

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 13-1042

ROSE M. DACANAY,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case in Largo, Florida, on October 1, 2013.

APPEARANCES

For Petitioner: Laurie A. Dart, Esquire  
Pinellas County Schools  
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Post Office Box 2942  
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For Respondent: Rose M. Dacanay, pro se  
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STATEMENT OF THE ISSUE

Should Petitioner, Pinellas County School Board (School Board or Board), terminate the employment of Respondent, Rose M. Dacanay, for the reasons that follow:

- A. Violation of Board Policy 4140A(9), incompetence?
- B. Violation of Board Policy 4140A(9)(a), failure to perform the duties of the position?
- C. Violation of Board Policy 4140A(19), failure to correct performance deficiencies?
- D. Violation of Board Policy 4140A(20), insubordination?
- E. Violation of Board Policy 4140A(24), failure to comply with Board policy, state law, or contractual agreement?

PRELIMINARY STATEMENT

By letter dated February 19, 2013, the superintendent of Pinellas County Schools advised Ms. Dacanay that he intended to recommend that the Board discharge her. The letter also advised Ms. Dacanay of her right to a hearing to dispute the decision. On March 11, 2013, Ms. Dacanay, through counsel, requested a hearing. The Board referred the matter to DOAH to conduct the requested hearing. The undersigned noticed the matter for hearing to begin June 4, 2013.

On May 28, 2013, the undersigned issued an Order allowing Ms. Dacanay's counsel to withdraw. On May 28, 2013, the undersigned entered a Case Management Order that, among other things, continued the hearing for a number of reasons "including recently failed settlement negotiations, the failure of the parties to appear for the pre-hearing conference, the failure of the parties to file the stipulations required by the Order of

Pre-hearing Instructions, the representations of the parties, [and] the parties' agreement to reschedule . . . ."

Subsequently, the hearing was set for October 1, 2013. The undersigned conducted the hearing as scheduled in Largo, Florida.

The School Board presented the testimony of Ms. Dacanay, Kim Gilbert, Darlene Tickner, Jerrie Brown, Karen Trockels, Rachel Jones, Tomeka Miller, Janelle Jenkins, Gail Cox, Caren Evans, Linda Vest Mark Manley, and Valencia Walker. School Board Exhibits 1 through 13, 15, and 16 were received into evidence. Ms. Dacanay testified and presented the testimony of Sherry Non and Nellie Turner. Exhibits 1, 2 and 7 through 10 of Ms. Dacanay's were admitted into evidence. The parties were provided an opportunity to submit proposed recommended orders. A Transcript was filed. Ms. Dacanay did not submit a proposed recommended order. The School Board timely filed and served a proposed recommended order.

#### FINDINGS OF FACT

1. The Pinellas County School District has employed Ms. Dacanay since August 2005. She has worked as a teacher assistant and as an exceptional student education (ESE) associate. At the beginning of the 2011-2012 school year, Ms. Dacanay worked as an ESE associate assigned to the Paul B. Stephens Exceptional Student Education Center (Paul B. Stephens).

The Center serves vulnerable students with significant developmental disabilities and medical needs.

2. ESE associates work under a classroom teacher's direct supervision. They must assist the teacher in all aspects of both the care and the education of the students.

3. During the first semester of the 2011-2012 school year, Ms. Dacanay worked in the classroom of Paulette Pickering. Because Ms. Dacanay's performance in Ms. Pickering's class was not satisfactory, the principal, Gail Cox, reassigned her to the classroom of Linda Vest for the second semester, which started January 2012.

4. Ms. Cox selected Ms. Vest's classroom because it did not have as many students as Ms. Pickering's, and the class was not as demanding. The reassignment was to give Ms. Dacanay an opportunity to improve her skills and continue working at the school.

5. Also during 2011, Ms. Cox, along with other administrators and a teacher's union representative, met in October and November with Ms. Dacanay four times to review multiple deficiencies in her performance and offer improvement plans. In the meeting held November 10, 2011, Ms. Cox encouraged Ms. Dacanay to apply for other positions in the school system that would not be so demanding and would be a better fit for her. In January of 2012, Ms. Cox spoke to Ms. Dacanay and told her

very directly, "This is not working, Rose. You need to find a different job. Even though everyone is nice and polite, you're still not doing your job, and you need to find another one that better fits your skills."

6. Ms. Dacanay did not take this advice. She worked the remainder of the 2011-2012 school year at Paul B. Stephens. After summer break, she returned to employment in the 2012-2013 school year. She was assigned to assist Kim Gilbert.

7. The students of Paul B. Stephens have emotional, mental, and physical disabilities. Many have severe and multiple disabilities. They are dependent upon the services of their teachers and teacher assistants.

8. One of the students in Ms. Gilbert's class required the use of Dynamic Ankle Foot Orthotics (DAFOS). These are hard plastic inserts positioned around a child's foot before putting on the child's shoe. They must be positioned and wedged on carefully to avoid hurting the student. After correct placement, they are strapped on. The DAFOS are individually made for each wearer's feet. Ms. Dacanay had been instructed and trained on how to put DAFOS on.

9. DAFOS position a child's foot to cure or resist deformity. They are uncomfortable even when properly applied. When DAFOS are put on the wrong foot, they are painful and can

cause blisters and sores. They also do not properly perform their rehabilitative function.

10. On October 23, 2012, Ms. Dacanay put a student's DAFOS on backwards. This would cause the student pain and eliminate the benefits of the DAFOS.

11. Fortunately, Ms. Gilbert spotted the mistake and corrected it.

12. The same student also needed and wore an arm splint. Ms. Dacanay had been instructed and trained on how to fasten the arm splints.

13. On October 24, 2012, Ms. Dacanay was improperly fastening the arm splint. Ms. Gilbert noticed and corrected her.

14. In 2012, Ms. Dacanay's duties included placing wheelchair-bound students in the bus and securing their wheelchairs. This service is critical to the students' safety and the safety of the other students. It requires properly fastening the students in their chairs with chest and foot straps to prevent them from falling from the chair or injuring their feet during transportation.

15. Ms. Dacanay was trained in securing the students and their wheelchairs for transport.

16. On October 29, 2012, Ms. Dacanay did not fasten the chest straps on one student's wheelchair.

17. On October 30, 2012, Ms. Dacanay did not properly secure a student's feet for transport on the bus.

18. Fortunately each time, other employees noticed the errors and corrected them.

19. On another occasion, Ms. Dacanay did not properly fasten the chest strap of a student in a wheelchair on the bus. Another ESE associate checked the student's straps and tightened them properly.

20. The students' wheelchairs were also strapped tightly in the bus to prevent movement or falling. Ms. Dacanay was properly trained on how to secure the bus hook-up straps.

21. From October forward, Ms. Dacanay routinely failed to properly secure students for the bus. A fellow ESE associate regularly observed this and began routinely checking and tightening the straps for the students.

22. Specifically, Ms. Dacanay did not properly fasten the wheelchair hook-ups on November 14 and December 4, 2012. Despite the fact that properly securing the wheelchairs was one of her duties, on December 4, 2012, Ms. Dacanay asked a student why he had not hooked up the side straps on his wheelchair.

23. Ms. Dacanay's neglect of the task of securing students in their wheelchairs was so common that the other ESE associates who worked in Ms. Gilbert's class were concerned for the children's safety. Consequently, they regularly checked the

wheelchairs of students for whom Ms. Dacanay was responsible to ensure that the students were properly secured and safe. They often found the straps loose and secured them.

24. Swimming was part of the curriculum and services for some students. On November 5, 2012, while bringing students back from the pool, Ms. Dacanay used only one hand to push a student in a tall, cumbersome therapy chair. The chair was tall, unstable, and very difficult to maneuver along the sidewalk. With her other hand, Ms. Dacanay was escorting another student. Two other ESE associates yelled at her to stop. Ms. Dacanay did not, and the chair "wobbled" and went off the sidewalk.

25. Ms. Dacanay was taking prescription medicine. She did not properly secure it, and a pill fell to the bathroom floor. Ms. Gilbert found the pill and gave it to the school nurse, Tomeka Miller. Ms. Dacanay went to Ms. Miller and asked her to return the pill. She also asked if anyone else knew about the pill. Ms. Miller advised Ms. Dacanay that Ms. Gilbert knew.

26. The ready availability of the pill to the students with disabilities represented a potential risk to the students.

27. One of the students for whom Ms. Dacanay was responsible was blind and had other issues. In the words of his teacher, Ms. Gilbert:

That was my student who was blind. In addition to having a lot of other issues, he's a student who is transported in a



wheelchair and he kind of cruises around furniture, but it's not a walker. He's very, very difficult, very strong, very stubborn. He has a lot of sensory issues, so you can't hurry him to do anything. It just makes the problem worse.

28. Ms. Dacanay was aware of the student's issues and needs.

29. On November 8, 2012, Ms. Dacanay was hurrying the student back into the classroom. She was urging him on and saying "come on, let's go." He became agitated.

30. Ms. Gilbert instructed Ms. Dacanay to let the student calm down. Ms. Dacanay did not.

31. This detrimentally affected the rest of the morning routine, including the student's therapy schedule.

32. Ms. Dacanay denied each of the events described above. Her denials are not credible judged in light of the conflicting testimony, consistency of testimony among several witnesses, and consistent reports in contemporaneously created documents.

33. In addition, Ms. Dacanay regularly displayed an inability to perform her work or learn her duties.

34. Despite repeated instructions, she failed to correctly perform routine functions.

35. When she worked with her students and the physical education teacher, Darlene Tickner, Ms. Tickner had to repeat instructions and requests multiple times to get her to work.

36. Ms. Dacanay's inability to understand her duties caused Ms. Tickner to develop a "Teacher Associate Class Expectations" worksheet to help remind Ms. Dacanay and the other associates of their fundamental duties. Although the worksheet was given to all associates, Ms. Dacanay's repeated inability to perform the duties of her position was the reason Ms. Tickner prepared the worksheet.

37. Although Ms. Dacanay was only responsible for seven students, she could not even remember their names.

38. Ms. Dacanay also demonstrated a pattern of not paying attention to the students, preferring instead to perform chores. For instance on September 19, 2012, when Ms. Dacanay should have been assisting with a student activity, she left the classroom area for about ten minutes and spent her time folding and storing student bathing suits. This was after she had read and signed the "Class Expectations" worksheet that listed "Focus on the students and the activity, not chores" first.

39. On another occasion, Ms. Dacanay neglected to bring a blind student who also needed a wheelchair, because of cerebral palsy, to the physical education class. Ms. Tickner asked Ms. Dacanay where the student was. Ms. Dacanay said "she didn't know."

40. Ms. Tickner sent Ms. Dacanay back to the classroom to get the student. Ms. Dacanay returned without the student and

said "she couldn't get him into his chair." Ms. Tickner had to go get the student and bring him to the class.

41. As the "Class Expectation" worksheet notes and Ms. Tickner had emphasized, class participation was important for the students and participation with the students was an important part of the associate's job.

42. Once when Ms. Tickner specifically instructed Ms. Dacanay to work with the other associates getting the students in and out of the pool, Ms. Dacanay disobeyed. Instead, she followed a mobile student who did not need assistance around.

43. On another occasion, Ms. Dacanay was supposed to prepare the students for swimming. She removed the diaper from a child who was not going swimming.

44. Similar issues and concerns about Ms. Dacanay's focus and attention to her duties caused the physical education teacher the year before, Mark Manley, to conclude that he could not leave the room if Ms. Dacanay was working with the students. She repeatedly demonstrated problems "focusing on tasks, staying on task . . . inability to stay with a program all the time."

45. The problems Ms. Dacanay had during the 2012-2013 school year were similar to earlier performance failures during her time at Paul B. Stephens when she was working with Ms. Pickering.

46. Ms. Cox met with Ms. Dacanay on October 18, 2012. The letter of reprimand following that meeting summarized the failings identified above and others.

47. The letter advised Ms. Dacanay:

[Y]ou appear to avoid work, especially toileting/changing student. Your ability to learn your job or perform your work responsibilities has been questioned and requires your teacher to constantly monitor you to ensure student safety. For example you appear not to remember which student uses which chair nor how to secure students in their chairs. This has happened several times. After 3-4 weeks in school you still needed direction to assist students with table activities before morning group. You have been off-task during PE and you were not able to monitor students assigned to you when they were in the pool. You also fell asleep during music class. In addition to classroom issues the assistants on the bus with you have stated that you pretend to forget how to hook up wheelchairs and harnesses, and do not do your share on the bus. You also fall asleep regularly on the way home in the afternoon which also puts more work on the other assistants.

48. Before working at Paul B. Stephens, Ms. Dacanay received less than satisfactory ratings on her evaluations beginning on February 20, 2007, at Largo High School, where her evaluation noted that she needed to improve punctuality and that she left her assigned area without notifying the teacher. In all, between February 20, 2007, and February 10, 2011, Ms. Dacanay's evaluations reflect 16 instances of being evaluated as unsatisfactory or in need of improvement in areas that include

punctuality, judgment, job knowledge, quality of work, quantity of work, initiative and attendance.

49. The weight of the persuasive, credible evidence established that Ms. Dacanay was not competent to perform her duties, did not perform her duties, and did not improve her performance despite being given repeated opportunities to improve.

#### CONCLUSIONS OF LAW

##### Jurisdiction, Burden, and Authority

50. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569, 120.57(1), and 1012.40(2)(c), Florida Statutes (2013).<sup>1/</sup>

51. The superintendent of the school district has the authority to make recommendations for dismissal of school employees pursuant to section 1012.27(5).

52. The Board has the authority to dismiss employees pursuant to sections 1001.42(5) and 1012.22(1)(f), Florida Statutes.

53. District school boards have authority to "adopt rules governing personnel matters." § 1012.23(1), Fla. Stat.

54. The Board must prove that it has just cause to terminate Ms. Dacanay's employment. Dileo v. Sch. Bd. Dade Cnty. 569 So. 2d 883 (Fla. 3d DCA 1990). It must prove just cause by a

preponderance of the evidence. See 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).

55. "Preponderance of evidence is evidence 'which as a whole shows that the fact sought to be proved is more probable than not.' State v. Edwards, 536 So. 2d 288, 292 n.3 (Fla. 1st DCA 1988)." Dufour v. State, 69 So. 3d 235, 252 (Fla. 2011). See also Escambia Cnty. Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 193; 55 So. 83, 92 (1911).

56. An ESE associate is an "educational support employee" under section 1012.40(1)(a). Section 1012.40(2)(b) permits a school board to discharge an educational support employee for reasons stated in the collective bargaining agreement. The bargaining agreement here provides that Board Policy 4140 will define just cause for dismissal.

#### Reasons for Discharge

57. The Board alleges that Ms. Dacanay violated the following policies:

A. Board Policy 4140A(9), "Incompetence as evidenced by inability or lack of fitness to discharge the required duty";

B. Board Policy 4140A(9)(a), "Failure to perform the duties of the position";

C. Board Policy 4140A(19), "Failure to Correct Performance Deficiencies";

D. Board Policy 4140A(20), "Insubordination, which is defined as a continuing or intentional failure to obey a direct order, reasonable in nature, and given by and with proper authority"; and

E. Board Policy 4140A(24), "Failure to comply with board policy, State law, or appropriate contractual agreement."

58. Board policy 4140A(9) defines "incompetence" as an "inability or lack of fitness to discharge the required duty."

59. The preponderance of the persuasive, credible evidence proves that Ms. Dacanay was not competent or willing to perform her duties, despite training and efforts to improve her performance.

60. Board Policy 4140A(9) (a) makes "[f]ailure to perform the duties of the position" an offense for which an employee may be dismissed. The preponderance of the persuasive, credible evidence proves a broad and continued failure by Ms. Dacanay to perform the duties of her position, despite training and efforts to improve her performance.

61. Board Policy 4140A(19) makes failure to correct performance deficiencies grounds for dismissal. As detailed in the Findings of Fact, Ms. Dacanay was advised of multiple and repeated performance deficiencies in 2012, as well as 2011. As also detailed in the Findings of Fact, Ms. Dacanay did not correct those deficiencies despite the fact that Ms. Cox and

other supervisors made repeated efforts to correct Ms. Dacanay's deficiencies by advising her of them, counseling her, and creating task lists for her.

62. Board Policy 4140A(20) defines "Insubordination . . . as a continuing or intentional failure to obey a direct order, reasonable in nature, and given by and with proper authority." The persuasive evidence did not establish a direct order given to Ms. Dacanay that she continually or intentionally failed to obey. It established, amply, that Ms. Dacanay did not perform her duties and did not improve when given the opportunity. But it does not prove a direct order given by someone with proper authority that she failed to obey.

63. Board Policy 4140A(24) makes failure to comply with Board policy, state law, or appropriate contractual agreement grounds for dismissal. The Findings of Fact establish violations of Board Policy 4140A(24).

64. Board Policy 4140 provides that the district "generally follows a system of progressive discipline in dealing with deficiencies in employee work performance or conduct. Progressive discipline may include, but is not limited to, written counseling/conference summary, caution, reprimand, suspension without pay, and dismissal . . . ." The district followed a system of progressive discipline for Ms. Dacanay. Despite the efforts of Ms. Cox, Ms. Dacanay's supervisors, and



her co-workers, Ms. Dacanay's unacceptable behavior continued, was repetitive, and did not respond to progressive discipline procedures. Board Policy 4140, Disciplinary Guideline (E) provides that dismissal is appropriate in these circumstances.

65. Board Policy 4140C identifies 12 aggravating or mitigating circumstances to be considered in imposing a penalty. All but four of them weigh in favor of dismissal. The four that do not are actual damage, pecuniary gain, length of employment, and whether the misconduct was motivated by unlawful discrimination.

66. Of the nine that weigh in favor of dismissal, the first is the threat posed to the health, safety, or welfare of the students. Ms. Dacanay's inability to perform her duties placed the very vulnerable population of students, which she served, at risk for injury.

67. The second is the severity of the offense. Not performing the basic functions of a position, especially when vulnerable students with disabilities are depending on you, is a severe offense.

68. The third is the degree of student involvement. All of Ms. Dacanay's failings directly involved the students for whom she was responsible.

69. The fourth is the "disciplinary history of the employee, including the number of offenses, the length of time

between offenses as well as the similarity of offenses."

Ms. Dacanay's offenses repeated for months and were quite similar.

70. The fifth is the lack of efforts by Ms. Dacanay to rehabilitate her failings.

71. The sixth is the lack of attempts by Ms. Dacanay to correct her deficiencies.

72. The seventh is the impact on students and co-workers. Ms. Dacanay's deficiencies denied students the care and attention they needed and imposed additional burdens on her co-workers.

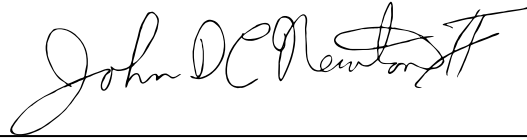
73. The eighth is the "employee's evaluations." Ms. Dacanay's history of evaluations has multiple warnings and reprimands for failings very similar to the specific offenses upon which the District relies for her discharge.

74. Consequently, the aggravating factors outweigh the mitigating factors.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Pinellas County School Board enter a final order finding that there is just cause to terminate Ms. Dacanay's employment and terminating her professional service contract for just cause pursuant to section 1012.33, Florida Statutes.

DONE AND ENTERED this 27th day of November, 2013, in  
Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of November, 2013.

ENDNOTE

<sup>1/</sup> All references are to the 2013 edition of the Florida  
Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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