STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARASOTA COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 14-4279

HARVEY DOREY,

Respondent.
_____/

RECOMMENDED ORDER

On November 12, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Sarasota, Florida.

APPEARANCES

For Petitioner: Robert K. Robinson, Esquire
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For Respondent: Jordan L. Wallach, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Petitioner may terminate Respondent's employment as a school psychologist because he is willfully absent without leave from his job, pursuant to section 1012.67, Florida Statutes, or because he was grossly insubordinate in failing to self-report a criminal arrest, pursuant to

section 1012.33(1)(a), Florida Statutes, and Florida Administrative Code Rules 6A-5.056(4) and 6A-10.081(5)(m).

PRELIMINARY STATEMENT

By letter dated August 25, 2014, Petitioner's Superintendent advised Respondent that he had abandoned his job by failing to report for duty since he had been arrested five days earlier and was guilty of insubordination by not self-reporting the arrest within 48 hours. The letter states that the Superintendent was recommending that the School Board terminate Respondent's employment. By letter dated September 3, 2014, Respondent requested a formal hearing.

By letter dated October 14, 2014, the Superintendent supplemented her letter of August 25 by adding that the failure to self-report was "grossly insubordinate." The October 14 letter states that Respondent would remain suspended without pay until further notice.

At the hearing, Petitioner called three witnesses and offered into evidence 20 exhibits: Petitioner Exhibits 1 through 3 and 17 through 33. Respondent called two witnesses and offered into evidence two exhibits: Respondent Exhibits 1 and 2. All exhibits were admitted, but Petitioner Exhibits 18 and 21 through 23 were not admitted for the truth.

The court reporter filed the transcript on December 4, 2014. Petitioner filed a proposed recommended order on December 4, and Respondent filed a proposed recommended order on December 15.

FINDINGS OF FACT

1. Petitioner has employed Respondent as a school psychologist for at least ten years. Working under an 11-month contract for the 2014-15 school year, Respondent's first day of duty was in late July, about one month prior to the students' return to school.

2. It appears that Respondent duly reported for work at the appointed time and assumed his assigned duties. However, on August 20, 2014, Respondent was arrested by a sheriff's deputy for the felonies of lewd and lascivious behavior and lewd and lascivious conduct with a minor.

3. The arrest took place during the school day at North Port High School. To avoid disrupting the school's operation any more than was necessary, the principal, deputy, and school resource officer coordinated the arrest so that Respondent presented himself for arrest in the front of the school. Respondent did so, and the arrest took place without incident.

4. After taking Respondent into custody, the deputy transported Respondent to the Sarasota County jail, where he has remained continuously since August 20 through the date of the hearing in this case. Respondent has not waived his right to a speedy trial, and his trial is presently set for early February 2015.

5. The Sarasota Herald Tribune published a story of the arrest in its online edition by 2:00 p.m. on August 20. The

story states that Respondent had been arrested for molesting a girl on multiple occasions in 2013 while the child, who was 14 and 15 years old at the time of the alleged incidents, lived in a therapeutic foster home that Respondent and his then-wife had operated. The story notes that Respondent was charged with lewd or lascivious molestation and lewd or lascivious conduct and was being held on $100,000 bond. Another story appeared in the Sarasota Herald Tribune newspaper on the following day and essentially repeated the facts reported in the online story.

6. On the day of the arrest, the sheriff's office faxed to Petitioner a memorandum of an arrest of an employee of Petitioner. The memorandum identifies Respondent as the arrestee and the charges as violations of sections 800.04(5)(c)2., Florida Statutes, for a "sex offense against child fondling victim 12 YOA to 16 YOA offender 18 YOA or older" and 800.04(6)(a)1. for a "sex offense against child person over 18 yrs on child less than 16 yrs old."

7. Respondent has never self-reported the arrest. However, within 48 hours of the arrest, the principal of North Port High School and Respondent's immediate supervisor in the District office knew all of the information concerning the arrest that would have been included in the self-reporting form that Petitioner has disseminated for self-reporting arrests.

8. As indicated in the August 20 online newspaper article, bond was initially set at $100,000 for the two offenses, but was

later doubled. The record permits no finding as to why Respondent has not posted bond himself or through the services of a limited surety; in particular, the record provides no basis for finding that Respondent has the financial capacity to pay the bond or, if using the services of a limited surety, pay the bond premium and post any security required by a surety.

9. Based on the foregoing, the sole factual grounds supporting Petitioner's abandonment claim are his arrest and ensuing pretrial incarceration.

CONCLUSIONS OF LAW

10. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1012.33(6)(a)2., Fla. Stat.

11. Section 1012.67 provides: "Any district school board employee who is willfully absent from duty without leave shall forfeit compensation for the time of such absence, and his or her employment shall be subject to termination by the district school board."

12. Section 1012.33(1) requires that all professional service contracts with instructional staff[1/]

> shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, . . . gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

13. Petitioner bears the burden of proving the material allegations by a preponderance of the evidence. Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

14. In general, a school board may terminate a professional service contract of an instructional employee by proving that the employee is "willfully absent without leave" under section 1012.67, just cause under section 1012.33,[2/] or a failure to correct performance deficiencies under section 1012.34(4). The first two of these grounds for termination are at issue in this case.

15. The basis for terminating an employee willfully absent without leave does not fall within the just-cause provisions of section 1012.33, so a termination under section 1012.67 does not require a showing of just cause. To prove willful absence, Petitioner must prove, first, an absence. Pursuant to the collective bargaining agreement, Petitioner may terminate the contract of an instructional employee who has been willfully absent without leave for three consecutive workdays.[3/] Petitioner took action to terminate Respondent on the fourth workday following his incarceration. Second, Petitioner must prove that the absence is without leave. Respondent has not obtained approved leave of any sort for this absence.

16. Lastly, Petitioner must prove that the absence is willful. This case presents the narrow question of whether an

arrest and pretrial incarceration for several months supply the requisite willfulness for a finding of willful absence without leave.

17. Petitioner argues for willful absence because the arrest and incarceration, without more, obviously prevent Respondent from performing his duties. In response to Respondent's arguments against a constructive abandonment on the basis of the insubstantiality of the grounds required for an arrest, Petitioner counters that Respondent's arrest was not arbitrary, but that Respondent "did something" to warrant his arrest.

18. The Administrative Law Judge presumes that Respondent's arrest and ongoing detention are lawful in all regards,[4/] but the only determination thus far is "reasonable suspicion"[5/] that Respondent committed the two offenses with which he has been charged. This "something" is too insubstantial a basis for a finding of willful absence from the job. The determination of "reasonable suspicion" underlying the issuance of the arrest warrant does not resemble a determination of just cause for termination under section 1012.33(1)(a). Termination for just cause under section 1012.33(1)(a) requires prior notice to Respondent, full discovery, and an evidentiary hearing with the usual rules of evidence before a disinterested adjudicator, all as provided by chapter 120, Florida Statutes. To find a willful absence on these facts is to circumvent the provisions of section

1012.33 by confusing a constructive abandonment with an actual abandonment. Compare Jenkins v. Dep't of HRS, 618 So. 2d 749 (Fla. 1st DCA 1993) (en banc):

> [w]hile a true abandonment of a state job is tantamount to a voluntary resignation, a constructive abandonment that is "neither intended nor reasonably to be expected by the employee, has the indicia of a termination for cause which would invoke PERC's exclusive jurisdiction over dismissals."

Id. at 753 (citing Tomlinson v. Dep't of HRS, 558 So. 2d 62, 65 (Fla. 2d DCA 1990)).

19. More directly, in Hawkins v. State, 138 So. 3d 1196 (Fla. 2d DCA 2014), a defendant had entered a plea agreement that required him to pay restitution. The court furloughed the defendant to allow him to earn the money required for restitution and ordered him to reappear in court with the restitution money for sentencing. While on furlough, the defendant was arrested in another jurisdiction on new charges and incarcerated prior to trial, so he missed his court date for restitution and sentencing. Although the new charges were later nolle prossed, the trial court that had furloughed him found that the defendant had committed a "voluntary volitional act" by getting arrested and thus had "willfully" failed to appear as required by court order.

20. The appellate court reversed, stating that:

> an "'[a]rrest' is an action by a police officer based on that officer's evaluation of probable cause, not a willful action of the

> defendant." Neeld v. State, 977 So. 2d 740, 744 n.6 (Fla. 2d DCA 2008); see also Schwingdorf v. State, 16 So. 3d 835, 836 (Fla. 2d DCA 2009) (quoting Neeld for the foregoing proposition). Thus a defendant's "arrest, standing alone, is insufficient to establish [his] willful violation of" a furlough agreement conditioned on his appearance at sentencing when the arrest prevents the defendant from attending. Schwingdorf, 16 So. 3d at 836.

138 So. 3d at 1200.

21. In Parker v. Department of Labor and Employment Security, 440 So. 2d 438 (Fla. 1st DCA 1983), the court reversed a final order of the Unemployment Appeals Commission, holding that a 26-day pretrial incarceration, which ended when the state dropped the charges, did not mean that the incarcerated employee had voluntarily left his employment, so as to relieve the employer of the burden of paying unemployment compensation benefits. In dictum, the court cautioned, "[t]here will undoubtedly be circumstances where an employee's pre-trial incarceration may reach the point where he ought to be considered as having abandoned his employment," but provided no guidance as to what these circumstances might be, other than evidently the duration of pretrial incarceration. Id. at 439.

22. In the face of this case law, Petitioner relies on four administrative final orders[6/] to support its argument that a pretrial arrest and incarceration constitutes a willful absence. In Stokes v. Choice, 1990 Fla. Div. Adm. Hearing LEXIS 6881 (1990), the school board determined that an instructional

employee was willfully absent without leave[7/] while in pretrial incarceration following his arrest for passing two worthless checks. At the time of the hearing, the employee had been incarcerated for 19 days, of which 12 days were work days; however, the employee obtained approved leave for six days, so he had missed six days without leave.

23. In School Board of Miami-Dade County, Florida v. Patricia A. Holmes, Case No. 02-2820 (Fla. DOAH Dec. 10, 2003),[8/] the school board determined that a noninstructional employee was guilty of "excessive absenteeism" evidently, willful absence without leave--after she had been incarcerated for seven months following a determination that she had violated a condition of probation for domestic violence. Exacerbating an already precarious situation, upon release from jail, the employee refused to report for work for an additional month so as not to jeopardize her claim for unemployment compensation benefits.

24. In Lee County School Board v. Joseph Simmons, Case No. 03-1498 (Fla. DOAH Jul. 15, 2003),[9/] a noninstructional employee was arrested for aggravated battery, false imprisonment, and multiple counts of aggravated assault with a deadly weapon. He remained incarcerated from January 29 through March 5, 2003. At this time, the employee was released pending trial on false imprisonment and one count of aggravated assault with a deadly weapon, the remaining charges having been dropped. On March 6, the school district conducted a predetermination conference where

the employee gave his version of the events that led to his arrest. The collective bargaining agreement provided for termination for "any absence" from duty without leave, but the final order also cites section 1012.67, which requires a "willful absence" without leave, and the final order draws no distinction between these two provisions. Ultimately, citing Holmes and Choice, supra, the final order determined that the arrest and pretrial incarceration satisfied the requirement of "willful absence" under section 1012.67 because, citing Choice, the employee "'willed the series of acts which set in motion the chain of events which eventually resulted in his incarceration.'"

25. In Broward County School Board v. Lindstrand, Case No. 13-1489 (Fla. DOAH Oct. 17, 2013; Fla. Sch. Bd. of Broward Cnty. Feb. 14, 2014),[10/] an instructional employee was arrested for driving under the influence. The trial was set for February 27 and 28, 2013, and the employee requested and obtained leave for February 26 through March 1. At the conclusion of the trial, the employee was sentenced to six weeks' incarceration, starting immediately. After three days' absence without leave, pursuant to school board policy, Petitioner advised Respondent that she would be terminated for willful absence without leave under section 1012.67. Citing Simmons, Holmes, and Choice, the final order terminated Respondent on the ground of willful absence without leave and without consideration of various just-cause allegations.

26. Holmes and Lindstrand are distinguishable as involving post-conviction incarcerations. Holmes is also distinguishable on the ground that the employee refused to report back to work for one month after her release from custody in an effort to preserve a claim for unemployment compensation.

27. Choice and Simmons involve pretrial incarcerations and are not distinguishable from the present case. However, these administrative final orders contain no discussion of any case law and are of little, if any, precedential value, especially in light of the subsequent case law identified above.

28. Rule 6A-10.081(5)(m) requires that an employee self-report, within 48 hours, any arrest involving the abuse of a child. Clearly, this rule applies to the present arrest for lewd and lascivious behavior and lewd and lascivious conduct with a minor. Equally clearly, Respondent has never self-reported his arrest.

29. Petitioner has alleged that Respondent's failure to self-report his arrest constitutes "gross insubordination" under section 1012.33(1)(a). Under rule 6A-5.056(4), "gross insubordination" is:

> 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.[11/]

30. "Misfeasance" and "malfeasance" are not involved in the present case because these words require affirmative actions;

nonfeasance describes a failure to disclose or, more broadly, an omission.[12/] Thus, the sole issue under "gross insubordination" is whether Respondent's failure to file the self-reporting form constituted an "intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority." However, the self-reporting rule is not a "direct order" given to Respondent personally; it is a rule applicable to all covered employees. See Rutan v. Pasco Cnty. Sch. Bd., 435 So. 2d 399, 400-01 (Fla. 2d DCA 1983), in which the court noted that there was no evidence that the teacher "ever refused to obey any orders from anyone. In fact, he apparently never received any orders regarding his conduct prior to his suspension."

31. As noted above,[13/] Petitioner could have pleaded the violation of the self-reporting rule as "just cause" for termination without regard to "gross insubordination." However, the adverse employment action must obviously be based on a reason that is "just." In this case, Petitioner's appropriate managerial employees possessed, from within a few hours after the arrest, all of the information that would have been contained on Petitioner's self-reporting form. Adverse employment action for such a failure to comply with the self-reporting rule would not be just.

RECOMMENDATION

It is

RECOMMENDED that the Sarasota County School Board enter a final order dismissing the termination claims based on willful absence without leave and just cause in the form of gross insubordination for failure to self-report an arrest within 48 hours.

DONE AND ENTERED this 23rd day of December, 2014, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2014.

ENDNOTES

[1/] "Instructional staff" includes school psychologists. § 1012.01(2)(b), Fla. Stat.

[2/] "Just cause" is a broad concept that has not been exhaustively defined by statute. See Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2d DCA 1994) (per curiam) (Blue, J., concurring). An examination of the grounds for the dismissal of an instructional employee holding a continuing contract and an instructional employee holding a professional service contract confirms the distinction drawn by Judge Blue. Under section 1012.33(4)(c), an instructional employee holding a continuing contract may be

dismissed during the term of his or her contract; "however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude." By contrast to this exhaustive listing of grounds for termination, under section 1012.33(1)(a) and (6)(a), an instructional employee holding a professional service contract may be dismissed during the term of his or her contract for "just cause," which:

> includes, but is not limited to, immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s. 1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

[3/] In this case, Respondent reported for duty on August 20, a Wednesday, but was taken into custody during the morning of this workday. After Respondent failed to report for duty for the succeeding three workdays--August 21, 22, and 25--Petitioner declared an abandonment on August 25, presumably after determining that Respondent had not reported for work earlier on that day.

[4/] Circuit court is the forum for determining whether probable cause exists for an arrest. The administrative forum lacks the authority to conduct a parallel probable-cause proceeding, under the guise of section 1012.67, with the attendant risk of a contrary result. Instead, the administrative forum must accept the probable-cause determination of the circuit court in the underlying criminal case.

[5/] The Florida Supreme Court has stated:

> In the past, we have defined "probable cause" as a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that

> the person is guilty of the offense charged. Dunnavant v. State, 46 So. 2d 871 (Fla. 1950). The reasons cited by the police must be sufficient to create a reasonable belief that a crime has been committed. Florida East Coast Ry. Co. v. Groves, 55 Fla. 436, 46 So. 294 (1908). As long as the neutral magistrate has a substantial basis for concluding that a search would uncover evidence of wrongdoing, the requirement of probable cause is satisfied. Polk v. Williams, 565 So. 2d 1387 (Fla. 5th DCA 1990). In the same vein, the United States Supreme Court has noted:
>
> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed.
>
> Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983) (emphasis added) (quotation marks omitted).

Schmitt v. State, 590 So. 2d 404, 409 (Fla. 1991).

[6/] At hearing, Petitioner relied on recommended orders, which are not listed in section 90.202, Florida Statutes, as materials of which the Administrative Law Judge may take official notice. Dykes v. Quincy Tel. Co., 539 So. 2d 503 (Fla. 1st DCA 1989). The Administrative Law Judge has addressed the corresponding final orders, which are listed under section 90.202(5). See Fla. Admin. Code R. 28-106.213(6).

[7/] The statute in this case was section 235.44, which was renumbered as section 1012.67.

[8/] Lexis contains no mention of this case, but the final and recommended orders are on the DOAH official website.

[9/] See preceding endnote.

[10/] This citation is to the recommended order. The final order, which was issued on February 14, 2014, is on the official DOAH website and makes no material changes to the recommended order.

[11/] A prior version of this rule, in effect through July 7, 2012, defined "gross insubordination" as: "a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority."

[12/] See, e.g., Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985) (dictum). As the Florida Supreme Court stated in Hardie v. Coleman, 115 Fla. 119, 125-126, 155 So. 129, 132 (Fla. 1934):

> . . . the Governor may suspend any officer not liable to impeachment, for malfeasance, misfeasance, neglect of duty in office, commission of any felony, drunkenness or incompetency, and for no other causes.
>
> Malfeasance has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful, which he has no right to perform or which he has contracted not to do. "Words and Phrases, Webster's New International Dictionary."
>
> Misfeasance is sometimes loosely applied in the sense of malfeasance. Appropriately used, misfeasance has reference to the performance by an officer in his official capacity, of a legal act in an improper or illegal manner, while malfeasance is the doing of an official act in an unlawful manner. Misfeasance is literally a misdeed or a trespass, while nonfeasance has reference to the neglect or refusal without sufficient excuse to do that which was an officer's legal duty to do.
>
> Neglect of duty has reference to the neglect or failure on the part of a public officer to do and perform some duty [126] or duties laid on him as such by virtue of his office or which is required of him by law. It is not material whether the neglect be willful, through malice, ignorance or oversight, when such neglect is grave and the frequency of it

is such as to endanger or threaten the public welfare, it is gross. Attorney General v. Jochiam, 99 Mich. 358, 58 N.W. 611, 23 L.R.A. 699.

[13/] See endnote 2, supra.

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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.