STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 14-2696TTS

ROBERT KONNOVITCH,

Respondent.
_____/

RECOMMENDED ORDER

On May 22, 2015, a hearing was held by video teleconference at locations in Lauderdale Lakes and Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Adrian J. Alvarez, Esquire
Haliczer, Pettis, and Schwamm, P.A.
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For Respondent: Valerie Kiffin Lewis, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent committed the actions set forth in the Amended Administrative Complaint dated July 31, 2014, and if so, whether these actions constitute just cause for suspension.

PRELIMINARY STATEMENT

On May 6, 2014, the School Board of Broward County (Petitioner) issued an Administrative Complaint against Robert Konnovich (Respondent), a teacher at Riverglades Elementary School (Riverglades), alleging violations of Florida Administrative Code Rules 6A-5.056; 6A-10.080(2) and (3); and 6A-10.081(3)(a), (e), and (g), and notifying Respondent that the Superintendent of Schools would be recommending that he be suspended for a period of ten days without pay. Respondent filed a request for formal hearing on or about May 30, 2014, disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On June 10, 2014, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for hearing on August 11, 2014. Respondent Robert Konnovitch's Motion for a More Definite Statement was filed on June 30, 2014, and was granted. On July 31, 2014, Petitioner's Amended Administrative Complaint was filed. After four continuances, the case was heard and completed on May 22, 2015. At hearing, Respondent testified on his own behalf and offered Exhibits 1 through 3 and 5 through 9, which were admitted, with the stipulation that it is unclear who wrote the handwritten notes on Exhibit 9. Petitioner offered

Exhibits A through K, Q1, Q2, and R, which were admitted into evidence, with the stipulation that Exhibit J was incorrectly dated 2012 when it should have been dated 2014. Petitioner presented the testimony of C.B., S.W., J.G., J.B., K.B., and S.B., all of whom were Respondent's former students at Riverglades, as well as that of Ms. JoAnne Seltzer, the principal of Riverglades during the alleged instances of misconduct.

Petitioner had expected to call another student witness, E.C., but concluded it was unnecessary. Respondent, relying upon earlier assurances from Petitioner that E.C. would be called as part of Petitioner's case, as indicated on Respondent's witness list, had not subpoenaed E.C. Upon learning that E.C. would not be appearing, Respondent requested that the hearing not be concluded, but continued on a later date for the sole purpose of hearing E.C.'s live testimony. This request was granted, with continuation of the hearing set for June 5, 2015. However, on June 1, 2015, Respondent moved to admit E.C.'s deposition into evidence. Petitioner made no objection to the motion. The Motion was granted, and the additional hearing date was canceled. The deposition of E.C. was admitted as Respondent's Exhibit 10.

The two-volume Transcript of the proceeding was filed with the Division of Administrative Hearings on July 8, 2015. A

Joint Motion for Extension of Time to Submit Proposed Recommended Orders was filed on July 9, 2015. This Motion was granted, and the deadline was extended to July 30, 2015. Both Petitioner and Respondent timely filed proposed recommended orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board of Broward County (School Board) is responsible for investigating and prosecuting allegations of misconduct against individuals it employs.

2. Respondent is employed by the School Board. As a member of the School Board's instructional staff, Respondent's employment is subject to section 1012.33, Florida Statutes (2014),[1/] which provides that his employment will not be suspended or terminated except for "just cause."

3. Respondent is required to abide by all Florida Statutes which pertain to teachers, the Code of Ethics and the Principles of Conduct of the Education Profession in Florida, and the Policies and Procedures of the School Board of Broward County, Florida.

The Incidents

4. At all times relevant to the allegations, Respondent was employed as a physical education (PE) teacher at Riverglades.

5. On January 10, 2014, Respondent was attempting to move his students inside after their time on the playground. One student, S.W., was talking loudly and frustrating Respondent's efforts. In response to this, Respondent pulled down on S.W.'s arm or wrist and screamed "Be quiet!" in her ear.

6. S.W. was not physically harmed by this incident and did not cry. However, when asked about how the incident made her feel, she testified "not good."

7. Respondent's approach was unnecessary, particularly considering that Respondent is over six feet tall and S.W. was a ten-year-old child at the time. Respondent could certainly project authority and correct a student's inappropriate behavior without the need to resort to physical contact and screaming.

8. After speaking with her teacher, S.W. filed a Bullying Witness Statement Form. Another student, C.B., witnessed the incident and similarly filed a report.

9. On January 15, 2014, Ms. JoAnne Seltzer, intern principal at Riverglades, held an informal conference with Respondent regarding the incident involving S.W.

10. In the conference summary report issued on January 21, 2014, Principal Seltzer notified Respondent of her expectation that Respondent would refrain from touching, embarrassing, screaming at, or demeaning students in the future. This constituted a direct order to Respondent.

11. On February 12, 2014, J.G., a fifth grade student at the time, filed an incident report after Respondent called J.G. by the name "Miguel" on multiple occasions. J.G. is of Hispanic origin, and J.G. believed that Respondent called him "Miguel" in a derogatory manner on the basis of his ethnicity. When J.G. attempted to correct Respondent by telling him his real name, Respondent retorted "same thing."

12. Respondent contended that he called J.G. "Miguel" because he was confusing J.G. with a second-grader who looked similar to J.G. and whose name was in fact Miguel. This testimony is rejected as not credible. Respondent called J.G. "Miguel" on a great many occasions, and was always corrected by J.G. These instances were not mistakes. They occurred in the middle of the school year, by which time Respondent should have known J.G.'s actual name. It is also uncontroverted that Respondent had a class roster, which should have eliminated any confusion. The purported look-a-like did not testify, nor was there any other corroboration of Respondent's claim.

13. These incidents occurred in the presence of the entire class, embarrassing J.G. and making him "mad."

14. On February 25, 2014, Principal Seltzer provided Respondent with a letter directing him to report to her office on February 28, 2014, for a pre-disciplinary meeting regarding his inappropriate conduct.

15. Before Principal Seltzer had an opportunity to hold the meeting with Respondent, on February 27, 2014, C.B., then an 11-year-old student, filed an incident report claiming that Respondent, the day prior, had told C.B. that he was a "loser." At hearing, C.B. also testified that Respondent called him fat.

16. Student witnesses, as well as Respondent, credibly testified that the "loser" comment was in reference to C.B. losing a game during class. Given that context, it was not shown that the term was used in a derogatory fashion.

17. As for the "fat" comment, Respondent admitted that the other students would joke with C.B. about C.B.'s weight and that Respondent would "laugh with the kids" but maintained he never personally called C.B. any derogatory names. However, two other students, S.W. and J.G., corroborated C.B.'s claim that Respondent called C.B. fat, and this testimony is credited.

18. This incident embarrassed C.B. and made him feel "bad." Respondent's behavior was inappropriate.

19. After these new allegations came to light, on February 27, 2014, Principal Seltzer provided Respondent with a second letter informing him of the additional incidents that had been brought to her attention and requesting that he report to her office on March 4, 2014, for his second three-day pre-disciplinary meeting.

20. After the pre-disciplinary meeting, on March 10, 2014, Principal Seltzer recommended that Respondent be suspended for five days. Respondent acknowledged receipt of the recommendation on March 14, 2014.

21. Subsequent to the notice of recommendation, but before its presentation to the School Board, the parents of students S.B., J.B., and K.B., requested a meeting with Principal Seltzer regarding Respondent's inappropriate behavior in the presence of their children.

22. S.B., a nine-year-old student, credibly testified that on one occasion Respondent, while looking directly at her, said the words "fucking bitch." The evidence was unclear as to whether Respondent directed those words to S.B. or was speaking to someone else on the phone. Respondent contended that he does not use profanity during class.

23. J.B., a nine-year-old student, and K.B., a seven-year-old student, both testified that they heard Respondent use the words "God dammit" and use profanity on multiple occasions during class. Respondent admitted that he used the words "God dang" during class, but denied that he ever said "dammit." The children's testimony is credited.

24. A conference was held on March 19, 2014. The student's mother, Principal Seltzer, Mr. Duhart (the interim

assistant principal), and Respondent discussed the allegations brought by S.B., J.B., and K.B.

25. On April 14, 2014, Principal Seltzer held a pre-disciplinary meeting with Respondent to discuss the reports of misconduct that had surfaced after her previous recommendation for a five-day suspension.

26. On April 15, 2014, Principal Seltzer changed her recommendation to a ten-day suspension based upon the additional complaints. Respondent acknowledged receipt of this recommendation on April 23, 2014.

27. Principal Seltzer testified that her ultimate recommendation for a ten-day suspension was based on Respondent's prior disciplinary history, dating back to 2008, and the fact that his recent misconduct had continued despite repeated warnings.

28. The Amended Administrative Complaint also references reports from students that, on one occasion, Respondent attempted to kick a student in the head. Although J.G.'s, C.B.'s and E.C.'s testimony all mention this incident, the scant details elicited at hearing failed to explain how Respondent could attempt to kick a student in the head from a sitting position. Petitioner failed to prove by a preponderance of the evidence that Respondent tried to kick a student in the head.

29. At hearing, Respondent suggested that the students who filed complaints against him had colluded in an effort to get him fired, but this proposition is rejected.

30. Respondent's comments and laughing with students about C.B.'s weight and Respondent's unnecessarily physical and aggressive discipline of S.W. failed to protect these students from conditions harmful to their mental health. Respondent's actions toward C.B. and his repeated addressing of student J.G. as "Miguel" intentionally exposed these students to unnecessary embarrassment and disparagement, and the actions toward J.G. also constituted harassment on the basis of race and national or ethnic origin. Respondent violated the Principles of Professional Conduct for the Education Profession in Florida. Respondent engaged in misconduct in office.

31. Respondent used profanity and engaged in other inappropriate communications with students J.G., C.B., S.W., K.B., and S.B. on several occasions. Respondent demonstrated incompetency to discharge his required duties as a teacher as a result of this inefficiency.

32. Respondent intentionally refused to comply with Principal Seltzer's direct orders not to touch, embarrass, demean, or scream at students. These orders were reasonable in nature. Respondent engaged in gross insubordination.

Prior Disciplinary Action

33. On February 13, 2008, the executive director of the School Board's Professional Standards and Special Investigative Unit gave Respondent a written reprimand based upon allegations of assault and battery. The letter stated that there was sufficient basis to establish probable cause and recommend discipline. The letter constituted a disciplinary action taken against Respondent in his position as an educator.

34. On January 14, 2011, the intern principal of Coral Glades High School, Respondent's employer at the time, held a pre-disciplinary meeting with Respondent based on allegations that he intentionally exposed students to unnecessary embarrassment or disparagement. By letter dated January 21, 2011, Respondent was issued a written reprimand for this misconduct.

35. On January 26, 2012, the intern principal of Coral Glades High School, Respondent's employer at the time, gave Respondent a written reprimand after finding that Respondent had used profanity in the presence of students during a heated argument with a colleague.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings (DOAH) has jurisdiction over the subject matter and parties in this case, pursuant to sections 120.569, 120.57(1), and 1012.33. Pursuant

to section 120.65(11), Petitioner has contracted with DOAH to conduct these hearings.

37. Petitioner is a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within the school district of Broward County, Florida, under section 1001.32, Florida Statutes.

38. Petitioner has the authority to discipline employees pursuant to sections 1012.22(1)(f) and 1012.33(6)(a).

39. Respondent's substantial interests are affected by any suspension of his employment, and he has standing to contest Petitioner's action. McIntyre v. Seminole Cnty. Sch. Bd., 779 So. 2d 639, 641 (Fla. 5th DCA 2001).

40. Petitioner has the burden of proving the charges set forth in its Amended Administrative Complaint by a preponderance of the evidence, rather than the stricter standard of clear and convincing evidence applicable in cases where the penalty is loss of licensure or certification. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996). The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

41. 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 15 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

42. Respondent's employment is subject to the provisions found in section 1012.33. Under this section a member of the instructional staff may only be suspended for just cause. Just cause includes, but is not limited to, "misconduct in office, incompetency . . . [and] gross insubordination" as these terms are defined by rule of the State Board of Education. §§ 1012.33(1)(a), (4)(c), and (6), Fla. Stat.

43. Section 1001.02(1) grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

Count I (Misconduct in Office)

44. The State Board of Education has adopted Florida Administrative Code Rule 6A-5.056(2), which in relevant part defines "misconduct in office" as:

> (2) "Misconduct in Office" means one or more of the following:
>
> (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;
>
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.; . . . .

Petitioner has specifically alleged that Respondent violated rule paragraphs (a) and (b) through his violation of rules 6A-10.080(2) and 6A-10.081(3)(a), (e), and (g).

45. Rule 6A-10.080(2), a portion of the Code of Ethics, reads:

> (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.

46. While rule 6A-5.056(2)(a) provides that a violation of the Code of Ethics is "misconduct," it has been frequently noted that the Code's precepts are "so general and so obviously aspirational as to be of little practical use in defining normative behavior." Miami-Dade Cnty. Sch. Bd. v. Brenes, Case No. 06-1758 (Fla. DOAH Feb. 27, 2007; Miami-Dade Cnty. Sch. Bd. Apr. 25, 2007). In any event, there was insufficient evidence of Respondent's concerns or intentions to find a violation of these ideals.

47. Rule 6A-10.081(3)(a), (e), and (g) requires that the educator:

> (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.
>
> ***

> (e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.
>
> ***
>
> (g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

48. Respondent's interactions with students C.B. and S.W. were violations of rule 6A-10.081(3)(a). Respondent shamed C.B. in the presence of his classmates and used unnecessary, physical, and aggressive discipline with S.W. It is axiomatic that a teacher has breached his duty to protect a student from conditions harmful to the student's mental health when the actions causing the harm are those of the "protecting" teacher.

49. Respondent's interaction with C.B. also constituted a violation of rule 6A-10.081(3)(e). It is clear that calling a child "fat" in the presence of his peers exposes that child to unnecessary embarrassment.

50. Respondent's interactions with student J.G. violated rule 6A-10.081(3)(e) and (g). Respondent's failure to call J.G. by his given name, and his choice to instead use what Respondent appears to deem a racially-generic name, was intentional. These incidents exposed J.G. to unnecessary embarrassment and

constituted harassment on the basis of race and national or ethnic origin.

51. Petitioner proved by a preponderance of the evidence that Respondent violated rule 6A-5.056(2) and is guilty of misconduct in office.

Count II – Incompetency

52. Rule 6A-5.056(3) defines incompetency as:

> (3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.
>
> (a) "Inefficiency" means one or more of the following:
>
> 1. Failure to perform duties prescribed by law;
>
> 2. Failure to communicate appropriately with and relate to students;
>
> 3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;
>
> 4. Disorganization of his or her classroom to such an extent that the health, safety or welfare of the students is diminished; or
>
> 5. Excessive absences or tardiness.
>
> (b) "Incapacity" means one or more of the following:
>
> 1. Lack of emotional stability;
>
> 2. Lack of adequate physical ability;
>
> 3. Lack of general educational background; or

4. Lack of adequate command of his or her area of specialization.

53. The evidence in this case has not shown Respondent to lack the capacity necessary to be a competent educator. However, the interactions between Respondent and J.G., C.B., S.W., K.B., S.B., and J.B. have shown that Respondent has communicated inappropriately with students on numerous occasions, and these interactions have demonstrated inefficiency. Petitioner proved by a preponderance of the evidence that Respondent violated rule 6A-5.056(3) and lacks competency in his position as an educator.

Count III – Insubordination

54. An administrative complaint should "specify the rule the agency alleges has been violated," as well as the offending conduct. Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J., concurring). While the Amended Administrative Complaint alleged that Respondent had been "insubordinate," the actual violation defined in rule 6A-5.056(4) is "gross insubordination."

55. However, an administrative complaint is not fatally deficient so long as it contains sufficient specificity to provide a fair opportunity to prepare a defense. Davis v. Dep't of Prof'l Reg., 457 So. 2d 1074 (Fla. 1st DCA 1984). Petitioner's omission of the modifier "gross" when alleging

insubordination did not fail to notify Respondent of the charges against him. The conduct was alleged with specificity. "Gross insubordination" is the only related offense in the rules cited in the Amended Administrative Complaint. The notice was sufficient to alert Respondent to the actual charge and allow him to prepare his defense.

56. Rule 6A-5.056(4) defines gross insubordination as "the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties."

57. Principal Seltzer, as the principal of Riverglades, was an appropriate authority to give orders to Respondent.

58. The order given by Principal Seltzer included not touching, embarrassing, demeaning, or screaming at students, and was reasonable in nature.

59. Petitioner proved by a preponderance of the evidence that Respondent is guilty of gross insubordination as defined by rule 6A-5.056(4).

Penalty

60. There is just cause to suspend instructional personnel without pay if they have engaged in misconduct in office, incompetency, or gross insubordination. §§ 1012.33(4)(c) and 1012.33(6)(a), Fla. Stat.

61. The School Board's Employee Disciplinary Guidelines, found in rule 4.9, state that discipline shall be progressive in nature. Factors considered in determining the appropriate discipline include: the repetitious nature of the offense, the length of time between the offenses, the employee's employment history, and attempts by the employee to correct the misconduct.

62. Section 120.57(1)(k) provides that a recommended order shall include a "recommended disposition, or penalty, if applicable" based upon the entire record.

63. Based on Respondent's prior disciplinary history, the systematic increase of the recommended penalty, Respondent's continuing misconduct despite repeated warnings, and Respondent's failure to take corrective action, it is determined that Principal Seltzer's increase in recommendation from a five-day suspension to a ten-day suspension was sufficiently progressive in nature as to satisfy the requirements of rule 4.9. Accordingly, suspension without pay for a period of ten days is appropriate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order finding Mr. Robert Konnovich guilty of misconduct in office, incompetency, and insubordination; and

suspending his employment, without pay, for a period of ten days.

DONE AND ENTERED this 24th day of August, 2015, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of August, 2015.

ENDNOTE

[1/] References to statutes and rules throughout this Recommended Order are to versions in effect at the time of the conduct described in the allegations, except as otherwise indicated.

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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.