STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 17-0244TTS

DAN A. HUSSAN,

Respondent.
_____/

RECOMMENDED ORDER

On March 8, 2017, Administrative Law Judge Lisa Shearer Nelson conducted an administrative hearing pursuant to section 120.57(1), Florida Statutes (2016), by video teleconference with sites in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Barbara Lee Sadaka, Esquire
St. Lucie County School Board
4204 Okeechobee Road
Fort Pierce, Florida 34947

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated section 1012.315, Florida Statutes; Florida Administrative Code Rules 6A-5.056 and 6A-10.081(1) through (5); and School Board Policies 6.30(2), (3)(b), and 6.301(2), as alleged in the

Statement of Charges and Petition for Termination (Petition); and, if so, what penalty should be imposed for these violations.

PRELIMINARY STATEMENT

On January 13, 2017, Petitioner, the St. Lucie County School Board (the School Board), filed a Petition against Respondent, Dan A. Hussan (Respondent or Mr. Hussan). That same day, the Board forwarded the Petition, along with Respondent's request for hearing, to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge. Also filed with the Petition was a Motion for DOAH to Relinquish Jurisdiction Back to School Board for Entry of Final Order Terminating Employment of Respondent (Motion to Relinquish Jurisdiction).

On January 24, 2017, an Order to Show Cause was issued, directing Respondent to respond to the Motion to Relinquish Jurisdiction. Counsel for Respondent responded to the motion and also filed an amended motion to withdraw.

On February 2, 2017, Petitioner's Motion to Relinquish Jurisdiction was denied, and the case was scheduled for hearing on March 8, 2017. Because Respondent is incarcerated, arrangements were made for him to participate by telephone. Respondent's amended motion to withdraw was granted by Order dated February 21, 2017, with directions that counsel provide to

Respondent a copy of the Notice of Hearing for this case, which he did.

On March 1, 2017, Respondent wrote a letter requesting that no hearing be conducted until the Fourth District Court of Appeal resolved his appeal related to the underlying criminal charges. No copy of the letter was provided to counsel for Petitioner, and a Notice of Ex Parte Communication was issued. On March 3, 2017, an Order Denying Continuance was entered, in which it was explained that this hearing was not an opportunity to relitigate the basis for the underlying criminal action, but instead was focused on the allegations in the Statement of Charges: i.e., was Respondent arrested and subsequently convicted of 16 counts of lewd and lascivious conduct toward children under 18, and had Petitioner established a basis for terminating his employment.

On March 8, 2017, the hearing was scheduled to commence. Before beginning the hearing, a phone call was placed to the Gulf Correctional Institution in order to allow Respondent to participate in the hearing. Once Respondent was placed on the line, on speaker phone, and the purpose of the call was identified, Respondent stated that he did not understand the purpose for the hearing and that he was not guilty of the charges; that he had been advised not to speak while his appeal of the underlying charges was pending; and that he was

terminating the call. At that point he did, in fact, end the telephone call.

The hearing then began, with the administrative law judge reciting the contents of the telephone call, which counsel for Petitioner confirmed was an accurate rendition of what she had heard. Petitioner presented the testimony of Aaron Clements, and Petitioner's Exhibits numbered 1 through 28 were admitted into evidence. Petitioner's Motion for Official Recognition, previously filed, was granted.

The Transcript of the proceedings was filed with the Division on March 28, 2017. Once the Transcript was filed, copies of the Transcript, exhibits, and the pleadings on the docket were forwarded to Respondent.

At Petitioner's request, the date for submission of proposed recommended orders was established as 20 days following the filing of the Transcript. Petitioner's Proposed Recommended Order was timely filed on April 17, 2017, and has been considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2013 codification, unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner, the School Board, is the constitutional entity authorized to operate, control, and supervise the St. Lucie County School System. The authority to supervise the

school system includes the hiring, discipline, and termination of employees within the school district.

2. Respondent was employed by the School Board as a teacher at Fort Pierce Westwood High School. He worked for the School Board since at least September 2007, albeit originally at a different school.

3. Respondent signed a professional services contract with the School Board on or about February 12, 2010. He is covered by the collective bargaining agreement between the School Board and the St. Lucie County Classroom Teachers' Association (CBA), as stated in Article I, section A of the CBA.

4. On October 28, 2011, Respondent was advised of a meeting to take place on November 1, 2011, regarding a School Board investigation into alleged inappropriate contact with students. There is no indication in the record whether Respondent attended the meeting or gave any information. There is also no indication whether the investigation referenced in the October 28, 2011, letter is the same investigation giving rise to these proceedings.

5. On March 3, 2014, Maurice Bonner, the Director of Personnel for the School Board, provided to Respondent a Notice of Investigation and Temporary Duty Assignment (Notice). The Notice advised that Respondent was being investigated regarding allegations of inappropriate contact with students, and that he

was being placed on temporary duty assignment as assigned by the Personnel Office. Respondent signed the letter acknowledging its receipt on March 14, 2014.

6. On April 1, 2014, Genelle Zoratti Yost, Superintendent of the School Board, wrote to Respondent with a reference line entitled Notice of Intent to Terminate Employment. The letter states, in pertinent part:

> On March 21, 2014 you were arrested for violating Section 800.04(6)(a)(b), Florida Statutes, "Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age."[1/] Pursuant to the Arrest Warrant issued on March 21, 2014 you are not to be within 100 feet of Fort Pierce Westwood High School or Harbor Branch. As a result, you are unavailable to work on campus so your temporary duty assignment outlined in the notice of Temporary Duty Assignment provided to you on March 3, 2014 shall remain in full force and effect until further notice. Furthermore, you have not reported your arrest to the Superintendent within 48 hours as required. . . .
>
> Based on the information available to the School District there is sufficient information to charge you with violating the following [list of State Board of Education rule violations and School Board Policy violations]. . . .

7. The April 1, 2014, letter notified Respondent that the superintendent would be recommending to the School Board that it terminate his employment, and provided him with notice of how he could request a hearing on the proposed termination. The letter also advised that, should he seek a hearing, the superintendent

would recommend that he be suspended without pay pending the outcome of the hearing. Respondent signed the letter acknowledging receipt of it on April 3, 2014.

8. Respondent requested a hearing with respect to his termination and was notified by letter dated April 23, 2014, that he was suspended without pay.

9. Respondent's request for hearing was forwarded to the Division, and the case was docketed as Case No. 14-1978. Because of the pendency of the criminal proceedings against Respondent, at the request of the parties, on September 30, 2014, Administrative Law Judge Darren Schwartz entered an Order Closing File and Relinquishing Jurisdiction, which closed the file with leave to re-open.

10. On a date that is not substantiated in this record,[2/] Respondent was tried by jury and convicted of seven counts of lewd or lascivious conduct in violation of section 800.04(6)(a) and (b) and nine counts of lewd and lascivious molestation in violation of section 800.04(5)(c)2. All 16 counts were second-degree felonies.

11. On July 29, 2016, counsel for the School Board wrote to then-counsel for Respondent, advising him that in light of the jury verdict, notice was being given that on August 9, 2016, the superintendent would be recommending Respondent's termination from employment. The letter also provided Respondent notice of

his rights to a hearing in accordance with section 1012.33(6)(a). Counsel for Respondent notified the superintendent that Respondent continued to request a hearing in accordance with the CBA.

12. On October 31, 2016, a Judgment and Sentence was entered in the case of State of Florida v. Dan Allen Hussan, Case No. 562014CF000857A (19th Judicial Circuit in and for St. Lucie County), adjudicating Respondent guilty of all 16 counts. Respondent was sentenced to 15 concurrent sentences of life in prison, with credit for 103 days served prior to sentencing. With respect to Count XVI, Respondent was sentenced to 15 years of sexual offender probation, consecutive to the sentence set forth in Count I.

13. On November 7, 2016, Judge James McCann entered, nunc pro tunc to October 31, 2016, an Order of Sex Offender Probation with respect to Count XVI. The Order of Sex Offender Probation adjudicated Respondent guilty and set the terms for sexual offender probation following the life sentence.

14. Respondent remains incarcerated. He also maintains that he is not guilty of the underlying charges.

15. Petitioner contends that Respondent did not self-report his arrest as required by School Board policy. However, no competent, substantial evidence was presented to demonstrate Respondent's failure to report. While a notice provided to him

regarding this allegation was admitted into evidence, the accusation, standing alone, does not amount to evidence that the accusation is true.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. §§ 120.569, 120.57(1), and 1012.33(6)(a)2., Fla. Stat.

17. The School Board is the duly-constituted governing body of the School District of St. Lucie County pursuant to Article IX, section 4 of the Florida Constitution, and sections 1001.30 and 1001.33, Florida Statutes. The School Board has the authority to adopt rules governing personnel matters pursuant to sections 1001.42(5) and (28), 1012.22(1), and 1012.23.

18. District superintendents are authorized to make recommendations for dismissal of school board employees, and school boards may dismiss school board instructional staff for "just cause." §§ 1001.42(5), 1012.22(1)(f), and 1012.33(6)(a), Fla. Stat.

19. Petitioner is seeking to terminate Respondent's employment for just cause. Therefore, Petitioner bears the burden to establish the charges against Respondent by a preponderance of the evidence. Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990); § 120.57(1)(l), Fla. Stat.

20. The preponderance of the evidence standard requires that the proof against Respondent be by the greater weight of the evidence, or evidence that "more likely than not" tends to prove the allegations. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

21. Section 1012.33(6)(a) provides that any member of instructional staff may be suspended or dismissed during the term of his or her contract for just cause as defined in section 1012.33(1)(a). Section 1012.33(1)(a) provides that:

> 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.

22. By virtue of the convictions for 16 counts of lewd and lascivious conduct, Petitioner has established just cause for termination.

23. In the Petition, Petitioner alleges that Respondent is also disqualified from employment pursuant to section 1012.315, by virtue of his criminal convictions.

24. Section 1012.315 provides that an individual is ineligible for educator certification, and instructional personnel are ineligible for employment in any position that requires direct contact with students, if the person has been convicted of certain enumerated offenses. Among those offenses are offenses under chapter 800, related to lewdness and indecent exposure. § 1012.315(1)(u), Fla. Stat.

25. In light of Respondent's conviction of 16 felonies pursuant to chapter 800, Petitioner has established that Respondent is disqualified from employment in an instructional position.

26. In his request for a delay in the hearing, Respondent contended that this matter should not be decided while his case is on appeal. However, as stated in the Order Denying Motion for Continuance, the School Board clearly has authority to take action with respect to his employment while the appeal in his criminal proceeding is pending. Kale v. Dep't of Health, 175 So. 3d 815, 820 (Fla. 1st DCA 2015).

27. At paragraph 21 of the Petition, Respondent is charged with violating School Board Policy 6.30(2) for failing to report his arrest to the superintendent within 48 hours.

28. By its terms, School Board Policy 6.30(2) requires employees to report both arrests and convictions. However, the only evidence submitted in this case regarding a failure to

report is Petitioner's Exhibit 28, which is a memorandum sent to Mr. Hussan advising him that he should have reported his arrest within 24 hours and that he must report the outcome of his case. This memorandum certainly makes the accusation that Respondent did not report his arrest, but it does not establish the truth of the accusation. No testimony was presented concerning the process for reporting, or that Respondent did not report to the superintendent as required by School Board Policy 6.30(2), or that there was no record for the School Board consistent with Respondent reporting his arrest. Absent some type of testimony, Petitioner's Exhibit 28 is simply hearsay upon which no finding of fact can be made. Therefore, the School Board did not meet its burden of proof with respect to this charge.

29. The Petition charges Respondent at paragraph 23 with violating School Board Policy 6.301(3)(b), which provides in part:

> (b) The following list is not intended to be all inclusive, but is typical of infractions that warrant disciplinary action:
>
> * * *
>
> (vi) Conviction of a criminal act that constitutes a felony
>
> * * *
>
> (xix) Violation of any rule, policy, regulation, or established procedure
>
> * * *

> (xxix) Any violation of the Principles of Professional Conduct for the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees.

30. By virtue of his criminal convictions, Respondent has violated School Board Policy 6.301(3)(b)(vi).

31. Petitioner listed a variety of other grounds in its Petition, such as immoral or indecent conduct, sexual harassment, off-duty conduct that does not promote the goodwill and favorable attitude of the public toward the School District, inappropriate relationship with a student, etc. All of these charges would require that the School Board present evidence related to Petitioner's conduct, as opposed to simply proving that he was convicted of a felony. Evidence of a conviction is not evidence of the underlying conduct. Williams v. Castor, 613 So. 2d 97, 99 (Fla. 1st DCA 1993).

32. At paragraph 25 of the Petition, the School Board charges Respondent with violating rule 6A-5.056. The rule states, in pertinent part:

> "Just cause" means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued are set forth in Sections 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined: (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.
(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.;
(c) A violation of the adopted school board rules;
(d) Behavior that disrupts the student's learning environment; or
(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

* * *

(8) "Crimes involving moral turpitude" means offenses listed in Section 1012.315, F.S.

33. As stated above, Petitioner did not present any competent, substantial evidence to prove Respondent's conduct, other than the existence of the convictions for lewd and lascivious conduct. To the extent that Respondent has committed a crime involving moral turpitude, as defined in rule 6A-5.056(8), Petitioner has demonstrated just cause for Respondent's termination. The other alleged violations that would demonstrate just cause have not been demonstrated.

34. The same can be said for alleged violations of rule 6A-10.081, the Code of Ethics for the Education Profession in Florida, which would have required Petitioner to present

evidence of the underlying conduct giving rise to the convictions.

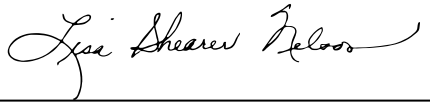
35. While Petitioner has proven only that Respondent was convicted and found guilty of the 16 counts of lewd and lascivious conduct, those convictions alone are more than enough to demonstrate just cause for Respondent's termination. Not only does just cause for termination exist, but section 1012.315 requires it.

36. Petitioner has asked for sanctions pursuant to section 57.105, Florida Statutes, because Respondent requested a hearing in this case. While the convictions are clearly without dispute, the Petition alleged violations that would require evidence of the underlying conduct, which Petitioner did not present. Moreover, as noted in the Order Denying Petitioner's Motion to Relinquish Jurisdiction, section 1012.33 does not condition Respondent's right to a hearing on a dispute of material fact. To terminate Respondent's employment without at least giving him the opportunity for a hearing is not contemplated by the statute, and Respondent consistently maintained that he was not guilty. Respondent is entitled to require the School Board to prove its reasons for terminating him, and by virtue of the convictions, it has done so. However, the undersigned does not believe that fees pursuant to section 57.105 are warranted, and Petitioner's request is denied.

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 terminating Respondent's employment based on a finding of just cause.

DONE AND ENTERED this 25th day of April, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2017.

ENDNOTES

[1/] No arrest warrants or indictments are included in the exhibits provided for hearing, and the only reference listed to support of the proposed fact reciting the arrests is a citation to the School Board's pre-hearing statement. The pre-hearing statement is also listed as a basis in support of other proposed facts. However, there is no indication that Mr. Hussan agreed to the facts listed as requiring no evidence at hearing in the pre-hearing stipulation, which was filed as a unilateral document, and the pre-hearing statement is not evidence that can be considered in this proceeding. Given the lack of evidence regarding the arrests, no express finding of fact can be made regarding the arrests. Given the evidence in the record that Respondent was convicted and sentenced for 16 counts of lewd and

lascivious conduct, it can be inferred that at some point, he was arrested for these crimes.

[2/] The jury verdict is also not included in the record, although the Judgment and Sentence, as well as the Order of Sex Offender Probation are. While the Judgment indicates on its face that Respondent was tried and found guilty of the listed crimes, it does not indicate when the jury trial took place.

COPIES FURNISHED:

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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.