

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 15-2047TTS

MICHELE HIRSCH,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 30, 2015, in Bartow, Florida, before Administrative Law Judge Lynne Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Donald H. Wilson, Jr., Esquire
Boswell and Dunlap, LLP
245 South Central Avenue
Bartow, Florida 33830

For Respondent: Branden M. Vicari, Esquire
Herdman and Sakellarides, P.A.
Suite 110
29605 U.S. Highway 19 North
Clearwater, Florida 33761

STATEMENT OF THE ISSUE

The issue is whether Respondent's conduct constitutes just cause for her dismissal from employment with Petitioner.

PRELIMINARY STATEMENT

By letter dated March 16, 2015, the superintendent of Polk County Schools notified Respondent, Michele Hirsch, of the recommendation to terminate Ms. Hirsch's employment with the Polk County School Board (School Board). The allegations and request in the superintendent's March 16 letter are summarized as followed:

- 03.06.13 Verbal warning Step I
Dundee Elementary student safety
- 03.08.14 Verbal warning Step I
Eastside Elementary excessive absenteeism
- 04.16.14 Written reprimand Step II
Eastside Elementary failure to leave lesson plans
- 10.02.14 Verbal warning Step I
Eastside Elementary performance issues
- 02.09.14 Request that superintendent considers suspending Ms. Hirsch without pay for a period of five days in accordance with the third step of Progressive Discipline.
- 02.19.15 Written reprimand Step II
Eastside Elementary excessive absenteeism

Ms. Hirsch timely requested an administrative hearing to challenge the termination of her employment. On April 15, 2015, the case was forwarded to the Division for the assignment of an administrative law judge to conduct a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes. Following one unopposed motion for continuance, the hearing was rescheduled and heard on the date listed above.

At the final hearing, the School Board presented the testimony of seven witnesses^{1/} and offered 13 exhibits, which were entered into evidence. All hearsay evidence was admitted subject to corroboration by competent, non-hearsay evidence. To the extent such hearsay was not corroborated, it will not be used as a basis for any finding herein. Ms. Hirsch testified on her own behalf and offered two exhibits, which were entered into evidence.

The one-volume Transcript was filed on July 13. On July 13, a Notice of Filing was issued informing the parties that the "proposed orders . . . must be filed with the Division of Administrative Hearings on or before the close of business on August 3."^{2/} Each party timely filed a Proposed Recommended Order (PRO). Each PRO has been duly considered in the preparation of this Recommended Order.

Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2014 codification.

FINDINGS OF FACT

1. The School Board is duly constituted and charged with the duty to operate, control, and supervise all free public schools within Polk County, Florida, pursuant to article IX, section 4, subsection (b) of the Florida Constitution and section 1001.32, Florida Statutes. Specifically, the School Board has

the authority to discipline employees. § 1012.22 (1)(f), Fla. Stat.

2. According to section 4.4-1 of the Teacher Collective Bargaining Agreement (Agreement):

Progressive discipline shall be followed, except in cases where the course of conduct or the severity of the offense justifies otherwise. Unusual circumstances may justify suspension with pay. Progressive discipline shall be administered in the following steps: (1) verbal warning in a conference with the teacher, (A written confirmation of a verbal warning is not a written reprimand); (2) dated written reprimand following a conference; (3) suspension without pay for up to five days by the Superintendent and (4) termination. "Letters of Concern" are not a form of discipline.

3. Progressive discipline is generally recognized as the process of using increasingly severe measures when an employee fails to correct a problem after being given a reasonable opportunity to do so. The measures range from mild to severe, meaning they can be as simple as a verbal warning to correct conduct, to employment termination for repetitive conduct that endangers others.

4. Ms. Hirsch has been employed by the School Board for 14 years. She has been employed pursuant to terms of the Agreement. Ms. Hirsch taught kindergarten at Dundee Elementary School (Dundee) for eight years. In 2013, she took a medical leave of absence to attend to family health matters out-of-state. When

Ms. Hirsch returned to Florida in January 2014, she was placed at Eastside Elementary School (Eastside), and assigned to teach first grade.

5. On April 8, 2014, Johna Jozwiak, Eastside's principal, issued a verbal warning with a written confirmation to Ms. Hirsch regarding her excessive absences. Ms. Hirsch had been absent from school for ten days, two of which were without any accrued leave time. Ms. Hirsch was put on notice that this verbal warning was the first step of Progressive Discipline as outlined in section 4.4-1 of the Agreement.

6. Eight days later, Principal Jozwiak issued a written reprimand to Ms. Hirsch regarding her failure to leave adequate substitute lessons plans on the days of her absences. This written reprimand was the second step of Progressive Discipline as outlined in section 4.4-1 of the Agreement. Principal Jozwiak testified that Ms. Hirsch was mailed a certified copy of the written reprimand; however, no evidence was introduced that Ms. Hirsch actually received a copy of it.

7. Ms. Hirsch's written request for her second family leave/medical leave of absence without pay indicated a "Beginning Date" of April 17, 2014, and a "Return Date" of August 11, 2014. Principal Jozwiak testified that she was uncertain if Ms. Hirsch would return to Eastside to teach in the 2014-2015 school year.^{3/} When Principal Jozwiak found out

Ms. Hirsch would return, Ms. Hirsch was assigned to teach a fifth grade class.^{4/}

8. Ms. Hirsch's fifth grade classroom was the last portable on the far end of the school property. Beyond her portable were private residences separated only by a chain-link fence.

Ms. Hirsch felt there were times when her request for assistance was delayed because of the distance to administrative support services at the front of the school.

9. Ms. Hirsch had new curriculum for the fifth grade and a different teaching method to follow called Common Core.

Ms. Hirsch had difficulty in controlling her class room, and in utilizing the Common Core teaching method.

10. On September 10, 2014, Ms. Hirsch participated in an instructional assistance conference with Principal Jozwiak. During this conference several aspects of Ms. Hirsch's teaching techniques were discussed, and seven specific suggestions were provided to improve her teaching techniques.

11. On October 2, 2014, Principal Jozwiak issued a verbal warning with a written confirmation (Petitioner's Exhibit 5)^{5/} regarding Ms. Hirsch's professional performance. The verbal warning reminded Ms. Hirsch of the September 10 conference, and the suggestions offered to improve her teaching techniques. Ms. Hirsch was offered continued support to improve her teaching techniques. Ms. Hirsch was put on notice that the verbal warning

was the first step of Progressive Discipline as outlined in section 4.4-1 of the Agreement.

12. Almost four months later, on January 22, 2015, Ms. Hirsch was issued a verbal warning with a written confirmation regarding her failure to follow the prescribed [Common Core] pacing schedule and daily plan. Again, Ms. Hirsch was put on notice that this verbal warning was the first step of Progressive Discipline as outlined in section 4.4-1 of the Agreement.^{6/}

13. On Friday, February 6, 2015, Eastside was placed in a "lockdown"^{7/} after the school day started. Although some students helped Ms. Hirsch put up the black paper to shield the windows, the overall class atmosphere was agitated. Students screamed and ran around the classroom. Eventually the students calmed down; however, it was difficult to keep them on task that day. The lockdown ended and the school day progressed. Principal Jozwiak was unable to recall whether there was a lockdown on February 6.

14. Near the end of the school day, the students became agitated again, and would not listen or pay attention to Ms. Hirsch's lesson. Ms. Hirsch turned the lights off and on, she clapped her hands, and she asked the students to "give me five" (which meant the students were to be quiet for five minutes). The students did not quiet down and Ms. Hirsch became frustrated.

15. In her frustration, Ms. Hirsch swept a basket off a shelf right next to her desk. The basket contained four or five little reader books. When the basket was swept off the shelf, neither it nor the reader books hit any students. The three students who testified corroborated Ms. Hirsch's statement that it was a little basket that was swept off a shelf. Although two students testified there was nothing in the basket, the third testified a book almost hit her. No testimony was adduced about the size of the books, other than Ms. Hirsch's testimony that they were "little." Ms. Hirsch voiced her frustration by calling the students "dumbasses." Ms. Hirsch immediately apologized to the students, and broke down in tears.

16. Principal Jowiak became aware of the language and book incident at the end of the school day on February 6. Principal Jowiak determined to address the matter on the next school day, Monday, February 9.

17. On Monday, February 9, Principal Jozwiak contacted the School Board's human resource department. Upon questioning, Ms. Hirsch admitted she slid her arm across a bookshelf and knocked a green and yellow basket off the shelf. In her frustration with the students' behavior that day, Ms. Hirsch told them they were acting like "dumbasses." Principal Jozwiak obtained written statements from the students in Ms. Hirsch's class. Over the next several days, parents called to complain

and the School Board then conducted an investigation of the incident.

18. On February 9, Principal Jozwiak wrote Superintendent Kathryn LeRoy the following:

On 2/6/15 it was reported to me that Ms. Hirsch, a teacher at our school, got angry with her students and threw buckets full of books off the shelves. While she was doing this, she called all of her students "dumbasses." After school on Friday, two students told another teacher about this issue. Two parents also called the office to report this incident. Administration interviewed all students. They confirmed that this happened. I have a statement from the staff member and others, and have verified that this took place as stated. On 2/9/15, administration asked Ms. Hirsch about this issue. She admitted to doing all the above actions.

We have documented on-going shortcomings in Ms. Hirsch's professionalism as a teacher at this school. She received a verbal warning for her failure to follow the procedural schedule and plan. A copy of the documentation for that step of Progressive Discipline is attached.^[8/]

I am of the opinion that Ms. Hirsch's recent lack of professionalism rises to the level of serious misconduct and just cause for further disciplinary action. Accordingly, pursuant to Section 4.4-1 of the *Teacher Collective Bargaining Agreement*, **I request that you consider suspending Ms. Hirsch without pay for a period of five days** in accordance with the third step of Progressive Discipline. (emphasis supplied).

19. Approximately 10 days later, Principal Jozwiak had a meeting with the head of the School Board's human resource

office, an associate superintendent, and her regional associate superintendent. The decision to terminate Ms. Hirsch's employment was made based on her admission.

20. On March 16, 2015,^{9/} Superintendent LeRoy wrote Respondent asserting that the School Board had just cause to terminate Ms. Hirsch's employment based on the following:

On March 6, 2013, you received a verbal warning (Step I) for issues regarding student safety. You received a verbal warning (Step I) on March 8, 2014 for excessive absenteeism. On April 16, 2014 you received a written reprimand (Step II) for failure to leave lesson plans when required to have a substitute cover your class. You received a verbal warning (Step I) on October 2, 2014 due to performance issues. On February 19, 2015 you received a written reprimand (Step II) for excessive absenteeism.

On February 6, 2015 there was an incident in your classroom where you became angry with your students. According to the witness statements that were collected, during your agitated state you threw or shoved buckets full of books off of shelves in the room and also called your class "dumbasses." These actions violate The Code of Ethics and The Principles of Professional Conduct of The Education Profession in Florida (3) (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" as well as (3) (e) ... "shall not intentionally expose a student to unnecessary embarrassment or disparagement."

Based on these findings, it has been determined that your actions constitute serious misconduct and that there is "just cause" for your termination as a School Board employee. You have the right to request a

hearing before the final action is taken by the School Board on this recommendation. Such request must be submitted in writing, addressed to Superintendent LeRoy, sent to the attention of Cynthia Sprouse, Office of Employee Relations, Polk County School Board, 1915 South Floral Avenue, Bartow, Florida 33830 no later than 4:00 p.m. on Wednesday, March 25, 2015. If you request a hearing, you will be suspended without pay at the April 14, 2015 Board Meeting pending the outcome of the hearing and the School Board's final action on the Hearing Officer's Recommended Order.

21. The allegations in this case are set forth above.

Ms. Hirsch is alleged to have received three verbal warnings and two written reprimands over the course of approximately 23 months. On February 6, 2015, Ms. Hirsch was alleged to have thrown "or shoved buckets full of books off of shelves in the [her class] room" in addition to calling her class "dumbasses." A careful review of the evidence proves otherwise.

22. While at Dundee Elementary School, Ms. Hirsch received a verbal warning regarding student safety issues. Although a March 6, 2013, letter was submitted into evidence to support this allegation, no direct testimony was received regarding it.

23. Ms. Hirsch was placed at Eastside in January 2014. No testimony was presented about a March 8, 2014, verbal warning with written confirmation about Ms. Hirsch's excessive absenteeism. Ms. Hirsch was served (and acknowledged receipt of)

an April 8, 2014, verbal warning with written confirmation regarding her excessive absenteeism.

24. The April 16, 2014, written reprimand identified Ms. Hirsch's failure to leave adequate substitute lesson plans when she was absent from school, and was presented as a second step in the Progressive Discipline scheme. Ms. Hirsch testified that she always provided lesson plans when she was absent. Ms. Hirsch's Exhibit No. 2, an email from February 22, 2015, providing "Lesson Plans for Week of February 23-27" is well after the alleged incident occurred.

25. In early October 2014 of the next school year, Ms. Hirsch received a verbal warning with a written confirmation regarding her professional performance. While Eastside's administration was continuing to provide support to Ms. Hirsch, this verbal warning was considered the first step of Progressive Discipline. Although a verbal warning with a written confirmation about Ms. Hirsch's "failure to follow the prescribed pacing schedule and daily plan" was issued on January 22, 2015, this notification was not within the superintendent's March 16 letter recommending termination.

26. Further, the superintendent's use of the verbiage that Ms. Hirsch "threw or shoved buckets full of books off of shelves in the room" is not supported by the evidence presented.

27. There is no doubt that Ms. Hirsch used inappropriate language with her students. Further, her sweeping the basket off its shelf was inappropriate behavior. Her demeanor and actions were inconsistent with professional behavior by a teacher. Petitioner has proven by a preponderance of evidence that there is just cause to discipline Ms. Hirsch.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1), 120.65, and 1012.33, Fla. Stat.

29. The School Board is the duly-constituted governing body of the School District of Polk County. Art. IX, § 4, Fla. Const.; §§ 1001.30 and 1001.33, Fla. Stat. A district school board has the statutory authority to adopt rules governing personnel matters pursuant to sections 1001.42(5), 1012.22(1), and 1012.23.

30. Petitioner bears the burden to prove the charges against Respondent by a preponderance of the evidence. Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990), citing Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990); McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1976); § 120.57(1)(j), Fla. Stat.

31. 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. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000); see also Williams v. Eau Claire Pub. Sch., 397 F.3d 441, 446 (6th Cir. 2005) (holding trial court properly defined the preponderance of the evidence standard as "such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . [a] belief that what is sought to be proved is more likely true than not true").

32. In Florida, the district superintendent has the authority to make recommendations for dismissal of school board employees, and the school board has the authority to suspend without pay school board instructional staff with professional service contracts for "just cause." §§ 1001.42(5), 1012.22(1)(f), and 1012.33(6)(a), Fla. Stat.

33. Just cause is defined to include misconduct in office. Section 1012.33(1)(a) provides in pertinent part:

[J]ust 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.

34. Section 4.4 of the Agreement provides in pertinent part:

Just Cause: No teacher will be disciplined, reprimanded, suspended, terminated or otherwise deprived of fringe benefits or contractual rights during the term of his/her contract without just cause. No teacher shall be demoted from continuing contract/professional service contract to Annual Contract nor be deprived of his/her contractual salary for the remainder of the contract year without just cause Any teacher terminated during the term of his/her contract shall be entitled to a fair hearing based on due process.

35. Section 4.4-1 of the Agreement provides for progressive discipline. (See paragraph 2 above.)

36. As alleged in the superintendent's proposed termination letter, Florida Administrative Code Rule 6A-10.081 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.

(3) Obligation to the student requires that the individual:

(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.

37. In utilizing the summary in the Preliminary Statement, the following is found:

03.06.13 Verbal warning Step I
Dundee Elementary student safety:
No direct proof provided to support the allegation.

03.08.14 Verbal warning Step I
Eastside Elementary excessive absenteeism:
No direct proof provided to support the allegation. (There was discussion of an April 8, 2014, verbal warning, but no oral motion to correct the charging document.)

04.16.14 Written reprimand Step II
Eastside Elementary failure to leave lesson plans:
Proof provided to support the allegation.

10.02.14 Verbal warning Step I
Eastside Elementary performance issues:
Proof provided to support the allegation.

02.09.14 Requested suspension without pay for five days in accordance with the third step of Progressive Discipline:
Proof provided to support that inappropriate language was used, but insufficient proof to support the throwing of buckets full of books off of shelves.

02.19.15 Written reprimand Step II
Eastside Elementary excessive absenteeism:
Proof provided to support the allegation.

38. The greater weight of the evidence supports a finding that Ms. Hirsch's proven actions were in violation of the standards of conduct to which she was bound. A teacher must not

use inappropriate language in front of students that will negatively affect the students and her effectiveness or professionalism as a teacher. However, the evidence did not support the allegation that Ms. Hirsch threw "buckets full of books off of shelves."

39. Ms. Hirsch's actions were not immoral, there was no gross insubordination or willful neglect of duty, nor was a crime involved. Further, no teacher evaluations were discussed or provided.

40. There is sufficient reason for sanctioning Ms. Hirsch, but termination of her contract would not be appropriate under the circumstances. There is no viable rationale for dispensing with Step III of the Progressive Discipline Policy, as originally proposed by Principal Jozwiak.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Polk County School Board, suspend Ms. Hirsch for five days without pay.

DONE AND ENTERED this 1st day of September, 2015, in
Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 2015.

ENDNOTES

- 1/ Three students testified and will be identified in the order in which they testified as Student 1, 2, or 3.
- 2/ At the conclusion of the hearing the parties requested 20 days in which to file their proposed recommended orders following the filing of the transcript. The request was granted.
- 3/ The documentation received from Ms. Hirsch (Respondent's Exhibit 1, pages 4 through 6) about this requested second leave of absence fails to reflect the principal or supervisor's signature, or the approval of the Human Resource Services representative for the School Board.
- 4/ Principal Jozwiak testified:

[W]e [the administrators of Eastside] didn't have leave confirmation back for Ms. Hirsch that she would be coming back to our class, back to our school until right before school started last year [2014-2015 school year]. So once we did, we placed her in a fifth grade position because we had filled other positions. And on medical leave you just

have to have a position; not necessarily guaranteed the same position."

This testimony is at odds with paragraph 11 of the School Board's Family and Medical Leave Procedures, which states:

Upon return from FMLA leave, the affected employee is entitled to be restored to the same position that the employee held when the leave started, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

^{5/} Petitioner's Exhibit 5 consisted of two pages: the first being the verbal warning with a written confirmation; and the second being a Polk County School District Instructional Assistance Conference Form. At the bottom of the second page, it is noted that "The Instructional Assistance Conference is not disciplinary in nature and does not take the place of a Professional Development Plan (PDP) Process." The two pages are misleading in that the second page should not be and is not considered a part of the verbal warning.

^{6/} This verbal warning was not listed in the superintendent's March 16, 2015, letter.

^{7/} Student 2 aptly described a lockdown as:

Like where if like someone's trying to come and you have to put like these papers up, like black papers so that they -- they can't see you and then like turn off the lights and sit down and be quiet.

^{8/} The "copy of the documentation" was not attached to Petitioner's Exhibit 8, the copy of the letter to the superintendent.

^{9/} The second page of Exhibit 10, the superintendent's letter, is dated March 12, 2015. Neither party objected to this Exhibit being admitted into evidence, thus, the undersigned accepts it as the proposed termination letter.

COPIES FURNISHED:

Mark S. Herdman, Esquire
Herdman and Sakellarides, P.A.
Suite 110
29605 U.S. Highway 19 North
Clearwater, Florida 33761
(eServed)

Branden M. Vicari, Esquire
Herdman and Sakellarides, P.A.
Suite 110
29605 U.S. Highway 19 North
Clearwater, Florida 33761
(eServed)

Donald H. Wilson, Jr., Esquire
Boswell and Dunlap, LLP
245 South Central Avenue
Bartow, Florida 33830
(eServed)

Dr. Kathryn LeRoy, Superintendent
Polk County School Board
1915 South Floral Avenue
Bartow, Florida 33830
(eServed)

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

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

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.