STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 16-7495TTS

ROSE DAVIDSON,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted by video teleconference on April 26, 2017, between sites in Miami and Tallahassee, Florida, before Administrative Law Judge Robert L. Kilbride of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Christopher J. LaPiano, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 430
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
29605 U.S. Highway 19, North, Suite 110
Clearwater, Florida 33761

STATEMENT OF THE ISSUES

Whether Rose Davidson committed the acts alleged in the Miami-Dade County School Board's Notice of Specific Charges dated April 7, 2017; and, if so, what discipline should be imposed against her.

PRELIMINARY STATEMENT

During the time period relevant to this proceeding, Rose Davidson (Respondent) taught first grade at Rainbow Park Elementary School (RPES).

At a scheduled meeting on December 14, 2016, the Miami-Dade County School Board (Petitioner or School Board) took action to suspend Respondent's employment without pay and instituted proceedings to terminate her employment. Being dissatisfied with this decision, Respondent timely requested an administrative hearing to challenge the School Board's action. The matter was referred to DOAH, and this hearing was conducted.

On April 7, 2017, the School Board filed its Notice of Specific Charges with DOAH. The Notice of Specific Charges alleged certain facts and charged in two separate counts that Respondent was guilty of (I) Misconduct in Office and (II) Gross Insubordination. These charges arose from an allegation that Respondent improperly assisted her first-grade students during a Grade 2 SAT Math Test administered on April 4, 2016, and instructed them not to be truthful if asked about the incident.

Prior to the hearing, the parties filed a Second Amended Joint Pre-hearing Stipulation, which contained certain stipulated facts. Those stipulated facts have been incorporated by the undersigned to the extent they were deemed relevant.

At the final hearing, the School Board presented the testimony of Tedria Saunders (reading coach and proctor), D.B. (class student), Ines Diaz (assistant principal), Detective Sofie Shakir (school investigator), Robin Armstrong (principal), and Helen Pina (district director of the Office of Professional Standards). Petitioner's pre-marked Exhibits 1 through 16, and late-filed Exhibit 17, were admitted into evidence. (Respondent objected to all hearsay contained in Petitioner's Exhibit 7, which was the investigative report prepared by Detective Shakir.)

Respondent testified on her own behalf, and also presented the testimony of Myriam Guisti (elementary school teacher). Respondent adopted and also offered pre-marked Exhibits 8 through 14 (student deposition transcripts), which had previously been offered into evidence by Petitioner.

A Transcript of the proceedings, consisting of one volume, was filed on June 19, 2017. Thereafter, each party timely filed proposed recommended orders, which were considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2016), and all references to rules are to the version thereof in effect as of the time of the alleged conduct in April 2016.

FINDINGS OF FACT

Based on the evidence presented and the record as a whole, the undersigned makes the following findings of fact:

1. Petitioner is the properly constituted School Board charged with the duty to operate, control, and supervise all public schools within the School District of Miami-Dade County, Florida.

2. In the 2015-2016 school year, Respondent was employed, under a professional services contract, as a first-grade teacher at RPES, a public school in Miami-Dade County.

3. Respondent's employment, and any disciplinary action proposed to be taken against her, is governed by a collective bargaining agreement between the School Board and the United Teachers of Dade, as well as policies of the School Board and Florida law.

4. Respondent has been employed by the School Board since 1990, nearly 27 years. She spent the first ten years of her career teaching at Westview Elementary. She subsequently taught high school for approximately 15 years. She was transferred to the Graham Center in the 2011-2012 school year, where she taught second grade for that school year and the 2012-2013 school year.

5. Respondent was out of work on a period of suspension from the School Board for the 2013-2014 school year. She was reinstated by the School Board based on a Recommended Order

issued by an Administrative Law Judge at DOAH in Case No. 13-3418TTS, which found in her favor. She has been at RPES since June 2014.

6. At the time of this incident in 2016, Respondent was a first grade teacher at RPES.

Classroom Testing Incident on April 4, 2016

7. On April 4, 2016, Respondent administered a standardized math test to her first-grade class.[1/] It was undisputed that the math test required the Respondent to read the questions out loud to the class, who then answered the questions on their individual test sheets.

8. Respondent was assisted during the math testing by a reading coach at the school, Tedria Saunders. Saunders had been employed by the School Board for approximately 12 years. Saunders was a certified reading teacher for grades kindergarten through 12.

9. Saunders was acting as a proctor and was expected to observe the students and provide support to Respondent. She stood or sat in the classroom during the course of the math exam. She had the freedom, like the teacher, to move around to observe the testing.

10. She testified that her relationship with Respondent had been professional and friendly, and they had done some curriculum planning together.[2/]

Count I--Misconduct in Office

11. During the course of the math test, Saunders observed Respondent engage in several testing irregularities. She saw Respondent providing direct assistance and "giving answers" to several students on the examination.

12. More descriptively, she saw Respondent physically point out the correct answer to several students stating "you need to fix the answer."

13. Saunders also heard Respondent give verbal answers, prompts, or cues to several students, as Respondent walked around the classroom and stood near the desks of several students.

14. As she walked around, Respondent would periodically touch or point to the student test booklet that was on the desk in front of the student, while making sounds and hand motions directing them to the correct answer. For example, when a student pointed to an answer, Respondent would give them a verbal cue or signal that their proposed answer was either right or wrong.

15. Saunders observed Respondent help approximately six to seven students using these methods.

16. Significantly, and after making these observations, Saunders decided to immediately depart from the classroom while the testing was still going on to ask the security guard to

summon the appropriate administrator or report the event herself.

17. After going outside, Saunders eventually found her way across the grassy area outside the classroom to the front office where she met with the assistant principal and test chairperson, Ines Diaz. She reported to Diaz that Respondent was improperly assisting the students and giving them answers to the standardized math questions.

18. When Diaz pressed Saunders on the plausibility of her observations, Saunders told her that she was "sure of" what she had seen and reported.

19. Diaz did not recall for certain if she went to the classroom herself, but was certain that Saunders was directed to return to the classroom, continue her observations, and allow the math testing to be completed.

20. The principal, Robin Armstrong, was present briefly during Saunders' initial visit with Diaz and after Saunders returned to the administrative office when the testing was concluded. She too overheard Saunders report testing irregularities by Respondent.

21. After the incident on April 7, 2016, Armstrong delivered a letter to Respondent warning her not to discuss the matter with any witnesses, students, and other staff members. Pet. Ex. 17.

22. On May 3, 2016, the administrative investigation was assigned to Detective Sofie Shakir. Among other things, the detective interviewed several of Respondent's students and staff members. Pet. Ex. 7.

23. Her investigation and subsequent findings resulted in the invalidation of the standardized math test for several of Respondent's first-grade students due to test irregularities and improper assistance by Respondent on April 4, 2016. Pet. Ex. 15.[3/]

24. A conference-for-the-record (a meeting which may lead to disciplinary action) was held with Respondent on August 26, 2017. The meeting included her union representative and Helen Pina from the Office of Professional Standards as well as several other members of the school administration.

25. The meeting occurred nearly five months after the incident. Pina recorded the results of the meeting in a Memorandum which was prepared pursuant to her duties. Pet. Ex. 4.

26. Pina documented in the memo that when she formally confronted Respondent with the allegations by Saunders, Respondent stated: "I want to say it was first grade, not 2nd. I performed the tests very professionally. I followed all the directions and no one helped any kids. I followed the directions from the booklet and that is all that I did."[4/]

27. More significant was a written statement prepared by Respondent and submitted to the principal just days after the classroom incident. Pet. Ex. 16. Although Respondent wrote that she administered the test "the proper way," again she did not take the opportunity to firmly and positively deny Saunders' allegations, or respond in more detail. This was significant to the undersigned.[5/]

28. Rather than an outright and emphatic denial of the accusations in her first written response, she instead accused Saunders of misconduct during the math testing. The undersigned found this unusual, and an attempt by Respondent to deflect the allegation and steer the blame to Saunders--not address it head on.[6/]

29. The testimony of Student D.B., called during the hearing, was uncertain, at best, and lacked any persuasive details to support a finding either way. As a result, his testimony was discounted and given little weight.

30. The evidence from Principal Armstrong and Assistant Principal Diaz, concerning the prompt and contemporaneous reporting by Saunders, is consistent with and corroborates Saunders' testimony concerning the classroom incident.[7/]

31. There was no evidence presented to indicate that Saunders had given any prior inconsistent or conflicting

statements, nor was her version of the classroom irregularities impeached or discredited in any material fashion.

32. The undersigned carefully read, studied, and compared a collection of deposition transcripts from seven students who were in Respondent's class the day of the incident. Pet. Exs. 8-14.

33. From those transcripts, only one of the seven students testified that Respondent directly helped or assisted him or her during the standardized math test. See Dep of J.M., Pet. Ex. 11.[8/]

34. The other six testified that Respondent did not help them, nor did they see Respondent help other students answer any test questions.

35. Similarly, only one of the seven students deposed stated that Saunders raised her voice or yelled at any one during the math examination. See Dep. of S.D., Pet. Ex. 9.[9/]

36. In evaluating the weight to be given to the seven student depositions, the undersigned notes several key points regarding their ability to accurately recall what occurred and to know what they saw.

37. Initially, all of the students were very young at the time of the incident. And while age is not controlling, it should be considered, along with other factors.

38. More significantly, none of these very young students were charged with the responsibility to watch or observe the conduct of the teacher, other students, or the proctor during the testing. Rather, they were instructed to concentrate and focus on their own test, and not their surroundings.[10/]

39. In fact, a reasonable inference from the circumstances surrounding this incident, or any other standardized classroom testing for that matter, is that during regulated testing of this nature, students would *not* be looking or turning around to observe what others are doing. Based on the private nature of classroom testing and warnings that typically precede testing, students have a natural inclination to avoid being accused of having "wandering eyes" during classroom testing.

40. In balance, the undersigned is unable to credit the testimony of those students who claim they did not see anything untoward or improper during the testing.

41. Under these circumstances, the fact that the students did not see anything improper does not persuade the undersigned that it did not happen the way Proctor Saunders' persuasively testified, distinctly recalled, and contemporaneously reported to the assistant principal.

42. As a result of the testimony adduced at the hearing and the reasonable inferences drawn from the evidence, the

undersigned concludes that there was sufficient evidence to prove Count I, Misconduct in Office.

Count II--Gross Insubordination

43. Regarding whether or not Respondent instructed students to be untruthful if questioned about her assisting them during the testing, five out of the seven deposed students denied this occurred.[11/]

44. One student said Respondent told them not to tell anyone she had "helped" them on the test. However, to put this comment in proper context, this student went on to clarify that "helping" them meant just *reading the questions* to them. Pet. Ex. 8. As a consequence, the testimony from this student is insignificant.[12/]

45. The remaining student, when asked directly if the teacher told him or her not to tell the truth, responded in deposition that Respondent only told him or her "don't tell your momma I helped you a little on the test." The description by this student was unclear and conflicting as well. Pet. Ex. 11. In sum, the testimony from this student was not persuasive.

46. In short, the undersigned is persuaded to give some weight and credence to the deposition transcripts of the five students who denied that Respondent told them not to tell the truth if asked.

47. Contrary to the allegation in paragraph 14 of the Notice of Specific Charges, there was no persuasive evidence that Respondent verbally told the students to be untruthful if asked.

48. On Count II, Gross Insubordination, the undersigned finds that the charge was not proven.

CONCLUSIONS OF LAW

49. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

50. Because Petitioner seeks to terminate Respondent's employment, and this case does not involve the loss of her teaching license or certification, Petitioner has the burden of proving the allegations in its Notice of Specific Charges by a preponderance of the evidence, as opposed to the higher standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

51. Relatedly, the School Board filed a Notice of Specific Charges and is limited to proving those allegations and seeking discipline for only those charges. Discipline for any other conduct or infractions would not be authorized. Christian v.

Dep't of Health, Bd. of Chiropractic Med., 161 So. 3d 416 (Fla. 2d DCA 2014), and cases cited therein.

52. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000)(relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) (quoting Bourjaily v. U.S., 483 U.S. 171, 175 (1987)).

53. In a chapter 120 hearing, the case is considered de novo by the Administrative Law Judge based on the facts and evidence presented at the hearing. There is no "presumption of correctness" that attaches to the preliminary decision of the Agency. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981), and Boca Raton Artificial Kidney Ctr., Inc. v. Fla. Dep't of HRS, 475 So. 2d 260 (Fla. 1st DCA 1985).

54. Factual findings in a recommended order are based on the discretion afforded to an independent Administrative Law Judge. Goin v. Comm'n on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995). Florida's Administrative Procedures Act requires the hearing officer to consider all the evidence presented. He or she is authorized to resolve conflicts, determine the credibility of witnesses, draw permissible and reasonable inferences from the evidence, and reach ultimate findings of

fact based on the competent and substantial evidence presented. Id.

55. Whether Respondent committed the charged offenses is a question of ultimate fact to be decided by the trier-of-fact in the context of each alleged violation. McKinney v. Castor, 66 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

56. In the present case, Petitioner offered an investigation report prepared by Detective Shakir outlining her interviews and findings. Pet. Ex. 7. The document was admitted, but Respondent timely objected at the hearing to the use of any hearsay in the report.

57. The detective indicated in her report that her findings were based on her interviews with various staff members and students who had witnessed the classroom incident. The interviews are hearsay and do not qualify under any hearsay exceptions.

58. As a result, the staff and student interviews contained in the investigator's investigation report were not relied upon or used by the undersigned to support any findings. Harris v. Game & Fresh Water Fish Com., 495 So. 2d 806 (Fla. 1st DCA 1986); M.S. v. Dep't of Child. & Fams., 6 So. 3d 102 (Fla. 4th DCA 2009); Reichenberg v. Davis, 846 So. 2d 1233 (Fla. 5th

DCA 2003), and Lee v. Dep't of HRS, 698 So. 2d 1194 (Fla. 1997).[13/]

59. As previously mentioned, the testimony of Student D.B. at the hearing was accorded little or no weight. Prior consistent or clarifying statements Student D.B. made to the Detective during his interview on May 5, 2016, are hearsay and cannot be used by the undersigned to bolster, clarify, or support his hearing testimony or credibility. Ehrhardt's Florida Evidence, 2010 ed., § 611.2, relying on Rodriguez v. State, 609 So. 2d 493 (Fla. 1992).

Applicable Provisions of the Collective Bargaining Agreement, School Board Policies, and Florida Statutes

60. The applicable Collective Bargaining Agreement (CBA) requires that the School Board prove "just cause" to discipline a teacher, and further provides that just cause for suspension or dismissal should be based upon Florida Statutes. Pet. Ex. 1, Art. XXI, § 1B.1.; see also Art. XXI, § 1B.2.

61. The statutory definition of "just cause" in school discipline cases is outlined in section 1012.33, Florida Statutes, and states as follows:

> 1012.33 Contracts with instructional staff, supervisors, and school principals.--
>
> (1)[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. (Emphasis added).

62. Florida Administrative Code Rules 6A-55.056(2) and 6A-10.081, and School Board Policies 3210 and 3210.01, outline ethical rules relied upon by the School Board in this case. Several of these rules and policies were violated by Respondent since it was proven that she helped, coached, or directly assisted several classroom students with standardized math test answers. (See for instance provisions outlined in Pet. Ex. 3, under "Fundamental Principles.")

63. Rule 6A-55.056(4) defines gross insubordination, in part, as an "intentional refusal to obey a direct order,

reasonable in nature, and given by and with proper authority, misfeasance, malfeasance as to involve failure in the performance of the required duties." This would require proof that the direct order was given and ignored, or intentionally refused.

64. As found previously, gross insubordination was not proven in this case since there was no persuasive proof that Respondent instructed students to be untruthful about the incident if asked.

Progressive Discipline

65. The CBA utilized by the parties expressly recognizes and embraces the doctrine of "progressive discipline." It characterizes the application of the doctrine as discretionary with the School Board ("Disciplinary action *may* be consistent with the concept of progressive discipline when the Board deems it appropriate.").

66. Although there is not a progression or list of disciplinary steps to be followed for particular offenses, the CBA expressly states that "the degree of discipline shall be reasonably related to the seriousness of the offense." Pet. Ex. 1, Art. XXI, § 1, Due Process, § A.1.

67. Therefore, the parties have agreed that the time-honored concept of progressive discipline should be the polestar to guide all disciplinary decisions.

68. In general, parties who follow progressive discipline recognize that as the seriousness of the offense increases, or if there are repeated instances of the same or minor offenses, the discipline imposed increases in severity.

69. Consequently, under the concept of progressive discipline, one act of misconduct may result in minor discipline merely because it was a first offense, whereas the same misconduct, if repeated, could justify the imposition of major discipline, including termination. In other words, different penalties can be imposed for the same misconduct depending on the employee's record. See, generally, In re Stallworth, 26 A.3d 1059 (N.J. Supreme Court 2010).

70. In the context of governmental discipline cases, agencies and hearing officers often conclude that in the absence of a definition, or a set list of progressive penalties, progressive discipline means that an employee is subjected to progressively more severe discipline when the standards of conduct continue to be violated for the same or similar offenses.

71. As with this case and in the absence of a list of progressive penalties, there are generally no hard and fast rules for progressive discipline. It is largely understood that the employer retains a fair amount of discretion to reasonably determine what discipline would be appropriate.

72. Factors that are often considered include, but are not limited to: (1) the type or severity of the offense committed, (2) the number of times the employee has committed the same or similar offense, (3) the employee's past disciplinary record, (4) the extent to which the company's or agency's operations or personnel have been disrupted or affected by the offense, (5) the employee's years of service, and (6) how other employees committing similar offenses have been treated. This last factor is commonly referred to as "being consistent with past practice or custom."

73. Regarding the severity of the punishment under a progressive discipline program implemented by a governmental agency, there is a body of case law in Florida that has developed to guide agencies on the reach and scope of progressive discipline.[14/]

74. More particularly, the Florida Third District Court of Appeal has provided some useful guidance in school discipline cases. In fact, the Florida Third District Court of Appeal had the opportunity to evaluate disciplinary decisions made by this School Board in several disciplinary cases involving the imposition of progressive discipline.

75. In three cases arising in the mid 1990's, the Court reversed the school board on several occasions for imposing a disciplinary sanction that was not warranted under the

circumstances, recognizing implicitly, if not directly, that the progressive discipline provisions of a CBA were controlling.[15/]

76. In Bell v. School Board, 681 So. 2d 843 (Fla. 3d DCA 1996), the court determined that dismissal was too severe a penalty under a progressive discipline policy for an 11-year employee with no prior disciplinary action who engaged in sex with his girlfriend in a private area at the school.

77. Likewise, in Collins v. School Board of Dade County, 676 So. 2d 1052 (Fla. 3d DCA 1996), a 17-month suspension was found too severe under the Board's progressive discipline policy for a 26-year employee without prior discipline, who jokingly brandished a knife at a co-worker.

78. Finally, in Centellas v. School Board, 683 So. 2d 644 (Fla. 3rd DCA 1996), the court characterized the dismissal of a bus driver caught driving on a suspended license as "wildly excessive and disproportionate."

79. In this hearing, there was no evidence presented to prove or suggest that Respondent, a 27-year employee, had been previously disciplined for *any* offenses. See Pet. Ex. 4, Summary of Conference-for-the-Record.

80. As a result, this case appears to be Respondent's first case in which misconduct in office was proven.

81. The undersigned concludes that Respondent's misconduct in office is a serious offense and strikes at the heart of the

integrity and soundness of our educational testing. Conversely, however, her misconduct warrants corrective discipline that is reasonably related to the offense taking into account the factors outlined above.

82. While several students had their test scores invalidated, fortunately there was no proof to suggest that there was any emotional or psychological injury to any of the students involved. Invalidation of the test scores was, however, disruptive to the school and its operations.

83. Nonetheless, Respondent's 27 years of continuous service, untarnished by any prior proven infractions, cannot be overlooked and must be considered.

84. Respondent is a long-term employee who should be afforded a chance to get back on track and contribute to the successful development of students in the school district.

85. In summary, the undersigned finds that Respondent violated Count I, Misconduct in Office. There was insufficient proof, however, to establish a violation of Count II, Gross Insubordination.

86. Applying the progressive discipline policy and guidance from the Florida Third District Court of Appeal, the undersigned recommends that Respondent serve a significant period of unpaid suspension and that she be required to attend

and successfully complete training related to testing protocol.[16/]

87. In determining the appropriate length for an unpaid suspension, the undersigned recommends that the School Board apply the factors outlined above, consider its past practice, and the guidance provided by the Florida Third District Court of Appeal in Bell, Collins and Centellas.

88. This recommendation is offered recognizing that the School Board is best suited to make the final decision on the length of the suspension, applying the facts, conclusions of law, and parameters recommended by the undersigned. See, generally, Dep't of Prof'l Reg. v. Bernal, 531 So. 2d 967, 968 (Fla. 1988).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is FURTHER RECOMMENDED that the final order impose a significant period of unpaid suspension against Rose Davidson and require retraining by her on standardized testing protocol.

DONE AND ENTERED this 19th day of July, 2017, in Tallahassee, Leon County, Florida.

Robert L. Kilbride
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 19th day of July, 2014.

ENDNOTES

[1/] A standardized reading test had been administered by Respondent the previous day without incident.

[2/] Although Respondent later testified that Saunders "hated me" and "orchestrated the incident against me," this testimony was not persuasive. The undersigned finds that there was no persuasive evidence developed at the hearing to show that there was any animosity or ill feelings Saunders harbored against Respondent and, in particular, no convincing reason or motivation for Saunders to be untruthful.

[3/] The investigation by Shakir included interviews of the assistant principal, Saunders, and several students who were in the class. The interviews occurred on or about May 5, 2016, approximately one month after the incident. As outlined below, based on the objection of Respondent's counsel, the investigation report, Petitioner's Exhibit 7, is hearsay and has not been used by the undersigned in making findings of fact, other than facts found based upon admissions of Respondent.

[4/] It is notable that after nearly five months to consider the accusation and prepare her response, Respondent did not take that conference opportunity, at least as recorded by Pina, to

categorically and emphatically deny in a more direct way the allegations made by Saunders against her personally.

[5/] The reasonable inference the undersigned draws from the absence of a firm, prompt, and unequivocal written denial of the personal accusations by Respondent was a consciousness of guilt or culpability on her part.

[6/] For instance, Respondent alleged that Saunders "slammed" a test booklet in a student's face during the testing and "scared her" and that "while Saunders was busy slamming K.'s test booklet on K.'s desk," another student started crying. She also stated that Saunders was shouting outside the door, talking to somebody on her cell phone. As the evidence developed, there were no administrators, parents, or students who stepped forward to complain in a convincing manner that Saunders had accosted the children in this deliberate way. Also, strangely enough, Respondent never separately reported this "misconduct" by Saunders, raising the reasonable inference that it never occurred. In sum, despite a full opportunity to do so, Respondent did not sufficiently address Saunders' allegations in her April 7, 2016, letter to the principal.

[7/] The undersigned considered it persuasive that Saunders considered Respondent's test assistance blatant and obvious enough to leave the room and immediately report the event to the assistant principal. As noted previously, when pressed by Diaz during her initial reporting, Saunders told Diaz that she was sure of what she saw and did not equivocate in her story.

[8/] Although another student stated that Respondent "helped lots of students" with the test, he or she clarified that this only meant that Respondent read them the math *questions*. See Dep. of L.C., Pet. Ex. 8.

[9/] All of the students who testified either in person, or by way of the deposition transcript, were first graders at the time, and presumably only six to seven years of age. At that age, it was not surprising to read that one of the young students did not understand what it meant to tell the truth.

[10/] Respondent's written instructions to the students on the classroom "white board" reinforced this fact.

[11/] The undersigned concludes that some weight should be accorded this aspect of the students' testimony. Common sense and experience dictates that whether they were specifically told

not to tell anyone is a more memorable and significant event for a young child, as opposed to asking them if they saw something they were not required to observe, or may have got in trouble for observing if looking around during censored testing.

[12/] As previously noted, it was undisputed that it was appropriate for Respondent to read the students each question.

[13/] The undersigned did use statements in the report directly attributed to Respondent, as an "admission" under section 90.803(18), Florida Statutes. See Pet. Ex. 7, Bates stamp 36.

[14/] This body of law is particularly instructive in this case since the parties' CBA does not specify a list of progressive steps for a particular offense.

[15/] Of particular interest is the progressive discipline policy and language at play in these cases was similar to the policy in this case.

[16/] This recommendation is made, in part, since there was no evidence presented concerning what the past practice or custom has been for comparable cases where a period of suspension was imposed.

COPIES FURNISHED:

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

Christopher J. La Piano, Esquire
Miami-Dade County School Board
1450 Northeast 2nd Avenue, Suite 430
Miami, Florida 33132
(eServed)

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

Alberto M. Carvalho, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 912
Miami, Florida 33132

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