

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 17-0615TTS

ILISSA SANDERS,

Respondent.

_____ /

RECOMMENDED ORDER

A hearing was held in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016), before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on May 8 and 9, 2017, at Citrus Cove Elementary School in Boynton Beach, Florida.

APPEARANCES

For Petitioner: Helene K. Baxter, Esquire
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STATEMENT OF THE ISSUES

The issue is whether just cause exists for Petitioner to suspend Respondent from her teaching position without pay for 15 days and to terminate her employment as a teacher.

PRELIMINARY STATEMENT

On or about January 11, 2017, Petitioner took action to suspend Respondent from her teaching position without pay for 15 days and to terminate her employment as a teacher. Respondent timely requested an evidentiary hearing pursuant to sections 120.569 and 120.57(1) to challenge Petitioner's proposed agency action. On or about January 25, 2017, Petitioner served and filed its Petition. The matter was referred to DOAH for assignment of an ALJ to conduct the hearing. Petitioner's Amended Petition, which was accepted as the operative administrative charging document in this proceeding, was filed on May 1, 2017.

The final hearing initially was scheduled to be conducted by video-teleconference on April 6 and 7, 2017. Pursuant to Petitioner's unopposed motion, the final hearing was continued and rescheduled for May 8 and 9, 2017, with the ALJ to appear in person at the hearing.

The final hearing was held on May 8 and 9, 2017, at Citrus Cove Elementary School in Boynton Beach, Florida. Petitioner presented the testimony of Laura Green, Diana Weinbaum,

Bernadette Standish, and students L.W., B.T., M.R., S.T., J.W., H.S., T.B., and A.S. Petitioner's Exhibits 1 through 11 and 33 through 37 were admitted into evidence without objection, and Petitioner's Exhibits 12 through 15, 17, 38, 39, and 50 were admitted over objection. Official recognition was taken of Petitioner's Exhibits 27 through 32 and 49. Respondent testified on her own behalf and presented the testimony of student S.G. Respondent's Exhibits 8 and 11 through 13 were admitted into evidence without objection, and Respondent's Exhibit 1 was admitted over objection.

The four-volume Transcript was filed at DOAH on June 19, 2017, and the parties were given until June 30, 2017, to file their proposed recommended orders. Petitioner's Proposed Recommended Order was timely filed on June 30, 2017. Respondent's Proposed Recommended Order was filed on July 3, 2017. Both proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Palm Beach County School Board, is charged with the duty to operate, control, and supervise free public schools within the School District of Palm Beach County ("District"), pursuant to article IX, section 4(b) of the Florida Constitution, and section 1012.33, Florida Statutes.

2. Respondent has been employed by Petitioner as a teacher with Petitioner since 2005. During the relevant timeframe, the 2015-2016 school year, Respondent was employed as a teacher at Citrus Cove Elementary School ("Citrus Cove"), where she taught third grade.

3. Respondent has not previously been subject to discipline by Petitioner. The evidence shows that she consistently received satisfactory performance evaluations.

II. Administrative Charges

4. On or about January 11, 2017, Petitioner took action to suspend Respondent for 15 days without pay and to terminate her employment as a teacher. Respondent timely challenged Petitioner's action by requesting an administrative hearing pursuant to sections 120.569 and 120.57(1).

5. The Amended Petition alleges that on or about March 31, 2016, Respondent breached testing security for the Florida Standards Assessment ("FSA")^{1/} by giving assistance to students who were taking the exam. The Amended Petition listed the actions in which Respondent is alleged to have engaged in assisting the students: pointing to wrong answers; giving a "thumbs up" for right answers; tapping on the desk to indicate wrong answers; rubbing students on the back to indicate corrected answers; stating what question the students should be on, or words to that effect; telling students that their answers were

wrong, or words to that effect; telling students that their answers were good or bad, or words to that effect; telling students which math strategies to use for certain questions, or words to that effect; telling students to bubble in when not done when the test was finished; and/or whispering to students during the test. The Amended Petition also alleges that Respondent reviewed test questions with the students after the exam period was over.

6. Based on these alleged actions, Petitioner has charged Respondent with violating specified provisions of the following: sections 1008.24(1) and (2) and 1008.36, Florida Statutes; Florida Administrative Code Rules 6A-10.042 and 6A-10.081; School Board Rule 1.013; and School Board Policy 3.02. If proved, the alleged violations of these rules and policies would constitute just cause under section 1012.33 to suspend Petitioner and terminate her employment as a teacher.

III. The FSA

7. The FSA is the state-wide student assessment program examination that is administered in Florida public school districts. See § 1008.22, Fla. Stat. (2015).^{2/} As a public school district in Florida, the District is required to administer the FSA in the schools in its district. Id.

8. The FSA for the third grade consists of a mathematics assessment and an English Language Arts ("ELA") assessment.

§ 1008.22(3)(a), Fla. Stat.

9. For the 2015-2016 school year, the FSA was administered to third grade students at Citrus Cove on March 29 through April 1, 2016. The evidence establishes that the ELA portion of the exam was administered on March 29 and 30, and the mathematics portion of the exam was administered on March 31 and April 1.

10. It is vitally important that a student's FSA scores accurately reflect the student's actual performance on the exam. To that point, if a student received a score that was artificially inflated due to having received assistance on the exam, the student may wrongly be promoted to the next grade, rather than receiving needed academic assistance to enable him or her to develop the skills necessary for promotion.

11. To ensure that the FSA is correctly administered, all teachers receive mandatory training in correct administration of the exam. In compliance with this requirement, the teachers at Citrus Cove, including Respondent, received training in administering the FSA for the 2015-2016 school year.

12. The evidence establishes that Respondent attended an FSA administration training session conducted at Citrus Cove on or about March 11, 2016.

13. At the training session, teachers, including Respondent, were shown a PowerPoint slide on administering the FSA. Afterward, Respondent received a copy of this presentation to review.

14. Also at that session, Respondent received the Spring 2016 FSA Paper-Based Test Administration Manual for Grade 3 ELA Reading and Grades 3-4 Mathematics ("FSA Manual"), which was published by the Florida Department of Education. Page nine of the manual lists examples of prohibited activities; this list includes changing or otherwise interfering with student responses to test items.

15. Respondent also received the Test Administrator Prohibited Activities Agreement at the session. This agreement informs the person administering the FSA that he or she may not engage in certain activities listed on the agreement. These prohibited activities include assisting students in answering test questions or giving students verbal or non-verbal cues. Respondent acknowledged that she received this agreement on March 11, 2016, by signing and dating the document.

16. Respondent also received the Test Administration and Security Agreement, which lists additional activities that are prohibited in administering the FSA. These activities include changing or otherwise interfering with student responses to test

items. Respondent acknowledged that she received this agreement on March 11, 2016, by signing and dating the document.

17. On or about March 28, 2016, Respondent received a copy of a PowerPoint presentation titled "Spring 2016 PBT Grade 3 Reading and Grades 3 and 4 Mathematics - Student Presentation." She was required to review this presentation with her students before the FSA was administered.^{3/}

18. Beginning in the 2015-2016 school year, teacher performance evaluations are based, in part, on Student Performance Rating on the FSA, using the Value-Added Model ("VAM"). Under this evaluation method, each teacher to whom this evaluation method applies—which includes Respondent—receives a "VAM Score" reflecting the performance ranking of his or her students on the mathematics and ELA portions of the FSA. The VAM Score constitutes 33 percent of the teacher's total performance evaluation. The credible and persuasive evidence establishes that teachers may be entitled to receive monetary bonuses if their students perform well on the FSA.

19. The evidence establishes that Respondent is experienced in administering standardized tests to students over the years in which she taught in public schools.

IV. Investigation Leading to Administrative Charges

20. At some point after the FSA had been administered at Citrus Cove in the 2015-2016 school year, a student, Z.C.-B., who

had been in Respondent's third grade class and taken the FSA administered by Respondent, transferred to another elementary school in the Palm Beach County School District.

21. Spurred by comments that Z.C.-B. made to her classroom teacher at the school to which she had transferred, Petitioner's Office of Professional Standards conducted an investigation into whether Respondent had assisted students during administration of the 2015-2016 FSA, in violation of applicable testing standards and protocols.

22. While the investigation was being conducted, Respondent was removed from the classroom and was reassigned to non-instructional duties.

23. As a result of the investigation, Respondent was notified, by correspondence dated December 12, 2016, that the Superintendent for the District would recommend that she be suspended without pay for 15 days and that her employment be terminated.

24. As noted above, Respondent timely requested an administrative hearing pursuant to sections 120.569 and 120.57(1).

V. Evidence Regarding Respondent's Administration of the FSA

25. Several students who had been in Respondent's third grade class in the 2015-2016 school year and to whom Respondent had administered the FSA that school year testified at the final

hearing regarding whether Respondent had engaged in certain conduct or actions during administration of the FSA.

Student L.W.

26. Student L.W. testified that while she was taking the FSA, Respondent patted her on the back and whispered "good job" to her. L.W. testified that she interpreted this comment as meaning that she had gotten the question correct.

27. L.W. also testified that Respondent made a "thumbs-up" gesture over her exam paper while standing next to L.W.'s desk. L.W. interpreted that gesture as meaning that she was doing well on the exam. L.W. could not recall how many times Respondent gave her a thumbs-up.

28. L.W. testified that during the administration of the test, Respondent also told the students what question they should be on at that particular point in the exam period, and that Respondent told the students that if they had not yet reached that question, they needed to speed up in answering the questions.

29. L.W. also testified that Respondent told the students when they had ten minutes left in the exam period.

30. L.W. testified that when the math portion of the exam was over, Respondent reviewed some math problem examples with the class, and that the examples she reviewed were very similar to those on the exam.

31. L.W. testified that Respondent did not help her answer the questions on the exam.

32. L.W. testified that "testing boards,"^{4/} consisting of cardboard barriers erected around a portion of the writing surface of the desk, were used in Respondent's classroom during administration of the FSA. L.W. also recalled that paper had been placed over the window in Respondent's classroom door.

33. She testified that she recalled the math portion of the FSA being administered before the reading portion was administered.

Student R.T.

34. R.T. testified that during the administration of the FSA, he saw Respondent whisper to other students who were taking the exam.

35. He testified that he saw Respondent give a "thumbs up" signal to the students while she was walking around the room monitoring the exam, and that she gave him a "thumbs up" sign while standing by his desk. He testified that he interpreted that signal to him as meaning he was doing "a great job" on the exam.

36. R.T. did not remember Respondent stating that the students should be on a specific question at that particular point in the exam period, or Respondent telling the students to speed up or to slow down in answering the questions.

37. He testified that Respondent did not allow the students to fill in answers after the time period for the exam had ended.

38. He also testified that Respondent did not check his answers during the exam or tell him he should change any particular answer on the exam.

39. R.T. testified that Respondent did not do anything to help him cheat during the exam.

40. R.T. testified that testing boards were not used during administration of the FSA. He did not recall whether paper had been placed over the window in the classroom door during administration of the FSA.

Student M.R.

41. M.R. testified that Respondent pointed to an answer on her FSA exam paper one time, and that Respondent touched the exam paper when she did so. M.R. interpreted this as indicating whether the "question was right or wrong." She testified that in response to Respondent's action, she changed the answer.

42. M.R. testified that Respondent gave her a "thumbs up" signal while she was standing next to M.R.'s desk, and that M.R. interpreted this gesture as meaning "the question was right."

43. M.R. did not recall whether Respondent stated that students should be on a specific question at that particular point in the exam period; however, she testified that she did recall Respondent telling students that they should slow down.

44. M.R. testified that she recalled Respondent reviewing questions with the class after the exam was over. She did not recall the specific questions or how many questions Respondent reviewed with the class.

45. M. R. also testified that testing boards were used in administration of the FSA. She did not recall whether the window in the classroom door was covered with paper during administration of the FSA.

Student S.T.

46. S.T. testified that Respondent whispered to her during the math portion of the FSA that she was "supposed to correct something and go back and check my test," and that Respondent pointed to a particular question on S.T.'s exam paper. In response to Respondent's action, S.T. went back and checked her answer to the question, then changed the answer. S.T. testified that Respondent did this for "one or two" questions.

47. S.T. also testified that she saw Respondent whispering to another student during the exam.

48. S.T. testified that during the math portion of the exam, Respondent told students that they should be on a specific question at that particular point in the exam period. She did not recall whether Respondent also did this during the reading portion of the exam.

49. Additionally, S.T. testified that during the exam, Respondent told the students "if you speed you will make mistakes and you should go back and check it again."

50. S.T. also testified that after the math portion of the exam was over, Respondent reviewed a particular question from the exam involving a "whole fraction."

51. S.T. recalled Respondent giving the class a "thumbs-up" after the exam to compliment them. She did not see Respondent give individual students a "thumbs-up" during the exam.

52. S.T. testified that Respondent did not rub her back, and that she did not see Respondent rub any other student's back during the exam.

53. S.T. did not recall whether testing boards were used during administration of the FSA. She testified that the window in the classroom door was not covered with paper.

Student J.W.

54. J.W. testified that during the exam, Respondent tapped on students' desks "if they were like staring off into space." She estimated that Respondent did this with respect to approximately six students.

55. J.W. also testified that during the exam, Respondent verbally told the students to slow down "because you might do better if you go slow." She testified that during the math portion of the exam, Respondent told the students that they

should be on a specific question "around a certain time." She also testified that at certain points during the math portion of the exam, Respondent had students raise their hands if they were on a particular question; according to J.W., Respondent did this "like four times."

56. J.W. testified that at the end of the math portion of the exam, Respondent allowed students to go back and fill in answers to questions they had not completed.

57. J.W. testified that after the exam, Respondent did not review questions with the class.

58. J.W. did not see Respondent give a "thumbs-up" at any time. She also did not see Respondent read or touch any student's exam paper.

59. J.W. testified that Respondent did not help her answer questions on the exam.

60. She did not recall Respondent rubbing any students on the back or patting them on the head.

61. J.W. testified that testing boards were not used in Respondent's classroom in administering the FSA, and that there was no paper covering the window in the classroom door.

Student H.S.

62. H.S. testified that during the math portion of the FSA, Respondent pointed to a question and told her to go back and check it. H.S. testified that in response, she changed her

answer, and that Respondent gave her a "thumbs-up" and whispered "good."

63. H.S. also testified that at the end of both the reading and math portions of the FSA, Respondent told the students to fill in answers to questions they had not finished.

64. H.S. testified that Respondent did not tell students to raise their hands during the exam.

65. H.S. could not remember if testing boards were used in administering the FSA, and she could not recall whether the window in the classroom door was covered with paper.

Student T.B.

66. T.B. testified that during the test, Respondent helped him answer a question by pointing to a sentence, and "when I flipped the page, the sentence was for an answer." He clarified that when he flipped the page of the exam, he saw another answer so "I changed it because I had the wrong one." He interpreted Respondent's action as indicating that he had gotten the question wrong, so he changed his answer.

67. T.B. also testified that Respondent told the students during both portions of the exam that they should be on a specific question at that particular point in the exam period. He testified that Respondent also told them if they were going too fast, they needed to slow down.

68. T.B. testified that testing boards were used in Respondent's classroom during administration of the FSA. He could not recall whether paper covered the window in the classroom door during the administration of the exam.

Student A.S.

69. A.S. testified that Respondent pointed to her exam paper and that in response, she went back and revised one of her answers on the math portion of the exam.

70. A.S. also testified that during the exam, Respondent told the students the specific question they should be on at that particular point, and if they were not on that question, they needed to speed up or slow down. A.S. testified that in response, she sped up and finished her exam on time.

71. A.S. also testified that after the exam period was over, Respondent told students to go back and fill in answers to questions they had not finished.

72. A.S. testified that testing boards were used in Respondent's classroom during administration of the FSA, and that paper covered the window in the classroom door.

Student S.G.

73. S.G. testified that during the exam, Respondent told the students that they should be on a specific question at that particular point in the exam.

74. S.G. was unable to recall many details about the 2015-2016 FSA exam or its administration.

Respondent

75. As discussed above, the investigation that gave rise to this proceeding was initiated after one of Respondent's former students, Z.C.-B.,^{5/} apparently communicated that Respondent had engaged in certain conduct during administration of the 2015-2016 FSA that, if true, would violate the statutes, rules, and policies regarding administration of the FSA.

76. Respondent offered a possible motive for Z.C.-B.'s statements. She testified that she had been asked by Z.C.-B.'s parents to provide information on a Social Security Supplemental Security Income ("SSI") application form regarding Z.C.-B.'s performance in school. Respondent stated on the form that in her view, Z.C.-B.'s school performance was "fine." Respondent surmised that because of her assessment of Z.C.-B.'s academic performance, Z.C.-B.'s family may not have qualified to receive SSI payments, so may have harbored ill will against her. She acknowledged that Z.C.-B.'s parents did not communicate to her that they "had a problem" with her statements on the SSI form.

77. Respondent testified that she did not believe she violated any testing protocols established by statute, rule, or policy in administering the 2015-2016 school year FSA.

78. She testified that she did not assist any students in answering any of the 2015-2016 FSA test items.

79. She testified that she did not linger at any student's desk long enough to read the FSA exam questions, and that she did not read the questions or know any questions on the exams in advance of administering them.

80. She also denied giving any non-verbal cues to the students during administration of the exam, other than generally giving them a "thumbs-up" to relax them and keep them on task.

81. She did not recall whether she had given any students any verbal cues during the exam.

82. She denied telling the students to speed up, slow down, or raise their hands if they were on a specific question at a particular time during the exam.

83. She denied changing any of the students' answers on the exam.

84. She testified that she did not recall tapping on any student's desk, but stated that if she had, it would have been to re-focus the student's attention to taking the exam.

85. She also denied having reviewed the questions on the 2015-2016 FSA exam with the students after it had been administered.

86. Respondent testified that she did not use testing boards during the administration of the FSA.^{6/} She testified that

the window in the classroom door was partially covered with paper and a magnetic frame containing a sign indicating that testing was being conducted.

VI. Progressive Discipline

87. The Collective Bargaining Agreement between the Palm Beach County School District and the Palm Beach County Classroom Teachers Association (July 1, 2015 - June 30, 2016) ("CBA"), titled "Discipline of Employees (Progressive Discipline)," article II, section M, establishes a disciplinary system under which discipline is administered "progressively." Under this system, discipline is imposed sequentially, beginning with a verbal reprimand with written notation; then advancing to a written reprimand; then advancing to suspension without pay; and culminating in termination of employment.

88. This sequential imposition of discipline applies "[e]xcept in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations" as to warrant deviating from the sequence. CBA, art. II, § M., ¶ 7. (emphasis added).

89. As noted above, Respondent has not previously been subject to discipline.

90. However, she is an experienced teacher who previously administered standardized tests to students over her years of

teaching. Further, and most important, Respondent received extensive training in the proper administration of the 2015-2016 FSA. Additionally, she received, and was charged with reviewing, understanding, and following, the FSA Manual, the Test Administrator Prohibited Activities Agreement, and the Test Administration and Security Agreement—all of which expressly prohibited engaging in conduct that constituted assisting students in answering test questions, giving students verbal or non-verbal cues, or interfering with students' responses on the exam.

91. Under these circumstances, it is determined that Respondent's conduct constituted a clearly flagrant and purposeful violation of Petitioner's rules and regulations.

VII. Findings of Ultimate Fact

92. Under Florida law, whether charged conduct constitutes a deviation from a standard of conduct established by rule or statute is a question of fact to be decided by the trier of fact, considering the testimony and evidence in the context of the alleged violation. Langston v. Jamerson, 653 So. 2d 489 (Fla. 1st DCA 1995); Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1st DCA 1985). See also McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); MacMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993). Accordingly, whether conduct alleged in an administrative complaint violates the laws, rules, and

policies set forth in the charging document is a factual, not legal, determination.

93. Petitioner has met its burden in this proceeding to show, by clear and convincing evidence, that Respondent engaged in conduct with which she was charged in the Amended Petition.

94. Nine students testified at the final hearing. All of them described various actions on Respondent's part that, as described, violated established FSA administration protocol.

95. Even though the students' descriptions of Respondent's conduct in administering the FSA were not uniformly consistent, the undersigned finds the students to be credible and persuasive witnesses. The undersigned ascribes the discrepancies in the students' testimony—which, on balance, concerned minor or collateral details^{7/}—to the fact that the students were testifying about events that had occurred approximately one year earlier, and also because not all of the students had the same interactions with Respondent during the FSA. Key to this credibility determination is that many of the students' testimonial descriptions were precise and explicit, and were strikingly similar and remarkably consistent regarding certain conduct in which Respondent is alleged to have engaged.

96. Specifically, several students testified, credibly, that during the exam, Respondent pointed to questions on their exam papers or touched their exam papers. Some of the students

perceived her actions as a prompt or cue, and in response, changed an answer.

97. Several students also credibly testified that during the exam, Respondent whispered to them about a question or response, saying "good job" or indicating that they should check an answer. Some students saw Respondent whisper to other students in the class during the exam.

98. Additionally, several students credibly testified that Respondent verbally paced the class by telling them, during the exam, that they should be on a specific question at that particular time, or that they should slow down or speed up in answering the questions.

99. Some students also credibly testified that after the exam period was over, Respondent allowed students to fill in answers to questions they had not finished.

100. Several students testified that they saw Respondent give a "thumbs up" during the exam. Some students credibly testified that Respondent specifically made that gesture to them, and that they interpreted the gesture as meaning they were doing a good job or that they had answered a particular question correctly.

101. One student also credibly testified that Respondent rubbed her back during the exam, which she interpreted as indicating that she had answered a question correctly.

102. As discussed above, Respondent denied having engaged in the conduct alleged in the Amended Petition, other than generally giving a "thumbs up" during the exam to relax the students.

103. Although Respondent denied having engaged in the conduct alleged in this proceeding, it is determined that the evidence in the record clearly and convincingly establishes that in administering the 2015-2016 FSA, Respondent engaged in certain conduct alleged in the Amended Petition. Specifically, the evidence clearly and convincingly shows that Respondent engaged in the following conduct: pointing to wrong answers; giving a "thumbs up" for the right answer; rubbing students on the back to indicate that an answer had been corrected; telling students that their answer was wrong, or words to that effect; telling students their answer was good or correct, or words to that effect; telling students to bubble in answers if they were not finished when the exam period was done; and whispering to students during the exam.

104. As further discussed below, these actions violate the following statutes, rules, and policies: section 1008.24(1)(c), (f), and (g), Florida Statutes^{8/,9/}; Florida Administrative Code Rule 6A-10.042(1)(c), (d), and (f); Florida Administrative Code Rule 6A-10.081(1)(b) and (c), (2)(a)1., (2)(b)2., and (2)(c)1.; Florida Administrative Code Rule 6A-5.056(2); School Board

Rule 1.013(1); and School Board Policy 3.02.4.a., b., g., and j. and 3.02.5.c.iii. and 5.i.^{10/}

105. As discussed below, Respondent's conduct in violating rule 6A-10.081 and Petitioner's policies also constitutes misconduct in office under rule 6A-5.056.

106. Based on the foregoing, the undersigned finds, as a matter of ultimate fact, that there is just cause, as defined in section 1012.33, to suspend Respondent without pay and to terminate her employment.

CONCLUSIONS OF LAW

107. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding.

108. This is a disciplinary proceeding in which Petitioner seeks to suspend Respondent from her teaching position, without pay, for 15 days, and to terminate her employment as a teacher, for violating the following: sections 1008.24(1)(c), (f), and (g), and 1008.24(2),^{11/} Florida Statutes; section 1008.36, Florida Statutes^{12/}; Florida Administrative Code Rule 6A-10.042(1)(c), (d), and (f); Florida Administrative Code Rule 6A-10.081(1)(b) and (c), (2)(a)1., (2)(b)2., and (2)(c)1.; Florida Administrative Code Rule 6A-5.056(2); School Board Rule 1.013(1); and School Board Policy 3.02.4.a., b., f.,^{13/} g., and j., and 3.02.5.c.iii and i.

109. Violations of these rules and policies, if proved, constitute just cause, pursuant to section 1012.33, Florida

Statutes, to suspend Petitioner and terminate her employment as a teacher.

110. Respondent is an "instructional employee" as defined in section 1012.01(2). Pursuant to sections 1012.22(1)(f) and 1012.27(5), rule 6A-5.056, School Board Policy 3.27, and article II, section M of CBA, Petitioner is authorized to discipline Respondent in this proceeding.

111. To suspend and terminate Respondent's employment, Petitioner must prove that Respondent committed the acts alleged in the Petition; that those acts violate the laws, rules, and policies cited in the Petition; and that the violation of these laws, rules, and policies constitutes just cause for her dismissal. § 1012.33(1)(a), (6), Fla. Stat.

112. Ordinarily, the evidentiary burden in disciplinary proceedings in which a school board proposes to suspend or terminate instructional personnel is a "preponderance of the evidence." See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990). However, where, as here, the school board has agreed through collective bargaining to a more demanding evidentiary standard, it must act in accordance with the applicable contract. See Chiles v. United Faculty of Fla., 615 So. 2d 671, 672-73 (Fla. 1993); Palm Beach

Cnty. Sch. Bd. v. Zedrick Barber, Case No. 15-0047 (Fla. DOAH Aug. 31, 2015; PBCSB Oct. 13, 2015).

113. Here, article II, section M, of the CBA provides that "disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action." Accordingly, Petitioner has the burden of proof in this proceeding by clear and convincing evidence.

114. The clear and convincing evidentiary standard requires that:

[T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

115. Additionally, as discussed above, 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.

Section 1008.24

116. Section 1008.24(1) provides in pertinent part:

(1) A person may not knowingly and willfully violate test security rules adopted by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification or administered by school districts pursuant to s. 1008.22, or, with respect to any such test, knowingly and willfully to:

* * *

(c) Coach examinees during testing or alter or interfere with examinees' responses in any way;

* * *

(f) Fail to follow test administration directions specified in the test administration manuals; or

(g) Participate in, direct, aid, counsel, assist in, or encourage any of the acts prohibited in this section.

117. Pursuant to the foregoing findings of fact, it is concluded that Respondent violated section 1008.24(1)(c), (f), and (g). Specifically, the evidence establishes that by engaging in the conduct found above, Respondent willfully violated the test security rules adopted by the Florida Department of Education by interfering with the students' responses during the FSA. Additionally, in doing so, Respondent failed to follow the test administration directions provided in the FSA Manual, and

participated in violating test administration standards established in section 1008.24 and rule 6A-10.042.

Rule 6A-10.042

118. Rule 6A-10.042 implements the FSA testing standards that are established in section 1008.22. This rule states in pertinent part:

(1) Tests implemented in accordance with the requirements of Sections . . . 1008.22 . . . , F.S., shall be maintained and administered in a secure manner such that the integrity of the tests shall be preserved.

* * *

(c) Examinees shall not be assisted in answering test questions by any means by persons administering or proctoring the administration of any test.

(d) Examinees' answers to questions shall not be interfered with in any way by persons administering, proctoring, or scoring the examinations.

* * *

(f) Persons who are involved in administering or proctoring the tests or persons who teach or otherwise prepare examinees for the tests shall not participate in, direct, aid, counsel, assist in, or encourage any activity which could result in the inaccurate measurement or reporting of the examinees' achievement.

119. Pursuant to the foregoing findings of fact, it is concluded that Respondent violated rule 6A-10.042(1)(c), (d), and (f). Specifically, Respondent affected the integrity of the

exam by assisting the students in answering questions and interfering with students' answers. In doing so, she participated in activity that could result in the inaccurate measurement or reporting of the students' achievement.

Rule 6A-10.081

120. Rule 6A-10.081, the Principles of Professional Conduct for the Education Profession in Florida, states in pertinent part:

(1) Florida educators shall be guided by the following ethical principles:

* * *

(b) 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.

(c) 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.

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

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

1. 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.

* * *

(b) Obligation to the public requires that the individual:

* * *

2. Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

* * *

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

1. Shall maintain honesty in all professional dealings.

121. Pursuant to the foregoing findings of fact, it is concluded that Respondent violated rule 6A-10.081(1)(b) and (c), and (2)(a)1., (b)2., and (c)1. Specifically, in violating the statutory and rule requirements prohibiting assisting students in answering the questions on the FSA, Respondent did not exercise best professional judgment or integrity, did not sustain a high degree of ethical conduct, and did not make reasonable efforts to protect the students from conditions harmful to their learning. Further, in assisting students in answering questions on the FSA, she engaged in intentional misrepresentation of facts concerning an educational matter through potentially affecting the accuracy

of their exam scores, and she failed to maintain honesty in the professional dealings associated with administering the FSA.

School Board Policy 1.013

122. School Board Policy 1.013, "Responsibilities of School District Personnel and Staff," states in pertinent part:

1. It shall be the responsibility of the personnel employed by the district school board to carry out their assigned duties in accordance with federal laws, rules, state statutes, state board of education rules, school board policy, superintendent's administrative directives and local school and area rules.

123. Based on the foregoing findings of fact, it is concluded that Respondent violated School Board Policy 1.013. As discussed above, in assisting students in answering questions on the FSA, Respondent did not carry out her assigned duty in accordance with applicable Florida Statutes, Florida Department of Education rules, or School Board policies.

School Board Policy 3.02

124. School Board Policy 3.02, the Code of Ethics, provides in pertinent part:

4. Accountability and Compliance

Each employee agrees and pledges:

- a. To provide the best example possible; striving to demonstrate excellence, integrity and responsibility in the workplace.
- b. To obey local, state and national laws, codes and regulations.

* * *

f. To take responsibility and be accountable for his or her acts or omissions.

g. To avoid conflicts of interest or any appearance of impropriety.

* * *

j. To be efficient and effective in the delivery of all job duties.

5. Ethical Standards

c. Misrepresentation or Falsification - We are committed to candor in our work relationships, providing other Board employees including supervisors, senior staff and Board members with accurate, reliable and timely information. Employees should exemplify honesty and integrity in the performance of their official duties for the School District. Unethical conduct includes but is not limited to:

* * *

iii. Falsifying or misrepresenting information reported regarding the evaluation of students and/or District personnel;

* * *

i. Professional Conduct - We are committed to ensuring that our power and authority are used in an appropriate, positive manner that enhances the public interest and trust. Employees should demonstrate conduct that follows generally recognized professional standards. Unethical conduct is any conduct that impairs the ability of any holder of a necessary license, certificate, etc., to function professionally in his or her employment position or a pattern of behavior or conduct that is detrimental to the health,

welfare, discipline, or morals of students or the workplace.

125. Based on the foregoing, it is concluded that Respondent's conduct violated the provisions of School Board Policy 3.02.4.a., b., g., and j.,^{14/} and 3.02.5.c.iii and i.

126. Specifically, in assisting students in answering questions on the FSA, Respondent did not provide the best example possible, or strive to, or demonstrate excellence, integrity, and responsibility in the workplace. Additionally, her conduct in assisting the students in answering questions on the FSA violated local and state regulations, negatively affected her effectiveness in the delivery of her job duties, and created the appearance of impropriety.

127. Additionally, Respondent engaged in conduct that falsified or misrepresented information regarding the evaluation of students, did not exemplify honesty and integrity in the performance of her official duties for the School District, and did not constitute conduct that follows generally recognized professional standards.

Rule 6A-5.056(2)

128. Rule 6A-5.056(2) defines conduct that constitutes misconduct in office. The rule states in pertinent part:

(2) "Misconduct in Office" means one or more of the following:

* * *

(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 adopted school board rules[.]

129. Based on the foregoing, it is concluded that Respondent's conduct in assisting students in answering questions on the FSA violates rule 6A-10.081 and the School Board policies addressed above. Accordingly, it is concluded that Respondent engaged in misconduct in office, as defined in rule 6A-5.056.

Just Cause under Section 1012.33

130. Section 1012.33(6) (a) states in pertinent part: "[a]ny member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a)." Section 1012.33(1)(a) states in pertinent part: "[j]ust cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: . . . misconduct in office."

131. Based on the foregoing, it is concluded that just cause exists, under section 1012.33, to suspend Respondent without pay and to terminate her employment.

Progressive Discipline

132. As discussed above, article II, section M, of CBA establishes a progressive discipline system that applies to

certain District employees, including Respondent. Under this system, discipline is imposed "progressively," or sequentially, except in specified circumstances.

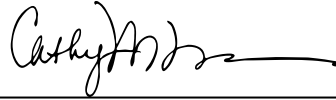
133. As discussed above, the disciplinary sequence established in article II, section M, applies, "[e]xcept in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations" as to warrant deviating from this sequence.

134. As discussed above, here, Respondent's conduct constituted a clearly flagrant and purposeful violation of Petitioner's rules and regulations. Accordingly, it is concluded that Petitioner is not required to adhere to the progressive discipline sequence set forth in article II, section M, of the CBA, and is authorized to suspend Respondent without pay and to terminate her employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Palm Beach County School Board, enter a final order suspending Respondent, Ilissa Sanders, without pay for 15 days and terminating her employment.

DONE AND ENTERED this 24th day of July, 2017, in
Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2017.

ENDNOTES

^{1/} Starting in the 2015-2016 school year, the FSA replaced the Florida Comprehensive Assessment Test as the statewide assessment exam.

^{2/} The 2015 version of Florida Statutes was in effect when the FSA for the 2015-2016 school year was administered. Therefore, the 2015 versions of chapters 1008 and 1012 apply to this proceeding. Likewise, the versions of the Florida Administrative Code rules and Petitioner's policies that were in effect at the time of the alleged violations also apply to this proceeding.

^{3/} The evidence establishes that Respondent did not review this presentation with her students before administering the FSA. Initially, an incorrect version of the PowerPoint presentation was transmitted by electronic mail ("email") to the third grade teachers at 10:18 a.m. on the morning of March 28, 2016—the day before the four-day FSA administration period began. At 11:32 a.m., the correct version of the presentation for third grade students was sent by email; however, Respondent did not have an opportunity to review the presentation with her students on March 28, and reviewing it with them on the morning of March 29, before the FSA was administered, would have delayed administration of the FSA in her class. In any event, the Amended Petition does not specifically allege that Respondent's

failure to review this presentation constitutes a factual basis for statutory, rule, or policy violations charged in this proceeding.

^{4/} Testing boards are used to shield students' test papers in order to prevent students from copying answers from each other's test papers. The evidence indicated that for most testing situations, the use of testing boards is not required and is in the teacher's discretion, although there was testimony to the effect that the school administration prefers that the teacher obtain permission before using testing boards. Respondent testified that she did not use testing boards in administering the 2015-2016 FSA, and it was her understanding that using testing boards was prohibited in administering the FSA. In any event, the Amended Petition does not allege that Respondent engaged in any conduct with respect to the use or non-use of testing boards that violates any statute, rule, or school district policy.

^{5/} See paragraph 20, supra. Respondent attempted to procure, by subpoena, Z.C.-B.'s appearance to testify at the final hearing; however, Z.C.-B. did not comply with the subpoena by appearing at the final hearing, and she did not testify at the final hearing.

^{6/} See note 4, supra.

^{7/} For example, the students' testimony varied with respect to whether testing boards were or were not used during the FSA, and whether paper did or did not cover the window of the classroom door while the FSA was being administered. These are collateral matters on which students may not have focused while in a stressful, high-stakes testing situation—much less recalled a year later.

^{8/} The Amended Petition, page 1, charges Respondent with violating section 1008.24(2). Section 1008.24 is titled "Test Administration and Security; Public Records Exemption." Subsection (2) of section 1008.24(2) states: "[a] person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083." Subsection (2) of section 1008.24(2) does not establish any substantive standards of conduct that can be "violated"; rather, this subsection prescribes an applicable penalty if section 1008.24 is violated. Furthermore, in any event, DOAH lacks jurisdiction to adjudicate or determine the potential imposition of criminal sanctions. Accordingly, this Recommended Order does not address any "violation" of section 1008.24(2).

^{9/} The Amended Petition, page 1, charges Respondent with violating section 1008.36. This statute creates the Florida School Recognition Program, a financial incentive program available to public schools in Florida, provided certain standards, specified in the statute, are met. This statute does not establish any substantive conduct standards that could be "violated" by a teacher for purposes of imposing discipline on that teacher. Accordingly, this Recommended Order does not find or conclude that Respondent's conduct "violated" section 1008.36.

^{10/} Petitioner has charged Respondent with violating School Board Policy 3.02.4.f., which requires the employee "to take responsibility and be accountable for his or her acts or omissions." The evidence does not establish that in engaging in the conduct with which she has been charged—i.e., assisting students in answering questions on the FSA—Respondent failed to take responsibility or to be held accountable for her actions. To the extent Respondent has defended herself by denying that she helped students on the FSA, that does not constitute a factual or legal basis for determining that she has failed to take responsibility or to be accountable for her actions. Indeed, if that were the case, any time a teacher denied having engaged in conduct alleged to violate applicable statutes, rules, and policies, he or she also could be charged with failing to "take responsibility and be accountable for his or her act or omissions." This would effectively force the teacher to choose between defending himself or herself at the peril of facing the additional charge of failing to "take responsibility and be accountable," or to forego defending himself or herself. For these reasons, the undersigned finds that Respondent's conduct did not violate School Board Policy 3.02.4.f.

^{11/} See note 8, supra.

^{12/} See note 9, supra.

^{13/} See note 10, supra.

^{14/} See note 10, supra.

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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.