STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 17-4226TTS

RENYA JONES,

Respondent.
_____/

RECOMMENDED ORDER

On December 4, 2017, Administrative Law Judge Lisa Shearer Nelson conducted a hearing pursuant to section 120.57(1), Florida Statutes (2017), in Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Barbara L. Sadaka, Esquire
Legal Department
School District of St. Lucie County
7000 Northwest Selvitz Road
Port St. Lucie, Florida 34983

For Respondent: Nicholas Wolfmeyer, Esquire
Egan, Lev, Lindstron & Siwica, P.A.
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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner, St. Lucie County School Board (Petitioner or the School Board), has just cause to terminate the employment of Respondent, Renya Jones (Respondent or Ms. Jones).

PRELIMINARY STATEMENT

On May 22, 2017, E. Wayne Gent, as Superintendent of the School Board, notified Respondent of his intent to recommend to the School Board that it terminate her employment at its June 13, 2017, meeting, and advised her of her right to a hearing. Ms. Jones was further notified that if she chose to exercise her right to a hearing, Mr. Gent would recommend that she be suspended without pay pending the outcome of the hearing.

Respondent requested a hearing, and on July 25, 2017, the School Board served a Petition for Termination and referred the case to the Division of Administrative Hearings (Division) for assignment of an administrative law judge.

The case was originally scheduled for hearing to commence October 13, 2017. However, there was some difficulty obtaining a location for the date originally set for hearing, and on September 6, 2017, an Order was issued explaining the difficulties, asking the parties for information regarding possible locations, and in the alternative, for mutually-acceptable dates to reschedule the hearing. As a result of the response by the parties, on September 19, 2017, the case was rescheduled for December 4, 2017.

On October 10, 2017, the School Board referred a separate Petition for Termination against Respondent for the assignment of an administrative law judge, and on October 12, 2017, requested

that the two cases be consolidated. An Order of Consolidation was entered October 12, 2017, consolidating the instant case with the second Petition for Termination, which was docketed as DOAH Case No. 17-5566TTS.

On October 26, 2017, Respondent filed a Petition to Determine the Invalidity of School Board Rules 6.16 and 6.50 (Rule Challenge), which was docketed as DOAH Case No. 17-5889RX and for which an Order of Assignment was issued October 30, 2017. Respondent also moved for consolidation of the rules challenge with DOAH Case Nos. 17-4226TTS (Discipline I) and 17-5566TTS (Discipline II). A Status Conference was conducted to address scheduling, because the disciplinary cases were already scheduled to go forward on December 4, 2017, five days past the statutory deadline for scheduling a rule challenge, absent an agreement of the parties or good cause shown. See § 120.56(1)(c), Fla. Stat. After discussion with the parties, Discipline I was severed from Discipline II and the Rule Challenge, and Discipline I remained scheduled for hearing on December 4, 2017. Discipline II and the Rule Challenge were consolidated for hearing and scheduled to be heard on January 23, 2018. At the time this Recommended Order is issued, the Rule Challenge has been heard and remains pending.[1/]

The hearing took place as scheduled. Prior to hearing, the parties filed a Pre-hearing Statement which contained a stipulation regarding those facts for which no proof at hearing

was required. To the extent those facts remain relevant in light of the severance of Discipline I from Discipline II and the Rule Challenge, those facts have been incorporated into the Findings of Fact below. At hearing, Petitioner presented the testimony of Actavis McQueen, Verna Brown, Sherri Brown, Mary Bergerman, Cynthia Garcia, Ucola Barrett-Baxter, Kenneth Rodriguez, Gina Dinello, and Aaron Clements; and Petitioner's Exhibits numbered 1 through 18 and 20 through 49 were admitted into evidence. Respondent presented the testimony of Marcela Marshall-Morgan and Andrew Copeland, and Respondent's Exhibit numbered 1 was admitted into evidence.

The two-volume Transcript of the proceedings was filed with the Division on January 5, 2018. At the request of the parties, the deadline for proposed recommended orders was extended to 30 days from the filing of the Transcript. Both parties filed Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order. All references to Florida Statutes are to the 2016 codification, unless otherwise indicated.

FINDINGS OF FACT

1. Respondent, Renya Jones, is employed by the School Board of St. Lucie County, Florida. She has been employed by the School Board since the 2004-2005 school year, most recently as a music teacher at Village Green Environmental Studies School.

2. Respondent has a professional services contract pursuant to section 1012.33, Florida Statutes. As a classroom teacher, she is covered by the Collective Bargaining Agreement between the School Board and the Classroom Teachers Association.

3. When Respondent was hired by the School Board, she participated in an orientation process whereby she received training on a variety of School Board policies, including the Code of Ethics/Professional Competency and the Drug-Free Workplace Policy. On July 28, 2004, she signed a New Employee Orientation Verification of Training form indicating that she had received training in the areas listed (including those named above), and that she had received a copy of the St. Lucie County School Board New Employee Handbook.

4. Respondent also submitted to pre-employment drug screening on July 30, 2004.

5. On May 8, 2017, Respondent was a music teacher at Village Green Environmental Studies School, also referred to as Village Green Elementary (Village Green).

6. The contractual hours for teachers at Village Green during the 2016-2017 school year were from 7:45 a.m. to 3:20 p.m. There were clubs that met in the morning before classes began at approximately 8:30 a.m., and those teachers working with clubs were required to report earlier so that they were present when the clubs were to start.

7. Respondent was the teacher working with the chorus club, which would require her to be present early. When teachers arrive at school, they normally sign in at the front desk.

8. Cynthia Garcia is the executive secretary to the principal at Village Green. During the 2016-2017 school year, the principal was Ucola Barrett-Baxter. Ms. Garcia typically arrives at school before anyone else and sits at the front desk as teachers sign in, as opposed to sitting in her office, adjacent to Ms. Barrett-Baxter's.

9. On May 8, 2017, Ms. Garcia was present when Respondent signed in at sometime between 7:30 and 7:50 a.m. Ms. Garcia asked Respondent if she was alright, because her appearance was different than normal. While Respondent was usually dressed professionally and wore make-up, that morning she was wearing no make-up and her wig was not on straight. Respondent replied that she was running a little behind and was a little messed up, and still needed to put on her make-up. Ms. Garcia testified that Respondent was different than when she usually signed in, and described her as a bit "giddy," flailing her arms and laughing.

10. Actavis McQueen is a fourth-grade teacher at Village Green. As she approached her classroom on May 8, 2017, Respondent called to her in the hallway a little after 8:00 a.m. Ms. McQueen described Respondent as giggly and loud, and when Ms. McQueen approached Respondent, she noticed that Respondent

was not properly dressed for work. For example, her wig was twisted, she was not wearing make-up as she usually does, her stomach was showing under the tank top she was wearing, and she was wearing flip flops or slides instead of shoes. Most importantly, Ms. McQueen could smell the strong odor of alcohol.

11. Respondent was loud and laughing, saying that the children would not recognize her without her make-up. Students were starting to come in for practice on the school play, and Ms. McQueen did not want the students to see Respondent in her current condition, so Ms. McQueen told students that there would not be a rehearsal that day. She told Respondent to go to her office in the back of her classroom and fix herself up.

12. Ms. McQueen was shocked by Respondent's appearance, and after telling Respondent to go to her office, Ms. McQueen headed toward the school office. On her way, she ran into Verna Brown at the cafeteria. The chorus room that served as Respondent's classroom is adjacent to or behind the cafeteria, and can be entered from the cafeteria area by way of the stage.

13. Verna Brown[2/] is a health paraprofessional employed at Village Green. On this particular morning, she was on duty in the cafeteria for those students eating breakfast. Ms. McQueen approached her and told Verna Brown that she had spoken to Respondent, and it appeared that Respondent had been drinking. Ms. McQueen reported that Respondent smelled of alcohol and asked

Verna Brown to go check on Respondent, because Ms. McQueen was uncertain what to do.

14. Verna Brown went to Respondent's class, and when she arrived, two other staff members were in Respondent's room, so she closed the door and said she would come back, which she did once the others left the room. Like Ms. McQueen, Verna Brown could smell alcohol and observed that Respondent's eyes were swollen and red, her hair was "wild," and her stomach was showing. Respondent indicated that she had been to a party.

15. Verna Brown was concerned for Respondent's well-being and told Respondent she needed to get herself together. While she was talking to Respondent, students were trying to come into the room through the stage, and were asking Respondent questions about rehearsal. Respondent told them there would be no rehearsal that morning and to come back at 3:00 p.m. Verna Brown was trying to keep the students from seeing Respondent because she did not want them to see her in that condition. Verna Brown asked Respondent if Respondent needed her to call someone to come get her, but Respondent indicated that she had a rental car, and left out the back door.[3/] Despite having signed in upon her arrival at Village Green, Respondent did not sign out when she left. Verna Brown was not authorized to arrange for a substitute for Respondent, but told her she would speak with Ms. Garcia about one. No substitute was ever procured.

16. Verna Brown returned to the cafeteria and confirmed to Ms. McQueen that she also smelled alcohol on Respondent. Ms. McQueen went to the office accompanied by Sherri Brown, the media specialist, in search of the principal, Ucola Barrett-Baxter. Ms. Garcia advised Ms. McQueen that Ms. Barrett-Baxter was at student drop-off duty, and Ms. McQueen told Ms. Garcia that she needed to speak to her about a staff member. Ms. Garcia asked if it was Respondent, and went to the drop-off area to advise Ms. Barrett-Baxter of Ms. McQueen's need to see her. Ms. Garcia believed that Ms. McQueen was very upset about Respondent and took over Ms. Baxter-Barrett's duties at the student drop-off area so that Ms. Barrett-Baxter could speak with Ms. McQueen.

17. Ms. Barrett-Baxter found Ms. McQueen at the media center, where Ms. McQueen advised her that she had seen Respondent and that Respondent appeared to be drunk and smelled like alcohol. Ms. Barrett-Baxter asked where Respondent could be located, and was told that she had already left the campus.

18. Ms. Barrett-Baxter immediately called Aaron Clements, the director of Employee Relations, and explained the situation. Upon learning that Ms. Barrett-Baxter had not seen Respondent personally and that Respondent was no longer at the school, Mr. Clements advised Ms. Barrett-Baxter that at that point, there was nothing that could be done.

19. As noted above, Sherri Brown is a media specialist at Village Green. At Ms. McQueen's request, she accompanied Ms. McQueen to the office to find Ms. Barrett-Baxter. She and Verna Brown were both concerned about whether Respondent made it home safely, and she tried to call Respondent. Respondent did not answer her phone when Sherri Brown called, and she and Verna Brown received permission from Ms. Barrett-Baxter to leave campus and drive by Respondent's home to make sure she had arrived. Once they saw the rental car Respondent had been driving parked at her home, they returned to campus.

20. Respondent returned Sherri Brown's call at about 10:17 a.m., and stated that she had left early due to an unidentified emergency. Sherri Brown told Respondent to contact Ms. Barrett-Baxter before she came back to work, and not to come back to the school. Sherri Brown relayed the telephone conversation with Respondent to her media assistant, Mary Bergerman, and told Ms. Bergerman that she needed to go to the office and report the contact with Respondent. Ms. Bergerman had heard Sherri Brown's side of the telephone conversation and confirmed that Sherri Brown had told Respondent not to return to the school, as opposed to advising her that she needed to come back.

21. When Sherri Brown arrived at the office, Ms. Barrett-Baxter was in a meeting with a parent. She stepped into

Ms. Garcia's office to relay the message that Respondent was going to contact the principal, and while she was there, Respondent entered the office behind her. Sherri Brown said hello to Respondent and returned to the library. She covered Respondent's classes for the day, and she and a co-worker covered the rehearsal that afternoon.

22. While Ms. Barrett-Baxter was in the parent conference, at approximately 10:24 a.m., she received a text from a number she did not recognize. She responded, "I'm in a meeting. Who's calling," to which Respondent responded, "Jones I'm there in 5 minutes."

23. Respondent arrived in the office while Ms. Barrett-Baxter was still in the parent conference, so she went in Ms. Garcia's office to wait. After somewhere between ten and 30 minutes, the parent conference concluded, and Respondent went in Ms. Barrett-Baxter's office. Ms. Barrett-Baxter testified that Respondent is normally well put together in terms of make-up and hair, but when she came in the office she looked disheveled, and noticeably different from her normal appearance. She could detect the smell of alcohol and her eyes were puffy and red. Respondent told her she had gone home to clean up a little bit, and Ms. Barrett-Baxter replied that it did not work, because she could smell the alcohol from across the desk. She told Respondent that she would have to contact the district office,

and left Respondent in her office while she went to Ms. Garcia's office to call Mr. Clements. Sometime that day, she also completed a Human Resources Reporting Form and emailed it to Mr. Clements. The Reporting Form summarized the reports she had received regarding Respondent's apparent intoxication and what she had observed when meeting with Respondent before calling Mr. Clements.

24. Reasonable suspicion existed to warrant testing for drugs and alcohol based upon Respondent's appearance, behavior, and the smell of alcohol emanating from her person and noted by nearly every person with whom she came in contact.

25. Mr. Clements advised that he would send someone from security to transport Respondent for testing. Ms. Barrett-Baxter had Respondent go sit in the conference room in the office area to wait for transport, and resumed her other duties.

26. Ken Rodriguez is a security officer for the St. Lucie County School District (School District) and a retired police officer from New York City, and he has worked at the School District for the last nine years. He arrived at Village Green between 11:00 and 11:30 a.m. Once he arrived, he went to the conference room where Respondent was waiting. He identified himself to Respondent and explained that he would be transporting her to the district office where she would meet with Aaron

Clements, who would explain to her the procedures that were going to take place.

27. Mr. Rodriguez asked Respondent about any personal affects she might have, and then asked someone in the office to retrieve her purse for her. Upon receiving the purse, Respondent placed it on the table and started looking for something. From his vantage point standing by the table, he could see a large ziplock bag of capsules in her purse, as well as a box of box cutters. He did not search her purse, but asked her about the bag of capsules, and Respondent told Mr. Rodriguez that they were vitamins.

28. Mr. Rodriguez took her explanation at face value, but advised her that he was going to hold onto both the bag of capsules and the box cutters as a safety measure while she was transported, and return them to her when they were finished.

29. Mr. Rodriguez and Respondent arrived at the School District offices sometime after noon. Mr. Rodriguez directed Respondent to sit in the reception area while he went in to see Mr. Clements. Mr. Rodriguez reported to Mr. Clements that he had taken possession of the capsules and the box cutter as a safety measure and gave them to Mr. Clements, and then brought Respondent in to meet with him. Mr. Rodriguez did not sit in on the meeting between Mr. Clements and Respondent.

30. Mr. Clements advised Respondent that she was going to be taken to the lab for drug/alcohol testing, and now would be the time for her to tell him if the pills were something illegal or would cause her to have a negative result from the test, and she again stated that they were vitamins. Mr. Clements reiterated that they were sending her for drug and alcohol testing, and she indicated that she understood. She was provided with the standard forms related to testing that are used for all employees being tested, and she signed them. Respondent did not ask Mr. Clements any questions, and appeared to understand what she was told.

31. Mr. Clements is not the medical resource officer for St. Lucie County Schools. The medical resource officer is identified on the form for drug testing, along with his telephone number. No evidence was presented to indicate that Respondent asked to speak to the medical resource officer or was prohibited from doing so.

32. The School District typically tests for both drugs and alcohol on a reasonable suspicion test. While there may be reasonable suspicion that someone is under the influence of either drugs or alcohol, without the testing, it is difficult to know for sure the source of the influence.

33. After meeting with Mr. Clements, Respondent was provided with a St. Lucie Public Schools Drug & Alcohol Testing

notification form that identifies the time Respondent left the School District and instructs her to report to the identified testing location no later than 30 minutes from receiving the form. Respondent and Mr. Clements both signed this form at 1:10 p.m.

34. Mr. Rodriguez drove Respondent to Absolute Testing/Consulting (Absolute Testing), where he provided the paperwork to a technician, Gina Dinello, who took her back for testing while he waited in the reception area.

35. Absolute Testing provides alcohol testing to St. Lucie County using a breathalyzer, and provides drug testing using a urine sample. Ms. Dinello holds the appropriate certifications to conduct the breathalyzer test and to collect the urine sample for the drug test. The sample for the urine test is obtained on premises and then transported to a laboratory for processing.

36. The breathalyzer that Absolute Testing uses is DOT-certified, and is calibrated in accordance with DOT standards.

37. Ms. Dinello took Respondent into the back room at Absolute Testing, and explained how the procedure for the breathalyzer works. She showed Respondent the documents related to the test, and Respondent signed them.

38. With breathalyzer tests, where there is a positive test result, it is standard procedure to wait 15 minutes and then have the person being tested blow into the breathalyzer a second time.

The theory is that, by waiting the 15 minutes, any extraneous influence, such as mouthwash, that might have affected the first test would have dissipated by the second test.

39. Respondent cooperated with the first administration of the breathalyzer test, which resulted in a reading of .186 at 1:40 p.m. Once she learned the results of the first test, however, she did not want to wait for the second administration. Ms. Dinello asked Mr. Rodriguez to help explain the process to her, and he did so, telling her that a second test was a standard part of the process. Both Mr. Rodriguez and Ms. Dinello explained to Respondent that she had a right to refuse the test, but her refusal would be documented. Respondent then consented to the second administration, which resulted in a reading of .191 at 1:56 p.m.

40. After the breathalyzer test was complete, Ms. Dinello explained that Respondent needed to provide a urine sample for the drug test. Respondent declined to do so, saying she had already blown the breathalyzer test, so there was no point to proceed with the urine test. Both Mr. Rodriguez and Ms. Dinello explained again that if she chose to refuse the test, the refusal would be documented and reported to the School District. Respondent refused to submit, and Ms. Dinello submitted paperwork to that effect.

41. Mr. Rodriguez was not informed of the results of the breathalyzer test. When the testing was finished, he took Respondent to her home, returned her belongings to her, and she walked into her home. He did not allow her to drive her car home, which remained at Village Green, because he believed that she could still be under the influence of alcohol. He testified that when he transported her to the testing facility, he could smell the heavy odor of alcohol on her, and he did not believe she was physically capable of driving home.

42. Respondent was paid a salary for May 8, 2017, and had not requested annual or sick leave. She was on duty when she arrived at the school that morning, and she remained on duty, despite the fact that she chose to go home without signing out for the day.

43. On May 9, 2017, Respondent received a letter by hand-delivery notifying her that she was under investigation for having a breath alcohol level of .186 and .191 while at her work location, and for refusing the drug test. She was placed on temporary duty assignment. While on temporary duty, Respondent received all of her pay and benefits. Moreover, Respondent was paid for the entire term of her contract for the 2016-2017 school year, from August 12, 2016, through June 30, 2017.

44. On May 10, 2017, Mr. Clements provided to Respondent a Meeting Notice, scheduling a meeting regarding the charges that

she refused the drug test and had unacceptable breath alcohol test results. Respondent acknowledged receiving the notice in writing and attended the meeting with her union representative. The purpose of the meeting was to provide Respondent with "due process" and give her the opportunity to provide any information she might choose regarding the allegations against her.

45. On May 15, 2017, Respondent received written notice of a second meeting, to be held on May 22, 2017. The purpose of this meeting was to provide Respondent the results of the School District's investigation. Respondent and her representative attended this meeting as well.

46. On May 22, 2017, Rafaal Sanchez, Jr., Mr. Clements' supervisor and executive director of Human Resources for the School District, recommended to Superintendent Gent that Respondent's employment be terminated. Superintendent Gent accepted Mr. Sanchez's recommendation and by letter dated May 22, 2017, notified Respondent of his intent to recommend to the School Board that her employment be terminated, as well as the procedure available to her to contest that recommendation. The letter also advised Respondent that if she chose to request a hearing, the superintendent would recommend that she be suspended without pay pending the outcome of the hearing.

47. That same day, counsel for Respondent wrote to Superintendent Gent regarding the allegations against Respondent.

He advised the superintendent that Respondent was relieved of duty on May 8, 2017, and was later called and told to return to Village Green, and that she voluntarily complied with this directive. He also contended that she was not presented with any drug testing policies and she had no knowledge of the consequences of failing to submit to the drug test at that time. As a result of this letter, Mr. Clements opened a second investigation to see whether anyone had told Respondent to return to school. At that time, he gathered statements from staff members, who had seen Respondent at school on the morning of May 8, 2017, and ultimately closed the investigation as unsubstantiated.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 1012.33(6)(a)2., Florida Statutes (2017).

49. The School Board is the duly-constituted governing body of the St. Lucie County School District 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.

50. 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), 1012.27(5), and 1012.33(6)(a), Fla. Stat.

51. 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.

52. 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).

53. 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.

54. The basis for the School Board's decision to terminate Respondent's employment is outlined in the Petition for Termination, which states in pertinent part:

> "[J]ust cause" exists for Respondent to be disciplined by way of termination pursuant to: § 1012.22(1)(f), Fla. Stat., § 1012.27(5), Fla. Stat., and § 1012.33(1)(a) and (6)(a), Fla. Stat.; *School Board Policies* 6.301(2); 6.301(3)(b)(i); 6.301(3)(b)(iii); 6.301(3)(b)(xix); 6.301(3)(b)(xxix); 6.301(3)(b)(xxxvii) *Employee Standards of Conduct*; 6.59 *Alcohol and Drug Free Workplace*; and 6.60 *Drug and Alcohol Testing*; Rules 6A-10.081(1)(b), (1)(c), and (2)(a)(1) F.A.C. *Principles of Professional Conduct for the Education Profession in Florida*; and Rule 6A-5.056 F.A.C., *Criteria for Suspension and Dismissal* for the violations stated above.

These allegations do not specifically use the term "misconduct." However, the provisions cited fit under the definition of "misconduct" delineated in Florida Administrative Code Rule 6A-5.056.

55. The School Board's Policies 6.301, 6.59, and 6.60 are at the heart of this case. Those policies provide in pertinent part:

> 6.301 Employee Standards of Conduct
>
> (2) Each principal, supervisor, or member of the instructional staff shall abide by the

Principles of Professional Conduct for the Education Profession in Florida. . . . All certificated employees shall be required to complete training on the standards of ethical conduct upon employment and annually thereafter. All employees shall abide by the Florida Code of Ethics for Public Officers and Employees.
(3) Disciplinary Guidelines for Employees

* * *

(b) The following list is not intended to be all inclusive, but is typical of infractions that warrant disciplinary action:
(i) Insubordination

* * *

(iii) Violation of drug and alcohol policy

* * *

(xix) Violation of any rule, policy, regulation, or established procedure

* * *

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

* * *

(xxxvii) Alcohol-related offences, including driving under the influence of alcohol

6.59 Alcohol and Drug-Free Workplace

(1) It is the intent of the School Board that work environments be free of the presence of illegal drugs and alcohol. Therefore, employees are prohibited from possessing, using, manufacturing, dispensing, distributing, or being under the influence of

illegal drugs or alcohol while on duty. For the purposes of this policy, illegal drugs are those controlled substances as defined by federal or state law, or any counterfeit of such drugs or substances.
(2) For the purpose of this policy, "workplace" means the site for the performance of work done in connection with employment. Workplace includes any school building or any school premises; and any vehicle used to transport students to and from school and school activities off school property during any school-sponsored or school-approved activity, event, or function, such as a field trip or athletic event, where students are under the jurisdiction of the School District.

* * *

(5) A drug-free awareness program is hereby established, and is to be implemented by the Superintendent, to inform employees of the dangers of drug abuse in the workplace, of the School Board's policy of maintaining a drug-free workplace, of available drug counseling, rehabilitation, and assistance programs, and of the penalties to be imposed upon employees for drug abuse violations occurring in the workplace. As a part of this program, all employees and applicants for employment shall be given notice of the School Board's policy regarding the maintenance of a drug-free workplace.

6.60*+ Drug and Alcohol Testing

(4) Prohibited Acts
(a) As a condition of continued employment, all employees are prohibited from possessing, consuming, reporting to work, or working with the presence of alcohol or drugs in their bodies in contravention of any federal or state statute, law, rule, or regulation governing the drug-free workplace or workplace safety. An employee who is in possession of or consumes alcohol or illegal

drugs while on duty will be discharged for the first offense and possibly denied of eligibility for workers' compensation and indemnity benefits in accordance with governing law.

* * *

(5) Procedures and Requirements
(a) Drug and alcohol testing is required in the following situations: when there is reasonable suspicion; when follow-up drug testing is appropriate; when the employee is in a safety sensitive position including driving School District vehicles; when testing is required by state or federal law or regulation; and applicants prior to employment.
(b) The decision to conduct testing shall be made by the Superintendent or designee without other prior notice to the employee. Scheduling for testing or examination will be during duty hours, except when required during routine physicals or time compensated by the School Board, at the discretion of the School Board, and the results will become part of the employee's permanent medical record. Should the employee refuse to cooperate with the testing, including refusing to submit to testing at the time ordered and without a valid medical explanation after receiving notice of the requirement for testing, or engaging in conduct that clearly obstructs the testing process, such refusal shall result in the employee's discharge from employment and forfeiture of eligibility for workers' compensation medical and indemnity benefits in accordance with governing law.
(c) For purposes of this policy, "reasonable suspicion" drug testing means testing based on a belief, drawn from specific objective and articulable facts and reasonable inferences drawn from those facts, that an employee is using or has used alcohol or drugs in violation or the School Board's

policy. Such facts may include, but are not limited to:
(i) Observable phenomena while at work, such as direct observation of alcohol or drug use or of the physical symptoms or manifestations of being under the influence of alcohol or a drug.
(ii) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
(iii) A report of alcohol or drug use provided by a reliable and credible source.

* * *

(e) In testing for the presence of alcohol, the School District shall use a generally accepted testing procedure. The employee will be permitted to report confidentially to the Medical Review Officer the use of prescription or nonprescription medications both before and after being tested.
(f) In testing for the presence of drugs, the School District will use an initial screening procedure. If the initial screening test is positive, a confirmation test, such as the gas chromatography/mass spectrometry test, will be performed. The employee will be permitted to report confidentially to the Medical Review Officer the use of prescription or nonprescription medications both before and after being tested. . . .
(g) Should testing substantiate the use of drugs and alcohol, and it is the employee's first offense, then the employee shall be given an opportunity to participate in and successfully complete an employee assistance program or drug and alcohol rehabilitation program. . . . For purposes of this policy, "alcohol concentration" means the number of grams of alcohol (i) per 100 milliliters of blood, (ii) per 210 liters of breath, or (iii) per 67 milliliters of urine. . . . (Emphasis added).

56. The rule history for the Drug and Alcohol Testing Policy indicates that the policy is implementing, in part, section 112.0455, Florida Statutes, which is the Drug-Free Workplace Act and section 440.102, Florida Statutes, which provides drug-free workplace program requirements.

57. Section 112.0455(5)(a) includes alcohol within the definition of the term "drug," and section 112.0455(5)(b) defines a "drug test" or "test" as "any chemical, biological, or physical instrument analysis administered for the purpose of determining the presence or absence of a drug or its metabolites."

58. With respect to notice given to employees, section 112.0455(6) provides:

> (a) Employers with no drug-testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. Employers with drug-testing programs in place prior to the effective date of this section are not required to provide a 60-day notice period.
> (b) Prior to testing, all employees and job applicants for employment shall be given a written policy statement from the employer which contains:
> 1. A general statement of the employer's policy on employee drug use, which shall identify:
> a. The types of testing an employee or job applicant may be required to submit to, including reasonable suspicion or other basis; and
> b. The actions the employer may take against an employee or job applicant on the

basis of a positive confirmed drug test result.
2. A statement advising the employee or job applicant of the existence of this section.
3. A general statement concerning confidentiality.
4. Procedures for employees and job applicants to confidentially report the use of prescription or nonprescription medications both before and after being tested. Additionally, employees and job applicants shall receive notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications shall be developed by the Agency for Health Care Administration.
5. The consequences of refusing to submit to a drug test.
6. Names, addresses, and telephone numbers of employee assistance programs and local alcohol and drug rehabilitation programs.
7. A statement that an employee or job applicant who receives a positive confirmed drug test result may contest or explain the result to the employer within 5 working days after written notification of the positive test result. If an employee or job applicant's explanation or challenge is unsatisfactory to the employer, the person may contest the drug test result as provided by subsections (14) and (15).
8. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil actions brought pursuant to this section.
9. A list of all drugs for which the employer will test, described by brand names or common names, as applicable, as well as by chemical names.
10. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission.

11. A statement notifying employees and job applicants of their right to consult the testing laboratory for technical information regarding prescription and nonprescription medication.
(c) An employer shall include notice of drug testing on vacancy announcements for those positions where drug testing is required. A notice of the employer's drug-testing policy shall also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy shall be made available for inspection by the general public during regular business hours in the employer's personnel office or other suitable locations.

59. Section 440.102 is similar in many respects to section 112.0455. With respect to notice, section 440.102(3) provides:

(a) One time only, prior to testing, an employer shall give all employees and job applicants for employment a written policy statement which contains:
1. A general statement of the employer's policy on employee drug use, which must identify:
a. The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis.
b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.
2. A statement advising the employee or job applicant of the existence of this section.
3. A general statement concerning confidentiality.
4. Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested.

5. A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the department.
6. The consequences of refusing to submit to a drug test.
7. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs.
8. A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5 working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration.
9. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section.
10. A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name.
11. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.
12. A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

> (b) An employer not having a drug-testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. An employer having a drug-testing program in place prior to July 1, 1990, is not required to provide a 60-day notice period.
> (c) An employer shall include notice of drug testing on vacancy announcements for positions for which drug testing is required. A notice of the employer's drug-testing policy must also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer's personnel office or other suitable locations.

60. It is found that the School Board proved by a preponderance of the evidence that Respondent was intoxicated when she reported for work and while she was on duty on May 8, 2017. This finding is supported by the testimony of Actavis McQueen, Verna Brown, Ms. Barrett-Baxter, Ken Rodriguez, and Aaron Clements, who all testified about her appearance, her unusual behavior, and the strong smell of alcohol on her person. There is sufficient evidence without the results of the alcohol breathalyzer test to support the conclusion that she was intoxicated.

61. The breathalyzer test simply confirms the conclusion that Respondent was, indeed, under the influence of alcohol. Both readings were well above any acceptable limit.

62. Respondent does not argue that the breathalyzer test results are inadmissible. She did not object to the admissibility of the test results at hearing and includes them in her proposed findings of fact. Respondent also did not challenge the efficacy of the machine or the procedure for its use. She contends that the School District did not comply with the requirements of its own policy and with the requirements of sections 112.0455 and 440.102, with respect to both the notice provided to Respondent and the right to consult with the medical review officer prior to testing, and that these failures call into question the reliability of the results.

63. The notice provisions in sections 112.0455 and 440.102 indicate that a one-time notice regarding the program and its requirements is required, not a test-by-test sort of notification. Respondent had submitted to applicant screening drug/alcohol testing prior to employment with the School District. Moreover, as part of her orientation as a School District employee, she signed an acknowledgment that she had received training on the Drug-Free Workplace Policy and had received a copy of the New Employee Handbook. The notice provided through orientation is sufficient.

64. With respect to the ability to consult with the medical review officer, Respondent reads the School Board's Drug and Alcohol Testing Policy as requiring the School District to say

that the employee shall meet with the medical resource officer both before and after testing. However, the policy states that the employee will be permitted to report confidentially to the medical review officer prior to testing. Here, no evidence was presented to indicate that Respondent ever asked to speak with the medical review officer, was prohibited from doing so, or what information she would have provided had the School Board arranged such a meeting.

65. Respondent has a valid point with respect to the process to be followed after a positive test result, however. No evidence was presented to indicate that any of the post-test procedures were followed with respect to the breathalyzer test results. However, given her refusal to submit to the urinalysis, the School District's failure to comply with the post-test procedure becomes a moot point. Moreover, Respondent participated in a due process meeting following the testing. No evidence was presented that she raised this issue at that meeting. Counsel for Respondent wrote to the superintendent on May 22, 2017, as noted in the Findings of Fact. Nothing related to the post-testing review by the medical review officer, or the failure to follow the policy, is mentioned.

66. Finally, Respondent contends that the School District's procedure does not follow the dictates of Florida Administrative Code Rule 59A-24.004(2)(b), which requires that testing for alcohol will be by blood for both the initial and confirmation

specimen.[4/] While the School Board's Drug Testing Policy clearly contemplates breathalyzer testing, AHCA's rules do not.[5/] Given this variance, the breathalyzer tests, standing alone, would not provide a basis for a finding that Respondent was in violation of the Drug and Alcohol Policy. European Marble Co. v. Robinson, 885 So. 2d 502, 503 (Fla. 1st DCA 2004).

67. There are few cases that interpret either section 112.0455 or section 440.102. None address the validity of test results where the procedures used vary from the rules enacted by AHCA, other than to hold that the party offering the test results is not entitled to a presumption (in the workers' compensation arena), that the employee's injury is due to alcohol or drug use. In those cases, additional evidence of intoxication or drug use would be required. See European Marble, above. Here, that additional evidence was presented.

68. With respect to the drug test, the School District has proven by a preponderance of the evidence that Respondent refused to submit to the urinalysis, even after she was advised that her refusal would be documented and reported back to the School District. There is no requirement in the School Board policy that she be informed, at that time, that her refusal would result in the termination of her employment. Her training regarding the Drug-Free Workplace Policy should have alerted her to this fact.

69. Respondent is charged with violating School Board Policy 6.301(3)(b)(i), quoted above at paragraph 55, which prohibits insubordination. Mr. Clements gave Respondent a directive, based on reasonable suspicion, to submit to a drug test. Her refusal demonstrates a violation of School Board Policy 6.301(3)(b)(i), by a preponderance of the evidence.

70. School Board Policy 6.301(3)(b)(iii) prohibits violation of a drug and alcohol policy. The overwhelming evidence presented at hearing supports the finding that Respondent reported to work in an intoxicated state and that she was under the influence of alcohol while on duty, in violation of School Board Policy 6.59(1).

71. Respondent contends that she was not on duty on May 8, 2017, because she went home, and only returned to work when summoned to do so. She also claims that when she returned to work, it was only for a meeting with the principal, and because she did not return to the classroom, she was not on duty.

72. Respondent's argument is rejected as not supported by the evidence. Respondent signed in for work on the morning of May 8, 2017, and never signed out. She was not on authorized leave and was paid for the day. Respondent was required to be present before the beginning of the school day because she had responsibilities related to the chorus club, and students were present in her room at a time when she was clearly intoxicated.

Another staff member tried to shield her from the students' view out of concern for her inappropriate appearance and behavior. Respondent was not told by anyone having authority to give such a directive that she should go home, and was not summoned back to school. While Respondent was not instructing students upon her return, she was meeting with a superior during the school day. Clearly, meeting with her principal is within the parameters of her position with the School District.

73. School Board Policy 6.301(3)(b)(xix) prohibits a violation of any rule, policy, regulation, or established procedure. By its nature this catch-all provision is duplicative when any other policy violation is proven. Inasmuch as a violation of School Board Policy 6.301(3)(b)(iii) has been proven, this provision has been proven as well.

74. School Board Policy 6.301(3)(b)(xxix) prohibits any violation of the Principals of Professional Conduct for the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees. This too, is a catch-all provision that depends on the violation of a separate standard.

75. School Board Policy 6.301(3)(b)(xxxvii) prohibits alcohol-related offenses, including driving under the influence of alcohol. There is no assertion in the Petition for Termination that Respondent is being charged with a violation for

driving under the influence. This provision is also duplicative of the charge of violating the drug and alcohol policy, given the factual allegations in this case. However, Respondent did violate this section of School Board Policy 6.301 by virtue of her intoxication on school board property at a time when she was supposed to be responsible for children.

76. The Petition for Termination also charges Respondent with violating rule 6A-10.081(1)(b) and (c), and (2)(a)1., which provides:

> (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 safety.

77. Respondent is correct that the provisions in rule 6A-10.081(1) are aspirational in nature, and do not serve as a basis for discipline. By its terms, the rule specifies that the conduct described in paragraph (2), as opposed to those aspirational principles in paragraph (1), may serve as a basis for discipline. Therefore, the undersigned does not recommend discipline or termination for a purported violation of the aspirational goals in rule 6A-10.081(1)(b) and (c).

78. The School Board has demonstrated that Respondent violated rule 6A-10.081(2)(a)1., by failing to protect students from conditions harmful to learning. Respondent came to school in an intoxicated state and was in her classroom while students were scheduled to be present. Only the actions of a co-worker limited her interaction with the students, because the co-worker did not want the students to see her in that condition. Appearing in the classroom during work hours reeking of alcohol and clearly under its influence is inconsistent with the standards of conduct that Respondent, as an educator, is expected to model.

79. Finally, rule 6A-5.056 identifies the criteria for suspension or dismissal of an educator, and provides 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:
>
> * * *
>
> (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.

80. The School Board has met its burden of proof to demonstrate just cause for terminating Respondent.

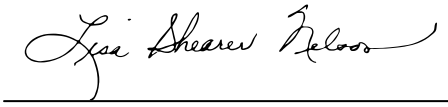
81. Respondent advocated at hearing that the School Board should have offered her something less than termination, given that the Drug and Alcohol Policy provides that first-time offenders with a positive test will be offered an opportunity at rehabilitation. However, the evidence shows that Respondent refused the urine test, even after being advised that the School Board would be notified of her refusal. Paragraph (5)(b) of the Drug and Alcohol Testing Policy (6.60*+) mandates that when an

employee refuses to test without a valid medical explanation after receiving notice of the requirement for testing, his or her refusal shall result in the employee's discharge. This mandatory directive comes into play here.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the School Board finding that Respondent's conduct as identified in the Findings of Fact constitute just cause for terminating her position as a teacher.

DONE AND ENTERED this 22nd day of February, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of February, 2018.

ENDNOTES

[1/] On January 18, 2018, the School Board filed a Notice of Voluntary Dismissal without Prejudice in Discipline II. The Rule Challenge proceeded to hearing. Neither case has any bearing on the decision made with respect to this case.

[2/] There are two witnesses with the same last name, Verna Brown and Sherri Brown. To distinguish between the two women, their full names are used.

[3/] Respondent presented the testimony of Marcella Marshall-Morgan for the purpose of establishing that Respondent drove her to Village Green that morning, and that she never noticed anything that would indicate Respondent was under the influence of drugs or alcohol. Ms. Marshall-Morgan testified that Respondent often drove her to the school to volunteer, and that she had on one occasion driven her to work in a rental car. However, she testified repeatedly that she did not remember dates and could not identify when she last rode with Respondent to Village Green. She testified that her last ride with Respondent could have been at the end of the school year, and did not recall if it was May 8, 2017. The fact that Respondent once gave her a ride in a rental car does not establish that the ride in a rental car happened on May 8, 2017.

[4/] Section 112.0455(13) gives the Agency for Health Care Administration (AHCA) the authority to adopt rules that cover, among other things, methods of analysis and procedures to ensure reliable drug-testing results, including standards for initial tests and confirmation tests.

[5/] School Board Policy 6.60(5)(m) states that "[i]f there are changes in governing statutes, laws, rules, or regulations that affect all or any part of this policy, the statute, law, rule, or regulation shall control."

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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.