STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 13-4292

MATTHEW KANE,

Respondent.
_______________________________/

RECOMMENDED ORDER

The final hearing was held in this case, commencing in Bradenton, Florida, on April 29 and 30, 2014, and continuing by video teleconference with sites in Sarasota and Tallahassee, Florida, on June 24 and 25, 2014, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Terry J. Harmon, Esquire
Jeffrey Slanker, Esquire
Sniffen & Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

For Respondent: Brett D. McIntosh, Esquire
766 Hudson Avenue, Suite B
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STATEMENT OF THE ISSUE

The issue in this case is whether the Manatee County School Board (Petitioner or Board) has just cause to terminate the employment contract of Matthew Kane (Respondent or Mr. Kane).

PRELIMINARY STATEMENT

By letters dated September 25 and October 4, 2013, Rick W. Mills, superintendent of the Manatee County School District (District), gave Mr. Kane written notice of the superintendent's intent to recommend to the Board that Mr. Kane's employment contract be terminated. In the name of the Board, the superintendent issued an administrative complaint (Complaint) on October 4, 2013, setting forth the allegations and charges on which the proposed action was based and informing Respondent of his right to an administrative hearing to contest the charges. Respondent timely requested an administrative hearing, and on November 6, 2013, Petitioner sent the case to the Division of Administrative Hearings for assignment of an administrative law judge to conduct the hearing requested by Respondent.

After the parties did not respond to an Initial Order seeking input to schedule the final hearing, a Notice of Hearing was issued, scheduling the final hearing for January 14, 2014. Petitioner filed an unopposed motion for continuance, which was granted, and the hearing was rescheduled for March 18, 2014.

Petitioner initiated discovery, which did not go smoothly, resulting in an emergency motion to compel discovery shortly before the discovery completion deadline established by Order of Pre-Hearing Instructions. Based on the asserted need for time to complete discovery, including discovery compelled from Respondent

and a non-party deposition still being coordinated, the final hearing was again continued and reset for April 29 and 30, 2014.

The parties completed discovery by mid-April, then timely filed their joint pre-hearing stipulation on April 18, 2014, setting forth stipulations as to a number of background facts that would not require evidence at hearing. The stipulated facts are generally reflected in Findings of Fact ¶¶ 1-11 below.[1/]

On April 23, 2014, Petitioner filed an emergency motion to quash a subpoena served on Board member Julie Aranibar to compel her testimony at the final hearing. The next day, Respondent filed a motion to again continue the final hearing. A telephonic hearing on the two motions was held on April 25, 2014. Orders were entered quashing the subpoena[2/] and denying the continuance.

At hearing, Petitioner presented the testimony of Steven Rinder, Don Sauer, A.K.,[3/] Debra Horne, R.S., Scott Martin, Patricia Aragon, L.S., Bill Vogel, Leonel Marines, Stephen Gulash, Jacqueline Peebles, Robert Gagnon, D.K., Respondent, and Troy Pumphrey. Petitioner's Exhibits 1, 2, 5, 6.D.1, 6.D.2, page one of 6.D.3, 6.D.4 through 6.D.6, 6.D.12, 6.D.14, 6.D.15, 19, 35, 44, 45, and 54 were admitted in evidence.

Respondent testified on his own behalf and also presented the testimony of Aida Coleman, Chad Coate, C.H., A.P., Robert Gagnon, Randy Smith, Danny Bench, and Freddy Ordonez. Respondent did not offer any exhibits.[4/]

The five-volume hearing Transcript was filed July 15, 2014. The deadline for filing proposed recommended orders (PROs) was set at 21 days after the transcript filing date, at Respondent's request. A joint motion to extend that filing deadline was granted. Both parties timely filed PROs by the extended deadline, and they have been carefully considered.

FINDINGS OF FACT

1. Petitioner is a duly-constituted school board, charged with the duty to operate, control, and supervise all free public schools within the District.

2. Respondent has been employed by the District since September 25, 1997.

3. Respondent was a teacher at the District's Lakewood Ranch High School from fall 2003 through spring 2007.

4. Respondent became an assistant principal at Manatee High School (MHS) for the 2007-2008 school year, and served in that position through January 1, 2012. On January 2, 2012, Respondent became the MHS interim principal for the rest of the school year.

5. Respondent returned to his prior position of assistant principal at MHS on July 1, 2012, when Don Sauer was hired as the new MHS principal. Respondent was an MHS assistant principal for most of the 2012-2013 school year; six weeks before the school-year end, he was transferred to an assistant principal position at the District's Southeast High School. At the time of hearing,

Respondent held an annual contract for an assistant principal position for the 2013-2014 school year.

6. As a teacher, assistant principal, and interim principal, Respondent was at all times required to abide by all Florida laws pertaining to teachers, the Code of Ethics and the Principles of Conduct of the Education Profession in Florida (adopted as State Board of Education rules), and the Board's policies and procedures that have been promulgated as rules (hereafter Board policies).[5/]

7. On August 1, 2013, Respondent was placed on paid administrative leave during the pendency of an investigation that ultimately led to this proceeding.

8. On August 14, 2013, Respondent was charged with felony failure to report known or suspected child abuse, and with providing false information to a law enforcement officer. The latter charge was subsequently dismissed.

9. By letters dated September 25, 2013, and October 4, 2013, hand-delivered to Respondent, the superintendent provided written notice of his intent to recommend termination of Respondent's employment. The Complaint, with allegations and charges against Respondent on which the recommendation was based, was delivered with the October 4, 2013, letter. Respondent was also informed that the superintendent would recommend to the

Board that Mr. Kane be suspended without pay pending final resolution of the Complaint.

10. On October 14, 2013, during a Board meeting at which Respondent was represented, the Board adopted the superintendent's recommendation to suspend Respondent without pay pending the outcome of any administrative hearing requested by Respondent.

11. On October 24, 2013, Respondent served a Request for Administrative Hearing and Respondent/Employee's Answer to Administrative Complaint.

12. At issue in this proceeding is whether Mr. Kane was informed of alleged improprieties with female students by an MHS paraprofessional, Rod Frazier, who was an administrative parent liaison handling student discipline and a football coach. If so, the issue then becomes whether Mr. Kane violated obligations imposed by Florida law and Board policies related to protecting students, including the obligations to report suspected child abuse and to report allegations of misconduct by instructional personnel affecting the health, safety, or welfare of students. The core allegations in the Complaint are that Mr. Kane was apprised of prior alleged inappropriate incidents involving Mr. Frazier and female students, yet he did nothing to intervene, which allowed Mr. Frazier to remain at MHS, placing the safety and well-being of students at risk.

13. Following Mr. Kane’s stint as MHS interim principal, a new principal arrived for the 2012-2013 school year, Don Sauer. Others--not Mr. Kane--were instrumental in bringing some of the allegations of Mr. Frazier’s improprieties to the attention of the new MHS principal in November 2012. The person who coordinated the effort to bring these matters to Mr. Sauer’s attention was Steven Rinder. Mr. Rinder is the coordinator of the student assistance program, which offers advice and assistance to students and families regarding non-academic issues that can affect students’ academic performance.

14. Mr. Rinder credibly testified that over the few weeks preceding his communication with Mr. Sauer, he was approached independently by several MHS teachers and other instructional staff, including Mike Strzempka (teacher), Lynn Aragon (teacher), Stephen Gulash (administrative parent liaison), Keltie O’Dell (teacher), and Jackie Peebles (teacher), regarding their concerns about Mr. Frazier’s inappropriate interactions with students. Mr. Rinder found these independent reports unusual, indicative of a problem needing attention, and significant enough that he went to Mr. Sauer about the concerns. Mr. Sauer told Mr. Rinder to make a list of the allegations, without names, and Mr. Sauer would do what ought to be done with a “hot potato”: pass it on.

15. Mr. Rinder put together a list of the allegations that had been conveyed to him. In addition, he obtained a list from

Mr. Gulash of the incidents he had observed or had been informed of, and Mr. Rinder added those items to his list. Mr. Rinder then gave the document to Mr. Sauer, who passed the "hot potato" on to the District's Office of Professional Standards (OPS).

16. As witnesses uniformly agreed, there was no question that the list, taken as a whole, raised serious concerns about Rod Frazier's conduct with female students that would amount to, at the least, employee misconduct. Several allegations, standing alone, raised serious concern of inappropriate touching of female students, such as Mr. Frazier behind closed doors with a female student sitting on his lap feeding him cake, and Mr. Frazier shoving a water bottle between a female student's legs.

17. Upon receipt of the Rinder list on November 14, 2012, OPS initiated an investigation of Mr. Frazier. A letter from the superintendent notified Mr. Frazier as follows: "Effective Thursday, November 15, 2012, you are being placed on paid administrative leave pending the outcome of our investigation of possible misconduct on your part."

18. On Thursday afternoon, November 15, 2012, OPS specialist Debra Horne went to MHS and interviewed four of the persons contributing to the list of allegations. Ms. Horne spoke with Mr. Rinder and Mr. Gulash and got some information regarding the names of the sources for each allegation, and the names of the students involved in the alleged incidents. Ms. Horne also

interviewed Mike Strzempka and Lynn Aragon, sources for several allegations. Ms. Horne did not interview Jackie Peebles that day, but learned that Ms. Peebles was the teacher who walked in on Mr. Frazier in his office and found a female student sitting on his lap feeding him cake. Ms. Horne also learned that the female student on Mr. Frazier's lap was D.K., a senior, no longer at MHS, but at the District's Palmetto High School. Ms. Horne did not interview Keltie O'Dell that day, nor Rod Frazier, nor D.K. or any of the other students whose names she had.

19. After those four interviews, Ms. Horne met with MHS principal Sauer and assistant principals Kane and Greg Faller, in Mr. Sauer's office. She called her boss, Scott Martin, a District assistant superintendent, and he participated by speaker phone. The purpose of the meeting was to bring everyone up to speed as to where Ms. Horne was in the investigation. Although the testimony was conflicting, the credible evidence established that during this meeting, Ms. Horne and Mr. Martin discussed the contents of the Rinder list, if not line by line, then item by item, and Ms. Horne reported that each allegation was either unverified or old. As to the old allegations, Ms. Horne reported that the concerns had been brought to the attention of either former principal Robert Gagnon or one of the assistant principals, and those administrators had already addressed the concerns with Mr. Frazier. When Ms. Horne made that statement,

the two assistant principals present and listening--Mr. Kane and Mr. Faller--expressed agreement by nodding their heads. At that point, Mr. Martin told Ms. Horne to wrap it up and return to their office.

20. Strangely, despite Ms. Horne having learned that "old" allegations had been reported to and addressed by administrators, Ms. Horne apparently did not interview the administrators about their knowledge of the allegations or what had been done to address those allegations with Mr. Frazier, either on that day or at any other time before she left OPS in late January 2013. There was no documentation in Mr. Frazier's file of any kind of discipline for inappropriate interactions with female students--no documentation of any conferences with administrators, directives, warnings, reprimands, or suspensions.

21. Mr. Kane acknowledged that at the meeting with Ms. Horne, the Rinder list itself was there; he skimmed the document, he did not read it item by item. It is difficult to imagine that as an assistant principal, Mr. Kane would not have been more interested in the specific allegations made against an instructional staff member, particularly when Mr. Kane nodded in agreement with Ms. Horne's report that the allegations were old and had been reported to and addressed by administration.

22. Mr. Kane did not offer any information to Ms. Horne about the allegations he had skimmed. At hearing, he explained

that he thought he was required to stay out of the OPS investigation. Inconsistently, he volunteered information about three staff members contributing to the list of allegations, stating at the meeting that Mr. Gulash, Ms. Aragon, and Mr. Strzempka all had grudges against Mr. Frazier.

23. Ms. Horne left MHS and returned to the District office to meet with Mr. Martin. Mr. Martin testified that he pressed Ms. Horne regarding whether she had gone down every rabbit trail, with the implication that he was satisfied that Ms. Horne had exhausted her investigative options by conducting only four interviews in the span of a few hours. Ms. Horne testified that she asked to interview D.K. and the other students whose names she had obtained, and also suggested conducting random interviews of students at MHS. Mr. Martin cut her off from this notion, stating that since no student "victim" had come forward, there was no reason to interview any students.

24. Prior to meeting with Ms. Horne, Mr. Martin discussed the investigation with Mr. Gagnon. Mr. Gagnon was MHS principal until January 2, 2012, when he was promoted to an assistant superintendent position in the District office and Respondent became MHS interim principal. Mr. Gagnon's message to Mr. Martin was that Mr. Frazier had been the subject of rumors before that had allegedly ruined his marriage, and that it would be bad if Mr. Frazier was still suspended by the next evening (Friday,

November 16, 2012), because there was an important football game, and rumors would fly if Mr. Frazier was not coaching at the big game on Friday night. Mr. Gagnon also told Mr. Martin that the investigation should proceed and that if Mr. Frazier did what he was alleged to have done, then the District should "bury him under the school." Mr. Gagnon characterized this latter message as the primary message. Nonetheless, at best he was sending a mixed message by suggesting that the District should thoroughly investigate, as long as it did so in one day so the coach could return to work in time for the big game Friday night.

25. Apparently keying on the game-night part of the mixed message, Mr. Martin made the decision after meeting with Ms. Horne that the investigation was going nowhere. He directed that Mr. Frazier be removed from paid administrative leave and returned to work the next day, Friday, November 16, 2012.

26. Meanwhile, Ms. Horne went back to MHS on Friday to complete at least a few of the obviously missing steps in the investigation, by interviewing Jackie Peebles, Keltie O'Dell, and Mr. Frazier. Ms. Peebles credibly testified that in her interview, Ms. Horne made it clear that she only wanted to hear about recent incidents, not old matters that had been reported in the past. Ms. Peebles found Ms. Horne more interested in allegations of grudges against Mr. Frazier than in allegations of inappropriate interactions with female students.

27. Ms. Horne testified that she was surprised to learn that Mr. Frazier had been taken off paid administrative leave and returned to work Friday morning, because she believed the investigation was still ongoing. However, since Mr. Frazier was placed on leave pending the investigation's "outcome," by taking Mr. Frazier off leave and returning him to work on Friday, November 16, 2012, the implication was that the investigation had reached its "outcome" and was concluded. Consistent with that implication, if the investigation was not formally closed it at least went dormant after November 16, 2012.

28. The investigation got a second life in early January 2013, when a letter written by D.K. was delivered to Mr. Sauer, detailing some of Mr. Frazier's inappropriate interactions with D.K. while she was at MHS in 2010-2011 and 2011-2012. D.K.'s letter corroborated some aspects of the Rinder-list allegations, and described additional incidents, such as more closed-door meetings in Mr. Frazier's office, when Mr. Frazier would hug her, rub her upper leg, and grab her thigh and buttocks. Mr. Sauer immediately sent the letter to OPS. With an alleged student victim now having come forward, OPS was compelled to resume the dormant investigation, and finally interview D.K.

29. Shortly after D.K. was interviewed, Mr. Frazier was put back on paid administrative leave. This time, the allegations were shared with the Bradenton Police Department, which initiated

its own investigation, culminating in criminal charges against Mr. Frazier for battery and interfering with school attendance. The Board issued an administrative complaint seeking to terminate Mr. Frazier's employment, but Mr. Frazier resigned in lieu of termination proceedings.

30. As an outgrowth of both the Board's investigation into Mr. Frazier's alleged misconduct and the Bradenton Police Department's investigation of Mr. Frazier, both the Board and the Bradenton Police Department initiated investigations into the actions and inactions of Respondent and others.

What Did Respondent Know And When Did He Know It?

31. As the prelude above suggests, the underlying matters involving Mr. Frazier must be described in order to address the core allegations against Respondent. However, the focus of this proceeding is not on whether there is proof of the allegations against Mr. Frazier, nor is the focus on how the investigations were handled; neither Mr. Frazier nor OPS personnel are on trial. Instead, as charged in the Complaint, the focus here is on whether allegations of Mr. Frazier's inappropriate interactions with students were brought to Respondent's attention; if so, when; and if so, what he did or did not do in response.

2009-2010: Patting Behinds; Closed Door Meetings; Lingerie Party

32. At MHS, assistant principals have a variety of duties; they may be assigned primarily to certain areas, with assignments

changing from time to time. For the 2009-2010 school year, one of Mr. Kane's primary duties was to serve as head of the MHS discipline office. The discipline office is staffed by administrative parent liaisons (liaisons). The liaisons are the school's disciplinarians--they handle student disciplinary referrals, communicate with parents about student discipline, and teach/supervise students serving in-school suspensions and "time-outs." The liaisons also monitor areas such as the courtyard, cafeteria, and parking lot. As discipline office head in 2009-2010, Mr. Kane supervised the liaisons, including Mr. Frazier.

33. L.S. has been a school bus driver for the District for ten years. In the 2009-2010 school year, L.S.'s daughter, R.S., was a senior at MHS and L.S. had an MHS bus route.

34. On several occasions during the 2009-2010 school year, while waiting at MHS in her bus, L.S. observed Mr. Frazier patting female students on their behinds. Also during that year, L.S. occasionally went to Mr. Frazier's office with student discipline referrals, and she would find Mr. Frazier in his office behind closed doors with female students. She found this conduct inappropriate, and reported it to Mr. Kane.

35. L.S.'s daughter, R.S., frequently got in trouble, and was often in time-out. According to R.S., one day in February 2010, near Valentine's Day, when she was in the time-out room supervised by Mr. Frazier, a female student, C.H., came in to ask

Mr. Frazier if he would be attending her "lingerie party," and Mr. Frazier responded that he would be there. The lingerie party discussion made R.S. uncomfortable, and she asked to go to the principal's office. When Mr. Frazier refused, R.S. walked out and headed toward the principal's office. R.S. testified that she was intercepted by Mr. Kane and Student Resource Officer Freddy Ordonez. R.S. said that she told them about the "lingerie party" dialog with Mr. Frazier, and Officer Ordonez told R.S. that she would be arrested if she kept making false accusations.

36. R.S.'s testimony about her "lingerie party" report to Mr. Kane was inconsistent with a prior statement she gave during an investigation of Rod Frazier. In that prior statement, R.S. told the investigator that it was Robert Gagnon, then-principal of MHS, who was with Officer Ordonez when R.S. reported the "lingerie party" incident.

37. Regardless of whom R.S. may have reported to that day, R.S.'s mother testified credibly that R.S. told her about the "lingerie party" incident when R.S. came home from school upset that day. L.S. then went to MHS to talk to Mr. Kane in his office to express her concerns about Mr. Frazier. In addition to relaying what R.S. had told her about the "lingerie party," L.S. also told Mr. Kane about Mr. Frazier's inappropriate conduct that she had personally observed on several occasions: L.S. told Mr. Kane that she had seen Mr. Frazier patting girls on their

behinds, and that when she went to see Mr. Frazier in his office, she found him with female students and the door closed. Mr. Kane told L.S. that he would check into the allegations.

38. At hearing, Mr. Kane testified that he has no recollection of the meeting L.S. described; he did not deny it occurred, saying only that he does not remember it and does not recall L.S.'s report about Mr. Frazier. Nonetheless, L.S.'s testimony was credible and is credited.[6/] Mr. Kane's testimony that he has no memory of L.S.'s allegations reported to him during the 2009-2010 school year means that, despite telling L.S. that he would look into her report about Mr. Frazier, Mr. Kane did nothing to document, investigate, or report the allegations.

2010-2011: Calling Girls Out Of Class; Cake Incident; Golf Carts

39. Jackie Peebles has been a teacher at MHS for eight years. In the 2010-2011 school year, she taught remedial math.

40. Ms. Peebles described how she noticed that Mr. Frazier tended to call female students out of class when they were dressed inappropriately. The students would leave for a while, and return wearing appropriate clothes. Ms. Peebles credited Mr. Frazier with doing his job to correct dress code violations.

41. However, the calls increased in frequency, for one student in particular, D.K., in her remedial math class. Mr. Frazier would frequently call to ask Ms. Peebles to send D.K. to his office. At first, D.K. would leave class wearing short-

shorts and return in sweat pants from lost and found, or she would leave wearing a tank top and return wearing Mr. Frazier's football jacket. Again, Ms. Peebles thought Mr. Frazier was just doing his job, but she became concerned because D.K. had an attendance problem and needed to be in class.

42. The problem got worse, with D.K. leaving when called to Mr. Frazier's office and not coming back. Ms. Peebles confronted Mr. Frazier, telling him that she was going to keep D.K. in her classroom whether she was dressed right or not, because D.K. was falling further and further behind.

43. Mr. Frazier stopped calling Ms. Peebles to release D.K. Instead, Ms. Peebles would hear D.K.'s telephone buzz, watch D.K. look at the phone, and then D.K. would announce that she forgot to tell Ms. Peebles that she has to go to Mr. Frazier's office.

44. Ms. Peebles reasonably surmised that Mr. Frazier was sending text messages to D.K. After this happened a few times, one day Ms. Peebles took D.K.'s phone, put it in her drawer, and kept teaching. The phone kept buzzing and buzzing. Ms. Peebles opened her drawer to turn off the phone, and saw a message on the screen asking why D.K. hadn't come to his office yet, and that he heard she was wearing her short-shorts again. Ms. Peebles reasonably inferred that this message was from Mr. Frazier.

45. Ms. Peebles testified that her concerns about Mr. Frazier calling girls (especially D.K.) out of class and

texting were heightened by the rather alarming “cake incident,” which occurred shortly after the short-shorts text message.

46. Ms. Peebles testified that one afternoon, she had broken up a fight between two students and escorted the students to the discipline office for referral to a liaison. Ms. Peebles found the discipline office’s secretary/receptionist, Aida Coleman, at her desk in the large outer area. Ms. Peebles looked around and found that the doors to the liaisons’ interior offices were all open and the offices empty, except that Mr. Frazier’s office door was closed. Ms. Peebles looked at Ms. Coleman with frustration because no one seemed available to help her with her disciplinary problem, but Ms. Coleman volunteered that it was all right, Mr. Frazier was in his office with a student. Ms. Peebles took this to mean that she could go in, so she left the two students in separated chairs, one by Ms. Coleman’s desk.

47. Ms. Peebles walked the short distance (estimated at around twenty feet) to Mr. Frazier’s office door. She knocked and opened the door simultaneously, and stepped a few feet inside. She was shocked to find Mr. Frazier seated behind his desk with D.K. sitting sideways across his lap, feeding him cake.

48. Ms. Peebles said that she yelled something like: “What the hell is going on in here?” Although she described it as a “yell,” when asked to gauge how loud she was by comparison to others speaking at the hearing, Ms. Peebles did not attribute a

great deal of volume to her "yell"--it was more a matter of what she said than how loudly she said it.

49. Ms. Peebles was troubled by the fact that Mr. Frazier and D.K. did not move, and both acted like nothing was wrong with their seating arrangement and activity. Ms. Peebles then told D.K. to "get off" Mr. Frazier's lap. D.K. did so, but she only moved as far as Mr. Frazier's desk, where she perched facing him. Ms. Peebles then told D.K.: "No, come around here and sit in a chair like a lady." D.K. did as she was told.

50. Ms. Peebles then told Mr. Frazier that she had a referral requiring his attention, with two students waiting outside. Mr. Frazier got up and went out with Ms. Peebles to address the awaiting disciplinary matter.

51. Ms. Peebles reported this incident to Respondent the next day. Ms. Peebles had a clear recollection of her conversation with Respondent in which she described the cake incident, and Respondent assured her he would take care of it. Ms. Peebles was relieved, because she assumed she could count on Respondent to address the matter with Mr. Frazier.

52. Ms. Peebles also told another liaison, Stephen Gulash, about the cake incident at some point shortly after it occurred--her best recollection was that she told Mr. Gulash the next morning. Mr. Gulash corroborated that Ms. Peebles told him about the cake incident--he thought it may have been right after it

occurred, because she seemed upset. Ms. Peebles does not recall being upset when she told Mr. Gulash about the incident. While Respondent suggests this is an inconsistency that undermines the credibility of both Ms. Peebles and Mr. Gulash, this minor difference in perception and recollection is immaterial and understandable. The incident itself was not a happy thing to observe or describe. Even a number of years later, Ms. Peebles seemed upset when describing the upsetting incident at hearing.

53. When Ms. Peebles told Mr. Gulash about the cake incident, Mr. Gulash asked Ms. Peebles if she had reported the incident to Mr. Kane. Ms. Peebles told him either that she had just done so or that she was about to.

54. The material details provided by Ms. Peebles--that the cake incident occurred as she described it, that she reported the incident to Respondent the next day, and that Respondent assured her he would take care of it--were credible and are credited.

55. The most alarming aspect of the cake incident is that D.K. was sitting on Mr. Frazier's lap feeding him cake in the privacy of his office, a clearly inappropriate and suggestive intimacy between this MHS staff disciplinarian and the female student he frequently called out of class to come visit him behind closed doors. D.K. provided credible corroborating testimony of this most troubling aspect of the cake incident,

acknowledging that she was sitting on Mr. Frazier’s lap feeding him cake when Ms. Peebles walked in and was shocked.

56. Respondent contends that Ms. Peebles’ testimony was undermined by D.K.’s testimony that she could not recall what, if anything, Ms. Peebles said when she opened the door and by Ms. Coleman’s testimony that she did not recall an encounter when Ms. Peebles was yelling at Mr. Frazier. Ms. Peebles’ verbal reaction to the shocking scene pales in significance to the scene itself. Moreover, the inability of D.K. and Ms. Coleman to recall did not effectively undermine Ms. Peebles’ clear, credible testimony. It is by no means clear that Ms. Peebles’ words to Mr. Frazier and D.K. (which D.K. might well want to forget or minimize), delivered while Ms. Peebles was standing a few feet inside the office with her back to the door, would have been heard by Ms. Coleman at her desk twenty feet away from the door, particularly since Ms. Peebles had deposited one of the fighting students in a chair next to Ms. Coleman’s desk.

57. Respondent testified that he does not recall Ms. Peebles reporting the cake incident to him. He added that if she had reported the incident as she described it at hearing, he believes there is no way he would not have acted, by documenting the report in writing or having Ms. Peebles do so, bringing it to the principal’s attention, and confronting Mr. Frazier with what was plainly inappropriate, improper, unprofessional conduct.

58. Ms. Peebles, however, was steadfast and credible in maintaining that she reported the cake incident to Mr. Kane the day after it occurred (corroborated by Mr. Gulash). Ms. Peebles also reported the cake incident to Mr. Faller a year later, after reporting another inappropriate Frazier incident to Mr. Faller (discussed below in school year 2011-2012).[7/]

59. Respondent attempted to undermine Ms. Peebles' credibility by dwelling on the lack of clarity on insignificant points, including when the cake incident occurred, what Mr. Kane's duties were at the time, and where Ms. Peebles and Mr. Kane were when she told him about the incident. Respondent's attempt was not effective.

60. For the purposes of this proceeding, it is enough to know that the cake incident took place either in the 2010-2011 school year or the 2011-2012 school year--the only two years that D.K. was a student at MHS. The incident most likely occurred in the 2010-2011 school year, when D.K. was in Ms. Peebles' math class. Ms. Peebles could not recall exactly when the incident occurred; she volunteered early on in her testimony, and repeated often, that she has never been good at remembering dates.[8/]

61. Likewise, regardless of Mr. Kane's duties at the time of the cake incident report, Ms. Peebles explained why he was an appropriate administrator for her to report to. Ms. Peebles testified initially that she thought Mr. Kane was head of

discipline when she reported the cake incident to him. That was shown to be not true. Mr. Faller took over the assignment as discipline office head in the 2010-2011 and 2011-2012 school years. However, Ms. Peebles added that after Mr. Faller assumed that role, Mr. Kane became Ms. Peebles' direct supervisor (not disputed by Respondent), and that she may have reported the cake incident to him for that reason. Later still, Mr. Kane was MHS interim principal, and if the cake incident occurred then, she might have reported it to him for that reason. Ms. Peebles credibly summed it up this way: "Mr. Kane never left the realm of being someone I thought that I would go to." (Tr. 568).

62. As to the setting where Ms. Peebles reported the cake incident to Mr. Kane, Ms. Peebles offered her recollection that they were in the discipline office, in the corner interior office assigned to the assistant principal serving as head of the discipline office. But whether Ms. Peebles reported the cake incident to Mr. Kane in the office assigned to the head of discipline, as she recalled, or in an office in the adjacent building when he became Ms. Peebles' direct supervisor, the setting is insignificant and the lack of clarity does not undermine the credible testimony regarding the material details.

63. Ms. Peebles was genuinely troubled to be offering testimony adverse to Mr. Kane. Ms. Peebles likes and respects Mr. Kane as an educator and administrator, and spoke highly of

his performance as an assistant principal and as her supervisor. Her general regard for him is why she was relieved to report the cake incident to him--she trusted him to follow through when he assured her that he would take care of it. Mr. Kane was equally complimentary of Ms. Peebles, describing her as one of the good teachers, and as someone who would not set out to hurt him.

64. Respondent's testimony expressing no recollection of Ms. Peebles' cake incident report to him and offering hindsight assurance that he would have acted on such a report was not as credible as Ms. Peebles' testimony and is not credited. Instead, Ms. Peebles' report was the second time Respondent was informed of Mr. Frazier's inappropriate closed-door sessions with female students--this time, with the added observation that Mr. Frazier was engaged in inappropriate physical contact with the female student in that particular closed-door session. As Respondent himself acknowledged, such a report should have spurred him to immediate action, but it did not. Moreover, because Respondent took no action in response to L.S.'s prior report, there was no record that this was the second report to Respondent of Mr. Frazier's improprieties. As with L.S.'s report, this second report was also received and ignored, instead of being documented, investigated, and addressed with Mr. Frazier.

65. Lynn Aragon is a teacher employed by the District. She taught at MHS for over ten years, until the end of the 2012-2013

school year, and is currently on a medical leave of absence. During the time period relevant to this proceeding, she served as the representative for the teacher's union at MHS, and because of that role, teachers at MHS often would come to her with concerns.

66. Ms. Aragon testified that during the 2010-2011 school year, a number of teachers came to her to express concerns about Mr. Frazier having female students in his office behind closed doors, calling female students to his office in the middle of class, texting female students in class, and going around in the courtyard on a golf cart with female students hugging him. Ms. Aragon testified that she reported these concerns to then-principal Bob Gagnon, but not to Mr. Kane.[9/]

67. Mr. Gagnon acknowledged that while he was still the MHS principal, he became aware of an issue with students on golf carts, although he did not say that Ms. Aragon was the source of his awareness or that Mr. Frazier was the subject of the "issue," or complaint. Mr. Gagnon testified that he went out and told all of the staff using golf carts--not just Mr. Frazier--to stop allowing students on their golf carts.

68. Several witnesses spoke generally about the legitimate use of golf carts by liaisons to monitor the parking lot and courtyard, and to transport a student when necessary. Often students congregate in the courtyard for lunch breaks, and it was

not unusual, at least before Mr. Gagnon's directive, for a student to sit on a golf cart with a liaison.

69. However, as Ms. Peebles credibly explained, the student-on-golf-cart issue was decidedly different where Mr. Frazier was concerned. Whereas other liaisons and administrators might have a couple of students on a golf cart to sit and talk or to drive them someplace, Ms. Peebles described what she saw on Mr. Frazier's golf cart: "[T]he students hanging around on Mr. Frazier's golf cart mostly tended to be female students . . . more female students than could fit on the seats. There would be so many stacked on there that you literally couldn't drive the golf cart anyplace."

2011-2012: Groping At A Bar; More Golf Cart Issues; Horseplay

70. Ms. Peebles testified that the year after the cake incident, another incident involving alleged inappropriate physical contact by Mr. Frazier was reported to her by MHS female student, A.P. Ms. Peebles told Mr. Faller about the allegations. When Mr. Faller seemed not interested, she told him about the prior cake incident, and she also told him that she had reported the cake incident to Mr. Kane. Ms. Peebles' testimony was credible. Mr. Faller did not testify.

71. Ms. Peebles did not say that she reported the A.P. incident to Mr. Kane. Nonetheless, Respondent offered A.P.'s testimony, apparently in an attempt to undermine the credibility

of Ms. Peebles' overall testimony. Instead, just as was the case with D.K., A.P.'s testimony corroborated the material facts, as reported by Ms. Peebles to Mr. Faller, regarding another troubling incident with Mr. Frazier. As A.P. testified, she snuck into a bar using fake identification, when she was still underage. She had a few drinks and was tipsy. Mr. Frazier approached her and grabbed her in "too friendly" a hug, putting his arms around the lower region of her back, or further down. Mr. Frazier had "his hands down there;" he was groping her and hanging all over her.

72. Respondent attempted to elicit testimony from A.P. that she never told Ms. Peebles about being groped in a bar by Mr. Frazier. Instead, A.P. testified that although she could not say with certainty that she went to Ms. Peebles about this incident, it would make sense that she would have gone to Ms. Peebles: "I could see myself going to her[.]"

73. A.P.'s testimony varied in some of the details from Ms. Peebles' description of what A.P. told her. Ms. Peebles testified that she does not recall the word A.P. used in lieu of "erection," she understood A.P. to be saying that Mr. Frazier had an erection and was rubbing himself against her buttocks. A.P. testified that she did not tell Ms. Peebles that Mr. Frazier had an erection; Ms. Peebles agreed that that was not the word A.P. used. Ms. Peebles also recalled A.P. showing her inappropriate

text messages from Mr. Frazier regarding A.P.'s private body parts that Mr. Frazier inappropriately groped at the bar; A.P. denied receiving text messages from Mr. Frazier. Their testimony was in sync regarding Mr. Frazier's inappropriate groping of A.P., who, at the time, was a minor and a student at MHS. Several years after the fact, the testimony by Ms. Peebles and A.P. is considered substantially and materially consistent. The variances do not undermine Ms. Peebles' credible testimony.

74. Not only was Ms. Peebles' testimony regarding the bar-groping incident and her reports to Mr. Faller credible, but it highlights the problem of serial undocumented "isolated incidents." An incident is reported to one administrator who ignores the report and takes no action; then when the next "isolated incident" is reported, the administrator receives that report as if nothing has ever been brought to his attention before, and again, takes no action; then when the next "isolated incident" is reported to a different administrator, there is nothing documenting that similar incidents had ever occurred before. Despite this pattern, Mr. Kane and Mr. Faller were the two administrators in the room nodding their heads in agreement when Ms. Horne reported to Mr. Martin that the allegations in the Rinder list were old news that had been reported to and handled by administrators. Two of the incidents on the Rinder list were the cake incident and the bar encounter. If brushing the

allegations under the rug can be called handling them, they were, indeed, handled.

75. While Mr. Kane was interim principal in 2012, two separate matters regarding Mr. Frazier were reported to him. In February 2012, Ms. Horne from OPS called Mr. Kane to inform him of an anonymous complaint received by the superintendent's office regarding female students riding with Mr. Frazier on his golf cart and that it "didn't look right."

76. At the direction of Ms. Essig, who was Mr. Kane's immediate supervisor, Ms. Horne relayed the complaint to Mr. Kane, and asked him to look into it and speak to Mr. Frazier about it. Ms. Horne did not hear back from Mr. Kane within a reasonable time, so she called him back. Mr. Kane told Ms. Horne that he issued a verbal directive to Mr. Frazier to be professional in his dealings with students at all times.

77. As Mr. Kane described it, he told Mr. Frazier to stop riding around with girls on his golf cart because others might perceive it to be inappropriate. Mr. Kane did not document his verbal directive to Mr. Frazier. The only evidence that there was a verbal directive comes from the hard-to-decipher scribbled note Ms. Horne made of her phone call to Mr. Kane to find out if he had responded to her request that he look into the complaint. There was no credible evidence that Respondent looked into the 2012 complaint at all, in the sense of trying to find out whether

Mr. Frazier had conducted himself, with females on his golf cart, in a way that "did not look right" (such as by allowing so many female students to pile onto the golf cart with him that he and the females necessarily would be sitting on top of each other, as Ms. Peebles described). Instead, Mr. Kane apparently did not ask Mr. Frazier what he was doing with girls on his golf cart. Mr. Kane explained that because the complaint lacked details (such as names, dates, times, locations, or what exactly did not look right), he could not ask Mr. Frazier about the details because Mr. Kane did not have them. That explanation is unreasonable; a reasonable interim principal performing the duty of looking into a complaint asks questions to find out details.

78. An absence of documentation about prior golf cart issues with Mr. Frazier resulted in yet another "isolated incident." The absence of documentation of Mr. Gagnon's student-on-golf-cart issue that caused him to tell all staff operating golf carts to stop letting students on the golf carts meant that the 2012 complaint about Mr. Frazier on his golf cart with female students and that it did not look right was never investigated as insubordination, for not following Mr. Gagnon's prior directive.

79. Also while Mr. Kane was interim principal, Mr. Gulash reported to Mr. Kane that Mr. Frazier shoved a water bottle between D.K.'s legs at the softball field. Mr. Kane had no recollection of Mr. Gulash reporting this incident to him.

Mr. Gulash acknowledged that he mentioned the incident to Mr. Kane while they were walking together into the cafeteria; that he described the incident to Mr. Frazier as "horseplay"; and that he did not make a big deal of it. Nonetheless, one would expect that a description of "horseplay" involving a male liaison/coach placing anything between the legs of a female student would not only get the interim principal's attention but also trigger immediate action.

80. D.K. corroborated the occurrence of bottle-between-the legs "horseplay" by Mr. Frazier. She testified that Mr. Frazier had shoved water bottles or Gatorade bottles between her legs on more than one occasion, both at the softball field and while D.K. was hanging out with Mr. Frazier on his golf cart. While there were discrepancies in the details offered by Mr. Gulash and D.K., once again, their testimony was in harmony with regard to the troubling aspect of the incident they described--that Mr. Frazier engaged in a form of "horseplay" with a minor female student that involved him putting a plastic bottle between the student's legs.

81. Respondent claimed that Mr. Gulash was biased and not credible for several different reasons; Mr. Gulash responded with explanations. On balance, the undersigned accepts Mr. Gulash's testimony, notwithstanding the attacks on his credibility. But even if Mr. Gulash did not tell Mr. Kane about the bottle-between-the-legs incident, those incidents should have, and would

have, come to light much sooner than they did if Mr. Kane had responded appropriately to the reports of Mr. Frazier's improprieties when they were made to him. D.K.'s credible testimony that one of these bottle-between-the-legs incidents occurred when she was on a golf cart with Mr. Frazier underscores the significance of the patterned failure to document or act on reports of Mr. Frazier's inappropriate conduct with female students on golf carts. Likewise, D.K.'s description of Mr. Frazier's inappropriate physical contact during closed-door sessions in his office underscores the significance of the patterned failure to document or act on reports of Mr. Frazier's inappropriate closed-door meetings with female students.

CONCLUSIONS OF LAW

82. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), 120.65, Fla. Stat. (2013).[10/]

83. Petitioner seeks to exercise its disciplinary authority to terminate Respondent's annual employment contract during the contract term. As the parties stipulated, Petitioner has the authority to do so if there is "just cause." §§ 1012.22(1)(f), 1012.33, Fla. Stat.; Fla. Admin. Code R. 6A-5.056; and Board Policy 6.11.

84. Petitioner bears the burden of proving by a preponderance of the evidence that just cause exists to terminate

Respondent's employment for the reasons charged in the Complaint. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); McNeill v. Pin. Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

85. The parties agree that the parameters for "just cause" are set forth in Board Policy 6.11. Paragraph (12)(c) of that rule specifically addresses "just cause" for involuntary termination of employment, providing as follows:

> Any employee of the School Board may be terminated from employment, for just cause including, but not limited to, immorality, misconduct in office, incompetence, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude, violation of the Policies and Procedures Manual of the School District of Manatee County, violation of any applicable Florida statute, [or] violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.

86. Whether Respondent committed the charged offenses is a question of ultimate fact to be decided by the trier of fact 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).

87. The Complaint charges Respondent with immorality, misconduct in office, incompetence and willful neglect of duty. Those terms are defined in rule 6A-5.056.

88. As a corollary to the "misconduct in office" charge, Respondent is also charged with violating: Florida Administrative Code Rules 6A-10.080(2) and (3), 6A-10.081(3)(a), (5)(a), and (5)(n); Board Policy 6.9; and section 1012.795(1), Florida Statutes, incorporated by reference in rule 6A-10.081(5)(n).

89. Petitioner proved that Respondent violated rule 6A-10.081(3)(a), and thereby, committed misconduct in office. Rule 6A-10.081(3)(a), one of the Principles of Professional Conduct for the Education Profession in Florida, requires the following:

> (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.

As found above, each time Respondent failed to act on reports by L.S., Ms. Peebles, and Mr. Gulash of Mr. Frazier's inappropriate interactions with female students, Respondent did not make reasonable efforts to protect students from harmful conditions as this rule of conduct requires. Likewise, when Respondent failed to conduct an actual investigation, when asked by OPS to look into a complaint about something not looking right regarding female students on golf carts with Mr. Frazier, Respondent failed to make reasonable efforts to protect students from harmful conditions. Respondent's violations of this rule constitute misconduct in office. Fla. Admin. Code R. 6A-5.056(2)(b).

90. Petitioner did not prove that Respondent violated rule 6A-10.081(5)(a), which requires that Respondent "maintain honesty in all professional dealings." The factual predicate for this charge was the allegation that Respondent intentionally provided false and/or misleading information during the course of the investigations. There was insufficient evidence that Respondent intentionally provided false or misleading information. Respondent was rather consistent in reporting his lack of recollection about virtually every critical subject. While one possible inference is that he was not being truthful, the other possibility is that he actually did not remember reports of Mr. Frazier's inappropriate interactions because of his patterned failure to document the reports and follow up with investigations and action. In light of the burden of proof, Respondent's memory lapses prevent a conclusion that he intentionally provided false or misleading information in the investigation. It is noted that the Complaint did not charge Respondent with being dishonest with Ms. Peebles and L.S. when he told them he would take care of or look into the matters they reported to him.

91. Petitioner proved that Respondent violated rule 6A-10.081(5)(n), requiring the following of an educator:

> Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 1012.795(1), F.S.

92. Section 1012.795(1)(b), incorporated into the foregoing rule, defines the following act committed by an educator as a violation warranting discipline:

> Knowingly failed to report actual or suspected child abuse as required in s. 1006.061 or report alleged misconduct by instructional personnel or school administrators which affects the health, safety, or welfare of a student as required in s. 1012.796.

93. Section 1006.061, Florida Statutes, speaks to the requirement to report actual or suspected child abuse, although not as directly as chapter 39, Florida Statutes. Regardless, the parties understood the Complaint to charge Respondent with knowingly failing to report suspected child abuse. However, Petitioner did not prove that Respondent violated his obligation to report suspected child abuse.

94. Neither party offered an analysis of what constitutes "child abuse" that would trigger a reporting requirement. A review of the definitions of "abuse" and its incorporated term, "harm," in section 39.01(2) and (32), Florida Statutes,[11/] leads to the conclusion that Respondent did not receive reports of suspected child abuse. The incidents found above to have been reported to Mr. Kane clearly involved inappropriate conduct by Mr. Frazier, including inappropriate touching of female students. However, while the sort of physical contact reported to Mr. Kane might constitute battery, the definition of "harm" constituting

child abuse does not incorporate the offense of battery, while it specifically incorporates "sexual battery, as defined in chapter 794, or lewd or lascivious acts, as defined in chapter 800[.]" See § 39.01(32)(b), Fla. Stat.; compare § 784.03, Fla. Stat. (defining battery as an intentional touching of another against the other's will) with § 794.011, Fla. Stat.(sexual battery) and ch. 800, Fla. Stat. (lewd and lascivious acts).[12/] Conduct rising to the latter level is what appears to be required under the cited definitions of "abuse" and its incorporated term "harm."

95. Petitioner did, however, prove that Respondent committed misconduct in office by violating the second part of section 1012.795(1)(b), incorporated by reference in rule 6A-10.081(5)(n). Petitioner proved that Respondent knowingly failed to report to appropriate authorities known allegations of misconduct by instructional personnel which affected the health, safety, or welfare of students, as required by section 1012.796, Florida Statutes.

96. Section 1012.796 addresses the requirement to report alleged misconduct affecting the health, safety, or welfare of students, in paragraphs (1)(d) and (5), as follows:

> [(1)](d) School board policies and procedures must include . . . standards of ethical conduct for instructional personnel and school administrators; the duties of instructional personnel and school administrators for upholding the standards; detailed procedures for reporting alleged misconduct by

> instructional personnel and school administrators which affects the health, safety, or welfare of a student; requirements for the reassignment of instructional personnel or school administrators pending the outcome of a misconduct investigation; and penalties for failing to comply with s. 1001.51 or s. 1012.795.
>
> * * *
>
> (5) When an allegation of misconduct by instructional personnel or school administrators, as defined in s. 1012.01, is received, if the alleged misconduct affects the health, safety, or welfare of a student, the district school superintendent in consultation with the school principal, or upon the request of the Commissioner of Education, must immediately suspend the instructional personnel or school administrators from regularly assigned duties, with pay, and reassign the suspended personnel or administrators to positions that do not require direct contact with students in the district school system. Such suspension shall continue until the completion of the proceedings and the determination of sanctions, if any, pursuant to this section and s. 1012.795.

97. The Complaint charges Respondent with violating Board Policy 6.9, which sets forth the Board's ethics policy and procedures for reporting suspected improprieties, comporting with section 1012.796(1)(d). The Board policy adopts the Code of Ethics of the Education Profession in Florida (State Code of Ethics), promulgated as rule 6A-10.080, and makes it binding on all District employees, including administrative and instructional staff members. The Board policy further provides:

> The [Board] supports strong internal control in its procedures and practices. All incidents of suspected improprieties should be reported to the Superintendent or filed with the designated official using Board adopted employee grievance procedures.

As to the procedures, Board Policy 6.9 provides in pertinent part:

> (1) Employees found to be in violation of the School Board Policy on Ethics may be subject to disciplinary procedures up to and including a recommendation of dismissal.
>
> (a) All employees are expected to notify their supervisor or other appropriate administrator, subject to established procedures, of any violations of law, School Board rule, . . . [or] suspected child abuse[.]

98. Pursuant to these interwoven statutes and rules, Ms. Peebles, L.S., and Mr. Gulash notified Respondent, who qualified as their supervisor or an appropriate administrator, of observed improprieties by Mr. Frazier. There is no question that the conduct observed and reported to Respondent--patting the behinds of female students, conducting closed-door meetings with female students, being caught in one such closed-door meeting with a female student sitting across his lap, and engaging in so-called horseplay by putting a plastic bottle between a female student's legs--were serious allegations of misconduct that affects the health, safety, or welfare of students. The welfare of MHS female students was plainly compromised by a staff disciplinarian left free to touch their buttocks and play around

with their thighs for years after complaints of this conduct was first reported to Respondent.

99. Described as a "teacher aide," also known as education paraprofessional, Mr. Frazier fell within the classification of "instructional personnel." See § 1012.01(2)(e), Fla. Stat.

100. Based on the Findings of Fact above, Respondent knowingly failed to report alleged misconduct by instructional personnel which affected the health, safety, or welfare of students. The allegations were appropriately reported to him by several different sources over the span of three school years. Pursuant to the above-quoted statutes, state rule, and Board policy, Respondent was required to convey those allegations to the superintendent's office for further action. Such serious allegations of misconduct require investigation, with suspension with pay and reassignment to a position without direct contact with students until the completion of the investigation. § 1012.796(5), Fla. Stat.

101. The above conclusions are augmented by the charged violations of rule 6A-10.080(2) and (3), part of the State Code of Ethics, providing:

> (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.

102. Violations of these standards fall under the umbrella of "misconduct of office." The Findings of Fact above support a conclusion that Respondent demonstrated by his actions, or more aptly, his inactions, that his primary concern was not always for students. It has already been concluded that Respondent has committed misconduct in office; these standards simply underscore Respondent's violation.

103. The facts found above do not support the charges of immorality, as defined in rule 6A-5.056(1). No record evidence was specifically directed to the elements of this offense.

104. As to the charge of "incompetence," the conclusions for the misconduct in office charge also support a conclusion that Respondent failed to perform duties prescribed by law, which constitutes "inefficiency," and, thus, "incompetence." Fla. Admin. Code R. 6A-5.056(3)(a)1. However, this charge is based on the same conduct; compound charges are unnecessary.

105. The same can be said for the final charge of willful neglect of duties, defined as "intentional or reckless failure to carry out required duties." Fla. Admin. Code R. 6A-5.056(5). This charge is based on the same conduct and is supported by the

same analysis, as the misconduct in office charge, and is considered a compound charge that is unnecessary.

106. Respondent's violations found above, based on the allegations and charges in the Complaint, provide just cause to terminate his employment during the annual contract term.

107. As a final matter, Respondent raised an "objection to procedure" with regard to the Board's action suspending him without pay pending the outcome of this hearing. When charges are filed to terminate an employee such as Respondent, the Board is authorized to suspend the employee without pay pending the outcome of any administrative hearing requested by the employee. See § 120.33(6)(b), Fla. Stat. (providing that when charges are filed to terminate administrative staff including any principal, the Board may suspend the employee without pay, subject to reinstatement with back pay if the charges are not sustained).

108. Respondent does not mention the Board's statutory authority. Instead, Respondent argues that the Board violated Policy 2.21(2)(b), by acting on the recommendation to suspend Respondent without pay less than 21 days after serving Respondent with the Complaint. As a result, Respondent contends that "even if the charges are sustained, Respondent must be awarded back pay from the date of his suspension to the date of the Final Order."

109. Respondent's reliance on Board Policy 2.21(2)(b) is misplaced. That rule applies when "a recommendation is made to

the School Board that an employee is to be suspended without pay as a disciplinary action[.]" In such a case, the complaint must be served, for a non-instructional employee like Respondent, at least 21 days prior to the Board meeting, coinciding with the time within which the employee may request a hearing. If there is a timely request for hearing, "the agenda item will be removed and the Board will take no action on the recommendation." That is because when the proposed disciplinary action is suspension without pay, the employee is entitled to challenge that proposed action before it takes effect.

110. In contrast, where, as here, the proposed disciplinary action is termination, a different procedure applies, prescribed by Board Policy 2.21(2)**(c)**. The rule provides that the complaint need only be served seven days before the Board meeting, and that once the employee has been served with a complaint, "the Superintendent will recommend that the employee be suspended without pay pending the outcome of the hearing" and the employee and his representative may argue to the Board why suspension without pay pending the outcome of the hearing should not be imposed. Unlike when suspension without pay is the proposed disciplinary action, it is not necessary to delay Board action until after the time to request a hearing has run, as long as the Board does not act on the proposed disciplinary action, which is termination of employment. Instead, as soon as charges are

filed, the Board may exercise its statutory authority under section 1012.33 to order suspension without pay as an interim measure, as an adjunct to proposed termination as the disciplinary action.

111. The Board here acted properly, in accordance with Board Policy 2.21(2)(c) and its statutory authority in section 1012.33. The Complaint was served ten days before the Board meeting, and once the Complaint was served, the superintendent proposed suspension without pay pending the outcome of any hearing requested. Until the time had run for a hearing request, the Board was precluded from taking action on the proposed disciplinary action--termination of employment--but was permitted, not only by its rule, but more importantly, by statute, to act when it did to suspend Respondent without pay, pending final resolution of the Complaint.

112. It is worth noting that Respondent's procedural argument is based on a time provision in Board rule, which is not in the statute authorizing the Board's action. Had Respondent been able to demonstrate that a time provision in an applicable Board rule had not been met, Respondent would not have been entitled to the relief of invalidating the Board's action, because Respondent failed to allege or prove that he was prejudiced by the alleged violation. Even for a time requirement imposed by statute, absent corresponding sanctions for

noncompliance, the requirement is interpreted to be procedural only, violation of which must be shown to be prejudicial. See, e.g., Carter v. Dep't of Prof. Reg., 633 So. 2d 3 (Fla. 1994).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Manatee County School Board, enter a final order terminating the employment of Respondent, Matthew Kane.

DONE AND ENTERED this 30th day of September, 2014, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2014.

ENDNOTES

[1/] The parties' stipulated facts contained a few errors, which have been corrected based on the evidence. For example, stipulated fact 5 was: "On January 2, 2012, Respondent was transferred from Assistant Principal at [Manatee High School] to Interim Principal for the remainder of the 2010-2011 school year." (emphasis added). The evidence establishes that the first date is correct, but the school-year reference should have been

2011-2012. The erroneous year reference was carried forward in stipulated facts 6 and 7, which have been corrected.

[2/] Respondent did not file a written response to the emergency motion to quash the subpoena he had served on a Board member. In the telephonic hearing, counsel for Respondent stated that a newspaper report suggested that Ms. Aranibar may have some relevant information, and he wanted to explore the matter. By then, however, Respondent had had nearly six months to engage in discovery, to explore tidbits in newspaper stories and pursue avenues that might lead to relevant information. Respondent's argument would have been germane if the question was whether Respondent would be allowed to timely seek discovery from Ms. Aranibar, although without more, likely insufficient to justify permitting discovery. Respondent's contention was certainly insufficient to justify subpoenaing a member of the agency head to testify at the final hearing. It was incumbent on Respondent to establish that the agency head member was uniquely able to provide relevant testimony and that Respondent had exhausted other tools in discovery; Respondent failed to make the necessary showing. See, e.g., Univ. of W. Fla. v. Habegger, 125 So. 3d 323, 325 (Fla. 1st DCA 2013) (quashing subpoena for deposition of university president because party failed to show that other discovery tools to obtain information were exhausted and that president was uniquely able to provide relevant information not available from other sources); Horne v. Sch. Bd. of Dade Cnty., 901 So. 2d 238, 240 (Fla. 1st DCA 2005) (confirming that "[d]epartment heads and similar high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranked officer" [citations omitted] and extending rule to former agency heads and similar officials).

[3/] Several witnesses were Manatee High School students during the relevant time and parents of those students. In an effort to protect their privacy, initials are used to identify these witnesses instead of their full names. There was no contention that use of the full name of any such witnesses was necessary, such as if their actual identity had been relevant or disputed.

[4/] At the end of the last hearing day, Respondent asked for leave post-hearing to offer all or part of a transcript of an interview by Debra Horne of witness Jackie Peebles, as an impeachment exhibit. The request was granted, and Respondent was given seven days to submit the proposed impeachment exhibit, after which Petitioner would be allowed to file an objection to admitting the

document for impeachment purposes, and a determination would be made as to whether the transcript qualified as impeachment evidence. Respondent did not act on the opportunity he requested to offer such a post-hearing exhibit.

[5/] The Board policies are contained in the School Board of Manatee County Policy & Procedure Manual in evidence (P. Exh. 44). Each policy has a history note identifying the date(s) of the policy's adoption and amendment, if any, by the Board.

[6/] Respondent sought to undermine the credibility of R.S. and L.S. by eliciting testimony that R.S. was a troublemaker who got in a fight and was expelled from MHS before graduation. R.S. was denied permission to walk in the graduation ceremony with her class, or attend the senior prom, and she holds Mr. Kane at least partly responsible. Respondent also presented the testimony of C.H., who denied entering the time-out room to ask Mr. Frazier if he would be attending her lingerie party. But C.H. had her own biases, admitting that she was friends with Mr. Frazier and that she was not friends with R.S.; moreover, C.H. may not want to acknowledge the statement attributed to her because it does not reflect well on her. Ultimately, L.S. was the witness found to have offered credible testimony. Despite Respondent's suggestion that L.S. shared R.S.'s bias and motive to offer false testimony against Mr. Kane to get him in trouble, L.S.'s testimony rang true. For example, L.S. testified that while sitting in her bus at MHS one day, she observed Mr. Frazier massaging a female student. However, when asked if she reported this to Mr. Kane, L.S. said: "I don't think -- not that one." If L.S. had fabricated her testimony to get Mr. Kane in trouble, she would not have acknowledged omitting this incident from her report.

[7/] Respondent sought to impeach Ms. Peebles by contending that she never mentioned reporting the cake incident to Mr. Kane, and that she only told Mr. Faller and Mr. Gulash, in her interview with Ms. Horne on November 15, 2012. Ms. Peebles disagreed, explaining that Ms. Horne did not want to talk about older incidents, and directed Ms. Peebles to talk about the more recent incident that she reported to Mr. Faller and then tried to gain his interest by also telling him about the prior cake incident. However, Ms. Peebles testified that at some point, she told Ms. Horne that she also reported the older cake incident to Mr. Kane. When counsel for Respondent asked Ms. Peebles to review a transcript of the tape recorded interview, Ms. Peebles said the tape recorder was not on the whole time. Ms. Peebles' explanation is credited. Ms. Horne had already gone on record as brushing aside old allegations, and may not have been interested

in recording what Ms. Peebles said about having reported the "old" allegations. Nonetheless, at the end of the hearing, Respondent asked for leave to file all or part of the Horne interview transcript as a proposed impeachment exhibit. As noted in endnote 4, Respondent decided not to submit the transcript. Respondent failed to effectively impeach Ms. Peebles' testimony.

[8/] Respondent mischaracterized the evidence in an attempt to undermine Ms. Peebles' testimony. Respondent proposed a finding of fact suggesting that Ms. Peebles has an overall memory problem, attributable to trauma suffered when she was held up at gunpoint, which "affected her memory, particularly with dates." (R. PRO at 9, unnumbered footnote). To the contrary, Ms. Peebles was simply and candidly explaining that she has always been bad at remembering dates--as an example, she said that she cannot remember when she was held up at gunpoint while working at a bank (before she began teaching eight years ago).

[9/] Ms. Aragon also described an incident in the 2010-2011 school year in which Mr. Frazier allegedly called a female student while she was in Ms. Aragon's class and asked if she had gotten her period yet. Ms. Aragon thought this was inappropriate and reported it to Mr. Gagnon, who said he would look into it. Mr. Gagnon delegated that task to Mr. Kane. Mr. Gagnon testified that Mr. Kane talked to Mr. Frazier, after which Mr. Kane reported that it was an innocuous situation in which Mr. Frazier was trying to be helpful. Mr. Kane testified that he does not recall this matter. There was no evidence to suggest this matter was insufficiently investigated or handled inappropriately.

[10/] References to Florida Statutes are to the (2013) codification, the law in effect at the time of hearing. Insofar as the statutes relied on impose disciplinary standards, it is noted that there have not been any material changes in the standards during the time span of Respondent's actions and inactions at issue. Presumably for that reason, both parties rely on the 2013 codification of Florida Statutes in their PROs.

[11/] As noted, statutory citations are to the 2013 codification. The definitions discussed above in section 39.01 were not changed between the 2009 codification and 2013.

[12/] The only alleged incident that would appear to fall within the definition of "lewd and lascivious acts" as defined in chapter 800 was the bar-groping incident involving A.P. As found above, that incident was not reported to Mr. Kane.

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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.