

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-0051

EMILY M. RANDALL,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, this case was heard in Viera, Florida, on September 29 and 30, 2015, before J. D. Parrish, an Administrative Law with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Wayne L. Helsby, Esquire  
Shannon L. Kelly, Esquire  
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For Respondent: Scarlett G. Davidson, Esquire  
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STATEMENT OF THE ISSUE

Whether Petitioner, Brevard County School Board (Petitioner or Board), has just cause to terminate Respondent, Emily M.

Randall (Respondent or Randall) from employment with the school district.

PRELIMINARY STATEMENT

On December 9, 2014, the former Superintendent for the Brevard County School District, Dr. Brian Binggeli, notified Respondent that he would recommend her termination as a school psychologist to the Board. At a subsequent Board meeting, Dr. Binggeli's recommendation was accepted, and Respondent was duly notified. Thereafter, Respondent timely requested an administrative hearing to challenge the proposed action and maintains that there is no just cause to support the termination of her employment.

The case was referred to DOAH on January 8, 2015. Thereafter, the case was scheduled in accordance with the Joint Response to Initial Order, and a Notice of Hearing set May 6 and 7, 2015, for the formal hearing.

Respondent filed an unopposed motion for continuance of the hearing. The parties acknowledged that they had previously waived the 70-day requirement for the hearing. On May 13, 2015, the parties filed a Joint Status Report that provided dates for the rescheduling of the cause. In accordance with the dates proposed by the parties, the case was scheduled for hearing for September 29 and 30, 2015.

At the hearing, Petitioner presented testimony from Dr. Maggie Balado, Dr. Beth Thedy, Kathy Krell, and Jim Hickey. Respondent testified on her own behalf and offered the testimony of Dr. Joan Adamson, Ava Dobbs, Dr. Debra Pace, and David Kosich. The Transcript of the proceedings was filed on October 20, 2015. By stipulation, the parties were granted 30 days leave from the date of filing the transcript within which to file their proposed orders. All parties timely filed proposed recommended orders that have been fully considered in the preparation of this Recommended Order. The exhibits received in evidence are fully identified by the Transcript.

#### FINDINGS OF FACT

##### The Parties

1. Petitioner is the entity charged by law with governing and administering the Brevard County School District and is responsible for all employees of the school district. Disciplinary actions, such as the instant case, fall within the jurisdiction of the Board.

2. At all times material to this case, Respondent was an employee of the School Board who served as an itinerant school psychologist.

##### The Charges

3. By letter dated December 9, 2014, Superintendent Binggeli recommended Respondent be terminated from her position

with the Board. The letter claimed Respondent had been willfully absent without leave; had failed to follow directives of her supervisor, constituting gross insubordination and willful neglect of duty; had repeatedly lied to supervisors, constituting misconduct in office; and had reported to a disciplinary meeting in a condition violating the Drug-Free Workplace Policy, constituting misconduct in office.

4. Respondent asserts that she should not be terminated for acts or omissions occurring prior to November 21, 2014, and that the Board failed to properly establish Respondent was "intoxicated" on that date.

#### Background Information

5. Petitioner employed Respondent as a school psychologist in 1992. Since that time, Respondent performed her responsibilities in an acceptable manner until the 2013-2014 school year.

6. As a school psychologist, Respondent was responsible for conducting psychological evaluations for students who may require services for learning disabilities, emotional handicaps, or behavioral disorders. Psychological assessments are critical to the evaluation of exceptional students and serve to assist instructional staff to provide appropriate educational plans for students meeting criteria for support services. It is critical that such evaluations be timely performed, documented in

accordance with law, and communicated to the appropriate personnel so that exceptional students may receive needed services. Eligible students do not receive exceptional services until all documented paperwork is completed. At all times material to this case, Respondent was required to complete her psychological educational assessments within 60 days.

7. All school psychologists, including Respondent, were assigned as "itinerant" workers. Typically, school psychologists are directed to work at three or four schools. At each school the school psychologist teams with instructional staff, guidance counselors, and administrators to forge appropriate plans for exceptional students. The school psychologist is an essential member of the team.

8. In practical terms, Respondent's duties included performing student evaluations; designing intervention strategies with teachers, administrators, and parents; and attending meetings with all those involved.

9. Additionally, school psychologists must respond to crisis situations as directed by the coordinator of psychological services. It is essential that the Psychological Services Department (Department) know the schedule of all school psychologists and be able to reach them by telephone.

10. Beginning in August of 2013, the coordinator of psychological services, Dr. Maggie Balado, gave all school

psychologists her personal contact information so that absences from work could be promptly reported. School psychologists were given the option of contacting Dr. Balado directly or the Department's secretary, Ms. Beyer, if they would be absent from their scheduled school assignment. Requiring school psychologists to contact the Department to report absences was a continuation of the policy that pre-dated Dr. Balado's appointment to the coordinator position.

11. In September of 2013, Dr. Balado also advised all school psychologists that they would be required to comply with the 60-day guideline for completing student evaluations. The requirement also pre-dated Dr. Balado becoming the coordinator.

#### Performance Concerns

12. In January of 2014, Dr. Balado learned that Respondent had been absent on December 17 and 19, 2013, and January 6 and 7, 2014. Because Respondent had not reported the absences as required by the Department policy, Dr. Balado reminded Respondent of the correct protocol for missing work and directed her to comply with the policy in the future.

13. At all times material to the allegations of this case, Respondent had adequate leave time to miss work. Reporting the absence was still required by the policy.

14. School psychologists are required to complete personnel allocation forms to allocate and track funding. Respondent

failed to timely complete the funding forms despite being reminded.

15. When Dr. Balado completed the performance evaluation for Respondent for the 2013-2014 school year, she noted that Respondent was out of compliance with four student evaluations and had 29 referrals that were to be completed for the school year. As a result, Dr. Balado rated Respondent as needing improvement in the categories of managing the learning environment, ethical leadership, and technology.

16. Dr. Balado met with Respondent to go over the concerns and Randall indicated that she would work to improve her performance.

17. Dr. Balado then met with Dr. Beth Thedy, assistant superintendent for Student Services, and decided to place Respondent on a professional development assistance plan to identify the issues that needed improvement and give Respondent a plan to show performance improvement.

18. On August 18, 2014, Dr. Balado and Dr. Thedy met with Respondent to go over the performance issues and to discuss the improvement plan. Respondent did not raise any questions regarding what was expected.

19. Despite being aware of the improvement plan, Respondent did not meet compliance standards for student evaluations. Moreover, Respondent never suggested to Dr. Balado or Dr. Thedy

that an accommodation was needed in order for her to meet compliance standards.

20. On October 2, 2014, Respondent did not timely respond to Dr. Balado's attempts to contact her.

Tangled Webs Were Woven

21. On October 30, 2014, Respondent was assigned to be at Coquina Elementary School (Coquina Elementary) in Titusville. The school is located approximately 40 minutes from Respondent's home, and she was to be there to watch a meeting with Enis Messick, the guidance counselor. After the meeting with Ms. Messick, Respondent planned to evaluate a student. Due to technical difficulties unknown to Respondent, Ms. Messick's meeting was canceled.

22. Respondent did not timely report to work at Coquina Elementary on October 30, 2014.

23. Respondent did not timely report her absence from work on October 30, 2014, to Dr. Balado or Ms. Beyer.

24. Failing to report her absence in accordance with prior directives, violated the attendance policy for the Department. Respondent had adequate leave to be absent from work on October 30, 2014. Failure to telephone her absence or e-mail the proper persons was a violation of a reasonable directive given to her on more than one prior occasion.



25. During the afternoon of October 30, 2014, Dr. Laura Rhinehardt, north area superintendent (encompassing Coquina Elementary School), contacted Dr. Balado and informed her that Respondent was not at her assigned school that day.

26. Thereafter, Dr. Balado telephoned Respondent and asked her where she was. Respondent told Dr. Balado that she was in the parking lot at Coquina Elementary School when she was not (Lie #1).

27. Suspicious of this statement, Dr. Balado directed Respondent to go into the school office and call her back on the landline at the school. Although Respondent indicated she would do so, she did not (Lie #2).

28. Dr. Balado then called Coquina Elementary's Principal Katrina Hudson who advised that Respondent had not been seen at the school that day (hearsay later corroborated/admitted by Respondent at a later date).

29. Respondent, next, told Dr. Balado that she went into the school's office as directed but did not feel comfortable using the school's telephone to call her back (Lie #3).

30. Dr. Balado was understandably concerned that Respondent had misrepresented the events of October 30, 2014.

31. Dr. Balado, next, communicated the events of October 30, 2014, to Dr. Thedy who placed Respondent on paid administrative leave on October 31, 2014.

32. On November 4, 2014, a meeting was held to review the events of October 30, 2014. Present were Dr. Thedy; Jim Hickey, director of Human Resources and Labor Relations; and Respondent.

33. Respondent told Dr. Thedy and Mr. Hickey that she was at Coquina Elementary on October 30, 2014, and that she could prove it (Lie #4).

34. Respondent said Enis Messick would verify she had been at Coquina Elementary on October 30, 2014 (Lie #5). Ms. Messick did not see Respondent at the school on the date in question. Ms. Messick corroborated that Respondent had phoned her to advise that she would not be at the school.

35. Respondent later stated that she had sat in her car in the parking lot at Coquina Elementary all day on October 30, 2014 (Lie #6).

36. None of Respondent's initial accounts of the events of October 30, 2014, were true or justified not reporting her absence as required by her supervisor, Dr. Balado.

37. Finally, when Mr. Hickey requested that Respondent provide a written statement setting forth the events of October 30, 2014, Respondent relented and admitted she had previously lied.

#### The Aftermath

38. Following Respondent's admission and further consideration of her behavior by Mr. Hickey, a pre-termination

meeting was scheduled for November 12, 2014, to discuss Respondent's conduct.

39. At the November 12, 2014, meeting, Respondent claimed that she had filed for an accommodation to assist her so that she could timely prepare the reports required by her job. Respondent claimed that in 2010, she had made Petitioner aware of her need for an accommodation due to a wrist problem that made typing difficult.

40. To address the accommodation request in 2010, Petitioner provided Respondent with a dictation software program known as Dragon. The software allowed Respondent to dictate the portions of her reports that required typing. After the software was provided, Respondent did not renew her request for an accommodation nor did she suggest the solution provided by the Board was inadequate to meet her needs. At all times material to the conversations between Respondent and Dr. Balado, Randall never mentioned a physical limitation kept her from meeting the timelines applicable to her work. Respondent's late-mentioned comment regarding this 2010 accommodation has not been deemed credible or persuasive as a basis for not completing her work assignments in a timely manner. The performance improvement plan developed by Dr. Thedy and Dr. Balado would have appropriately addressed the deficiency in Respondent's work.

41. A second meeting was scheduled for November 21, 2014, to discuss Respondent's future employment with the Board. Respondent remained on paid administrative leave throughout the procedure of reviewing the allegations and concerns regarding Respondent's performance and behavior.

42. In anticipation of the November 21, 2014, meeting, Petitioner's staff conferred and decided to offer Respondent the opportunity to be placed on a performance improvement plan, with a freeze to her salary for the next school year, and an unpaid five-day suspension. Had the meeting gone as Petitioner hoped, Respondent's disciplinary action would have been resolved with Respondent's acceptance of the offer.

43. On November 21, 2014, Respondent, her husband, and her lawyer met with Mr. Hickey, Dr. Thedy, and Dr. Balado.

44. Based upon Respondent's behavior and demeanor at the meeting, Petitioner's attendees became suspicious of Respondent's condition. Respondent's demeanor shifted from crying and emotional to questioning and anger. Respondent was disheveled, her eyes were red and watery, her skin was flushed, and she was shaking. Coupled with what Mr. Hickey, Dr. Thedy and Dr. Balado noted was a strong odor of alcoholic beverage, Respondent's demeanor gave Petitioner's employees the concern that Respondent was under the influence of alcohol.

45. After conferring with one another, Dr. Thedy and Mr. Hickey completed a reasonable suspicion observation form and expressed concern that Respondent was intoxicated.

46. After being directed to undergo a reasonable suspicion breathalyzer examination, Respondent submitted to the test performed by Kathy Krell, the Drug and Alcohol Program Administrator for Petitioner.

47. Ms. Krell has been fully-trained to administer breathalyzer examinations, has held the position with the Board for over 20 years, and has performed thousands of tests, such as the one given to Respondent. Ms. Krell performed Respondent's examination in accordance with all testing guidelines and as routinely completed in the regular course of business for the Board.

48. The final results of Respondent's breathalyzer demonstrated that on November 21, 2014, at approximately 2:45 p.m., Respondent had an alcohol level of .104. This level is above the legal level for driving in the State of Florida.

49. Respondent voluntarily submitted to the breathalyzer examination and has provided no credible explanation for the test results. Instead, Respondent challenged the results and maintains that her conduct, demeanor, appearance, and test results do not establish that she was intoxicated on November 21, 2014.

50. It is determined that contrary to Respondent's assertion, on November 21, 2014, at approximately 2:45 p.m., while attending a school meeting on School Board property to address her future employment with Petitioner, Respondent was under the influence of some alcoholic beverage or substance such that she was, in fact, impaired or intoxicated. To suggest that she was fully capable of functioning with an alcohol level of .104 is both contrary to common sense and the facts of this case. Respondent failed to maintain a professional demeanor and was unable to maintain a consistent appearance and behavior.

51. When the results of the breathalyzer were made known to the parties, Petitioner withdrew the disciplinary offer then pending for Respondent's acceptance.

52. Subsequent to the November 21, 2014, meeting, Dr. Balado gave Respondent a referral to Petitioner's employment assistance program (EAP). The EAP is available to Board employees with problems that adversely impact their ability to perform their work assignments. When an employee in EAP acknowledges their issue, participates, and agrees to seek help for their problem, the employer typically works to return the employee to the work environment.

53. In this case, Dr. Binggeli recommended that the Board terminate Respondent's employment on December 9, 2014.

54. At its December 16, 2014, meeting, Petitioner voted to terminate Respondent's employment with the school district and the instant administrative challenge to the decision ensued.

CONCLUSIONS OF LAW

55. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

56. Petitioner bears the burden of proof in this case to establish by a preponderance of the evidence that Respondent committed the charges supporting just cause for termination. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996).

57. Dr. Binggeli's letter of December 9, 2014, outlined the charges against Respondent and announced his intention to recommend termination of Randall's employment. The letter provided in pertinent part:

The reason for my decision is that an investigation has shown that during the 2013-2014 school year you were repeatedly absent without leave on December 17 and 19, 2013, and January 6 and 7, 2014, by failing to report for work and without giving notice or otherwise following procedure for calling in sick or requesting vacation time off. You were counseled concerning your unexcused absences and advised that further violations of leave policy would result in further discipline.

On October 30, 2014, you again failed to report to work at Coquina Elementary or

follow procedures for notifying your supervisor of your absence or requesting leave. When questioned about your whereabouts on that day you lied to school personnel telling them that you were at Coquina Elementary that day when in fact you were at home. On November 3, 2014, you were placed on administrative leave pending an investigation.

On November 4, 2014, you were questioned about unexcused absence on October 30, 2014, by the Assistant Superintendent of Student Services and Director of Labor Relations. At that meeting you continued to lie about your whereabouts that day before finally stating that you drove to Coquina Elementary, sat in your car in the parking lot for a period of time, then drove home and took a nap. You also admitted you did not call in to notify your supervisor of your absence from work.

On November 21, 2014, you were directed to report to the District Office for a disciplinary meeting with your supervisor and Director of Labor Relations. You were accompanied by your husband and legal counsel.

At this meeting you smelled of alcohol, had a flushed face and bloodshot watery eyes. You appeared to be under the influence of alcohol. Based upon these observations you were directed to submit to a reasonable suspicion Breathalyzer test. The Breathalyzer test showed your breath alcohol level to be .104%, more than the level specified by law for driving under the influence and legally intoxicated.

1. Your actions of repeatedly being willfully absent without leave as described above constitutes a violation of Section 1012.67, Florida Statutes, and just cause to terminate your employment.



2. Your actions in being repeatedly absent without having given prior notice subsequent to being told to give prior notice and follow procedures for requesting leave constitutes both gross insubordination and willful neglect of duty in violation of Rule 6A-5.056(4), F.A.C. and provide just cause to terminate your employment for misconduct in office.

3. Your actions in repeatedly lying to your supervisors when asked about your whereabouts on October 30, 2014, constitute misconduct in office by violating Section 6B-1006, F.A.C. of The Principles of Professional Conduct of The Education Profession In Florida by failing to maintain honesty in all professional dealings.

4. Your actions in reporting for your disciplinary meeting on November 21, 2014, while intoxicated constitutes a violation of Rule 6A-5.056(2)(c), F.A.C. and misconduct in office by violating School Board of Brevard County Drug-Free Workplace Policy 3124 and provides just cause to terminate your employment.

5. Your actions as described above constitute just cause to terminate your employment and cancel your professional service contract under Section 1012.33(6)(a), Florida Statutes. [See Petitioner's Exhibit 22].

58. Section 1012.33, Florida Statutes (2015), provides in part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts

as specified in subsection (4), 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, 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.

\* \* \*

(6) (a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1) (a). [Emphasis added].

59. Section 1012.67 provides:

Absence without leave.—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.

60. Florida Administrative Code Rule 6A-10.080 sets forth the Code of Ethics of the Education Profession in Florida. The rule provides:

(1) The educator values the worth and dignity of every person, the pursuit of

truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

61. Rule 6A-10.081 sets forth the Principles of Professional Conduct for the Education Profession in Florida. The rule provides in pertinent part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

\* \* \*

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

62. As to the specific charges of this case, Petitioner has established by a preponderance of the evidence that Respondent repeatedly failed to follow directives regarding reporting her absences on five occasions: December 17 and 19, 2013; January 6 and 7, 2014; and finally, October 30, 2014. Even after being counseled after the first four instances, Respondent failed to appropriately contact the Department on October 30, 2014. Reporting an absence was not an onerous burden for Respondent. A telephone call, a text message, or an e-mail would have sufficed. Instead, Respondent did nothing. After the fact, Respondent claims that she was not in a state to comply with the required notification. Given the simplicity of the task required to timely notify the office that she would not be at work, this assertion is deemed without merit.

63. Petitioner has further established by a preponderance of the evidence that Respondent repeatedly lied to school personnel regarding her whereabouts on October 30, 2014. Employees, such as Respondent, are held to the highest standard of professional ethical conduct. Dishonesty in reporting basic information to your supervisor and others cannot meet the standard required of Respondent. Respondent offered no credible explanation for why she felt compelled to misrepresent (repeatedly) facts to school personnel. Had Respondent simply stated the truth (that she was at home and unable to work that

day), disciplinary action would not be required. By failing to maintain a standard of honesty and integrity, Respondent brought disciplinary measures on herself.

64. Finally, with regard to Respondent's conduct of November 21, 2014, Petitioner has established by a preponderance of the evidence that Respondent presented to a meeting on School Board property under the influence of alcohol. How a school employee could blow a .104 on a breathalyzer test at 2:45 p.m. on a regular business day is troubling and demonstrates Respondent's extremely poor judgment. Common sense would suggest that one does not drink before an important meeting. Given the Respondent's conduct, appearance, and demeanor during the meeting of November 21, 2014, it is concluded Respondent was intoxicated and impaired. To suggest that Respondent was not so impaired as to be considered intoxicated, is rejected as contrary to the facts of this case. An ordinarily prudent and cautious person would not act as Respondent did at the meeting. Respondent did not act professionally, she appeared disheveled with red watery eyes, and demonstrated mood swings consistent with an intoxicated person's behavior. Coupled with the odor emanating from Respondent's person and the results of the breathalyzer examination, there is adequate information to reach the conclusion that Respondent was intoxicated.

65. The ultimate issue to be resolved by this case is an appropriate penalty for Respondent's conduct. Wrestling with the employment future of a long-time Board employee is difficult. Had Respondent demonstrated sincere remorse for her behavior, leniency might be appropriate. Had Respondent been credible in her explanation of the events of October 30, 2014, a lesser penalty might have been appropriate. In fact, the five-day suspension that was offered at the November 21, 2014, meeting, with the other restrictions proposed, would have addressed the matter fully. Instead, Respondent had a couple of wine spritzers (her explanation for the breathalyzer results) in anticipation of one of the most important meetings of her professional career and reported to the meeting under the influence of alcohol. Respondent's behavior went from bad to worse. Respondent's credibility descended with each misrepresentation of fact. Honesty is a cornerstone of ethical conduct, and Respondent demonstrated she failed to meet the ethical standards for employees of the Board on numerous occasions.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent's employment with the Brevard County School District be suspended until such time as Respondent can show that she has successfully completed continuing educational courses related to the ethical standards

expected of her, that her salary be frozen at the level of compensation for the 2013-2014 school year, that she does not receive any back pay or other compensation for the duration of her suspension, and that she be placed on a professional improvement plan to assure monitoring and compliance with all requirements of her job.

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



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J. D. PARRISH  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of December, 2015.

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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.