STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 12-3644TTS

BRUCE WEINBERG,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on March 18, 2013, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Brian M. Engle, Esquire
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For Respondent: Robert T. McKee, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists to suspend Respondent from his employment with the Broward County School Board.

## PRELIMINARY STATEMENT

At its regularly scheduled meeting on November 7, 2012, Petitioner Broward County School Board ("Petitioner" or "School Board") voted to suspend Respondent without pay for three workdays.

Respondent timely requested a formal administrative hearing to contest Petitioner's action, and, on November 9, 2012, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings. Petitioner filed an Administrative Complaint ("Complaint") the same day, wherein it alleges that Respondent is guilty of insubordination and/or misconduct in office, and, as such, just cause exists to suspend him from employment.

As noted above, the final hearing was held on March 18, 2013, during which Petitioner presented the testimony of three witnesses (Brian Faso, Cornelia Hoff, and Pamela Carroll) and introduced 20 exhibits, numbered 1-10 and 12-21. Respondent testified on his own behalf and introduced five exhibits, numbered 1-3 and 6-7.

The final hearing transcript was filed on April 26, 2013. Subsequently, and at the Petitioner's unopposed request, the undersigned extended the deadline for the filing of proposed recommended orders to May 17, 2013. Both parties timely filed proposed recommended orders, which the undersigned has

considered in the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

## FINDINGS OF FACT

### I. Background

1. Petitioner is the entity charged with the duty to operate, control, and supervise the public schools within Broward County, Florida.

2. At all times relevant to the instant proceeding, Respondent was assigned to Miramar High School ("Miramar"), where he serves as a drama teacher and, until March 6, 2012, sponsored the school's drama club.

3. Respondent's career with the School Board, which spans some 25 years, has not been entirely without incident: on November 3, 2010, one of Miramar's assistant principals issued a written directive to Respondent that instructed him, among other things, to "speak in a calm, respectful, and professional tone at all times"; some 15 months later, on February 10, 2012, Respondent was issued a written reprimand, which was based upon an allegation that he had engaged in unprofessional behavior during a meeting. As detailed below, the School Board now seeks to suspend Respondent for three days, alleging that, during a

meeting with two administrators on March 8, 2012, Respondent once again behaved unprofessionally.[1/]

II. Instant Allegations

4. The relevant facts are largely undisputed. On March 6, 2012, Respondent was advised by a member of Miramar's administration that the drama club would not be permitted to travel to the state thespian competition. The circumstances surrounding the cancellation of the trip, although not relevant to this proceeding, frustrated and disappointed Respondent, who immediately resigned as the drama club sponsor by submitting a letter to Brian Faso (Miramar's principal). The letter, which was dated March 6, 2012, provided, in relevant part:

> Effective immediately, I am resigning my position as Drama Club and Thespian Sponsor. I appreciate the opportunity to work with some of the very talented students at Miramar High.

5. Notwithstanding the seemingly unambiguous nature of the foregoing correspondence, Mr. Faso was uncertain if Respondent also intended to resign his teaching position. As a result, Mr. Faso instructed Cornelia Hoff, Miramar's intern principal, to meet with Respondent to discuss the issue.

6. Thereafter, on March 8, 2012, Ms. Hoff met with Respondent in the principal's conference room. Ms. Hoff was seated at the head of the conference table, with Respondent positioned two chairs away to her left. Pamela Carroll, one of

Miramar's assistant principals and the only other person in attendance, was seated opposite Respondent.

7. At the outset of the meeting, Ms. Hoff inquired of Respondent concerning his intentions——namely, whether he desired to remain in his position as drama teacher. Respondent did not immediately answer, attempting instead, unsuccessfully, to discuss the canceled trip that prompted his March 6 letter. After some back and forth, Ms. Hoff advised Respondent that, pursuant to Miramar's "best practices," the position of drama teacher is "tied" to service as the drama club sponsor.[2/] Reasonably interpreting this remark as an insinuation that his employment could be in jeopardy, Respondent sat upright[3/] in his chair and stated, in a louder-than-normal speaking voice (but not a yell),[4/] that he would "sue everyone in the room" if the canceled trip "came back to haunt" him. Predictably, Ms. Hoff adjourned the meeting a few moments later.

8. Although Respondent's behavior during the meeting of March 8 was no doubt regrettable, there is no evidence that the isolated, intemperate remark has impaired his effectiveness as a School Board employee. Further, and in light of the circumstances under which the comment was made (i.e., in direct response to a remark that led Respondent to question the security of his employment), there is insufficient evidence that

Respondent intentionally disregarded the standing directive that he speak calmly and professionally at all times.

III. Ultimate Findings

9. It is determined, as a matter of ultimate fact, that Respondent is not guilty of misconduct in office.

10. It is determined, as a matter of ultimate fact, that Respondent is not guilty of insubordination.

## CONCLUSIONS OF LAW

I. Jurisdiction

11. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

II. The Burden and Standard of Proof

12. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring).

13. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

14. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995). The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000); see also Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005)(holding trial court properly defined the preponderance of the evidence standard as "such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . [a] belief that what is sought to be proved is more likely true than not true").

15. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

III. The Charges Against Respondent

16. Pursuant to section 1012.33(6)(a), Florida Statutes, Petitioner is authorized to suspend or dismiss a member of its instructional staff for "just cause," which is defined, in relevant part, as follows:

> Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34 . . . gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea to, regardless of adjudication of guilt, any crime involving moral turpitude.

§ 1012.33(1)(a), Fla. Stat. (emphasis added).

17. In the Complaint, Petitioner asserts that Respondent is guilty of gross insubordination and/or misconduct in office and that, as a consequence, just cause exists to impose a suspension. Each offense is discussed separately below, beginning with the charge of misconduct in office.

A. Misconduct in Office

18. At the time of Respondent's alleged misbehavior, the offense of misconduct in office was defined by the State Board of Education as a:

> [V]iolation 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.

Fla. Admin. Code R. 6B-4.009(3)(emphasis added).[5/]

19. In turn, the Code of Ethics of the Education Profession (adopted in Florida Administrative Code Rule 6B-1.001) and the Principles of Professional Conduct for the Education Profession in Florida (adopted in Florida Administrative Code Rule 6B-1.006),[6/] provide in pertinent part as follows:

> 6B-1.001 Code of Ethics of the Education Profession in Florida
>
> (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.
>
> * * *
>
> 6B-1.006 Principles of Professional Conduct for the Education Profession in Florida.
>
> * * *
>
> (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. . . .

20. "As shown by a careful reading of rule 6B-4.009, the offense of misconduct in office consists of three elements: (1) A serious violation of a specific rule that (2) causes (3) an impairment of the employee's effectiveness in the school system." Broward Cnty. Sch. Bd. v. Sapp, Case No. 01-3803, 2002 Fla. Div. Adm. Hear. LEXIS 1574, *18-19 (Fla. DOAH Sept. 24,

2002; BCSB Dec. 10, 2002). For ease of reference, the second and third elements can be conflated into one component: "resulting ineffectiveness." Id.

21. In its Proposed Recommended Order, Petitioner contends that Respondent's behavior during the meeting of March 8, 2012, was inconsistent with the high degree of ethical conduct demanded by rule 6B-1.001(3), and, further, that it created a "hostile, intimidating, abusive, offensive, or oppressive environment," contrary to rule 6B-1.006(5)(d) of the Principles of Professional Conduct.

22. Even assuming Petitioner is correct in this regard, the charge of misconduct in office fails for several reasons. First, Petitioner's Complaint did not specifically plead subsection (3) of rule 6B-1.001, nor did it allege that Respondent was in violation of subsection (5)(d) of rule 6B-1.006; instead, the Complaint cites rules 6B-1.001 and 6B-1.006 generally, accompanied by a blanket allegation that Respondent is guilty of "misconduct in office." Such loose pleading is insufficient to provide Respondent with adequate notice of the specific rule provisions at issue. See Manatee Cnty. Sch. Bd. v. Daniels-Youmans, Case No. 11-1078, 2011 Fla. Div. Adm. Hear. LEXIS 232, *28 (Fla. DOAH Aug. 22, 2011; MCSB Oct. 31, 2011) ("Although . . . the Administrative Complaint charges [misconduct in office], there is no citation to a

specific provision of the Code of Ethics allegedly violated by Respondent. Therefore, this charge was not sufficiently pled to be the basis for disciplinary action."). What is more, and accepting for argument's sake that the pleading deficiency can be brushed aside, the record is devoid of evidence that Respondent's conduct was so serious that it impaired his effectiveness as an employee. See MacMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226, 230 (Fla. 1st DCA 1993)(holding evidence insufficient to establish misconduct in office; "We reiterate that Rule 6B-4.009(3) defines misconduct in office as a violation of the Code of Ethics and the Principles of Professional Conduct which is so serious as to impair the individual's effectiveness in the school system. . . . Other than the Superintendent's conclusory remarks, we find no evidence demonstrating a loss of effectiveness in the school system.").[7/] For these reasons, Respondent is not guilty of misconduct in office.

B. Gross Insubordination

23. As noted previously, Petitioner alleges also that Respondent is guilty of gross insubordination, which is defined as follows:

> Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a

> direct order, reasonable in nature, and given by and with proper authority.

Fla. Admin. Code R. 6B-4.009(4)(emphasis added).[8/]

24. During the final hearing in this matter, it was stipulated that, at the time of the alleged misconduct, Respondent was under a direct, proper, and reasonable order to speak calmly and professionally at all times. All that need be addressed, then, is whether Petitioner has demonstrated a "constant or continuing intentional refusal to obey." Id.

25. Respondent asserts, and the undersigned agrees, that Petitioner has failed to prove that the behavior at issue——i.e., Respondent stating loudly that he would "sue everyone in the room" if the canceled trip "came back to haunt him"——represents an intentional act of disobedience. See Forehand v. Sch. Bd. of Gulf Cnty., 600 So. 2d 1187, 1193 (Fla. 1st DCA 1992)(holding that the intent element of gross insubordination requires proof that the educator deliberately violated the directive at issue). The remark, although impertinently phrased ("I will file a grievance if . . ." would have been preferable), was made in the spur of the moment and only in response to Ms. Hoff's statement that service as the drama sponsor was "tied" to the position of drama teacher, a comment that led Respondent to believe, reasonably, that his job was at risk. Under the circumstances, Respondent's remark was nothing more than a reflexive and

hyperbolic expression of his willingness to protect his legal rights should his employment be improvidently jeopardized—an act that cannot be fairly characterized as a *deliberate* violation of the standing directive.

26. Further, and even assuming that Respondent acted with the requisite intent, there is no evidence of a "constant or continuing" refusal to obey the directive. Fla. Admin. Code R. 6B-4.009(4)("Gross insubordination . . . is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature . . . ."). Although "constant or continuing" is not defined by statute or rule, guidance is provided by Rutan v. Pasco County School Board, 435 So. 2d 399, 400 (Fla. 2d DCA 1983), where the court held:

> Rule [6B-4.009(4)] states that "[g]ross insubordination . . . is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority." This administrative rule indicates that to be guilty of gross insubordination . . . the teacher must intentionally refuse to obey a reasonable, direct order, and this refusal must be done in a constant and continuous manner. Constant is defined as: "1. Continually recurring; persistent. 2. Unchanging in nature, value or extent; invariable. . . ." *The American Heritage Dictionary of the English Language* 284 (New College Edition, 1979). Continuous means: "1. Extending or prolonged without interruption or cessation . . . ." *Id.*, at 288-89. We do not believe

> that Rutan's conduct fits within these definitions. (emphasis added).

27. As in Rutan, there is no evidence that Respondent violated the directive "persistently" or "without interruption." Indeed, the episode of March 8, 2012, represents the only instance of alleged misbehavior that Petitioner has pursued in this matter——conduct that, standing alone, is insufficient to satisfy rule 6B-4.009(4).[9/] See Smith v. Sch. Bd. of Leon Cnty., 405 So. 2d 183, 185 (Fla. 1st DCA 1981)("[Appellant's] actions did not meet the definition of 'gross insubordination' since they were an isolated outburst and could not have been deemed 'constant or continuing.'"). For these reasons, the charge of misconduct in office fails.

## RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is

RECOMMENDED that the Broward County School Board enter a final order: exonerating Respondent of all charges brought against him in this proceeding; and awarding Respondent any lost pay and benefits he experienced as a result of the three-day suspension.

DONE AND ENTERED this 6th day of June, 2013, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of June, 2013.

ENDNOTES

[1/] The Complaint also alleges that, on March 28, 2012, Respondent behaved unprofessionally during a meeting with a different school administrator. However, Petitioner abandoned this allegation during the final hearing. See Final Hearing Transcript, p. 69.

[2/] See Final Hearing Transcript, p. 97, lines 17-20; Petitioner's Exhibit 21C, p. 14, lines 6-9.

[3/] At no point did Respondent invade the personal space of either Ms. Hoff or Ms. Carroll. See Final Hearing Transcript, pp. 82-83.

[4/] See Final Hearing Transcript, p. 75, lines 9-10.

[5/] On July 8, 2012, rule 6B-4.009 was substantially revised and renumbered as Florida Administrative Code Rule 6A-5.056. However, as rule 6A-5.056 was not in effect on the date of Respondent's alleged misconduct (i.e., March 8, 2012), rule 6B-4.009 controls in this proceeding. See Miami-Dade Cnty. Sch. Bd. v. Mobley, Case No. 12-1852, 2013 Fla. Div. Adm. Hear. LEXIS 225, *11 n.4 (Fla. DOAH Apr. 17, 2013)("The most recent amendment to rule 6A-5.056, adopted on July 8, 2012, does not

apply to this proceeding because the conduct at issue occurred before the amendment's effective date.").

[6/] On January 11, 2013, rules 6B-1.001 and 6B-1.006 were transferred to Florida Administrative Code Rules 6A-10.080 and 6A-10.081, respectively.

[7/] In apparent conflict with MacMillan, the Second and Fifth District Courts of Appeal have held that impaired effectiveness can be inferred. Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492, 498 (Fla. 5th DCA 2000)(holding impaired effectiveness could be inferred by nature of misconduct, which included resisting arrest and testifying falsely under oath during a criminal trial; "[t]his is a level of misconduct which would support the inference that Purvis' effectiveness as a teacher has been impaired, even though no parent, student or co-worker was called as a witness to say so"); Walker v. Highlands Cnty. Sch. Bd., 752 So. 2d 127, 128 (Fla. 2d DCA 2000)(holding that teacher's misconduct, which resulted in "loss of control" in classroom, permitted an inference of ineffectiveness). Although the undersigned doubts that MacMillan can be rationally distinguished from Purvis or Walker——particularly since the single instance of misconduct in Walker was less serious than the repeated lewd comments in MacMillan——to the extent the decisions can be reconciled, it appears at the very least that an inference of resulting ineffectiveness should be "used sparingly and with great care. . . . [and] in limited circumstances." Miami-Dade Cnty. Sch. Bd. v. Eskridge, Case No. 10-9326, 2011 Fla. Div. Adm. Hear. LEXIS 62, *15 n.6 (Fla. DOAH Apr. 6, 2011)(quoting Miami-Dade Cnty. Sch. Bd. v. Wallace, Case No. 00-4392, 2001 WL 335989 (Fla. DOAH Apr. 4, 2001)). The undersigned concludes that the facts of the instant case do not involve the "limited circumstances" that would permit an inference of impaired effectiveness.

[8/] As explained in endnote 5, supra, Rule 6B-4.009, which was in effect at the time of Respondent's misconduct, was subsequently revised and renumbered as Florida Administrative Code Rule 6A-5.056.

[9/] In its Proposed Recommended Order, Petitioner notes that Respondent also engaged in unprofessional behavior during a January 2012 meeting, which resulted in the issuance of a formal reprimand the following month. See Petitioner's PRO at p. 9, ¶ 38. It is doubtful, however, that Petitioner can rely upon behavior for which Respondent has already been punished to

establish a constant or continuing pattern of misconduct (so as to support the charge of insubordination). Cf. Dep't of Transp. v. Career Serv. Comm'n, 366 So. 2d 473, 474 (Fla. 1st DCA 1979) (holding agency lacked the authority to discipline an employee twice for the same offense). In any event, two instances of unprofessional conduct committed subsequent to the issuance of the 2010 directive hardly constitute an uninterrupted or persistent pattern of misbehavior.

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 must be filed with the agency that will issue the final order in this case.