STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 13-4956TTS

JAMES DAILEY,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy, by video teleconference at sites in Tallahassee and Port St. Lucie, Florida, on March 26 and 27, 2014.

APPEARANCES

For Petitioner: David Miklas, Esquire
Richeson and Coke, P.A.
Post Office Box 4048
Fort Pierce, Florida 34948

For Respondent: Nicholas Anthony Caggia, Esquire
Law Office of Thomas L. Johnson
510 Vonderburg Drive, Suite 309
Brandon, Florida 33511

STATEMENT OF THE ISSUE

The issue is whether Petitioner has just cause to place Respondent, a classroom teacher, on administrative leave without pay from November 20, 2013, through the remainder of the 2013-

2014 school year due to Respondent's excessive absenteeism, as alleged in the December 19, 2013, Statement of Charges.

PRELIMINARY STATEMENT

By letter dated October 24, 2013, Genelle Zoratti Yost (Yost), superintendent of St. Lucie County public schools (Petitioner) placed James Dailey (Respondent) on temporary duty assignment at home and informed him that she planned to recommend his placement on "administrative leave without pay," effective November 20, 2013. At its regular meeting on November 19, 2013, the St. Lucie County School Board (District or Board) voted to accept the recommendation and placed Respondent on administrative leave without pay for the remainder of the 2013-2014 school year, effective November 20, 2013.

Respondent requested a formal administrative hearing to contest Petitioner's actions. Despite insisting that this was not a disciplinary matter, the District issued a Statement of Charges on December 19, 2013, alleging that Respondent was excessively absent from his position as a classroom teacher at Port St. Lucie High School (PSLHS) and its actions were thereby warranted. Respondent requested an administrative hearing. On December 20, 2013, Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the hearing.

On March 17, 2014, the parties filed a Joint Pre-hearing Stipulation, including a statement of agreed facts that have been adopted and incorporated herein as necessary.

At the final hearing, which took place on March 26 and 27, 2014, Petitioner called the following witnesses: PSLHS Principal Bridgette Hargadine (Hargadine) and Assistant Superintendent for Human Resources Susan Ranew (Ranew). Petitioner's Exhibits 1 through 7a and 7c, 8 through 10, 13, 14, 18, and 19 were admitted in evidence. Respondent testified on his own behalf and called the following witnesses: Yost and Marvin Sanders (Sanders), Executive Director of Growth Management, Intergovernmental Relations, Maintenance and Facilities. Respondent's Exhibits 1 through 3, 5 through 25, 27 through 30, 32, 34, and 39 were admitted.

The three-volume final hearing Transcript was filed on April 28, 2014. Respondent filed an Unopposed Motion for Extension of Time to file Proposed Recommended Order on that same day. The motion was granted on April 29, 2014. Both parties timely filed proposed recommended orders which were considered in the preparation of this Recommended Order.

Unless otherwise noted, citations to the Florida Statutes and Florida Administrative Code refer to the 2013 version.

FINDINGS OF FACT

1. Petitioner is a duly-constituted school board charged with the duty of operating, controlling, and supervising all free public schools within St. Lucie County, Florida, pursuant to article IX, section 4(b), Florida Constitution, and section 1001.32, Florida Statutes.

2. At all times material hereto, Respondent was employed as a teacher at PSLHS, a public school in St. Lucie County, Florida. Respondent has been employed by the District for approximately 20 years.

3. Respondent has a professional services contract pursuant to section 1012.33. As a classroom teacher, Respondent is charged with instructing high school students. Regular attendance is considered by Petitioner to be an essential function of the position of classroom teacher.

4. Pursuant to Board Policy 6.549(1)(a), Respondent was entitled to four days of sick leave as of the first day of employment of each school year and thereafter earned one sick day for each month of employment, for a maximum of ten sick days per school year.

2012-2013 School Year

5. During the 2012-2013 fiscal year, Respondent was assigned to teach intensive math classes to students who struggle to pass required state exams required for graduation.

6. Hargadine, in coordination with Petitioner's Human Resources Department, directed Assistant Principal April Rogers (Rogers) to meet with Respondent on October 2, 2012, to address Respondent's pattern of absenteeism and the impact it was having on students, and to explore the possibility of accommodations if his frequent absences were caused by a health condition.

7. At least one student asked to be removed from Respondent's class due to the frequency of Respondent's absences.

8. As directed, on October 2, 2012, Rogers met with Respondent and discussed Petitioner's concerns that Respondent's absences resulted in his students missing math instruction for 39 percent of their scheduled classes. Respondent was notified that he had already exhausted his available sick leave and he had not properly filled out leave requests in a timely manner. During this meeting, Respondent acknowledged that his absences had a negative impact on students. This conference was memorialized in a Summary of Conference dated October 2, 2012, issued to Respondent from Rogers.

9. After the October 2, 2012, meeting, Respondent was also absent on October 16 through 19, 2012.

10. On October 23, 2012, Rogers issued a Letter of Concern to Respondent detailing his continued excessive absenteeism and failure to timely request leave. The letter advised that Respondent's absenteeism amounted to 17 of 42 instructional days

and equated to 40 percent of lost instructional time for Respondent's students. This letter reiterated that Respondent's absences directly affect his students' educational success.

11. In addition to Respondent disrupting the continuity of the classroom by failing to attend work, Respondent also failed to supply adequate lesson plans and/or provide for student instruction while he took unapproved leave. On several occasions, Hargadine or her assistant principal had to create or add to the lesson plans to enable a substitute to teach Respondent's classes.

12. Respondent's absenteeism and lack of proper notice of his absences resulted in his students being "taught" by individuals who did not have a college degree in mathematics, or even education, as some of these individuals were substitutes (who only need a high school diploma), para-educators, and even clerical workers. When staff members were required to provide coverage for Respondent's classes, it negatively impacted both students and co-workers. For example, if a clerical worker or para-educator was called to provide coverage for Respondent's classes, their own work would have to wait and they would not be able to complete their own specific job duties in order to ensure coverage for Respondent's students.

13. After receiving the October 23, 2012, Letter of Concern, Respondent was also absent on October 31, November 1, November 2, November 5, and November 6, 2012.

14. As the assistant superintendent for Human Resources, Ranew assists site-based administrators (principals and assistant principals) concerning staff discipline and adherence to policies and procedures. Rogers requested Ranew's assistance in addressing Respondent's absenteeism. On November 6, 2012, Ranew issued a letter to Respondent regarding his excessive absenteeism.

15. This letter from Ranew reminded Respondent of the importance of him submitting leave requests because his school would not know of his absence even if he properly requested a substitute teacher using the AESOP (computerized) system.

16. By this letter, Ranew also attempted to initiate the "interactive process" required by the Americans with Disabilities Act (ADA). Although Respondent had not identified himself as a "qualified individual with a disability" within the meaning of the ADA, his excessive absenteeism suggested that he might need an accommodation if his absenteeism was being caused by a medical condition.

17. The November 6 letter stated, "to the extent that your absenteeism is being caused by medical condition, the District may be agreeable to allowing you to take a leave [of absence] to

accommodate such a condition, if that would help. In the event you realize that you are unable to regularly be at work due to a medical condition, you should consider promptly requesting an extended leave of absence (e.g., for this semester or the school year), and the District would be willing to consider such a request."

18. To determine Respondent's potential eligibility for an accommodation pursuant to the ADA, Ranew specifically requested that Respondent's doctor provide documentation clarifying:
"a) any specific condition/impairment that Respondent has, as well as the cause; b) any restrictions/limitations on Respondent's work duties as a teacher; c) the expected duration for each limitation or whether it is permanent; d) whether the condition is controllable with the use of medication, and if yes:
1. what is the mitigating effect of this medication; and
2. whether Respondent could fully perform his job duties, with the aid of such medication."

19. In response to Ranew's letter, Respondent provided the District with a doctor's note from Dr. Kenneth Palestrant dated November 7, 2012, stating that the majority of Respondent's visits to the clinics occur between the months of January through May and September through December (effectively during the calendar school year) and speculated that Respondent "may" be exposed to allergens in the school building or in his classroom.

20. Dr. Palestrant explained that Respondent was being treated with antibiotics and allergy medications and recommended Respondent receive an allergy test from an allergist to identify the specific allergens. Dr. Palestrant found that other than the potential environmental exposure to an allergen, he found "no reason [Respondent] cannot perform his full duties as a school teacher as he has no impairment and the medications he has been given have no mitigating effect upon his performance."

21. After receiving Dr. Palestrant's November 7, 2012, note, and after receiving an e-mail from Respondent in which he wondered if something in his classroom might be causing his medical condition, Ranew asked Sanders to inspect Respondent's classroom. Sanders' job duties would require him to facilitate any remedial action with regard to Respondent's classroom, should one be needed. In response to this request, Respondent's classroom was inspected but nothing of concern was discovered within the room. Nonetheless, the classroom was sanitized using two methods: with an ozone machine to kill bacteria and other germs, including mold, and also with a fogger using disinfectant that kills microorganisms, bacteria, and mold, as a precaution.

22. On November 15, 2012, Respondent sent an e-mail to Ranew, informing her that he was "being evaluated by an Allergist, and will be setting up a colonoscopy per doctor's orders Tuesday, [November 20, 2012]."

23. On November 15, 2012, Ranew sent an e-mail to Respondent requesting that he provide her with an allergist report when complete.

24. On November 16, 2012, Respondent sent an e-mail to Ranew in which he discussed beginning to take a new allergy medicine, and promised to fax the allergist report to her.

25. Ranew issued a letter to Respondent dated December 21, 2012, advising him that she had yet to receive an allergist report, again requesting such a report or medical clarification. Ranew's December 21, 2012, letter also reminded Respondent that regular, consistent, punctual attendance, and working a full assigned workday are essential functions of his position as a classroom teacher.

26. Although Respondent did not request leave under the Family and Medical Leave Act (FMLA), when he failed to provide the requested allergist report five weeks after Ranew requested it, and Respondent continued his pattern of excessive absenteeism, the District advised that it intended to designate his absences as FMLA-qualifying.

27. Ranew's December 21, 2012, letter to Respondent again requested clarification from Respondent's doctor/allergist, with a focus on "whether there is a modification or adjustment to the work environment that will enable you to perform the essential functions of [your] position (classroom teacher)."

28. Respondent was told, "[i]n the event that you believe that something such as trees, grass, or something else near your current classroom/school may be causing your condition, which has resulted in many absences, the [School] District is willing to consider a request to transfer you to another location."

29. Notably, Respondent did not provide any information from a health care provider which suggested any work modification would enable him to perform the essential functions of his job, nor did he take advantage of Petitioner's offer of a transfer to another location.

30. In response, Respondent emailed Ranew on December 29, 2012, advising that his allergy test would be conducted on January 3, 2013, and he would provide the results to her as soon as he received them. Respondent also expressed interest in obtaining information regarding short-term disability leave.

31. On January 8, 2013, Ranew advised Respondent that if he desired to take leave in connection with his private insurance company's short-term disability policy, she requested that he advise her "as soon as possible as the [School] District may be able to accommodate you with an extended leave."

32. There is no evidence that Respondent pursued Ranew's offer for an accommodation in connection with short-term disability.

33. By letter dated January 8, 2013, Ranew advised Respondent that she still had not received a copy of his allergist's report, and she "had been trying to accommodate [Respondent], but it is difficult to do when the information [the School District] need[s] is still not provided." Ranew again reminded Respondent that his students needed continuity in the classroom and, if he was unable to provide that, other arrangements would need to be made for the upcoming semester.

34. Respondent provided Ranew with an allergist report dated January 18, 2013. The report explained that Respondent tested positive for multiple allergens, and recommended treatments, including immunotherapy (allergy injections), prescribed medications (nasal sprays), and surgery (balloon sinuplasty).

35. Respondent's allergist identified Respondent being allergic to 42 antigens, including cats, dogs, various grasses, weeds, trees, dust mites and cockroaches, and mold.

36. Respondent's allergist recommended Respondent undergo surgery, and Petitioner permitted Respondent to take FMLA leave for such surgery. Respondent was also permitted to intermittently use all remaining FMLA leave available to him, which he exhausted and which expired on March 28, 2013, due to the conclusion of his FMLA designated 12-month period.

37. In addition to utilizing all FMLA leave available, the District also provided an additional 21 days of unpaid leave during the remainder of the 2012-2013 school year to Respondent, which was above and beyond his allotted sick leave, as well as above and beyond the 60 days of FMLA leave to which he was entitled.

38. During the 2012-2013 school year, Respondent was absent 89 out of 191 possible work days, which accounts for an absenteeism rate of 48 percent.

39. During the 2012-2013 school year, Respondent only worked 772.50 hours. Although Petitioner designated additional unpaid days as FMLA, Respondent was not eligible for additional FMLA leave beginning in March 2013 through March 2014 because he had not worked the requisite number of hours in the preceding 12-month period to be eligible for FMLA leave.

2013-2014 School Year

40. On August 9, 2013, prior to the beginning of the 2013-2014 school year, Ranew sent a letter to Respondent regarding his excessive absenteeism; explaining that his regular attendance was expected during the upcoming 2013-2014 school year; that his students need continuity in the classroom and if he was unable to provide that continuity, that other arrangements needed to be made for the next school year; that he should not expect to be automatically extended any additional unpaid leave during the

2013-2014 school year; and he would only receive the sick leave to which he was already entitled.

41. Ranew advised Respondent that when he returned for work at the beginning of the 2013-2014 school year he would have four days of permitted sick leave advanced to him, and would accrue one additional day at the end of each month from August through February.

42. In this letter, Ranew also told Respondent that it was her understanding that the sinus surgery that he underwent was part of his treatment plan to resolve the sinus and allergy issues which seriously impacted his attendance (during the 2012-2013 school year) and that his chronic sinusitis was expected to improve post operatively. Respondent did not challenge or correct Ranew's understanding on these issues and did not indicate that additional absences were anticipated.

43. Ranew had serious concerns about the lack of consistent instruction for Respondent's students due to Respondent's absenteeism. Only 11 of Respondent's 94 students passed the standardized math examination required for graduation in the 2012-2013 school year, which is approximately a 12 percent pass rate. This was significantly lower than the 50 percent pass rate of Respondent's colleagues who also taught the same type of "struggling" math students.

44. In order to minimize the potential disruption to students caused by excessive absenteeism, Respondent was assigned to teach accounting classes for the new school year which are not courses required for graduation. Respondent was also assigned to a different classroom, in a different building, for the 2013-2014 school year.

45. As of October 3, 2013, Respondent was absent on August 27, 28, 29, 30, and September 5, 9, 20, 23, 25, 26, and October 2, 2013, well in excess of the sick leave that he was permitted to take in accordance with Board policy.

46. By letter dated October 3, 2013, Ms. Ranew wrote to Respondent advising him that his pattern of absenteeism has a direct negative impact on an orderly learning environment and referring to her August 9 correspondence wherein she directed Respondent to advise the District if he needed leave above and beyond the sick days that he was permitted to take.

47. Ranew advised Respondent that he had not provided the requested medical documentation that would support that he had a medical condition necessitating leave from his job, but that the District was continuing its attempt to engage Respondent in an interactive process concerning his medical condition, and again requested documentation from Respondent’s doctor addressing his recent absences and his current condition.

48. In response to Ranew's October 3, 2013, letter, Respondent submitted a doctor's note dated October 9, 2013, which advised that Respondent's condition "can be treated with nasal sprays and intermittent antibiotics" but raised the potential for future treatment to include additional surgical procedure(s). Importantly, the doctor's note clearly explained that Respondent "can perform as a teacher with [his medical conditions], though he may notice hearing loss changes whenever he has middle ear fluid."

49. The October 9, 2013, doctor's note Respondent submitted accounted for four of his absences in August and two of his absences in September, but failed to address the other eight absences which he incurred during September and October 2013.

50. Even after receiving Ms. Ranew's October 3, 2013, letter, Respondent was absent on October 9, 21, and 22, 2013. As of October 24, 2013, Respondent was absent 14 days out of 46 instructional days for the 2013-2014 school year.

51. Ranew worked with Yost in the decision to recommend to the Board that Respondent be placed on administrative leave without pay. The basis for that recommendation was Respondent's excessive absenteeism and failure to follow protocol for sick leave.

52. By letter dated October 24, 2013, Yost advised Respondent that she was recommending his placement on a leave of

absence specifically because of his continual excessive absenteeism, which had been a constant disruption to the classroom and directly impacted an orderly, continuous learning environment for his students.

53. Yost believed that recommending Respondent be placed on leave without pay was not disciplinary in nature, but rather done to provide him an accommodation to resolve any issues which had caused his excessive absenteeism.

54. On October 24, 2013, Yost placed Respondent on "home assignment" with pay through November 19, 2013, at which time the Board voted to accept Yost's recommendation to place Respondent on leave without pay for the remainder of the school year.

The Charges Against Respondent

55. In its Statement of Charges in Support of the Placement on Administrative Leave Without Pay filed on December 19, 2013, the District advanced four theories for Respondent's leave without pay: incompetency, gross insubordination, willful neglect of duty, and misconduct in office.

56. "Incompetency" is defined in Florida Administrative Code Rule 6A-5.056(3) as, "the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity." "Gross insubordination" is defined in rule 6A-5.056(4) as "the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper

authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties." See Fla. Admin. Code R. 6A-5.056(2)(c). "Willful neglect of duty" is defined in rule 6A-5.056(5) as the "intentional or reckless failure to carry out required duties."

57. "Misconduct in Office," according to rule 6A-5.056(2), is satisfied by a showing of one or more of the following: a violation of the adopted school board rules, a violation of the Code of Ethics of the Education Profession in Florida (as adopted in Florida Administrative Code Rule 6B-1.001), or behavior that disrupts the student's learning environment.

58. The Board's Policy 6.301(3)(b) identifies a variety of terminable offenses including:

> (i) Insubordination
>
> * * *
>
> (x) Failure to follow a direct order in normal performance of employee's job
>
> * * *
>
> (xiii) Failure to notify supervisor and receive permission for one or more consecutive workdays' absence
>
> (xiv) Unsatisfactory work performance
>
> (xv) Excessive absences or tardiness
>
> (xvi) Neglect of duty
>
> (xvii) Unauthorized absences

* * *

(xix) Violation of any rule, policy, regulation, or established procedure

* * *

(xxix) Any violation of the Code of Ethics of the Education Profession, the Principles of Professional Conduct for the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees

* * *

(xxxiv) Failure to correct performance deficiencies

59. The finding that Respondent violated one and/or multiple Board policies relating to his excessive absenteeism necessarily shows that he is guilty of "misconduct in office."

Respondent's Defenses

A. Reason for Absences

60. Respondent does not dispute his record of absenteeism or the District's record of communicating its concern regarding his chronic absenteeism and its effect on his students. Rather, Respondent asserts that his absenteeism was related to the environmental conditions at PSLHS. Respondent believes that he suffered from chronic sinus problems, headaches, and repeated scratchy throats due to possible exposure to mold or other allergens at the school which caused many of his absences.

61. According to Respondent, PSLHS suffered storm damage in 2008 that resulted in mold growing around his classroom door. After school authorities were notified by Respondent of the mold issue, the door and mold was removed. Respondent has not worked in that classroom in more than three years.

62. Respondent admitted that some of his absences during the 2012-2013 and 2013-2014 school years were not related to sinus problems. For example, Respondent missed work when he stayed up late with a new puppy. Respondent also missed work to get massage therapy on several occasions. Several of Respondent's absences were attributed to stomach issues.

63. None of Respondent's doctors identified any need for Respondent to be extensively absent from work due to any medical condition, other than his recommended sinus surgery which occurred in early 2013 and was covered by FMLA.

64. No evidence was introduced at the hearing that any of Respondent's doctors actually determined that anything either at PSLHS or within Respondent's classroom caused Respondent's excessive absenteeism, or that Respondent could not work at PSLHS due any medical reason. To the contrary, during the 2012-2013 school year, Respondent provided 30 doctor's notes returning him to work with no restrictions. During the 2013-2014 school year, Respondent provided four doctor's notes returning him to work with no restrictions.

65. Respondent admitted he was allergic to various grasses and trees common to Florida, and even admitted he was allergic to the grass in his own yard. When Respondent was asked if anything changed in his home environment between the 2011-2012 and 2012-2013 school years where his absences skyrocketed, he testified that he had just gotten a puppy.

66. During the relevant time period, approximately 70 percent of Respondent's absences occurred on days when the proceeding day was not a school day, which suggests it was unlikely that Respondent's absences were due to the environment at his work site. Although Respondent claimed his school environment exacerbated his allergies, his absences at issue are full-day absences where he called in sick for the entire day rather than leaving work during the workday. At no time did Respondent or his healthcare providers suggest that PSLHS or Respondent's classroom should have air quality testing.

67. Respondent admitted, on the days he was absent, he felt worse when he woke up at home than when he was at work in his classroom and when he was too sick to come to work he would wake up "hacking."

68. Further, while on administrative leave without pay, Respondent showed up to PSLHS in January 2014 to oversee a wrestling tournament that he previously helped organize. It is illogical that Respondent would voluntarily return to the very

place which he now suggests made him so sick that he needed to continuously take days off without available leave or sick time.

69. No credible evidence was presented to suggest that Respondent's chronic absenteeism was as a result of the District's failure "to provide a suitable working environment," as alleged by Respondent.[1/]

B. Use of Administrative Leave Rather Than Discipline

70. The Board asserts that Respondent's chronic pattern of absences during the 2012-2013 school year and the first few months of the 2013-2014 school year resulted in "just cause" for termination. However, in lieu of termination, Ranew proposed, and the Board accepted, her recommendation for administrative leave without pay. Ranew credibly testified that she believed this would give Respondent the opportunity to take care of any problems that were causing his absenteeism and allow him to successfully return to the classroom in the 2014-2015 school year.

71. There is no provision under any statute, rule, or policy specifically providing the Board with the authority to place an employee on administrative leave without pay instead of a suspension without pay or termination.[2/]

72. Because of this, Respondent argues that he was deprived of due process by the Board and that the Board's action constitutes the improper use of an unpromulgated rule.

73. A "rule" is defined in the Administrative Procedure Act (APA) as an:

> agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of rule.

§ 120.52(16), Fla. Stat.

74. No evidence was presented regarding any alleged Board "statement of general applicability" regarding the use of administrative leave without pay as a substitute for disciplinary action.

75. Further, it is clear from the record that Respondent received all the process to which he was entitled--notice and an opportunity to be heard prior to the implementation of the leave without pay. Respondent was provided a letter by hand delivery on October 24, 2013, from Yost in which he was advised that he was being placed on temporary duty assignment until the next Board meeting and that she intended to recommend he be placed on administrative leave without pay through the remainder of the school year due to his excessive absenteeism. He was notified that he had exhausted all paid leave yet continued to be absent.

76. It was also noted that Respondent's physician indicated he could perform as a teacher but may have a hearing loss when

middle ear fluid is present. Notably, his physician's letter accounted for four of his absences in August and two of his absences in September 2013, but did not address the other eight absences which he incurred during September and October 2013. This letter advised Respondent that if he had any information to provide regarding why this action should not be taken, he could do so in a meeting or in writing.

77. Accordingly, Respondent had notice and an opportunity to be heard prior to the implementation of the leave without pay. Additionally, the Statement of Charges issued on December 19, 2013, and the formal administrative hearing before DOAH constituted notice and an evidentiary hearing--the post adverse employment action due process to which Respondent was entitled.

78. The undersigned has no doubt about the sincerity of the Board's desire to see Respondent take time to address whatever was resulting in his absences and return to work successfully. However, to call Respondent's "administrative leave without pay" a non-disciplinary action is an exercise in form over substance. While on leave, Respondent was not receiving his normal wages for teaching. He was not allowed to return to the school to teach for the balance of the school year.[3/]

79. Understandably, Respondent does not perceive his leave as beneficent. For all intents and purposes it is, in fact, a "suspension" without pay which, pursuant to the Board's policies,

applicable rules, and statutes, can only be imposed for "just cause."[4/]

Determinations of Ultimate Fact

80. The greater weight of the evidence establishes that Respondent engaged in a pattern of excessive and chronic unexcused absenteeism during the 2012-2013 and 2013-2014 school years, despite the District's repeated reminders regarding the disruption caused by Respondent's absences and its multiple attempts to accommodate any medical condition that might have been causing the absences.[5/] This pattern resulted in a variety of terminable offenses as described in Board Policy 6.301(3)(b).

81. It is determined, as a matter of ultimate fact, that Respondent is guilty of incompetency, as defined by rule 6A-5.056(3)(a)5. by virtue of his excessive absenteeism--a pattern which was not resolved after FMLA leave, 21 additional days of leave without pay during the 2012-2013 school year, and which continued into the new school year of 2013-2014.

82. It is determined, as a matter of ultimate fact, that Respondent is guilty of gross insubordination by virtue of his failure to perform his required duties, excessive absenteeism despite having no paid leave available, and failing to return to work on a consistent and regular basis after repeated and extensive counseling by the District regarding the consequences of his actions.

83. It is determined, as a matter of ultimate fact, that Respondent engaged in willful neglect of duty by failing to regularly report to work or to properly request time off from work or make arrangements to have lesson plans available for substitute teachers.

84. It is determined, as a matter of ultimate fact, that Respondent engaged in misconduct in office by virtue of his violation of School Board policies and disrupting his students' learning environment by his chronic absenteeism.

CONCLUSIONS OF LAW

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

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

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

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

89. The findings of ultimate fact in this case obviate the need for legal analysis. It is axiomatic that an essential function of the job of classroom teacher is regular attendance. In this case, the District did everything it could to assist Respondent with his apparent ongoing and erratic need for time off and to work towards returning him successfully to the classroom. It is surprising that Respondent's employment was not terminated at the end of the 2012-2013 school year. It is asinine to expect the District to prevent Respondent's exposure to allergens that he is constantly surrounded by outside of the school environment, and to which he intentionally exposes himself.

90. Sections 1012.33(1)(a) and (6) provide in pertinent part that instructional staff may be terminated during the term of their employment contract only for "just cause." § 1012.33(1)(a) & (6), Fla. Stat.

91. "Just cause" is defined in section 1012.33(1)(a) to include "incompetency," "gross insubordination," "willful neglect of duty," and "misconduct in office."

92. By demonstrating Respondent's pattern of excessive absenteeism and its consequences for Respondent's students and co-workers, Petitioner proved, by a preponderance of the evidence, that just cause existed to place Respondent on leave without pay from November 20, 2013, through the end of the 2013-2014 school year in lieu of termination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, St. Lucie County School Board, enter a final order upholding Respondent's suspension without pay from November 20, 2013, through the end of the 2013-2014 school year; denying back pay for the full period of his suspension; and reinstating Respondent's employment as a teacher at the start of the 2014-2015 school year.

DONE AND ENTERED this 12th day of June, 2014, in Tallahassee, Leon County, Florida.

MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2014.

ENDNOTES

[1/] Respondent introduced evidence of an indoor environmental inspection report prepared by Eco Advisors, LLC, based upon a November 2013 inspection of the boys' locker room, coaches' offices, and computer lab of PSLHS which was performed at the request of a coach. Respondent suggests that due to this report, the District was on notice of indoor air quality concerns and therefore should have somehow taken steps to "protect" him from possible allergens such as mold. This argument is without merit. Respondent testified that he did not work in the gym area during the 2013-2014 school year and did not work in the computer lab during his tenure at the school. Further, testing performed in November 2013 is not necessarily reflective of any conditions in the building to which Respondent may have been exposed during the 2012-2013 school year or the portion of the 2013-2014 school year until October 24, 2013. If anything, this report shows that the District was concerned about, and responsive to, specific concerns regarding the environmental conditions of the school.

[2/] The Board's witnesses also testified that they were unaware of anything in the collective-bargaining agreement (CBA) that authorizes the use of an administrative leave without pay in lieu of termination. However, the CBA, which was admitted in evidence, contains a broad "management rights" provision which

provides, "All management rights and management functions not expressly delegated in this agreement are reserved to the Board." It is unreasonable to conclude that the Board has the ultimate authority to terminate the teacher's contract for excessive absenteeism but nevertheless lacks the authority to employ an intermediate, and remedial, level of discipline (such as administrative leave without pay which is tantamount to a suspension) in order to protect the career of a long-tenured teacher. The undersigned interprets the management rights provision to include the implied authority to take lesser disciplinary action in lieu of termination.

[3/] Although there was conflicting testimony regarding whether Respondent continued to receive health insurance benefits from the Board during his leave, it was clear that the Board intended that he would not be eligible for benefits while on leave.

[4/] While the Americans with Disabilities Act (ADA) provides as a possible "reasonable accommodation" an extended leave without pay, Respondent's leave cannot be construed as such because he neither sought any accommodation nor did he provide the District with any medical documentation to demonstrate that he was a "qualified individual with a disability" within the meaning of the ADA.

[5/] This excludes the 60 days of FMLA leave that were granted for Respondent's surgery recovery in early 2013.

COPIES FURNISHED:

David Miklas, Esquire
Richeson and Coke, P.A.
Post Office Box 4048
Fort Pierce, Florida 34948

Nicholas Anthony Caggia, Esquire
Law Office of Thomas L. Johnson
510 Vonderburg Drive, Suite 309
Brandon, Florida 33511

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Genelle Zoratti Yost, Superintendent
St. Lucie County School Board
4204 Okeechobee Road
Fort Pierce, Florida 34947

Pam Stewart, Commissioner
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.