STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 16-5872TTS

JANNIFER THOMAS,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing on February 1, 2017, in Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Johnathan A. Ferguson, Esquire
St. Lucie County School Board
4204 Okeechobee Road
Fort Pierce, Florida 34947

For Respondent: Thomas L. Johnson, Esquire
Law Office of Thomas L. Johnson, P.A.
Suite 309
510 Vonderburg Drive
Brandon, Florida 33511

STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend without pay and terminate Respondent's employment as a teacher.

PRELIMINARY STATEMENT

By letter dated September 9, 2013, Petitioner, St. Lucie County School Board ("School Board"), notified Respondent, Jannifer Thomas ("Respondent"), of the School Board's intent to terminate her employment as a teacher. On September 10, 2013, Respondent timely requested an administrative hearing. Subsequently, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. On November 12, 2013, at its regularly scheduled meeting, the School Board suspended Respondent without pay.

The matter was assigned to Administrative Law Judge Jessica E. Varn under DOAH Case No. 13-4677TTS. The final hearing was initially set for March 4 and 5, 2014. On February 24, 2014, Respondent filed an Unopposed Motion for Continuance based on ongoing discovery. On February 25, 2014, Judge Varn entered an Order granting the motion. On February 26, 2014, Judge Varn entered an Order resetting the final hearing for May 13 and 15, 2014. On May 9, 2014, Respondent filed an unopposed motion to stay proceedings based on pending criminal felony charges against her. On May 12, 2014, Judge Varn entered an Order granting the motion, and requiring the parties to advise of the status of the criminal case by no later than July 14, 2014.

On July 14, 2014, the parties filed a joint status report, indicating that Respondent's felony case should be resolved at a court date set for September 24, 2014. The parties also advised of their availability for final hearing in October 2014. Accordingly, on July 18, 2014, Judge Varn entered an Order resetting the matter for final hearing on October 21 and 22, 2014. On October 1, 2014, Respondent filed a second unopposed motion to stay proceedings because the court date on Respondent's felony charges was delayed to December 17, 2014. On October 6, 2014, a telephonic hearing on the motion was held, during which the parties agreed to closure of the DOAH file without prejudice, and with leave to reopen, should a hearing be necessary. Accordingly, on October 6, 2014, Judge Varn entered an Order closing the file.

On April 27, 2016, all criminal charges against Respondent were Nolle Prossed. On August 2, 2016, Respondent requested an administrative hearing. Subsequently, the School Board referred the matter back to DOAH to assign an Administrative Law Judge to conduct the final hearing.

On October 24, 2016, the undersigned entered an Order setting this matter for final hearing on December 13 and 14, 2016. On November 11, 2016, the parties filed a joint motion for temporary postponement of the hearing based on a scheduling conflict. On November 18, 2016, the undersigned entered an Order

granting the motion, resetting the final hearing for February 1 and 2, 2017.

On October 11, 2016, the School Board filed its Statement of Charges and Petition for Termination ("Statement"). The Statement contains certain factual allegations, and based on those factual allegations, the School Board charged Respondent with the following violations: (1) Violation of School Board Policy 5.37(8)(a), "Reporting Child Abuse"; (2) Violation of section 39.201, Florida Statute, "Mandatory reports of child abuse, abandonment, or neglect; mandatory reports of death; central abuse hotline."; (3) Violation of School Board Policy 6.94(2)(a), "Reporting Professional Misconduct"; (4) Violation of section 1006.061(1), Florida Statute, "Child abuse, abandonment, and neglect policy"; (5) Violation of School Board Policy 6.301(3)(b), "Employee Standards of Conduct"; "Disciplinary Guidelines for Employees"; (6) Violation of Florida Administrative Code Rule 6A-10.080, "Code of Ethics of the Education Profession in Florida"; and (7) Violation of rule 6A-10.081(3)(a) and (5)(n), "Principles of Professional Conduct for the Education Profession of Florida".

The final hearing commenced as scheduled on February 1, 2017, with both parties present. At the hearing, the School Board presented the testimony of Detective Ronald Wentz, Master Deputy Jonathan Horowitz, and Detective Christopher Jadin. The

School Board's Exhibits 1 through 7, 9 and 10, 12, 23A, 23F, 23G, 23H, and 25 were received into evidence. Respondent testified on her own behalf and presented the additional testimony of Pastor Theodore Sanders. Respondent's Exhibits 1 through 5, 8 and 9, and 11 were received into evidence. The parties' Joint Exhibit 1 was also received into evidence.

At the hearing, the parties agreed to file their proposed recommended orders within 30 days after the filing of the final hearing transcript at DOAH. The three-volume final hearing Transcript was filed at DOAH on February 21, 2017. On March 21, 2017, Respondent filed an unopposed motion to extend the deadline to March 31, 2017, in which to file proposed recommended orders. On March 22, 2017, the undersigned entered an Order granting the motion. On March 29, 2017, Respondent filed a second unopposed motion to extend the deadline to April 18, 2017, in which to file proposed recommended orders. On March 29, 2017, the undersigned entered an Order granting the motion. On April 14, 2017, the School Board filed an unopposed motion to extend the deadline to April 24, 2017, in which to file proposed recommended orders. On April 17, 2017, the undersigned entered an Order granting the motion.

The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order. On January 25, 2017, the parties filed their Joint Pre-

Hearing Stipulation, in which they stipulated to certain facts. These facts have been incorporated into this Recommended Order as indicated below.

Unless otherwise indicated, all rules and statutory references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise the public schools within St. Lucie County, Florida.

2. At all times material hereto, Respondent was employed by the School Board as a music teacher at Manatee Academy K-8 School ("Manatee"), pursuant to a Professional Services Contract, issued in accordance with section 1012.33(3)(a), Florida Statutes. Respondent's employment with the School Board as a teacher began in 2006.

3. At all times material hereto, Respondent's employment with the School Board was governed by Florida law and the School Board's policies.

4. Prior to the incidents giving rise to this proceeding, Respondent was not the subject of any discipline. She had received overall ratings of "Exceptional" or "Above Expectation" on her teaching evaluation forms.

5. The incidents giving rise to this proceeding occurred on October 18 and 19, 2012, during the 2012-2013 school year.

October 18 and 19

6. Respondent awoke around 6:00 a.m. on Thursday, October 18, 2012, and reported to work at Manatee. That afternoon, Respondent finished her work day at Manatee and left the school sometime after 3:15 p.m. After running some errands, Respondent arrived at her single-family residential home in Fort Pierce, sometime after 5:00 p.m.

7. Respondent shared the home with her long-time boyfriend and fiancé, Dominic Madison ("Madison"). Madison was also a teacher employed by the School Board. At that time, Madison was a band director at a local high school. By the time Respondent got home, Madison had not yet returned home from his work day at the high school.

8. Shortly after arriving home, Respondent sat down at her personal laptop computer to check e-mails and do some work. The computer was connected to the home's wi-fi network. While working on the computer, Respondent discovered an unfamiliar icon and link to a file on the home network.

9. The icon peaked Respondent's interest. Upon clicking on the icon, a video opened with Madison's face. Respondent then observed Madison and a white female engaged in sexual activity in a room inside their home.[1/] While Respondent was unsure, it

appeared that the female might be a former student of Madison's who might also be a minor. As she continued watching the video, Respondent recognized the female as one of Madison's 17-year-old students, K.M.

10. After watching the video, Respondent was devastated, upset, angry, and unable to process what she saw. She called Madison at 6:36 p.m., to confront him about the video and confirm her suspicions that he, in fact, engaged in sexual activity with a minor student. They spoke for approximately 36 minutes. During the call, they argued, and Madison neither admitted nor denied engaging in sexual activity with K.M. By this point, Respondent was in tears and so upset and completely devastated that she experienced chest pains.

11. After getting off the phone with Madison and while still at home, Respondent called her pastor, Theodore Sanders, for guidance. They spoke around 7:13 p.m., for approximately 14 minutes.

12. Pastor Sanders knew Madison because his children had been members of the band at Madison's high school. Pastor Sanders was shocked by Respondent's allegation that Madison had engaged in sexual activity with a minor student. Due to the ramifications of such a "huge allegation," Pastor Sanders was cautious and wanted to make sure that Respondent was certain about what she saw on the video.

13. It is understandable that Respondent needed some period of time in which to process the situation, given that Madison was her fiancé; they had a long relationship together; and she observed Madison on her personal computer engaging in sexual activity with a minor student in their home. Sometime after 7:30 p.m., Respondent left the home. At 7:26 p.m., Respondent and Madison spoke again on the phone for approximately 38 minutes.

14. Respondent and Pastor Sanders spoke again on the phone at 8:03 p.m. and 8:45 p.m., with such calls lasting one minute and 10 minutes, respectively. In the interim, Respondent spoke again on the phone with Madison for 43 minutes starting at 8:03 p.m.

15. As a teacher, Respondent is a mandatory reporter of child abuse under sections 39.201(2)(a) and 1006.061(1), Florida Statutes. Respondent clearly understood that she had a mandatory obligation to report the sexual activity she saw on the video between Madison and K.M.[2/]

16. Respondent and Pastor Sanders discussed the need to report what Respondent saw. There was never any doubt that the abuse needed to be reported. Because of Respondent's distraught emotional state at the time, they agreed that Pastor Sanders would make the call. Pastor Sanders told Respondent to get off the road and go home. Pastor Sanders then called "911" at some

point after they got off the phone at 8:55 p.m., to report the abuse.

17. At the hearing, Respondent acknowledged that there was almost a four-hour gap from when she first saw the video until the time that Pastor Sanders stated he was going to report the abuse. Respondent further acknowledged that prior to 8:55 p.m., she had never made a phone call to report the abuse to 911, DCF, or her principal.

18. However, given that Respondent had just recently seen a video on her personal computer of her fiancé engaged in sexual activity with a minor female student in their home, it was understandable that Respondent needed time to process the situation. A less than four-hour delay from when Respondent first saw the video to Pastor Sanders' call to 911 was immediate, and not an unreasonable delay given the unique facts of this case.

19. Sometime before 10:00 p.m., Respondent returned to her residence. She saw Madison's vehicle and assumed he was inside the home. According to Respondent, she knew the police were on their way. Respondent nevertheless entered the home, but she did not approach Madison in any manner.

20. At approximately 10:00 p.m., two St. Lucie County Sheriff's deputies arrived at the home and rang the doorbell at the front door. Madison answered the door, and was told by one

of the deputies that they were there to talk to Respondent. The officer asked Respondent to step outside to speak with them and Madison was directed to step back.

21. Madison then went back inside the home and closed the door behind him.

22. One of the deputies remained at the front porch area while Respondent and the other deputy began to discuss what Respondent had seen on the video.

23. At this point, one of the deputies requested to see the video so Respondent and the deputies proceeded to attempt to go back inside the front door. However, they discovered that Madison had locked the door behind him when he re-entered the home.

24. By this point, no law enforcement officer had explored the perimeter of the home to determine whether there were any other entrances or exists from the home. Nor was Respondent asked by either deputy if there were any other entrances or exits from the home.

25. Respondent began ringing the doorbell and knocking on the front door. In the midst of Respondent ringing the doorbell, knocking on the door, and receiving no response from Madison, the deputies asked Respondent, for the first time, if there were any guns in the home and any other entrances and exits.

26. Respondent advised the deputies that there was a back door. Ultimately, it was determined that Madison had snuck out the back door of the home to elude law enforcement.

27. Respondent gave the deputies permission to enter and search the home. They entered through the open back door. Once the house was cleared by the officers, Respondent and the officers went inside the home.

28. Respondent was cooperative during the search of the home and she consented to allowing the officers to look at the computer.

29. Respondent attempted to show one of the deputies what she saw on the computer, but nothing would come up. Ultimately, it was determined that Madison took the evidence with him when he fled the home.

30. When officers went into the front office and wanted to collect some items belonging to Madison, Respondent told the officers that she would prefer if they got a search warrant. The officers obtained a search warrant and stayed all night searching the home until approximately 5:00 a.m.

31. Respondent did not sleep or eat while the officers were at the home and she was visibly "shaken-up" and crying at times during the evening and early morning hours of October 19.

32. Detective Wentz was at the home and spoke with Respondent throughout the night and early morning of October 19.

At some point, Detective Wentz "flat out asked" Respondent if she knew where Madison was located. Respondent responded, indicating she did not know where he fled to.

33. Detective Wentz made it clear to Respondent on multiple occasions during the evening of October 18 and early morning of October 19 that if she knew Madison's whereabouts, she should let him know. Before he left the home on the morning of October 19, Detective Wentz reiterated to Respondent that she needed to contact law enforcement immediately if she had any information about Madison's whereabouts. Respondent clearly understood this directive.

34. At no time during the evening of October 18 and early morning of October 19 did Respondent ever volunteer information as to where she thought Madison might be. On the other hand, the persuasive and credible evidence adduced at hearing establishes that Respondent did not know of Madison's whereabouts at any time during the evening of October 18 and early hours of October 19 after he fled the home.

35. However, by 11:45 a.m., on October 19, Respondent discovered that Madison might be staying at the local Holiday Inn Express, based on information she received from Madison's father. Respondent called the front desk of the hotel at 11:47 a.m. and 12:01 p.m., in an effort to confirm that Madison was indeed at the Holiday Inn. Respondent and Madison spoke at 12:09 p.m., at

which time Respondent knew Madison was still at the hotel, about to check-out of the hotel.

36. At no time between 11:47 a.m. and 1:39 p.m., did Respondent make any calls to law enforcement to let them know that Madison might be at the Holiday Inn. Master Deputy Horowitz was at Respondent's home before 1:39 p.m. However, Respondent failed to inform Master Deputy Horowitz that Madison was at the Holiday Inn. Master Deputy Horowitz specifically asked Respondent if she knew where Madison was. Respondent responded, stating that she "did not know where his whereabouts were at the time."

37. Respondent spoke with Master Deputy Horowitz by telephone on two or three occasions later that afternoon. Respondent's testimony that she told Master Deputy during one of these telephone conversations that Madison had been at the Holiday Inn is not credited and is rejected as unpersuasive.

38. Later that afternoon, Respondent was transported to the Sheriff's Office for an interview. During the interview, Respondent admitted she failed to inform law enforcement that Respondent had been staying at the Holiday Inn:

> DETECTIVE NORMAN: I know you've talked to several detectives throughout yesterday evening, last night, this morning, this afternoon. Probably seen more faces that you want to see. Here's--here's what we're trying to figure out, where your fiancé is. Do you know where he is?

> MISS THOMAS: And I understand that. And like I told the officers that came to the home, it was information that was left out. And it truly was not intentional. I know the way it looked, intentionally, it made me look bad, but I honestly do not know where he is. At the time when I did speak to him, he told me that's where he was, that he was leaving that location so I haven't a clue. He hasn't contacted me since the last time I spoke with him today.
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> * * *
>
> And I mean, I'm disappointed because I made a mistake. I did. I omitted something that I didn't realize at the time and I don't know if it was, you know, just, you know, just did it just because I guess deep down I was maybe trying--you know, I don't know why I didn't say, "Oh yea, by the way this." I don't know why. That was so stupid.

Petitioner's Exhibit 12, pp. 5-7.

39. Following the interview, Respondent was placed under arrest and charged with one felony count of failing to report child abuse in violation of sections 39.201(1)(b) and 39.205, Florida Statutes, and one felony count of being an accessory after the fact, in violation of section 777.03(1)(c), Florida Statutes. After Respondent was arrested, she was placed on temporary duty assignment at home with pay. On Monday, October 22, Respondent self-reported her arrest and the abuse of K.M. by Madison to her principal and the District. Subsequently, the State Attorney charged Respondent in the Nineteenth Judicial Circuit for the felony charges of failing to report child abuse

in violation of sections 39.201(1)(b) and 39.205, and for the felony charge of being an accessory after the fact in violation of section 777.03(1)(c).

40. The persuasive and credible evidence adduced at hearing establishes that Respondent did not call Madison while he was at the Holiday Inn Express to warn him so that he could elude arrest. Nevertheless, Respondent knew Madison was at the Holiday Inn at least by 12:09 p.m. on October 19, when she spoke to Madison on the telephone. Respondent failed to inform law enforcement that he was at the Holiday Inn, or that he had been at the Holiday Inn, until her interview at the Sheriff's office later that afternoon just prior to her arrest. After a 23-hour manhunt, law enforcement officers found and arrested Madison at the Holiday Inn Express around 7:00 p.m.

41. Respondent's delay in informing law enforcement of Madison's whereabouts or that he had been at the Holiday Inn Express delayed his arrest by at most, approximately seven hours. Notably, the video was discovered by Respondent, reported by Respondent to law enforcement, and Madison was arrested, within the span of approximately 25 or 26 hours. Ultimately, it was Respondent who identified the victims of Madison's crimes. It was Respondent's discovery of the video, her immediate reporting of the abuse, and her later identification of the victims, which led to Madison's arrest and his conviction on all charges.

42. The State Attorney charged Madison in the Nineteenth Judicial Circuit with 40 counts of criminal activity: 34 felony charges of sexual activity with a minor; five felony charges of sexual battery on a child in custodial relationship; and one felony charge of using a child in a sexual performance. On April 1, 2016, Madison was adjudicated guilty on five counts of sexual activity with a minor. Madison was sentenced to 15 years, consecutive, for each count.

43. On August 7, 2013, Respondent pled no contest to both charges. On the plea form, Respondent checked section 25, which states: "I specifically believe the plea is in my best interest even though I am innocent of the charge, charges, or violations, or may have defenses to them." After Madison was adjudicated guilty, all criminal charges against Respondent were Nolle Prossed.

44. The persuasive and credible evidence adduced at hearing fails to establish that Respondent is guilty of misconduct in office in violation of Florida Administrative Code Rule 6A-5.056(2)(d) or (e). The evidence does not establish that Respondent engaged in behavior that disrupted a student's learning environment or reduced her ability or his or her colleagues' ability to effectively perform duties.

45. The persuasive and credible evidence adduced at hearing fails to establish that Respondent violated Florida

Administrative Code Rule 6B-1.006(3)(a). The evidence does not establish that Respondent failed to make reasonable efforts to protect a student from conditions harmful to learning and/or to the student's mental and/or physical health.

46. Indeed, Respondent protected students from any further abuse by Madison. Respondent is responsible for Madison's abuse of K.M. being brought to the attention of law enforcement immediately after she observed the video on her personal computer.

47. Within about four hours after observing her fiancé engaging in sexual activity with a minor on her personal computer and processing the situation and speaking with her pastor, the matter was reported to 911, and law enforcement arrived at Respondent's home.

48. Madison was at the home when the deputies arrived. Notably, the deputies who arrived at Respondent's home did not ask to speak with Madison first. Instead, they asked to speak with Respondent, and Respondent was asked to step outside the home. Madison, the alleged perpetrator of the sexual abuse, was ordered by one of the deputies to go back inside the home.

49. Knowing full well that the suspect, Madison, went back inside the home through the front door, neither deputy undertook any efforts to determine whether Madison might have an escape route through another door. A perimeter was not established

until after law enforcement officers discovered that Madison had fled the home.

50. Respondent cooperated with law enforcement while they were at her home. She cooperated fully in the prosecution of Madison and she was instrumental in securing Madison's criminal conviction for the abuse.

51. Given the totality of the circumstances, Respondent's failure to inform law enforcement during the afternoon of October 19 of Madison's whereabouts at the Holiday Inn, which delayed the arrest of Madison by seven hours, at most, does not rise to the level of conduct sufficient to support a finding of guilt in violation of rule 6B-1.006(3)(a).

52. The persuasive and credible evidence adduced at hearing fails to establish that Respondent violated rule 6B-1.006(3)(n). Respondent reported the abuse to appropriate authorities when Pastor Sanders called 911. She also reported the abuse to appropriate authorities when deputies arrived at her home. Respondent also self-reported the incident to her principal and the District on the following Monday, October 22.

53. The persuasive and credible evidence adduced at hearing fails to establish that Respondent is guilty of immorality in violation of rule 6A-5.056(1). Insufficient credible and persuasive evidence was adduced at hearing to establish that Respondent engaged in conduct inconsistent with the standards of

public conscience and good morals, and that the conduct was sufficiently notorious so as to disgrace or bring disrespect to Respondent or the teaching profession and impair Respondent's service in the community.

54. The persuasive and credible evidence adduced at hearing fails to establish that Respondent violated Policy 5.37(8)(a). Respondent "directly" reported her knowledge of Madison's abuse of K.M. as required by the policy when Pastor Sanders called 911 within four hours of Respondent's view of the video.

55. The persuasive and credible evidence adduced at hearing fails to establish that Respondent violated Policy 6.301(3)(b). As to Policy 6.301(3)(b)(viii), Respondent did not engage in immoral conduct, nor was it shown that Respondent's conduct was "indecent." As to Policy 6.301(3)(b)(xxx), the School Board failed to prove that Respondent engaged in off-duty conduct that does not promote the good will and favorable attitude of the public toward the School District, its programs, and policies.

56. In reaching this conclusion, it is notable that the School Board did not call any members of the public or any administrators, teachers, or other personnel as witnesses to support this claim. Moreover, the School Board does not argue in its proposed recommended order that it proved that Respondent violated Policy 6.301(3)(b)(xxx). Paragraphs 71 through 73 refer to another specific subdivision within Policy 6.301(3)(b),

6.301(3)(b)(viii). However, there is no specific argument that Respondent violated Policy 6.301(3)(b)(xxx).

57. The persuasive and credible evidence adduced at hearing fails to establish that Respondent violated Policy 6.94(2)(a). As detailed above, Respondent reported the abuse when Pastor Sanders called 911. Respondent also reported the incident to the deputies when they arrived at her home shortly after Pastor Sanders called 911, and when she self-reported the abuse to her principal and the District on the following Monday, October 22.

CONCLUSIONS OF LAW

58. DOAH has jurisdiction of the subject matter and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

59. Respondent is an instructional employee, as that term is defined in section 1012.01(2), Florida Statutes. The School Board has the authority to suspend without pay and terminate instructional employees pursuant to sections 1012.33(1)(a) and (6)(a).

60. The School Board has the burden of proving, by a preponderance of the evidence, that Respondent committed the violations alleged in the Administrative Complaint and that such violations constitute "just cause" for suspension without pay and dismissal. §§ 1012.33(1)(a) and (6)(a), Fla. Stat.; Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

61. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000). The preponderance of the evidence standard is less stringent than the standard of clear and convincing evidence applicable to loss of a license or certification. Cisneros v. Sch. Bd. of Miami-Dade Cnty., 990 So. 2d 1179 (Fla. 3d DCA 2008).

62. 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); McMillian v. Nassau Cnty. Sch. Bd., 629 So. 2d 226, 228 (Fla. 1st DCA 1993).

63. Sections 1012.33(1)(a) and (6)(a) provide in pertinent part that instructional staff may be suspended without pay and terminated during the term of their employment contract only for "just cause." §§ 1012.33(1)(a) and (6)(a), Fla. Stat. "Just cause" is defined in section 1012.33(1)(a) to include, but not be limited to, the following material instances as defined by rule of the State Board of Education: "misconduct in office" and "immorality."

64. Section 1001.02(1), Florida Statutes, 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. The statues and rules governing this de novo administrative proceeding are penal in nature and thus must be strictly construed, with any ambiguities resolved in favor of the employee. Gainey v. Sch. Bd., 387 So. 2d 1023, 1029 (Fla. 1st DCA 1980); Broward Cnty. Sch. Bd. v. Joseph, 2013 Fla. Div. Adm. Hear. LEXIS 399, *19, Case No. 13-0490TTS (Fla. DOAH July 8, 2013).

65. Consistent with the Legislature's grant of rulemaking authority, the State Board of Education has defined "misconduct in office" in rule 6A-5.056(2), which provides:

> (2) "Misconduct in Office" means one or more of the following:
>
> (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;
>
> (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;
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> (c) A violation of the adopted school board rules;
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> (d) Behavior that disrupts the student's learning environment; or
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> (e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

66. Rule 6A-10.080 became effective January 11, 2013. The applicable rule in effect in October 2012 was rule 6B-1.001.

Rule 6B-1.001 contains the same language as rule 6A-10.080, which became effective January 11, 2013. Rule 6B-1.001, titled "Code of Ethics of the Education Profession in Florida," 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.

67. While rule 6A-5.056(2)(a) provides that violation of the Code of Ethics rule constitutes "misconduct," it has been frequently noted that the precepts set forth in the above-cited "Code of Ethics" are "so general and so obviously aspirational as to be of little practical use in defining normative behavior." Miami-Dade Cnty. Sch. Bd. v. Lantz, 2014 Fla. Div. Adm. Hear. LEXIS 399, *29-30, Case No. 12-3970 (Fla. DOAH July 29, 2014).

68. Rule 6A-5.056(2)(b) incorporates by reference rule 6A-10.081, which is titled "Principles of Professional Conduct for

the Education Profession in Florida." Rule 6A-10.081 became effective January 11, 2013. The applicable rule in effect in October 2012 was rule 6B-1.006. Rule 6B-1.006 contains the same language as rule 6A-10.081, which became effective January 11, 2013. Rule 6B-1.006 provides, in pertinent part:

> (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.
>
> * * *
>
> (n) Shall report to appropriate authorities any known allegations of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

69. Consistent with its rulemaking authority, the State Board of Education has defined "immorality" in rule 6A-5.056(1), which provides, in pertinent part:

> (1) "Immorality" means conduct that is inconsistent with the standards of public conscience and good morals. It is conduct that brings the individual concerned or the education profession into public disgrace or disrespect and impairs the individual's service in the community.

70. To support a finding of just cause to discipline a teacher based on immorality, the evidence must establish both that: a) the teacher engaged in conduct inconsistent with the standards of public conscience and good morals; and b) that the

conduct was sufficiently notorious so as to (1) disgrace or bring disrespect to the individual or the teaching profession and (2) impair the teacher's service in the community. McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996).

71. School Board Policy 5.37(8)(a) is a "rule" within the meaning of rule 6A-5.056(2)(c). School Board Policy 5.37(8)(a) provides, in pertinent part:

> (8) Child Abuse, Abandonment, or Neglect
>
> (a) All School Board employees who know or have reasonable cause to suspect that a student is an abused, abandoned, or neglected child shall report such knowledge or suspicion directly both (i) to the state-wide central abuse hotline established and maintained by the Florida Department of Children and Families (DCF), and/or (ii) to the appropriate local law enforcement agency, either through the School Resource Officer or through the central dispatch center telephone number (911).

72. School Board Policy 6.94(2)a. is a "rule" within the meaning of rule 6A-5.056(2)(c). School Board Policy 6.94(2)a. provides as follows:

> 2. Reporting Professional Misconduct
>
> a. District staff members are required to report to the principal of the school and the Assistant Superintendent of Human Resources alleged misconduct by District employees which affects the health, safety, or welfare of a student. If the alleged misconduct to be reported is regarding the Assistant Superintendent of Human Resources, the District employee shall report the alleged misconduct to the Superintendent. Failure to

report such alleged misconduct shall result in appropriate disciplinary action, as provided in Section 1012.796(1)(d), Florida Statutes.

73. School Board Policy 6.301 is a "rule" within the meaning of rule 6A-5.056(2)(c). School Board Policy 6.301 provides, in pertinent part, as follows:

> (2) Each principal, supervisor, or member of the instructional staff shall abide by the Code of Ethics of the Education Profession in Florida, the Principles of Professional Conduct for the Education Profession in Florida, and the Standards of Competent and Professional Performance in Florida. All certificated employees shall be required to complete training on the standards of ethical conduct upon employment and annually thereafter. All employees shall abide by the Florida Code of Ethics for Public Officers and Employees.
>
> (3) The School District generally follows a system of progressive discipline in dealing with deficiencies in employee work performance or conduct. Should unacceptable behavior occur, corrective measures will be taken to prevent reoccurrence. The Superintendent is authorized to place employees on administrative assignment and/or leave as necessary during an investigation. However, some behavior may be so extreme as to merit immediate dismissal.
>
> (b) The following list is not intended to be all inclusive, but is typical of infractions that warrant disciplinary action:
>
> (viii) Immoral or indecent conduct
>
> * * *
>
> (xix) Violation of any rule, policy, regulation, or established procedure

* * *

> (xxix) Any violation of the Code of Ethics of the Education Profession, of Professional Conduct of the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees.
>
> (xxx) Off duty conduct that does not promote the good will and favorable attitude of the public toward the School District, its programs, and policies.

74. Turning to the instant case, the School Board failed to prove by a preponderance of the evidence that Respondent violated rule 6B-1.006(3)(a). As detailed above, the evidence does not establish that Respondent failed to make reasonable efforts to protect a student from conditions harmful to learning and/or to the student's mental and/or physical health.

75. The School Board failed to prove by a preponderance of the evidence that Respondent violated rule 6B-1.006(3)(n). As detailed above, Respondent reported Madison's abuse of K.M. to "appropriate authorities."

76. The School Board failed to prove by a preponderance of the evidence that Respondent violated rule 6A-5.056(1).

77. The School Board failed to prove by a preponderance of the evidence that Respondent violated Policy 5.37(8)(a). Policy 5.37(8)(a) requires that suspected abuse be reported "directly." According to the School Board, the word "directly" means that Respondent had a non-delegable duty to report the abuse to 911,

herself. In other words, under the School Board's interpretation, Respondent was prohibited from having someone else, such as Pastor Sanders, make the call to 911, even though Respondent spoke to law enforcement shortly after the call was made.

78. Because the word "directly" is undefined in the policy and susceptible to different meanings, an examination of the dictionary definition is appropriate. Brandy's Prods. V. Dep't of Bus. & Prof'l Reg., 188 So. 3d 130, 132 (Fla. 1st DCA 2016). The dictionary defines "directly" as: "in a direct manner; in immediate physical contact; in the manner of direct variation."

However, the dictionary also defines "directly" as: "without delay: IMMEDIATELY; in a little while; SHORTLY." See "Directly." Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/directly (last visited May 22, 2017).

79. Thus, "directly" may be used to relate to a period of time (i.e., "without delay: "IMMEDIATELY", "in a little while"). Alternatively, "directly" may be used to relate to the intervention of something or someone (i.e., "in a direct manner; in immediate physical contact; in the manner of direct variation."). The latter definition supports the School Board's position. The former definition does not.

80. In the present case, strictly construing the policy in a light most favorable to the employee, "directly" relates to a

period of time. To hold otherwise would lead to an absurd result. For example, a teacher who learns of sexual activity involving another teacher and minor student would be found to have complied with the policy, if the teacher failed to report the abuse within six months, but when the teacher finally did report the abuse, she made the report herself.

81. Also, consider a situation where a teacher observed abuse and, instead of calling 911 herself, shouted across the home to her husband, who was also inside the house, requesting that her husband make the call. The husband makes the call to 911, and within a short period of time, law enforcement arrives at the home in response to the call and speaks with the teacher. The teacher then communicates the fact of the abuse to the officer. It cannot seriously be contended that the teacher, under that scenario, would have violated the policy and be subjected to discipline simply because she did not make the call herself to 911.

82. In sum, Respondent complied with the policy when Pastor Sanders called 911 on her behalf within four hours after Respondent saw the video. That Respondent, herself, did not personally call 911, is of no consequence.[3/]

83. The School Board failed to prove by a preponderance of the evidence that Respondent violated Policy 6.94(2)a.

84. On page four of its proposed recommended order, the School Board asserts that:

> [I]n accordance with Florida Statute section 1012.33, Respondent should be terminated from her position as a teacher due to her conduct occurring on October 18th and 19th of 2012, which also formed the basis of Respondent's two felony criminal charges (failing to report child abuse (Fla. Stat. section 39.201(1)(B), 39.205(2) and being an accessory after the fact (Fla. Stat. section 777.03(1)(c). (emphasis added).

85. Section 39.201(1)(a) and (b) provide as follows:

> (a) Any person who knows or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter, or that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care shall report such knowledge or suspicion to the department in the manner prescribed in subsection (2).
>
> (b) Any person who knows, or has reasonable cause to suspect, that a child is abused by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter, shall report such knowledge or suspicion to the department in the manner prescribed in subsection (2).

86. Section 39.201(2)(b) provides as follows:

> Each report of known or suspected abuse by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter, shall be made immediately to the department's central abuse hotline. Such

> reports may be made on the single statewide toll-free telephone number or via fax, web-based chat, or web-based report. Such reports or calls shall be immediately electronically transferred to the appropriate county sheriff's office by the central abuse hotline.

87. Section 39.205(2) provides as follows:

> (2) Unless the court finds that the person is a victim of domestic violence or that other mitigating circumstances exist, a person who is 18 years of age or older and lives in the same house or living unit as a child who is known or suspected to be a victim of child abuse, neglect of a child, or aggravated child abuse, and knowingly and willfully fails to report the abuse commits a felony of the third degree, punishable as provided in s. 775.082, 2. 775.083, or s. 775.084.

88. Section 777.03(1)(c) provides as follows:

> (c) Any person who maintains or assists the principal or an accessory before the fact, or gives the offender any other aid, knowing that the offender has committed a crime and such crime was a capital, life, first degree, or second degree felony, or had been an accessory thereto before the fact, with the intent that the offender avoids or escapes detection, arrest, trial, or punishment, is an accessory after the fact.

89. Importantly, the undersigned and the School Board lack jurisdiction to enforce sections 39.201(1) and (2) and 777.03(1)(c). Any purported violations of these statutes must be established elsewhere, such as in a criminal court. Palm Beach Cnty. Sch. Bd. v. Harrell, 2017 Fla. Div. Adm. Hear. LEXIS 234, *25, n. 6, Case No. 16-6862 (Fla. DOAH April 11, 2017).

90. The School Board can, of course, adopt its own rules containing certain requirements for reporting suspected abuse of minor students, which it has done.[4/] In support of its termination of Respondent, the School Board alleged that Respondent violated Policy, 5.37(8)(a). As detailed above, construing the Policy favorable to Respondent, reporting to DCF is only one possible option available to a teacher for reporting abuse. Another option is to report the abuse by calling 911. Respondent complied with the requirements of Policy 5.37(8)(a).

91. Even if section 39.205(2) could be considered by the undersigned as a potential independent ground for Respondent's termination, a review of the statute demonstrates that it has no application to the facts of this case. No evidence was presented at the hearing that K.M. resided in Respondent's household.

92. Even if the undersigned had jurisdiction to consider whether Respondent was an accessory after the fact in violation of section 777.03(1)(c), the facts found herein fail to establish that Respondent violated the statute. As the Fifth District Court of Appeal stated in Melahn v. State, 843 So. 2d 929, 930 (Fla. 5th DCA 2003):

> The crime of accessory after the fact requires some overt action by the defendant. See Bowen v. State, 791 So. 2d 44, 52 (Fla. 2d DCA 2001)(citing Roberts v. State, 318 So. 2d 166 (Fla. 2d DCA 1975)). Certain falsehoods told to an officer seeking information, which go beyond merely

> disavowing knowledge or refusing to cooperate with an investigation, may support a conviction for accessory after the fact. Id. at 53 (citing State v. Taylor, 283 So. 2d 882 (Fla. 4th DCA 1973)). In the instant case, Melahan's conduct upon being questioned by police cannot support a conviction for accessory after the fact because he merely refused to cooperate, and he told no alleged falsehoods beyond disavowing knowledge.

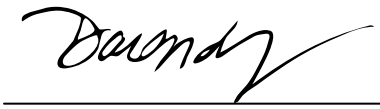
Melahn v. State, 843 So. 2d 929, 930 (Fla. 5th DCA 2003).

93. In sum, and as detailed above, the School Board failed to prove, by a preponderance of the evidence, that Respondent violated the rules and policies alleged in the Statement of Charges and Petition as a basis for Respondent's termination.[5/]

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the St. Lucie County School Board enter a final order rescinding Respondent's suspension without pay and termination, and reinstate her with back pay and benefits.

DONE AND ENTERED this 23rd day of May, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2017.

ENDNOTES

[1/] Respondent and Madison are both African-American.

[2/] Notably, section 1006.061, Florida Statutes, obligates the School Board to:

> (1) Post in a prominent place in each school a notice that, pursuant to chapter 39, all employees and agents of the district school board, charter school, or private school have an affirmative duty to report all actual or suspected cases of child abuse, abandonment, or neglect; have immunity from liability if they report such cases in good faith; and have a duty to comply with child protective investigations and all other provisions of law relating to child abuse, abandonment, and neglect. The notice shall also include the statewide toll-free telephone number of the central abuse hotline.
>
> (2) Post in a prominent place at each school site and on each school's Internet website, if available, the policies and procedures for

> reporting alleged misconduct by instructional personnel or school administrators which affects the health, safety, or welfare of a student; the contact person to whom the report is made; and the penalties imposed on instructional personnel or school administrators who fail to report suspected or actual child abuse or alleged misconduct by other instructional personnel or school administrators.

At the hearing, no evidence was presented to establish that the School Board complied with these requirements.

[3/] Notably, Policy 5.37(8)(a) contains an inherent inconsistency because of the use of the term "both" before subdivision (i), which is then followed by the use of the phrase "and/or." Construing the policy in a light most favorable to Respondent as is required, the rule actually provides for three mechanisms for a teacher to directly report abuse of a student. First, the teacher may report the abuse to the DCF central abuse hotline. Second, the teacher may report the abuse to the appropriate local law enforcement agency through the School Resource Officer. Third, the teacher may report the abuse to appropriate local law enforcement through the central dispatch center telephone number (911).

The School Board's reliance on Barber v. State, 592 So. 2d 330 (Fla. 2d DCA 1992), is misplaced. That case is distinguishable from the instant case because it involved a foster care worker's reporting requirements under chapter 415 of the Florida Statutes and the worker's challenge to the constitutionality of section 415.513(1). No issue was presented in that case as to the meaning of "directly," and whether the initial reporting of suspected abuse could be made by someone other than the person first having knowledge of the abuse.

Respondent's contention that Policy 5.37(8)(a) applies only to students and incidents that occur on campus, during school time, or involving a school event while a teacher is on-duty, is without merit. Nowhere in Policy 5.37(8)(a) is there any requirement that the alleged conduct occur on campus, during school time, or during a school event while a teacher is on-duty. A plain reading of the Policy demonstrates that it applies to a situation, as in the present case, where a teacher knows or should have reasonable cause to suspect that a student is abused, abandoned, or neglected.

In addition, Respondent's position that Policy 5.37(8)(a) cannot be applied to her because it contains no language regarding disciplinary consequences for failing to report abuse, is without merit. Rule 5.056(2)(c) clearly provides that violation of a School Board rule constitutes misconduct in office. Because a teacher can be terminated for misconduct in office, a teacher can be terminated for violating a School Board Policy, which amounts to a rule.

The School Board contends for the first time in paragraphs 45 and 46 of its proposed recommended order that Respondent also violated Policy 5.37(4) and 5.37 (8)(b)(iii). However, as to Policy 5.37, the School Board's Statement of Charges and Petition for Termination alleged a violation of 5.37(8)(a), only. Policy 5.37(4) and 5.37(8)(b)(iii) were not alleged as a basis for discipline in the School Board's Statement of Charges and Petition for Termination.

At no time did the School Board request to amend its Statement of Charges to include these provisions as a basis for Respondent's proposed termination. Policy 5.37(4) and 5.37(8)(b)(iii) were also not alleged as a basis for Respondent's termination in the parties' Pre-Hearing Stipulation.

To expand the scope of this administrative proceeding to address a purported violation of Policy 5.37(4) and 5.37(8)(b)(iii) would violate Respondent's due process rights. Accordingly, the School Board is precluded from arguing Policy 5.37(4) and 5.37(8)(b)(iii) as grounds for Respondent's termination. McMillian v. Nassau Cnty. Sch. Bd., 629 So. 2d 226, 228 (Fla. 1st DCA 1995); Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

Even if the School Board was not precluded from arguing Policy 5.37(4) and 5.37(8)(b)(iii) as grounds for Respondent's termination, the aforementioned facts demonstrate that the School Board failed to prove, by a preponderance of the evidence, that Respondent violated such policies.

Policy 8.37(4) states as follows:

> (4) Prosecution of Crimes--School authorities shall cooperate fully with the applicable law enforcement agency in the

> prosecution of any criminal case that, in the opinion of such agency, has prosecutorial merit.

This policy refers to a situation where criminal charges have been filed and there is an active prosecution of that criminal case. The policy does not apply before an individual's arrest and prior to the institution of criminal charges. As detailed above, Respondent cooperated fully in the State Attorney's prosecution of Madison's criminal case.

Policy 5.37(8)(b)(iii) states as follows:

> (b) Each school in the District shall post in a prominent place a notice containing the state-wide toll-free telephone number of the central abuse hotline and stating that, pursuant to Florida Statutes, all District employees:
>
> * * *
>
> (iii) Have a duty to comply and cooperate with child protective investigations and all provisions of law relating to child abuse, abandonment, or neglect.

This policy imposes an affirmative obligation on the part of the School Board to post a particular type of notice. Insufficient evidence was presented at the hearing to establish that the information required by the policy was posted by the school in a prominent place at the school. The policy is inapplicable to the instant case.

[4/] In Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217 (Fla. 2d DCA 1994), Judge Blue (specially concurring) stated the following:

> I agree section 231.36, Florida Statutes (1991), provides no objective standard by which school boards are required to judge the conduct of instructional staff, resulting in school boards exercising a purely subjective analysis when deciding to terminate a teacher during the term of a professional service contract. I write because I am not sure the legislature intended to endow school boards with this absolute discretion. If not,

> section 231.36 should be amended to clarify the conduct that would warrant the dismissal of teachers holding a professional services contract.

Dietz, 647 So. 2d at 218.

Subsequent to Dietz, the Florida Legislature amended section 231.36. The 1999 amendment removed from local school boards the absolute discretion to define just cause relating to the termination of instructional staff during the term of the employee's professional service contract and vested with the State Board of Education the authority to define by rule what constitutes just cause. Gabriele v. Sch. Bd. of Manatee Cnty, 114 So. 3d 477, 480 (Fla. 2d DCA 2013)(recognizing that "section 1012.33 sets forth detailed provisions regulating and limiting a school board's authority over discipline of teachers under a professional service contract."); Duval Cnty. Sch. Bd. v. Hunter, 2012 Fla. Div. Adm. Hear. LEXIS 605, *24, Case No. 12-2080TTS (Fla. DOAH October 3, 2012).

[5/] In paragraph 67 of its proposed recommended order, the School Board also contends that Respondent violated "Section 1006.06(1), Florida Statute." There is no section 1006.06(1) of the Florida Statutes. Assuming that the School Board is referring to section 1006.061(1), that section is inapplicable and does not provide a basis for disciplining Respondent for the reasons detailed above.

Finally, the School Board's proposed recommended order also asserts that Respondent violated an employee handbook. The employee handbook is not a rule, nor is there any mention of it in the Statement of Charges and Petition or the parties' Prehearing Stipulation. Accordingly, the employee handbook does not provide a basis for disciplining Respondent.

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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.