STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 18-2983TTS

RANDALL J. SMITH,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this case in Bartow, Florida, on February 11, 2019.

APPEARANCES

For Petitioner: Donald H. Wilson, Jr., Esquire
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Bartow, Florida 33830-4620

For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

The issue is whether just cause exists for Petitioner, Polk County School Board (School Board), to terminate Respondent's employment as a classroom teacher.

PRELIMINARY STATEMENT

By letter dated December 13, 2017, the School Board informed Respondent, a classroom teacher, that because of "serious misconduct," he was suspended, with pay, effective immediately; and that a recommendation would be made at the School Board's meeting on January 23, 2018, to terminate him, effective the following day. Respondent timely requested a hearing, and the matter was referred by the School Board to the Division of Administrative Hearings to conduct a formal hearing to resolve the dispute. Respondent requested, and was granted, two continuances of the final hearing.

At the final hearing, the School Board presented the testimony of two witnesses. School Board Exhibits 1 through 6 and 8 were accepted in evidence. Respondent testified on his own behalf. Respondent's Exhibit 1 was accepted in evidence.

A one-volume Transcript of the hearing has been prepared. The parties timely submitted proposed recommended orders (PROs), which have been considered.

FINDINGS OF FACT

1. The School Board is charged with the duty to operate, control, and supervise public schools in Polk County. This includes the power to discipline classroom teachers. See §§ 1012.22(1)(f) and 1012.33, Fla. Stat. (2018).

2. The record does not disclose whether Respondent holds a professional service contract or has an annual contract with the School Board. In any event, he has been employed with the School Board as a classroom teacher since September 2016.

3. Before moving to Florida in 2016, Respondent taught motion picture television arts in Ohio for four and one-half years. Before that, he worked in the motion picture industry for 27 years.

4. From September 2016 until he was suspended in January 2018, Respondent taught Television (TV) Production at Haines City High School and supervised the school's TV news program. In the program, students film events on campus before and after school, learn how to edit the film, and then prepare videos for school use. Mr. Lane is the school principal.

5. Based on an allegation that he was observed sleeping in class on November 29, 2017, coupled with a three-day suspension, without pay, that he served a month earlier, the School Board seeks to terminate Respondent's employment. Specifically, the termination letter alleges that on November 29, 2017, Respondent "was found sleeping at [his] classroom desk," "students [were] unsupervised and scattered about [the] classroom," and this conduct constitutes "serious misconduct." Sch. Bd. Ex. 4.

6. To terminate Respondent, the School Board relies upon the fourth step in the four-step progressive discipline process

found in the Teacher Collective Bargaining Agreement (CBA), which governs the employment of instructional personnel. Article 4-4.1 provides that, "except in cases where the course of conduct or the severity of the offense justifies otherwise," a teacher may be terminated only after progressive discipline has been administered in Steps I, II, and III. Sch. Bd. Ex. 8.

7. On October 24, 2017, Respondent received a three-day suspension without pay for making inappropriate comments during a discussion with students in his class. Due to the serious nature of the incident, the School Board accepted the principal's recommendation that it bypass the first two steps of progressive discipline and invoke discipline under Step III. Respondent did not contest or grieve that action. Therefore, Respondent has not been given progressive discipline under Step I (a verbal warning in a conference with the teacher) or Step II (a dated written reprimand following a conference).

8. In the fall of school year 2017-2018, Respondent taught TV Production-Editing during fourth period. The TV Production area encompassed a large suite of rooms, including a main classroom, a TV news room, a control room, and two hallways with lockers for equipment. Typically, there were between 25 and 30 students in the class.

9. Respondent wears contact lenses, but because of chronically dry eyes, he must use artificial tears four to eight times per day in order to avoid swelling of the eyelids.

10. To properly hydrate his eyes, after using the artificial tears, Respondent tilts his head back, closes his eyes, and rolls his eyes for a few minutes to allow the eyes to absorb the solution.

11. Midway through his fourth-period class on November 29, 2017, Ms. Young, the assistant principal, entered Respondent's classroom to do an unannounced walk-through. She observed the lights off and Respondent sitting at his desk with his eyes closed and "leaned back" in his chair with his mouth open. Ms. Young assumed he was asleep so she cleared her throat, then waved her hand, and finally knocked on his desk twice, but he did not open his eyes. She then knocked louder on the desk and called his name. This appeared to startle Respondent and he sat up and looked around the class. After she informed him that she was performing a walk-through in his class, Respondent replied "okay," and said he was aware she was there.

12. Ms. Young was in Mr. Smith's classroom area approximately five minutes. After getting his attention, she walked through the entire suite of rooms and observed "some" students on their phones, "some" on the computer, and "some" walking in the back of the room. Even though Mr. Smith testified

at hearing that his students were "absolutely malicious" and "they'll do anything," Ms. Young did not report seeing any unusual or unsafe conditions that might result in placing any student's safety in jeopardy.

13. Mr. Smith denies that he was asleep. He testified that just before the assistant principal did her walk-through, he had put drops in his eyes, cocked his head back, closed his eyes, and was in the process of rolling his eyes to rehydrate them. A few minutes earlier, he had given permission for a student to use the restroom. When Ms. Young entered the classroom, he knew someone had entered the room but assumed it was the student returning from the restroom. When he opened his eyes, he greeted Ms. Young, who replied that she was "walking through [his] classroom."

14. According to Ms. Young, it was "very evident" that he was asleep, "100 percent," and it was not possible that he just had his eyes closed. Ms. Young's testimony concerning her observations is the most persuasive and has been credited. The incident was reported to Mr. Lane the same day.

15. After the incident was reported to Mr. Lane, he recommended that Respondent be terminated for serious misconduct. Sch. Bd. Ex. 4. Mr. Lane explained that this action was justified because of concerns over the "safety of the children" in Respondent's class, given the large suite of rooms under his

supervision. He also testified that the incident brought into question Respondent's effectiveness as a teacher.

16. The School Board's attempted reliance at the hearing on a few other times when Respondent allegedly was sleeping in class has been disregarded for two reasons: they are based mainly on hearsay testimony, which does not supplement or corroborate other competent evidence; and, more importantly, they are not included as charges in the termination letter or parties' Pre-hearing Stipulation. Pilla v. Sch. Bd. of Miami-Dade Cnty., 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995) (the teacher must have fair notice and an opportunity to be heard on each of the charges brought against him).

17. On December 13, 2017, the School Board's human resource services department informed Respondent by letter that he was suspended, with pay, pursuant to Article 4-4.1 of the CBA pending the School Board's consideration of a recommendation that he be terminated, effective January 24, 2018. Sch. Bd. Ex. 5.

18. According to the termination letter, the School Board determined that Respondent's actions "constitute serious misconduct" for which "just cause" for termination exists, and "[t]ermination constitutes Step IV of Progressive Discipline as outlined in Article 4-4.1 of the [CBA]." Sch. Bd. Ex. 5.

CONCLUSIONS OF LAW

19. This is a disciplinary proceeding in which the School Board seeks to terminate Respondent's employment.

20. Respondent is a classroom teacher and his employment with the School Board is governed by an instructional staff contract. §§ 1012.01(2)(a) and 1012.33(1)(a), Fla. Stat. The terms of his employment are also governed by the CBA.

21. The School Board is authorized to suspend or dismiss instructional personnel pursuant to sections 1012.22(1)(f), 1012.33(1)(a), and 1012.33(6)(a), Florida Statutes, but only for just cause.

22. Because Respondent has not been given progressive discipline under Steps I and II of Article 4-4.1 of the CBA, termination is only permissible where Respondent's course of conduct or the severity of the offense justifies otherwise. Quiller v. Duval Cnty. Sch. Bd., 171 So. 3d 745, 746 (Fla. 1st DCA 2015)(school board is mandated to follow progressive steps in administering discipline unless a severe act of misconduct warrants circumventing those steps); Polk Cnty. Sch. Bd. v. Boyd, Case No. 18-4764TTS (Fla. DOAH Dec. 18, 2018; Polk Cnty. Sch. Bd. Feb. 1, 2019).

23. To terminate Respondent, the School Board bears the burden of proving by a preponderance of the evidence that Respondent committed the serious misconduct alleged, and that the

violations constitute just cause for dismissal. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009).

24. "Just cause" is defined as including "the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, [or] willful neglect of duty." § 1012.33(1)(a), Fla. Stat. Here, the School Board alleges that Respondent is guilty of "misconduct in office" as the basis for termination.

25. The State Board of Education has adopted Florida Administrative Code Rule 6A-5.056 (which replaced and amended former rule 6B-4.009) setting forth instances of "just cause" to suspend or dismiss specified school personnel.[1/] The rule defines "just cause" as "cause that is legally sufficient" and provides the following definition of misconduct in office:

> "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 is set forth in section 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined:
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> * * *
>
> (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;
>
> (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.

26. The termination letter fails to disclose which provision within the foregoing definition the alleged misconduct violates. And the parties' Pre-hearing Stipulation adds no clarity. In his PRO, Respondent reiterates this point by noting that the School Board "has not identified any provision of the Code to specifically define how Respondent's conduct constituted 'just cause' for the termination of his employment." While the factual basis for the termination is set forth in the charging document, the specific part of the rule being violated is not disclosed. This left Respondent in the position of guessing which of the five paragraphs within rule 6A-5.056(2) may be implicated, and which, if any, of the 31 disciplinary principles enumerated in rule 6A-10.081(2) may be at issue.

27. In its PRO, the School Board alleges for the first time that Respondent's conduct violates the Principle of Professional Conduct found in rule 6A-10.081(2)(a)1., which requires a teacher to make a "reasonable effort" to protect the student from

conditions harmful to his mental and/or physical health or safety. The PRO alleges also for the first time that Respondent's conduct equates to an impairment of his effectiveness as a teacher.

28. Neither the charging document nor the parties' Pre-hearing Stipulation provided adequate notice of the specific rule provisions to support the violation. However, Respondent did not complain about the adequacy of the notice until his PRO was filed. In the absence of any demonstrated prejudice to Respondent, the merits of the charges will be considered below.

29. The undersigned has accepted the more persuasive evidence that Respondent was asleep when Ms. Young entered his classroom on November 29, 2017. However, this conduct is not so severe that it warrants circumventing the progressive steps in administering discipline in Article 4-4.1. Quiller, 171 So. 3d at 746. While the safety of the students was given as the primary reason for termination, there is no evidence that during the very few minutes when Respondent was napping, the safety of the students was in jeopardy because of a lack of supervision.

30. Finally, at hearing, Mr. Lane testified that sleeping in class on one occasion equates to an impairment of Respondent's effectiveness as a teacher. In support of this testimony, in its PRO, the School Board cites a string of cases for the proposition that the misconduct of the teacher can be so serious that it

impairs the teacher's effectiveness. Purvis v. Marion Cnty. Sch. Bd., 766 So. 2d 492 (Fla. 5th DCA 2000); Walker v. Highland Cnty. Sch. Bd., 752 So. 2d 127 (Fla. 2d DCA 2000); Summers v. Sch. Bd. of Marion Cnty., 666 So. 2d 175 (Fla. 5th DCA 1996). In Purvis, a teacher resisted arrest by the police after a barroom brawl and lied under oath; in Walker, a teacher's class "was out of control," with one student being so intoxicated he could not walk. The misconduct here is not even close. In the third case, the school board's decision to terminate the teacher because of impairment of his effectiveness as a teacher was reversed on the ground there was no specific evidence to support that action.

31. Sleeping in class on one occasion, with students present, should not be condoned, even if the safety of the students is not placed in jeopardy. This action warrants no more than a dated reprimand following a conference. Just cause does not exist to terminate Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Polk County School Board enter a final order issuing a verbal warning (Step I) or a dated written reprimand (Step II) to Respondent for being observed sleeping in class on November 29, 2017.

DONE AND ENTERED this 6th day of March, 2019, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of March, 2019.

ENDNOTE

[1/] The School Board's PRO incorrectly uses the definition of "misconduct in office" found in former rule 6B-4.009(3), which was repealed in 2012.

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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.