

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 17-1983TTS

PATRICK MCCALLION,

Respondent.

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RECOMMENDED ORDER

On July 25, 2017, a hearing was conducted pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Yolonda Y. Green, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), in Tallahassee, Florida.

APPEARANCES

For Petitioner: Stephen W. Johnson, Esquire  
McLin and Burnsed  
1000 West Main Street  
Post Office Box 491357  
Leesburg, Florida 34749-1357

For Respondent: Mark S. Levine, Esquire  
Levine & Stivers, LLC  
245 East Virginia Street  
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Petitioner had just cause to discipline Respondent and; if so, what discipline should be imposed for Respondent's actions.

PRELIMINARY STATEMENT

By letter dated March 6, 2017, Susan Moxley, Superintendent of Schools, issued a letter to Respondent ("Respondent" or "Mr. McCallion"), notifying him that Petitioner took action to suspend Respondent from his teaching position without pay for one day. The Notice alleged that on February 9, 2017, Respondent, without approval, removed door hardware from his office and replaced it with unauthorized hardware. The Notice further alleged that Respondent violated two provisions of the Florida Principles of Professional Conduct for the Education Profession (as adopted in Florida Administrative Code Rule 6A-5.056), including Florida Administrative Code Rule 6A-5.056(2), by violating School Board Policy 7.65(3)(E), and Rule 6A-5.056(3).

On March 20, 2017, Respondent timely requested a hearing to dispute Petitioner's intended action. On March 31, 2017, this matter was referred to the Division for assignment to an Administrative Law Judge.

On April 7, 2017, the undersigned issued a Notice of Hearing scheduling this matter for May 9, 2017. On April 26, 2017, Respondent filed a Motion to Continue. The undersigned granted the motion and rescheduled the hearing for July 25, 2017.

The hearing commenced as scheduled with both parties represented by counsel. Petitioner presented the testimony of the following witnesses: Robert McCue (Clermont Middle School Principal) and David Myers (Lake County Schools Assistant Superintendent for Human Resources). Petitioner's Exhibits 1 through 7 were admitted into evidence. Respondent testified on his own behalf and offered Exhibits 1 through 7, which were admitted into evidence.

An electronic copy of the one-volume Transcript of the hearing was filed on August 15, 2017. The parties requested that they be permitted 20 days to file their Proposed Recommended Orders ("PROs"). The parties timely submitted PROs, which have been considered in preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2016), unless otherwise noted.

#### FINDINGS OF FACT

##### Parties

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the system of public schools in Lake County, Florida. Art. IX, § 4(b), Florida Constitution;

§ 1001.32, Fla. Stat. Petitioner has the authority to discipline instructional staff and other school employees.

§ 1012.22(1)(f), Fla. Stat.

2. At all times relevant to this proceeding, Respondent was a physical education ("PE") instructor at Clermont Middle School. During the 2016-2017 school year, Mr. McCallion was assigned to instruct five classes with 40 students in each class, for a total of 200 students.

3. As a PE instructor Mr. McCallion maintains records for students, including students in the Exceptional Student Education ("ESE") program. The student files contain confidential information, including student 504 plans, Individual Education Plans ("IEPs"), student grades, teacher comments regarding students, social security numbers, and personal health information.

4. Mr. McCallion maintained the student records in five binders and stored them on a cart so he could easily transport the records between his office and the class meeting location. When class was not in session, the records were stored in Mr. McCallion's office.

5. In addition to student files, Mr. McCallion stored his school-assigned lap top; his personal effects, including his wallet and car keys; and money collected from students for school-related activities in his office.

## Office/Security of Records

6. In accordance with the Collective Bargaining Agreement, Mr. McCallion was assigned an office located in the boys' locker room. He did not share his office with any other school employee. However, there were reportedly 20 keys issued to individuals that could be used for Mr. McCallion's office. Mr. McCallion shared with the school principal, Mr. McCue, his concern about the number of keys to his office.

7. School Board Policy 5.70 states that "rules and procedures for maintaining student records shall be consistent with Florida Statutes, State Board of Education rules, and "Federal Education Rights and Privacy Act" ("FERPA") and "Privacy Rights of Parents and Students."

8. Rule 6A-1.0955 requires that student records used or maintained by a public institution or agency be protected in accordance with FERPA. Further, this rule requires that the confidentiality of the student records be maintained from unauthorized or unintentional access and that the school principal or designee is responsible for those records at the school level.

9. Mr. McCue acknowledged that the security of student records is important and that it was Mr. McCallion's responsibility to secure the records.

10. Mr. McCallion did not have a locked file cabinet in his office. The testimony at hearing revealed that there was a room within Mr. McCallion's office that could be used to store files. However, that room did not have a lock. While Mr. McCue stated there were other alternatives within Mr. McCallion's office that could be used to store files, all other options known to Mr. McCallion would not provide the same security as a locked office.

Events Giving Rise to This Proceeding

11. On February 9, 2017, Mr. McCallion was scheduled to work the usual school day followed by car duty until 4:15 p.m. On the same evening, two basketball games were scheduled to take place in the school gym, beginning with the boys' game at 5:30 p.m.

12. After car duty, at approximately 5:15 p.m., Mr. McCallion returned to his office and discovered a male referee changing clothes in his office. Mr. McCallion had not given the referee permission to use his office and had no knowledge who gave him permission. Although each room at Clermont Middle School could be rented through a rental agreement, Mr. McCue confirmed at hearing that the referees did not have an agreement to use Mr. McCallion's office. The undersigned finds that the security of the student records was compromised when an unauthorized person had access to them.

13. Mr. McCallion went to the gym and spoke with the athletic director, Coach Seabrook. Mr. McCallion expressed his "concern" about the referee using his office without his prior knowledge. According to Mr. McCallion, Coach Seabrook advised him that she allowed the referee to use his office because she did not know where to put him.

14. Concerned, in part, for the safety of the student records, Mr. McCallion decided to replace the lock on his office door. He purchased a lock from the local Lowe's home improvement store, removed the School Board-owned lock, and replaced that lock with the lock he purchased at Lowe's. The boys' game had ended when Mr. McCallion finished changing the lock, so he placed the referee's personal items on a bench within the locked locker room. The referee's personal items were secure because all persons with access to the locker room after the game ended were school personnel.

15. Mr. McCallion did not have permission from Mr. McCue or any administrator to replace the lock on his office door. Approximately five days later, he told Mr. McCue about the lock change.

16. Unbeknownst to Mr. McCallion, at some point after the boys' game started on February 9, 2017, Mr. McCue arrived at the game. The athletic director approached him and told him that Mr. McCallion had a conversation with her about using his office

for the referees to change. However, Mr. McCue and Mr. McCallion did not see each other at the game.

17. After the game, Mr. McCue went to let the referee into Mr. McCallion's office to retrieve his personal items. He walked through the locked boys' locker room to get there. Mr. McCue's key did not work on the office door. He asked the athletic director and her key did not work either. Then, Mr. McCue asked the custodian to try his key without success. It was about this time that Mr. McCue noticed that the referee's personal items were on a bench in the locker room and they had walked past them. Mr. McCue also noticed that the door handle/lock to Mr. McCallion's office had been replaced with an unauthorized lock. School Board policy requires that only authorized district personnel may change locks on school board property.

#### Prior Discipline

18. Prior to the February 2017 incident, Mr. McCallion had prior discipline which arose from an incident involving damage to school property (a door lock). During the 2013-2014 school year, Mr. McCallion chaperoned a school field trip. He returned from the field trip after 6:30 p.m. and discovered that the locks to the gym had been changed. Mr. McCallion was unable to access his office to retrieve his personal items. Then, he used a pocket knife to gain access to the gym, which caused damage to



the gym door handle. Due to Mr. McCallion's actions, he was issued a Level II written reprimand on April 15, 2014.

19. After the incident, Mr. McCue discussed the circumstances with the employee relations office. They discussed the School Board's policy on progressive discipline.

20. Petitioner has adopted, as policy, section 6.361 of the School Board of Lake County, an Employee Discipline Plan. The Employee Discipline Plan includes a Progressive Discipline Method by which sanctions are graduated based on the severity of the occurrence, and on whether it has recurred. The purpose of the policy is to let employees know the nature of the violation and provide an opportunity to correct the behavior. Each subsequent offense calls for the next step in discipline.

21. On February 15, 2017, Respondent discussed the incident with Mr. McCue. On February 27, 2017, Mr. McCue issued a letter notifying Respondent that he would recommend to the Superintendent that Mr. McCallion be suspended without pay for one day for his actions.

22. Mr. McCallion's complete employee file was not presented at the hearing. However, the performance evaluation documents that were entered into evidence show that he was an employee of the School Board for at least the past 12 years and had received satisfactory evaluations in the area of classroom instruction and supervision.

## CONCLUSIONS OF LAW

### Jurisdiction

23. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

24. Respondent is an employee of the School Board and holds a professional services contract pursuant to section 1012.33(3)(a), Florida Statutes.

25. Petitioner seeks to suspend Respondent's employment, which does not involve the loss of a license or certification. Thus, Petitioner has the burden of proving the allegations in its notice of suspension and charging document by a preponderance of the evidence. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009); Cisneros v. Sch. Bd. of Dade Cnty., 990 So. 2d 1179, 1183 (Fla. 3d DCA 2008); 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).

26. The preponderance of the evidence standard "is defined as '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." Gross v. Lyons, 763 So.

2d 276, 289 n.1 (Fla. 2000). See also Haines v. Dep't of Child. & Fams., 983 So. 2d 602, 606 (Fla. 5th DCA 2008).

Standards

27. A district school board is considered a public employer with respect to all employees of the school district. § 447.203(2), Fla. Stat. As such, a school board has the right to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or other legitimate reasons. § 447.209, Fla. Stat.

28. Section 1012.22(1) provides, in part, that a district school board shall "[d]esignate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees . . . , subject to the requirements of [chapter 1012]."

29. Respondent is an employee of the School Board pursuant to section 1012.33.

30. Section 1012.33(1)(a) provides that a teacher's contract "shall contain provisions for dismissal during the term of the contract for just cause," which includes misconduct in office as defined by rule of the State Board of Education.

31. The School Board alleged in its Notice that Respondent violated the Principles of Professional Conduct for Education Profession in Florida based on two violations. The Notice

alleges Respondent violated rule 6A-5.056(2) by violating school board policy 7.65(3) (E) .

32. Rule 6A-5.056 establishes the criteria for suspension and dismissal of school personnel. Subsection (2) of the rule provides:

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

\* \* \*

(c) A violation of the adopted school board rules;

33. School Board Rule 7.65(3) (E) provides that actions constituting fraud include unauthorized destruction, theft, tampering, or removal of records, furniture, fixtures, or equipment.

34. The evidence established that Mr. McCallion removed the School Board-owned door handle from his office door and replaced it with a handle he purchased. He did not receive permission before he changed the lock and therefore, his actions were unauthorized.

35. Mr. McCallion contends that no one was harmed by him changing the lock to his office because he was acting to secure student records. He also contends that Mr. McCue agreed that Mr. McCallion's actions were reasonable at that time to secure the student records. Despite the perceived reasonableness of his actions, Mr. McCallion indeed removed a School Board-issued

door lock and replaced it without prior authorization from Mr. McCue, or any other. Based on his actions, Mr. McCallion engaged in misconduct by violating an adopted school board policy.

36. The School Board also alleged in its Notice that Respondent violated rule 6A-5.056(3), which provides as follows:

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

\* \* \*

3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents.

37. The evidence establishes that on February 9, 2017, Mr. McCallion discovered a person alone in his office where student records were readily accessible. While Mr. McCue testified that he had no expectation that the referee would review the records, the referee had unauthorized access to them.

38. Mr. McCallion notified the athletic director of his concerns of the referee using his office without his knowledge. The athletic director later notified Mr. McCue of Mr. McCallion's concerns. Instead of taking action, Mr. McCue continued to watch the game.

39. Prior to the February 2017 incident, Mr. McCallion expressed to Mr. McCue his concerns about the number of keys to his office and he requested that the lock be changed. Mr. McCue acknowledged Mr. McCallion's concerns and assured him that he would look into it.

40. Petitioner contends that Mr. McCallion failed to communicate with anyone that he had changed the lock on his office door on the night of the incident. However, he reported the changed lock five days later. The evidence offered at hearing establishes that the totality of the facts demonstrates that Mr. McCallion appropriately communicated his concerns about the security of his office to colleagues and administrators and later communicated to Mr. McCue that he changed the lock on his office door. Petitioner did not prove that Mr. McCallion failed to appropriately communicate with colleagues and administrators.

41. The evidence introduced at hearing demonstrates that Petitioner proved that Mr. McCallion engaged in misconduct by removing the lock on his office door without authorization and replacing it with an unauthorized lock.

42. Based on the foregoing, Petitioner had just cause to discipline Respondent by imposing a one-day suspension, without pay, for misconduct in office.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Lake County School Board, enter a final order:

- a) dismissing the allegations in the notice of recommendation of suspension that Respondent failed to appropriately communicate with colleagues and administrators;
- b) finding that Patrick McCallion engaged in misconduct by removing the lock on his office door without authorization and replacing it with an unauthorized lock; and
- c) finding that Lake County School Board had just cause to discipline Patrick McCallion with a one-day suspension without pay for misconduct in office.

DONE AND ENTERED this 6th day of October, 2017, in Tallahassee, Leon County, Florida.



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YOLONDA Y. GREEN  
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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of October, 2017.

COPIES FURNISHED:

Stephen W. Johnson, Esquire  
McLin and Burnsed  
1000 West Main Street  
Post Office Box 491357  
Leesburg, Florida 34749-1357  
(eServed)

Mark S. Levine, Esquire  
Levine & Stivers, LLC  
245 East Virginia Street  
Tallahassee, Florida 32301  
(eServed)

Ronald G. Stowers, Esquire  
Levine and Stivers, LLC  
245 East Virginia Street  
Tallahassee, Florida 32301  
(eServed)

Diane S. Kornegay, M.Ed.  
Superintendent  
Lake County Schools  
201 West Burleigh Boulevard  
Tavares, Florida 32778-2496

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

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



NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.