

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 18-4764TTS

STACIA BOYD,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before Andrew D. Manko, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes,^{1/} on November 6, 2018, in Lakeland, Florida.

APPEARANCES

For Petitioner: Donald H. Wilson, Jr., Esquire
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner, Polk County School Board, to terminate Respondent, Stacia Boyd from her employment as a teacher.

PRELIMINARY STATEMENT

By letter dated, January 26, 2018, the Associate Superintendent of the Polk County School Board (the "School Board") notified Stacia Boyd of her intent to recommend that Ms. Boyd be terminated from her employment as a classroom teacher. The School Board initially recommended termination on the following grounds: alleged excessive absenteeism in May 2017 resulting in a verbal warning (Step One) and written reprimand (Step Two); alleged misconduct in an interaction with an assistant principal in July 2017 resulting in a five-day suspension without pay (Step Three); and alleged serious misconduct relating to Ms. Boyd's failure to timely enter grades despite several admonishments to do so (Step Four).

Ms. Boyd timely requested an administrative hearing to challenge her termination and the School Board referred the matter to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge to conduct an evidentiary hearing under chapter 120, Florida Statutes.

After transferring the case to DOAH, the School Board sent an amended termination letter, dated October 24, 2018. The amended letter still recommended termination, but omitted any reference to the conduct at issue in Steps One and Two and relied solely on the conduct at issue in Steps Three and Four.

Consistent with the amended letter, counsel for the School Board confirmed at the final hearing that the School Board wished to proceed only on the misconduct at issue in Steps Three and Four.

The final hearing was held on November 6, 2018. The School Board presented the testimony of three witnesses who worked with Ms. Boyd at Wendell Watson Elementary School: (1) Shari Richard, the Instructional Coach; (2) Tanya Poe-Liburd, the Assistant Principal; and (3) Kelly Burgess, the Principal. Petitioner's Exhibits 1 through 14 were received into evidence almost entirely without objection.^{2/} Ms. Boyd testified on her own behalf.

A one-volume Transcript of the final hearing was filed at DOAH on November 21, 2018. Both parties filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. The School Board employs Ms. Boyd as a classroom teacher. She holds an instructional staff contract pursuant to section 1012.33, Florida Statutes.

2. Ms. Boyd has been a classroom teacher for 17 years. She began her teaching career in Mississippi, but has taught in Polk County for the last 15 years. In the past, Ms. Boyd taught first grade. During the 2015-2016 and 2016-2017 school years, she taught second grade at Socrum Elementary School. At the

start of the 2017-2018 school year, she taught first grade at Wendell Watson Elementary School.

3. At all relevant times, the terms of Ms. Boyd's employment were governed by a contract negotiated by the School Board and the Polk Education Association, Inc., called the Teacher Collective Bargaining Agreement ("CBA").

4. Article 4.4-1 of the CBA provides for progressive discipline for teachers, starting with a verbal warning and escalating up through termination. Progressive discipline is generally recognized as the process of using increasingly severe measures when an employee fails to correct a problem after being given a reasonable opportunity to do so.

5. Pursuant to the CBA, progressive discipline is administered in the following four steps: (1) verbal warning, (2) written reprimand, (3) suspension without pay for up to five days, and (4) termination. The CBA makes clear that progressive discipline must be followed, "except in cases where the course of conduct or the severity of the offense justifies otherwise."

6. At the outset of these proceedings, the School Board based its request for termination on three prior progressive disciplinary actions against Ms. Boyd for conduct at Socrum Elementary School. These originally accounted for Steps One, Two, and Three of the progressive discipline policy. Importantly, however, the School Board later withdrew Steps One

and Two and confirmed at the hearing that only Steps Three and Four should be considered. That said, a review of each step is important for the analysis to follow.

7. In May 2017, the School Board apparently issued Ms. Boyd a verbal warning and written reprimand for alleged excessive absenteeism. Those disciplinary actions originally represented Steps One and Two, respectively, of the progressive discipline policy. But, as acknowledged by the School Board, these two steps and the conduct underlying them are not considered for purposes of determining whether the School Board has just cause to terminate Ms. Boyd because they were "grieved and were removed from her disciplinary history."

8. In July 2017, the School Board suspended Ms. Boyd without pay for five days as a result of a May 2017 incident involving an assistant principal. The parties stipulated that the School Board referred to the incident as "sexual harassment" and that Ms. Boyd did not challenge the suspension.^{3/} Though the School Board initially charged this as Step Three of progressive discipline, its withdrawal of the prior verbal warning and written reprimand rendered this five-day suspension as the first step of progressive discipline.

9. The primary events leading up to the School Board's decision to terminate Ms. Boyd occurred in the months immediately following the July 2017 suspension, after the School

Board transferred Ms. Boyd to a new school. The School Board alleges that Ms. Boyd failed to timely enter grades, which constituted "gross insubordination" and "willful neglect of duty" sufficient to warrant her dismissal.^{4/}

10. At the beginning of the 2017-2018 school year, the School Board assigned Ms. Boyd to teach first grade at Wendell Watson Elementary School. Although she taught first grade two years prior, she spent the last two years teaching second grade at Socrum Elementary.

11. Prior to the start of the school year, the Principal of Wendell Watson Elementary, Kelly Burgess, met with Ms. Boyd upon arrival, showed her around the school, and walked her to her classroom. Principal Burgess did not discuss teaching expectations with Ms. Boyd at that time but let Ms. Boyd know that she was always available to help.

12. At the beginning of the school year, Assistant Principal Tanya Poe-Liburd met with all of the teachers to discuss lesson plans and grading expectations, among other things. Assistant Principal Poe-Liburd did not offer specific details about these expectations, but she confirmed Ms. Boyd attended the meeting.

13. The School provided two additional resources for their teachers. Ms. Shari Richard, the School's Instructional Coach, worked full-time at the School and met with new teachers on a

monthly basis to go over helpful information, even if the teacher previously taught in the County, because some of Wendell Watson's standards were different than other schools. Ms. Ashley Jones, the first grade team leader, worked full-time as a first grade teacher at the School and she assisted the other first grade teachers with any questions or teaching issues.

14. When a new teacher started at the School, Ms. Richard conducted an initial meeting to review a number of teaching expectations, including curriculum maps, the Pinnacle grading system, classroom management, and procedures, etc. Ms. Richard held her first new teacher training session on August 21, 2017, but Ms. Boyd was unable to attend that day.^{5/}

15. On August 28, 2017, Ms. Richard finally met with Ms. Boyd in her classroom during a lunch/planning hour to conduct the training session. They walked around the classroom and Ms. Richard offered advice on organizational issues, such as lowering a clipboard so the students could reach it. She showed Ms. Boyd the math lab, how to grade a BEAR spelling inventory, and where to obtain math and science resources.

16. During the meeting, which lasted approximately 35-40 minutes, Ms. Richard reviewed a packet of training materials. Ms. Richard went through all of the items, but did not have to spend as much time on each one because Ms. Boyd had been a

teacher in Polk County and already knew much of the information. One page they did review detailed the "suggested" minimum number of grades that were expected during a nine week grading period.^{6/} Specifically, the guideline suggested at least nine grades in writing, 18 grades in reading, four grades each in language and social studies, and nine grades each in math and science. The document noted that "[t]he total number of grades per subject may vary."

17. The training materials did not reference OneNote, the School's online system where teachers upload and access lesson plans and materials. Ms. Boyd apparently had never used OneNote before and the School Board presented no evidence that Ms. Richard or Assistant Principal Poe-Liburud trained her on this particular system at the beginning of the school year.

18. However, all first grade teachers met as a group twice a week to create lesson plans for math and writing/reading. The teachers collaborated on the weekly units, expectations, and materials, and they collectively uploaded the plans into OneNote. Ms. Jones attended all of the planning sessions. Ms. Richard also attended all of the writing/reading sessions and most of the math sessions. For other subjects, such as science and social studies, each teacher created their own plans and materials.

19. In the weeks following the initial training meeting, Ms. Boyd claimed that she struggled at her new school and felt like an outsider. But she kept those feelings largely to herself and her claim that her struggles were caused by the School lacked credibility. She claimed to have trouble finding teaching materials and accessing the weekly lesson plans on OneNote, even though she met twice a week with the other first grade teachers, including Ms. Jones, and Ms. Richard. She said she struggled for several weeks to find reading books, even though they were in her classroom the whole time. She also claimed to have difficulty obtaining books and plans for science and math, even though all first grade teachers used the same curriculum maps and had access to the same materials.

20. Ms. Boyd testified that she knew she was not grading enough assignments and that her performance was subpar. Nevertheless, she never proactively reached out to Ms. Richard, Ms. Jones, Assistant Principal Poe-Liburd, or Principal Burgess.^{7/} Even if Ms. Boyd received no training initially in the use of OneNote, with which she apparently was unfamiliar, it was incumbent on her to ask for help immediately. She did not do so. Even when Ms. Richard emailed her to offer assistance, Ms. Boyd never responded.

21. Worse yet, Ms. Boyd never raised these critical issues with Ms. Jones or Ms. Richard at the twice-weekly lesson

planning sessions. Ms. Boyd's excuse that she tried to find Ms. Jones every day but could not is incredible and establishes the willfulness of her failure to obtain the help she clearly needed.

22. Instead of meaningfully reaching out to her supervisors for help, Ms. Boyd waited for the School's administration to confront her. On September 19, 2017, Principal Burgess and Assistant Principal Poe-Liburud met with Ms. Boyd to discuss several academic concerns, including the failure to timely enter grades. Ms. Boyd said she felt like an outsider and was having trouble accessing the lesson plans and figuring out what to grade. Principal Burgess reminded Ms. Boyd that she was not new to the Pinnacle grading system, but to check with Ms. Jones, Ms. Richard, or come directly to her if she had questions regarding grading issues.

23. There is no dispute that Principal Burgess and Assistant Principal Poe-Liburud directed Ms. Boyd to input her grades. But Ms. Boyd says they never told her how many grades to input and the School Board elicited no testimony to dispute that fact. Assistant Principal Poe-Liburud also did not give Ms. Boyd a deadline, but she noted that interims were due in late September/early October.

24. Nevertheless, Assistant Principal Poe-Liburud connected Ms. Boyd with Ms. Jones to ensure she understood how to access

the lesson plans and determine what to grade, and they met on September 25, 2017. Ms. Jones showed Ms. Boyd where to locate the lesson plans in OneNote and how to insert plans therein. They reviewed the homework policy and substitute teacher plan procedure. Ms. Jones confirmed her availability to help.

25. Although Ms. Jones showed Ms. Boyd how to access OneNote, Ms. Boyd never addressed her concern over the lack of materials and papers to grade. Ms. Boyd said she never raised those issues with Ms. Jones again because she could not find her. Again, this excuse is not credible given that Ms. Jones worked full-time at the school and they both attended the twice-weekly lesson plan meetings.

26. On September 29, 2017, Assistant Principal Poe-Liburd spoke to Ms. Boyd about additional concerns, including the lack of timely entering grades. As with the prior meeting, the School Board presented no evidence that Ms. Boyd was directed to input a *specific* number of grades. But Ms. Boyd confirmed she would improve her teaching and grading, upload grades that weekend, and reprint the interim reports to be sent to the parents. Ms. Boyd failed to do so.

27. On October 4, 2017, Principal Burgess and Assistant Principal Poe-Liburd met with Ms. Boyd again. Principal Burgess reminded Ms. Boyd about grades and expectations, that Ms. Richard had already discussed the Pinnacle grading system,

which Ms. Boyd was familiar with since she had been a County teacher for many years, and that Ms. Boyd should ask if she needed assistance. They directed Ms. Boyd to reach out to Ms. Jones if she needed materials. Ms. Boyd indicated at that time that she would enter the grades so the School could re-print the interim grade sheets.

28. Ms. Boyd went on medical leave on October 4, 2017, as a result of an unspecified illness.

29. The following week, on October 9, 2017, Ms. Boyd's grade sheets showed on average one grade each per student for social studies and science, three grades for language arts, and two grades for math. The lack of sufficient grades gravely concerned Principal Burgess. At a minimum, she expected at least four grades per subject. Principal Burgess believes she discussed the grading expectations again with Ms. Boyd, but cannot recall because Ms. Boyd went on medical leave around that time.

30. The School re-printed the grade sheets again on October 12, 2017, which represented the final grades sent to parents for the nine-week period. Although Ms. Boyd added more grades in each category since the last meeting, the grade sheets included just five grades for language arts, two each for science and social studies, and four for math.

31. The minimum number of required grades at the nine-week mark is an important factual issue in this case, as the School Board alleges that Ms. Boyd's grading insufficiencies constitute just cause for termination. But the School Board's evidence is inconsistent as to those minimums. The "suggested" minimums sheet provided to Ms. Boyd during her training suggested at least nine grades each in writing, math, and science, 18 grades in reading, and four grades each in language and social studies. Principal Burgess offered conflicting standards, stating once that four grades per subject were required, stating later that four grades each for science and social studies and nine grades each for math and language arts were required, and stating yet another time that at least nine grades per subject were required. Ms. Richard testified that typically one grade per week was required, which equates to nine grades per subject.

32. Ms. Boyd's final grade tally for these subjects fell short of the minimum standards, regardless of which version applies. But this lack of clarity bears significantly on the allegation that Ms. Boyd intentionally refused to follow a directive regarding grades.

33. As a result of Ms. Boyd's grading failures, the School had to print the report cards without a sufficient number of grades. The undisputed evidence showed that grading is "one of the most critical functions of a classroom teacher, because this

is the record on how the students are performing, and is the communication from the parent and teacher" about the child's performance. Entering a sufficient number of grades at the nine-week mark was "just part of her responsibilities as a teacher" and Ms. Boyd's failures in this regard did not meet the expectation of a teacher's performance. Ms. Boyd agreed that she fell short of her duties.

ULTIMATE FINDINGS OF FACT

34. The School Board contends that just cause exists to terminate Ms. Boyd because her actions constitute "gross insubordination" or "willful neglect of duty," as those terms are defined in section 1012.33(1)(a) and Florida Administrative Code Rule 6A-5.056(4) and (5).^{8/}

35. Whether Respondent committed the alleged misconduct is a question of ultimate fact to be determined by the trier-of-fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

36. Based on the evidence and testimony presented during the final hearing, the School Board failed to prove by a preponderance of the evidence that Ms. Boyd committed gross insubordination. However, the School Board proved by a preponderance of the evidence that Ms. Boyd committed willful

neglect of duties. Accordingly, "just cause" exists for the School Board to discipline Ms. Boyd. § 1012.33(1)(a), Fla. Stat.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the subject matter and parties to this proceeding pursuant to sections 120.569, 120.57(1), and 1012.33(6)(a)2.

38. The School Board is duly constituted and charged with the duty to operate, control, and supervise public schools within Polk County, Florida. Art. IX, § 4(b), Fla. Const.; §§ 1001.33 and 1001.42, Fla. Stat. This includes the power to discipline instructional staff, such as classroom teachers. §§ 1012.22(1)(f) and 1012.33, Fla. Stat.

39. Ms. Boyd is a classroom teacher and her employment with the School Board is governed by an instructional staff contract. §§ 1012.01(2)(a) and 1012.33, Fla. Stat. The terms of Ms. Boyd's employment with the School Board are also governed by the CBA.

40. The School Board may suspend or dismiss Ms. Boyd during the term of her employment contract, but only for "just cause." § 1012.33(1)(a) and (6)(a), Fla. Stat.

41. Similarly, article 4.4 of the CBA provides that teachers cannot be "disciplined, reprimanded, suspended, terminated or otherwise deprived of fringe benefits or

contractual rights during the term of his/her contract without just cause." The CBA defines just cause as a "fair and reasonable basis for disciplinary action up to and including termination, as defined in applicable Florida Statutes specific to the contract under which the employee is employed."

42. Section 1012.33(1)(a) lists the instances that qualify as "just cause," including "gross insubordination" and "willful neglect of duty."

43. Pursuant to statutory authority, the State Board of Education promulgated rule 6A-5.056, which 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 is 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:

* * *

(4) "Gross insubordination" means the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties.

(5) "Willful neglect of duty" means intentional or reckless failure to carry out required duties.

44. "The School Board bears the burden of proving by a preponderance of the evidence each element of the charged

offense which may warrant dismissal.” Cropsey v. Sch. Bd., 19 So. 3d 351, 355 (Fla. 2d DCA 2009) (citing Dileo v. Sch. Bd. of Dade Cty., 569 So. 2d 883 (Fla. 3d DCA 1990)). Preponderance of the evidence is defined as “the greater weight of the evidence,” or evidence that “more likely than not” tends to prove a certain proposition. S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014).

45. The School Board contends that just cause exists to terminate Ms. Boyd because her actions constitute gross insubordination or willful neglect of duties.

46. Based on the findings of fact above, the School Board failed to establish by the greater weight of the evidence that Ms. Boyd’s conduct rose to the level of gross insubordination. To succeed on this allegation, the School Board must prove that the School issued Ms. Boyd a direct, reasonable order that she intentionally refused to obey. Fla. Admin. Code. R. 6A-5.056(4).

47. There is no doubt that the School had authority to direct Ms. Boyd to grade a minimum number of assignments for each nine-week period and to timely post those grades. However, the School Board failed to establish by the greater weight of the evidence that the School directed Ms. Boyd to input a specific number of grades or to do so by a specific date. The evidence also conflicted as to how many grades were required and

the grade sheet given to Ms. Boyd at the beginning of the year included only "suggested" minimums. If the School's witnesses who purportedly gave the directives could not agree on the specifics, then the undersigned finds it more probable than not that the directives also lacked specificity when given.

48. But even if the School issued a reasonable, direct order, the evidence failed to establish that Ms. Boyd intentionally refused to obey it. Ms. Boyd did not intentionally refuse to timely post grades; she failed to have a sufficient number of grades to post. To be clear, Ms. Boyd unquestionably acted willfully and neglectfully in failing to access lesson plans and materials that could be graded. But that egregious conduct falls short of an intentional refusal to follow a directive to timely enter her grades.

49. However, the findings of fact above establish by the greater weight of the evidence that Ms. Boyd committed a "willful neglect of duty" by recklessly failing to carry out required duties. Fla. Admin. Code R. 6A-5.056(5). There is no dispute that grading assignments and doing so in a timely fashion are two of the most critical duties of a teacher. Ms. Boyd agreed that her performance in this regard was deficient. Yet, she willfully and recklessly failed to avail herself of the assistance she needed to sufficiently perform these critical tasks. She met with Ms. Richard and Ms. Jones

twice a week, every week, to discuss lesson plans and never once raised these concerns with them. Even when she met with Ms. Jones specifically to discuss accessing the lesson plans, she failed to raise her concern about lacking materials on the other subjects. Ms. Boyd's excuse for not obtaining help on grounds that she could never find Ms. Jones on campus is incredible and further establishes the willfulness of her misconduct.

50. Because the School Board established by the greater weight of the evidence that Ms. Boyd engaged in willful neglect of her duties, just cause exists to discipline her.

51. In determining the appropriate sanction, the School Board's progressive discipline policy must be consulted.

Article 4.4-1 of the CBA provides as follows:

Progressive discipline shall be followed, except in cases where the course of conduct or the severity of the offense justifies otherwise. Unusual circumstances may justify suspension with pay. Progressive discipline shall be administered in the following steps:

- (1) verbal warning in a conference with the teacher. (A written confirmation of a verbal warning is not a written reprimand);
- (2) dated written reprimand following a conference;
- (3) suspension without pay for up to five days by the Superintendent and
- (4) termination.

"Letters of Concern" are not a form of discipline.

52. The plain language of the CBA limits the School Board's discretion to impose the ultimate sanction of termination to only two circumstances: (1) where an employee has previously been issued a verbal warning, written reprimand, and a five-day suspension without pay; or (2) where the course of conduct or the severity of the offense justifies otherwise. If neither of those circumstances is met, termination is not a permissible disciplinary action.

53. The School Board maintains that both circumstances are met. First, termination is the appropriate next step due to the prior five-day suspension without pay based on an unrelated altercation with an assistant principal. Second, termination is appropriate because Ms. Boyd's course of conduct and the severity of the offense permitted the School Board to avoid following progressive discipline policy.

54. As to the School Board's first contention, the undersigned finds that termination is not the proper next step of progressive discipline. When the School Board suspended Ms. Boyd, it did so as Step Three of progressive discipline because she had previously received a verbal warning and written reprimand. Although Ms. Boyd did not grieve the suspension, she successfully grieved the two prior disciplinary actions on which the suspension was explicitly based. Without the two underlying

disciplinary actions (Steps One and Two), the School Board could not have suspended Ms. Boyd for this isolated incident on what would have been her first disciplinary action during her 15-year career. Instead, Ms. Boyd should have received a verbal warning or at most a written reprimand for the July 2017 incident.

55. Moreover, progressive discipline is typically a form of escalating penalties for a similar pattern of misconduct. Without question, the type of misconduct underlying the suspension was wholly unrelated to the grading deficiencies. Indeed, the School Board's letter suspending Ms. Boyd stated that "future incidents of this nature" may result in termination. Thus, utilizing the suspension as a basis to step closer to termination would be contrary to the notice given to Ms. Boyd and to the concept that progressive discipline applies to a related course of misconduct.

56. As to the Department's second contention that Ms. Boyd's conduct was severe enough to skip progressive discipline, that is a question of ultimate fact for the undersigned to determine based on the competent, substantial record evidence. See Costin v. Fla. A & M Univ. Bd. of Trs., 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008) (holding that ALJ's finding as to whether employee's misconduct justified dismissal based on terms of the university's progressive

discipline rule was "an 'ultimate fact' best left to the trier of fact under these circumstances").

57. The CBA does not define what "course of conduct" or "offense" is severe enough to meet the exception to progressive discipline and the School Board presented no evidence on this issue. Given that this is an exception, the undersigned concludes that it must mean something more egregious than the standard types of misconduct defined in rule 6A-5.056 for which progressive discipline must be followed.^{9/}

58. Determining the appropriate sanction in this case is a close call. The School Board re-assigned Ms. Boyd to Wendell Watson Elementary as a result of the five-day suspension at her prior school. The School's administration did not choose to hire her and knew she had previously been suspended, and Ms. Boyd perhaps reasonably felt like an unwelcome outsider. It is tough not to feel sympathy for the difficult circumstances she *believed* befell her, particularly given that she went on medical leave just before the School Board sought to terminate her. All of that aside, Ms. Boyd knew her job was in jeopardy given the prior suspension and became concerned early on about her subpar performance. While admittedly floundering in one of the most critical functions of her job, she willfully failed to get the help she so obviously needed. As a 17-year teaching

veteran, she knew better. And, worse yet, the students suffered as a result of her failures.

59. For all these reasons, and based on the evidence presented, the undersigned finds the offense serious enough to warrant termination under these particular facts. This finding, reluctantly made given the failure to follow progressive discipline, is in part due to the School Board's discretion on the issue of teacher discipline and in part due to the critical importance of grading as a core duty for any teacher.

RECOMMENDATION

Based on the foregoing Findings of Fact, Ultimate Findings of Fact, and Conclusions of Law, it is RECOMMENDED that Petitioner, Polk County School Board, enter a final order upholding its decision to dismiss Respondent, Stacia Boyd, from her employment contract.

DONE AND ENTERED this 18th day of December, 2018, in Tallahassee, Leon County, Florida.



ANDREW D. MANKO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of December, 2018.

ENDNOTES

^{1/} All rule and statutory references are to the 2018 versions unless otherwise indicated.

^{2/} Respondent only objected to Petitioner's Exhibit 7 – an email from Assistant Principal Poe-Liburud to Ms. Boyd, dated October 2, 2017, summarizing a conversation the two had about the School's numerous concerns – and that objection focused solely on the fact that it contained hearsay statements of a parent. Those hearsay statements were not considered in finding the facts or recommending the appropriate penalty herein.

^{3/} The only record evidence of the facts surrounding the suspension are two letters admitted as Petitioner's Exhibits 1 and 2. Petitioner's Exhibit 1 is a letter dated June 13, 2018, from Principal Kenyatta Feacher to Ms. Boyd, detailing the facts of the incident from the School's perspective and recommending that the School Board suspend Ms. Boyd for five days without pay "in accordance with the third step of Progressive Discipline." Petitioner's Exhibit 2 is a letter dated July 28, 2017, from Associate Superintendent Teddre Porteous, notifying Ms. Boyd that her actions rose to the level of gross misconduct, that the suspension constituted Step Three of progressive discipline, and that "future incidents of this nature may result in additional disciplinary action, up to and including termination."

These exhibits were admitted into evidence without objection, but there is no question that the two letters and much of the details therein are hearsay. Hearsay is admissible in administrative proceedings, but can only be used to explain or supplement other admissible evidence; a finding of fact cannot be based on hearsay alone unless that evidence would be admissible in a civil action over objection. § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3). Although the parties stipulated that the suspension occurred and that Ms. Boyd did not grieve it, their counsel's *arguments* at the hearing indicated a dispute as to exactly what happened – e.g., unbuttoning a button on the assistant principal's shirt versus tasseling his tie. But neither party presented testimony as to the facts surrounding the suspension, for which the hearsay letters could be used to explain or supplement, nor did the School Board present evidence to establish the predicate

necessary to admit the letters or the information therein as business records or via some other recognized exception to the hearsay rule. See Wark v. Home Shopping Club, 715 So. 2d 323, 324 (Fla. 2d DCA 1998) (holding that hearsay documents could not be used to support a finding of fact where no other supporting evidence had been admitted and the proponent of the hearsay failed to establish the predicate necessary to admit the evidence under the business records exception); Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986) (same).

The two hearsay letters and the facts detailed therein, thus, cannot be used to support findings of fact. That Ms. Boyd failed to object to their admission on hearsay grounds matters not in this context. Fla. Admin. Code R. 28-106.213(3). Accordingly, the facts found herein relating to the suspension are based solely on the parties' stipulation that a suspension occurred for a May 2017 incident and that it was not grieved by Ms. Boyd.

^{4/} The School Board's Proposed Recommended Order ("PRO") focuses almost entirely on the untimely grading issues in August-October 2017 and contends that such conduct constitutes "gross insubordination" and "willful neglect of duty" under section 1012.33(1)(a), which meets the definition of "just cause" to terminate. In fact, the School Board argued that this misconduct was sufficient alone to fall under the CBA exception for following progressive discipline. But the School Board also noted at the end that it was "significant" that Ms. Boyd had recently been suspended as Step Three discipline and that termination was the next step, Step Four, of progressive discipline. The School Board's positions in this regard will be addressed in the Conclusions of Law section below.

^{5/} Ms. Boyd had several absences during the first couple of months of the school year as a result of a variety of medical issues. However, the School Board presented no evidence that it deemed these absences unexcused or that they in any way supported the decision to terminate. Ms. Boyd went on medical leave under the Family Medical Leave Act on October 4, 2017, just before Principal Burgess recommended her termination.

^{6/} Although Ms. Boyd testified that she did not receive the grading sheet and that the meeting only lasted 10-15 minutes, Ms. Richard's conflicting testimony was more credible given the level of detail with which she recalled the entire meeting and the fact that Ms. Boyd signed an acknowledgment form at the meeting.

Ms. Boyd also had been a teacher in Polk County for fifteen years and agreed she was familiar with the Pinnacle system.

^{7/} Ms. Boyd never reached out to Principal Burgess specifically about grades, but did reach out concerning some classroom management issues. Ms. Richard worked with Ms. Boyd on those issues.

^{8/} The School Board's termination letter did not reference the statute or administrative rule that Ms. Boyd allegedly violated. In fact, the School Board's first reference to the applicable law was in its PRO. This practice of failing to clearly state the statutory violation in the termination letter or reference it at the final hearing should be avoided because of due process concerns and how much more difficult it makes the process of considering the testimony and resolving the dispute. However, the termination letter here sufficiently put Ms. Boyd on notice of the alleged misconduct and, as such, no due process violation occurred.

Even apart from not citing the statute and rule earlier in the case, it cannot be ignored that the School Board's PRO referenced older, now inapplicable, administrative rules as the bases for Ms. Boyd's dismissal (Florida Administrative Code Rule 6A-5.053(4), (5)). In 1998, rule 6A-5.053 was repealed and the criteria for suspension and dismissal are now contained in rule 6A-5.056, which defines "gross insubordination" and "willful neglect of duty" differently than the prior rule. Because rule 6A-5.056 was in effect at the time of the underlying misconduct, that rule and the definitions contained therein apply.

^{9/} Cases involving other CBAs have referred to this type of exception as requiring "severe acts of misconduct," Quiller v. Duval County School Board, 171 So. 3d 745, 746 (Fla. 1st DCA 2015) (citing the Duval County CBA), or circumstances "which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable School Board rules." Palm Bch. Cty. Sch. Bd. v. Harrell, Case No. 16-6862 (Fla. DOAH Apr. 11, 2017). The CBAs in those cases admittedly contained more stringent language than the CBA here.

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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.