

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-4303TTS

NICOLE POLLINO,

Respondent.

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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 Lauderdale Lakes, Florida, on February 19, 2015.

APPEARANCES

For Petitioner: Adrian J. Alvarez, Esquire
Haliczer, Pettis, and Schwamm, P.A.
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For Respondent: Melissa C. Mihok, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner has just cause to suspend Respondent, a classroom teacher, for five days without pay based upon her failure to follow the officially assigned Florida Comprehensive

Assessment Test (FCAT) testing schedule, as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

At its regularly scheduled meeting on June 24, 2014, Broward County School Board (Petitioner or School Board) voted to suspend the employment of Nicole Pollino (Respondent) for five days without pay. On August 20, 2014, Respondent requested a formal administrative hearing to contest Petitioner's action. On September 15, 2014, Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the hearing.

The matter was originally set for hearing for December 2, 2014. The matter was rescheduled twice based upon the parties' joint motions for continuance. On February 10, 2015, the parties filed a 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 February 19, 2015, Petitioner called the following witnesses: Cheryl Cendon, Principal of Millennium Middle School (MMS); Berta Hernandez-Berkowitz, Guidance employee at MMS; Sandy Leung, teacher at MMS; and Sophia Shaw, teacher at MMS. Petitioner's Exhibits 1 through 3, 5 through 8, 10, 12 and 13 were admitted in evidence. Respondent testified on her own behalf and Kim Baker and Helen

Vargas, both teachers at MMS, also testified on Respondent's behalf. Respondent's Exhibits 1 and 2 were admitted in evidence.

The two-volume final hearing Transcript was filed on March 27, 2015.^{1/} 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 administrative rules refer to the versions in effect at the time of the events giving rise to the charges identified in the Administrative Complaint.

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 Broward 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 seventh grade teacher at MMS, a public school in Broward County, Florida. Respondent has been employed by the School Board for approximately ten years pursuant to a professional service contract and subject to Florida Statutes, the regulations issued by the Florida State Board of Education, the policies and procedures of the School Board, and the collective bargaining agreement between the Broward Teacher's Union (BTU) and the

School Board. Prior to teaching at MMS, Respondent taught school in Dade County for approximately 15 years.

3. The FCAT is a test which was given annually since 1998 through the 2013-2014 school year to all Florida public school students in grades three through 11. The test measures student achievement in reading, writing, mathematics, and science based on the state's grade-level standards.^{2/} Respondent proctored FCAT exams since the test's inception.

4. State, district, and school level training is provided annually to teachers, including Respondent, so they may comply with FCAT requirements and avoid potential ramifications to the school or the students for violation of those requirements.

5. Ramifications for failing to comply with FCAT requirements include sanctions against the teacher and/or the school, and possible termination or invalidation of a school's letter grade.

6. Teachers are specifically educated on the process of obtaining certification numbers and signing a receipt for certain materials designated to them for FCAT testing purposes. Furthermore, the teachers are provided a three-digit code which is provided to the students so that the State knows which teachers proctored which exams. The requirements and safeguards relating to properly proctoring and administering the FCAT testing are important to the integrity of such tests.

2013 FCAT

7. The FCAT for the 2012-2013 school year was administered at MMS in April 2013. Respondent was the testing proctor during the mathematics FCAT on April 15, 2013.

8. Respondent provided the students a testing reference sheet for the End of Course exam for an algebra class rather than the FCAT reference sheet. According to Respondent, this was the sheet that was distributed to her to provide to the students from the Guidance Department. This error was brought to Respondent's attention by students during the first session of the exam. Believing that she was not permitted to discuss the contents of the exam with the students, Respondent instructed the students to do the best they could with what they had.

9. It is alleged that Respondent failed to follow appropriate testing procedures by not timely contacting administration or addressing the problem when the students brought it to her attention during session 1 of the FCAT Math test. Respondent's failure to address the situation, immediately, or during a scheduled break in the testing, led to the use of the wrong reference sheet for the second session as well as the first. Ultimately, the FCAT was invalidated for Respondent's students and the school district had to purchase an alternative exam for the students who were not provided the proper FCAT reference sheet.

10. Respondent received a one-day suspension without pay, based on her failure to follow proper FCAT testing protocols, which Respondent did not contest.

2014 FCAT

11. The FCAT testing process has been supervised by Principal Cheryl Cendon since she opened MMS as its Principal in 2002. Principal Cendon's process regarding the scheduling of FCAT testing, and assignment of teachers to groups of students to proctor, was consistent through the 2013-2014 school year. FCAT administration requires a complex schedule because of limited computer availability and teachers' scheduled planning periods and lunchtimes.

12. The first step in this process is for Principal Cendon to prepare a draft schedule which she then shares with teaching teams to solicit their input. After receiving teacher input, Principal Cendon's second step is to meet with technical personnel to ensure that the appropriate number of computers is available for the testing as scheduled. The third step is for principal Cendon to meet with Exceptional Student Education (ESE) and English for Speakers of Other Languages (ESOL) teachers to determine whether special accommodations are required for particular students.

13. The fourth and final step for Principal Cendon is to prepare a final schedule on colored paper to be disseminated at

the FCAT teacher training session approximately two weeks prior to the beginning of testing.

14. During Principal Cendon's tenure at MMS, teachers have often been assigned to proctor their Monday morning, first block, students for standardized testing, including for the FCAT. However, there is no requirement that teachers be assigned these groups and Principal Cendon has assigned different groups of students to teachers as needed in the past.

15. Approximately two weeks prior to FCAT testing, the school transmits to the State a list of which students will be tested at what time, in which classroom, and by which teacher. The State then generates a ticket for each student which is provided to the students on the day of the test. On test day, teachers are required to pick up and sign out their assigned materials from a secure room monitored by Guidance. No one has the authority to modify the final schedule other than Principal Cendon.

16. Respondent was on the "Innovators" teaching team during the 2013-2014 school year which included four other teachers. Principal Cendon met with the Innovators team for a "data chat" on February 14, 2014, to review the first draft of her FCAT schedule. At this meeting there was a discussion regarding changing the time of the testing for one lab but no discussion regarding which students were assigned to which teachers. Some

members of the Innovators team, including Respondent, were not assigned their Monday morning, first block, students.

17. On April 9, 2014, MMS teachers, including Respondent, attended FCAT training and received the final FCAT testing schedule and assignment printed on blue paper which had been prepared by Principal Cendon. This training included a PowerPoint presentation. On the fourth slide under the heading "testing reminders," teachers were instructed:

Refer to schedule set up for each grade level. ASK QUESTIONS BEFORE TESTING BEGINS.

Follow **exact** testing time and day for each session, NO DEVIATIONS.

FAILURE TO COMPLY WITH THESE RULES MAY RESULT IN REPRIMAND, CRIMINAL PENALTY OR LOSS OF CERTIFICATION.

18. Between February 14, 2014, and the first day of FCAT testing, April 23, 2014, Respondent did not request a change in the schedule from either Guidance or Principal Cendon.

19. Respondent was concerned that she was not assigned her Monday morning block of students (Innovators E) for the 2014 FCAT.

20. Sometime after receiving the draft schedule in February 2014, Respondent addressed her concerns with Innovators Team Leader, Kim Baker. Either before or after receiving the draft schedule, Ms. Baker briefly spoke separately to Principal Cendon and Guidance employee, Berta Hernandez-Berkowitz, and

stated "we're testing our regular Monday morning groups" to which Principal Cendon and Ms. Hernandez-Berkowitz purportedly said "yes." In fact, Ms. Baker was assigned her Monday morning group of students.

21. Respondent believes she had a similar conversation with Ms. Hernandez-Berkowitz in passing.^{3/} Neither Respondent nor Ms. Baker advised Principal Cendon or Ms. Hernandez-Berkowitz of their belief that the final schedule was in error because several team members were assigned students other than their Monday morning, first block.

22. Based upon these informal and brief conversations, Respondent and Ms. Baker decided to create a different schedule for the Innovators team after distribution of the final schedule on April 9, 2014. Respondent prepared the revised schedule for the week of the FCAT because she had a teaching schedule template on her computer. Respondent disseminated it to the Innovators teachers by e-mail on or about April 14, 2014, and also advised several team members verbally prior to the FCAT on April 23 to follow the schedule which she (Respondent) created. Respondent did not send the revised schedule to Guidance or Principal Cendon.

23. Two members of the team, Sophia Shaw and Sandy Leung, were confused by the e-mail and direction from Respondent and asked the FCAT Coordinator, Janet Jackson, prior to the test,

which schedule to follow. They were instructed by Ms. Jackson to follow the blue schedule, which was the final schedule prepared by Principal Cendon.

24. On the first morning of FCAT testing, April 23, 2014, Respondent reported to the secure room and signed out the bin of materials for Innovators E, her Monday morning group, rather than her assigned group of Innovators B. Similarly, Ms. Vargas signed out the bin of test materials for her Monday morning group, Innovators D, rather than her assigned group for FCAT, Innovators C.

25. When Ms. Leung arrived to sign out her assigned bin for Innovators D, she initially grabbed the wrong bin for Innovators B because the materials for D had already been removed from the room by Ms. Vargas. Ms. Leung realized the error because Innovators B was assigned to Respondent. Ms. Leung brought this error to the attention of Ms. Jackson. Respondent and Ms. Vargas were instructed to immediately return to the secure room to pick up the correct materials as assigned on the final schedule prepared by Principal Cendon.

26. When Ms. Shaw arrived to pick up her assigned materials for Group E, she found they had already been checked out by Respondent and only the materials for Group C remained. Both Ms. Leung and Ms. Shaw had to wait for their materials to be returned to the test room and be recounted before they could go

to their classrooms. This resulted in a delay of the start of the test for Ms. Shaw's students.

CONCLUSIONS OF LAW

27. 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.

28. Because Petitioner, acting through the Superintendent, seeks to suspend Respondent's employment without pay, which does not involve the loss of a license or certification, Petitioner has the burden of proving the allegations in its Administrative Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

29. Section 1012.33(1)(a), Florida Statutes, includes the following definition of just cause to terminate a teacher's professional services contract:

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 or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

30. The Administrative Complaint alleges that Respondent's failure to follow clear instructions and directives about FCAT testing constitutes misconduct and insubordination in violation of sections 1008.24 and 1022.33, Florida Statutes, and Florida Administrative Code Rule 6A-5.056.

31. 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).

32. 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.

Misconduct in Office

33. Consistent with its rulemaking authority, the State Board of Education has defined "misconduct in office" in rule 6A-5.056(2), which reads in pertinent part as follows:

(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 6B-1.001, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

34. No evidence was presented to demonstrate that Respondent violated the Code of Ethics, the Principles of Professional Conduct, or any adopted School Board rule. No evidence was presented that demonstrated that the confusion created on the morning of the test by Respondent's actions disrupted the learning environment. At most, the students of Ms. Shaw were briefly delayed in the beginning of the test day.

35. Only due to the common sense used by Respondent's colleagues on the morning of the FCAT, in questioning why they should disregard the final schedule in favor of Respondent's schedule, the mix-up of assigned testing materials did not result in a reduction of either Respondent's or her colleagues' ability to effectively perform their duties. Accordingly, Petitioner failed to demonstrate by a preponderance of the evidence that Respondent engaged in "misconduct in office."

Insubordination

36. "Gross Insubordination" is defined 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." Fla. Admin. Code R. 6A-5.066(4).

37. Section 1008.24 governs test administration and security. In relevant part, section 1008.24(1)(f) and (g) provides a person may not knowingly and willfully "fail to follow test administration directions specified in the test administration manuals" or "participate in, direct, aid, counsel, assist in, or encourage any of the acts prohibited in this section." Violation of these provisions constitutes a misdemeanor in the first degree. § 1008.24(2), Fla. Stat.

38. As described above, the 2014 FCAT training materials specifically told teachers, including Respondent, to refer to the schedule and there could be absolutely no deviations from times and dates. In light of the mandates of section 1008.24, this instruction constituted a direct order, reasonable in nature, and given by and with proper authority.

39. Given Respondent's one-day suspension for failure to follow FCAT testing protocols in 2013, she clearly was aware of the need for strict conformance to the FCAT schedule as assigned by Principal Cendon. It is clear that for whatever reason, Respondent intended that she and her fellow team members would only test their Monday morning, first block, students. Rather than address this concern directly with Principal Cendon or Guidance, either at the February 14 meeting or thereafter,

Respondent chose to disseminate her own schedule to only her team members and insist they ignore the blue final schedule.

Respondent's assertion, that she believed she somehow had tacit approval of an alternative schedule which she failed to share with administration, simply is not credible.

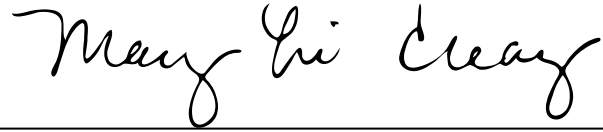
40. Petitioner demonstrated by a preponderance of the evidence that Respondent committed "gross insubordination."

41. Under these circumstances, the undersigned recommends that Respondent be suspended without pay for a period of five days which is consistent with the progressive disciplinary guidelines of Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Broward County School Board, enter a final order finding that just cause exists to suspend the employment of Respondent, Nicole Pollino, without pay for a period of five days for gross insubordination.

DONE AND ENTERED this 30th day of April, 2015, in
Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2015.

ENDNOTES

^{1/} The first volume of the Transcript was inadvertently not filed until April 15, 2015. Respondent was provided additional time to file a proposed recommended order.

^{2/} These facts regarding the FCAT were not provided at the hearing but the undersigned sua sponte took judicial notice of this general background information regarding the FCAT available on the Florida Department of Education website: www.fldoc.edu.

^{3/} Both Principal Cendon and Ms. Hernandez-Berkowitz have no recollection of such a conversation, and Ms. Baker does not recall the details with any specificity. Ms. Baker's version is being credited only because it makes no difference in the outcome of this proceeding.

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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.