School, rated her as "proficient" in all categories.

[7]/ If Respondent pursued this course of action, it can be inferred that it did not alleviate the circumstances that resulted in Respondent's tardiness, because as discussed below, Respondent continued to be tardy.

[8]/ Given that Respondent's tardies appear to have been due to circumstances largely beyond her control and that she appeared to be trying to take steps to rectify the situation, Surrancy's actions in this regard were unhelpful, but nonetheless were within her discretion as principal to ensure smooth operation of HMS.

[9]/ As discussed below, Respondent was suspended during the 2012-2013 school year after she had incurred additional absences during that school year.

[10]/ Respondent's homeroom lasted an hour and her first period of instructional class time began at 8:45 a.m.

[11]/ One of the eight tardies later was determined covered by the FMLA. Respondent's tardies were documented by Warren or by assistant principals when Warren was not present at the 5000 Role Models location.

[12]/ One of Respondent's absences was authorized under the FMLA, and the other constituted authorized personal leave pursuant to the UTD contract.

[13]/ Respondent timely challenged this action, which is at issue in these consolidated proceedings as Case No. 12-3603.

[14]/ This rule had been transferred to rule 6A-5.056 by this date; that rule number is the correct citation.

[15]/ As further evidence to support Respondent's position that Surrancy was unreasonable in denying her request for modification of her workday schedule, Respondent testified that when she taught at Norland Middle School between 2008 and 2011, that principal did modify her schedule to accommodate her late arrival due to caring for her son. As discussed in note 16, the UTD Contract grants broad discretion to the school principal to grant or deny such requests. Surrancy presented a plausible, reasonable basis for denying Respondent's request, so did not abuse her discretion. Moreover, under any circumstances, any claim that Surrancy violated the UTD Contract should have been addressed in a grievance proceeding, rather than in this proceeding.

[16/] Article IX, section 2 of the UTD Contract requires that teacher scheduling be accomplished in a fair, equitable, and impartial fashion, taking into account seniority and employee preferences. Even if other teachers had been available to cover Respondent's homeroom, it was within Surrancy's discretion, as the school principal, to determine whether to transfer Respondent's homeroom class responsibilities to another teacher, taking into account the competing interests contemplated in this contract provision.

[17/] Respondent already had served a 30-day suspension without pay, from October 11, 2012, to November 21, 2012, and challenges that suspension in case no. 12-3603. In case no. 13-1177, Respondent challenges Petitioner's most recent action to suspend her without pay and terminate her employment.

[18/] Rule 6A-5.056 was amended in January 2013 to make violation of school board rules a basis for a determination of misconduct in office.

[19/] See Webb v. Nationwide Mut. Ins. Co., 2009 U.S. Dist. LEXIS 83520 (S.D. Ohio Sept. 14, 2009), infra note 20.

[20/] Petitioner relies on Brown v. Eastern Maine Medical Center, 514 F.Supp. 2d 104 (D. Me. 2007), as support for its position that the FMLA does not, in any case, cover tardiness to work. However, other courts have interpreted the FMLA to cover tardiness under appropriate circumstances. In Webb v. Nationwide Mut. Ins. Co., 2009 U.S. Dist. LEXIS 83520 (S.D. Ohio Sept. 14, 2009), the court determined that FMLA leave did not cover the plaintiff's tardiness to work, but only because she had not provided documentation adequate to show that the tardies were due to serious medical conditions of herself or her child. A fair reading of Webb is that the plaintiff's tardies would have been considered "leave" had she provided documentation sufficient to demonstrate medical necessity for them. Similarly, here, had Respondent accurately documented the frequency with which she was going to be tardy (admittedly difficult but nonetheless legally required under the FMLA) her tardies should have been considered covered leave under the FMLA for the period of time when she was not present at the work site. In any event, Respondent did not provide appropriate documentation to support the frequency of her tardies.

[21/] It is determined that Respondent did not violate Policy 3210 by failing to self-report arrests within 48 hours to appropriate authorities and final dispositions of such arrests. The only

competent evidence in the record establishes that Respondent was arrested in July 2011 and did timely self-report that arrest, which ultimately was disposed of by dismissal of the charges.

[22/] In its Proposed Recommended Order, Petitioner asserts that "despite Respondent's contention to the contrary, there is no evidence that she ever reported this arrest to the District." This is an incorrect statement. Respondent's testimony constitutes evidence that she reported the July 2011 arrest, and there is no competent substantial evidence in the record to counter this testimony. Moreover, as the party asserting the affirmative of the issue——i.e., that Respondent violated this policy by failing to report an arrest——the burden is on Petitioner to prove that assertion. As previously discussed, Petitioner did not present any competent evidence establishing that the alleged violation occurred.

[23/] Indeed, if every employee who faced challenging child care and workday commute issues were excused from compliance with the requirement to arrive timely at work, Petitioner could not effectively operate its school system.

[24/] The conduct at issue in these proceedings is alleged to have occurred between August 2011 and March 2013. The 2011 version of section 1012.33 governs conduct that is alleged to have occurred between August 2011 and the effective date of Florida Statutes 2012; the 2012 version of section 1012.33 governs conduct that is alleged to have occurred between that date and March 2013. Section 1012.33 was not amended during the 2012 legislative session, so the 2011 and 2012 versions of this statute are the same.

[25/] Rule 6A-5.056 originally was adopted as rule 6B-4.09, and was transferred to rule 6B-4.009 on April 5, 1983. Also on that date, the rule was transferred to rule 6A-5.056, which is the current and correct citation for this rule. See rule 6A-5.056, rulemaking authority (referring to the rule as "formerly" 6B-4.009).

[26/] The version of rule 6A-5.056 in effect during this period was adopted and became effective on April 5, 1983.

[27/] The version of rule 6A-5.056 in effect during this period was adopted and became effective on July 8, 2012.

[28/] Rule 6A-5.056 originally was adopted as rule 6B-4.09, and was transferred to rule 6B-4.009 on April 5, 1983. Also on that

date, the rule was transferred to rule 6A-5.056, which is the current and correct citation for this rule. See rule 6A-5.056, rulemaking authority (referring to the rule as "formerly" 6B-4.009).

[29/] The version of rule 6A-5.056 in effect during this period was adopted and became effective on April 5, 1983.

[30/] The version of rule 6A-5.056 in effect during this period was adopted and became effective on July 8, 2012.

[31/] Rule 6B-1.001 initially was adopted on July 6, 1982.

[32/] Rule 6B-1.006 initially was adopted on December 29, 1998.

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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.