STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POLK COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 18-5014TTS

HELENA MAYS,

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 (2018),[1/] on January 4, 2019, in Lakeland, Florida.

APPEARANCES

For Petitioner: David R. Carmichael, Esquire
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For Respondent: Anthony Duran, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner, the Polk County School Board, to terminate Respondent, Helena Mays, from her employment as a classroom teacher.

PRELIMINARY STATEMENT

On August 22, 2018, the Associate Superintendent of the Polk County School Board ("School Board") notified Helena Mays of her intent to recommend that she be terminated from her employment as a classroom teacher. The School Board recommended termination on grounds that Ms. Mays improperly disciplined three students by making them clean the classroom floor with a toothbrush, which the School Board alleged constituted serious misconduct and "just cause" for termination.

Ms. Mays timely requested an administrative hearing to challenge the 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.

The final hearing was held on January 4, 2019. The School Board presented the testimony of three live witnesses: (1) Tony Kirk, the School Board's Director of Employee Relations; (2) Matt P. Burkett, the Principal of Lake Alfred Elementary School; and (3) Barry Marbutt, a School Board Personnel Investigator. Petitioner's Exhibits 1 through 16 were received into evidence without objection. Petitioner's Exhibits 1 and 2 are the School Board's investigative report ("Investigative Report") and the Lake Alfred Police Department Police Report ("Police Report"), on which the Investigative

Report was almost entirely based. Petitioner's Exhibits 6, 7, and 8 are the deposition transcripts of the three students at issue, and Petitioner's Exhibits 13, 14, and 15 are the videotaped recordings of those depositions. Because each of these exhibits constitutes hearsay and, in large part, hearsay within hearsay, the admissibility, reliability, and weight to be given these exhibits, if any, are analyzed below. Indeed, all exhibits were admitted with the caveat that any hearsay exhibits for which no hearsay exception had been established could only be used to corroborate or supplement other non-hearsay evidence presented at hearing.

Ms. Mays presented no witness testimony. Instead, she relied on the summary of her interview with Investigator Marbutt included in the Investigative Report. Respondent's Exhibits 1 and 2 were received into evidence without objection.

A one-volume Transcript of the final hearing was filed at DOAH on January 28, 2019. After granting Ms. Mays' extension request, both parties timely filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties and Terms of Employment

1. 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.

2. Ms. Mays is a classroom teacher and has been employed by the School Board for 21 years. For the last six years, she has been teaching at Lake Alfred Elementary School and currently teaches second grade. Ms. Mays holds an instructional staff contract pursuant to section 1012.33.

3. At all relevant times, the terms of Ms. Mays' 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 requires progressive discipline for teachers, which is the process of using increasingly severe measures when an employee fails to correct a problem after being given a reasonable opportunity to do so. Progressive discipline is administered as follows: (1) verbal warning, (2) written reprimand, (3) suspension without pay for up to five days, and (4) termination. Importantly, the CBA makes clear that "[p]rogressive discipline shall be followed, except in cases where the course of conduct or the severity of the offense justifies otherwise."

II. Administrative Charges

5. On August 22, 2018, the Associate Superintendent of the School Board notified Ms. Mays that she "disciplined several students by making them scrub the classroom floor with a toothbrush" and that "[t]his form of discipline is not an approved method of Polk County Schools."

6. The School Board determined that Ms. Mays' conduct violated two Principles of Professional Conduct for the Education Profession and two identical provisions of a School Board Rule, which required Ms. Mays to "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety," and not "intentionally expose a student to unnecessary embarrassment or disparagement." Fla. Admin. Code R. 6A-10.081(2)(a)1. & 5.; Polk Cty. Sch. Bd. R. 3210A.1. & 5.

7. Because Ms. Mays has never been disciplined during her 21-year career, this should have been step one of progressive discipline. Nevertheless, the School Board alleged that it had "just cause" to skip progressive discipline and immediately terminate Ms. Mays based on alleged "serious misconduct."

8. As fleshed out by the arguments at the hearing, the School Board seeks to terminate Ms. Mays for disciplining three students——who were sent to Ms. Mays by other teachers after they misbehaved in their respective classrooms——by requiring each of

them on one occasion to clean black marks off the floor with a toothbrush.

III. The School Board's Investigation and Decision to Terminate

9. The School Board became aware of the events leading to its decision to terminate Ms. Mays on Friday, April 27, 2018, after a parent complained to Principal Burkett that Ms. Mays required her daughter, K.G., to clean the floor with a toothbrush.

10. Principal Burkett spoke with Ms. Mays about the issue that morning and she wanted to meet with the parent. During the meeting, Ms. Mays did not deny that she had K.G. clean the floor with a toothbrush because of her behavioral issues.

11. Though there is neither a School Board rule nor other provision of law that explicitly prohibits the use of a toothbrush as a disciplinary technique, Principal Burkett informed Ms. Mays during the meeting that she acted improperly. He did not provide a formal verbal warning, however, as there had never been reports of this kind of discipline before.

12. Principal Burkett did not believe Ms. Mays would use this form of discipline again, but he remained concerned that she may engage in other improper disciplinary techniques given her "matter-of-fact tone" during the meeting. However, he allowed her to finish teaching for the day.

13. Principal Burkett reported the incident to Mr. Kirk by leaving him a voicemail that day. Principal Burkett also contacted the School Board's investigator, Mr. Marbutt.

14. Over the weekend, the issue garnered media attention, resulting in criminal and child abuse investigations by the Lake Alfred Police Department ("LAPD") and the Department of Children and Families ("DCF"). On Monday, April 30, 2018, LAPD and DCF interviewed several students and teachers at the school.

15. Investigator Marbutt also visited the school that day, but he did not sit in on the interviews. He tried to speak to Ms. Mays, but she refused to do so at that time given the ongoing criminal investigation. The School Board immediately placed Ms. Mays on administrative leave with pay.

16. Over the next few weeks, LAPD and DCF investigated the matter and interviewed students, parents, and teachers. The School Board merely monitored the investigation during that time. Ultimately, LAPD and DCF recommended no criminal charges be brought against Ms. Mays and closed their investigations.

17. On June 7, 2018, Investigator Marbutt received the Police Report and reached out to Ms. Mays to schedule an interview. She agreed to speak with him and that interview was conducted on June 20, 2018.

18. On July 31, 2018, Investigator Marbutt completed his Investigative Report and sent it to Principal Burkett. The

contents and findings in the Investigative Report were based almost exclusively on the Police Report and DCF's investigative notes (not offered into evidence), both of which contained only summaries of the interviews conducted by LAPD and DCF.[2/] Other than Ms. Mays, Investigator Marbutt spoke to no students, parents, or other teachers.

19. Based on the Police Report, DCF's investigative notes, and his interview of Ms. Mays, Investigator Marbutt believed there was sufficient evidence to show that Ms. Mays violated School Board rules and the Principles of Professional Conduct.

20. On August 22, 2018, based on Investigator Marbutt's investigation, the Associate Superintendent notified Ms. Mays that she was suspended without pay and her termination would be recommended at the next School Board meeting in October 2018.

IV. Evidence Regarding the Incidents Underlying Termination

21. Pursuant to School policy, teachers can remove disruptive students from their own classrooms and send them to an adjoining teacher's room to be disciplined. The two teachers usually communicate as to why the student is being sent to the other's room, but the student's actual teacher determines how long they stay before being allowed to return.

22. Ms. Mays rarely has to send her own students to other rooms for discipline. In her classroom, she uses varied techniques depending on the situation. She issues warnings,

uses clip and champs systems, and may require students to write apology notes. Sometimes she imposes a time out during which the students perform a writing activity. If the students continue to misbehave, she may send them to the office. Ms. Mays documents the discipline in the student's agenda and calls their parents.

23. Ms. Mays thought only 12 students were sent to her by other teachers for discipline. She would typically require these students to write apology notes for their misbehavior and also gave them a chance to do their class work. If they obliged, they continued to do that until their teacher asked them to return. But if the students refused and disrupted her class after repeated warnings, she used other tactics as a last resort.

24. In four isolated instances over the last school year (though the School Board only proceeded on three such incidents, one per student), Ms. Mays required three students to clean black marks off the classroom floor after they refused to follow repeated warnings to do their work and instead disrupted her class. Ms. Mays gave the students the option to pick from three utensils: a scrubber, toothbrush, or magic eraser.

25. According to Ms. Mays, the students did not clean the floor all day, but only for about 15 minutes. Even then, the students spent time sitting on the floor just holding the

cleaning utensil. She otherwise would try to get them to do their work.

26. Ms. Mays never had to discipline her own students in this fashion and, as to the visiting students, she only used the tactic when she ran out of other options after repeated problems. She never withheld food from the students during this time and never made them scrub the floor of the bathroom. The point was to make the students understand the consequences for not doing their class work.

27. The three students at issue, K.G., D.G., and C.C., gave sworn testimony in videotaped depositions.[3/] The students were only eight to nine years old and had some difficulty confirming that they knew the difference between a truth and a lie. They also had trouble providing consistent verbal responses to questions, such as clearly and specifically detailing the events and the duration of time. This is understandable given their young age and possible nerves, but it renders their testimony less persuasive and credible on some of the important issues.

28. According to K.G.'s deposition, her teacher, Ms. Schinleber, sent her to Ms. Mays' classroom for talking in class. K.G. said that Ms. Mays made her clean the floor with a "big" toothbrush from the morning until she went home.

29. Importantly, K.G. never testified that she was in pain, suffered an injury, or felt embarrassed while cleaning the floor. Ms. Mays confirmed that K.G. never complained to her about these issues. Investigator Marbutt had no knowledge of K.G. seeing a doctor after the incident. Thus, there was no evidence on which to base a finding of fact that K.G. suffered pain, harm, or embarrassment as a result of this incident.[4/]

30. As to the duration of time, the undersigned finds K.G.'s testimony that she had to scrub the floor all day to lack credibility, even if it were not hearsay. This is in part because of K.G.'s demeanor during her deposition, the lack of clarity with which she could recall the details or timing of the events, her exaggeration about the size of the toothbrush, and her concession that she actually did not scrub all day because she went to lunch. The undersigned finds that the persuasive and credible weight of the evidence establishes that K.G. was in and out of Ms. Mays' room for much of the day, but scrubbed the floor for no more than 15 minutes.[5/]

31. According to D.G.'s deposition, his teacher, Ms. Hermes, sent him to Ms. Mays' classroom several times for misbehaving and being disrespectful.

32. Most recently, Ms. Hermes sent him after he got mad and refused to do his math work; Ms. Mays required him to do his work in the back of the room. Prior to that, on some unknown

day, Ms. Hermes sent him after lunch for being disrespectful; Ms. Mays made him clean five to seven black marks off the floor with a sponge. The School Board confirmed that neither of these two incidents should be considered, as only those involving a toothbrush were relevant to this proceeding.

33. As to the relevant incident here, D.G. testified that Ms. Hermes sent him to Ms. Mays for being disrespectful and she made him scrub foot-long black marks off the floor with a regular-size toothbrush until the end of the day.

34. Importantly, D.G. never testified that he was in pain, suffered an injury, or felt embarrassed. Investigator Marbutt had no knowledge of D.G. seeing a doctor after the incident. Thus, there was no evidence on which to base a finding of fact that D.G. suffered pain, harm, or embarrassment as a result of this incident.[6/]

35. As to how long D.G. scrubbed the floor, his testimony was unclear. D.G. could not recall the date or time of day that the incident occurred, except that it happened after lunch. Although he said he scrubbed the floor until the end of the day, it is impossible to determine how long that lasted since he could not recall when in the afternoon he went to Ms. Mays' classroom. The undersigned believes the persuasive and credible weight of the evidence establishes that D.G. was in Ms. Mays'

room for a portion of the afternoon, but that the scrubbing lasted no more than about 15 minutes as confirmed by Ms. Mays.

36. In testifying about the three times he was sent to Ms. Mays' classroom, D.G. got confused about the details and when they occurred. He initially stated that Ms. Mays made him scrub the toilet and the floor with a toothbrush, but later said she only made him scrub marks off the floor. He said he had to scrub the floor with a toothbrush twice, but later testified that he used a sponge on one of those occasions. D.G. apparently told an officer that he had to clean the entire floor, bathroom, and hallway, but confirmed in his deposition that he only had to clean marks off the classroom floor. D.G.'s lack of clarity as to the details, his demeanor during his deposition, the difficulty he had in being sworn in, along with the inconsistencies between his testimony and the statements he made to law enforcement, render much of his testimony on the critical issues herein not credible (even if it were not hearsay).

37. According to C.C.'s deposition, Ms. Schinleber sent him to Ms. Mays' classroom after misbehaving and Ms. Mays required him to clean marker stains off the floor with a washcloth. C.C. did not know how long he cleaned the floor, but said it was less than an entire class and that he was permitted to go to lunch.

38. Importantly, C.C. never testified that he felt embarrassed while cleaning the floor. C.C. said his hands got "blistery" and, though he tried to tell Ms. Mays that he was tired and show her his hands, she was teaching in the front of the room and yelled back to him to scrub harder. C.C. confirmed that his hands felt the same as when he wrote too much.

39. At the end of the deposition, C.C.'s mother explained that C.C. has an immune deficiency disease where his hands cramp up. What upset her the most was that C.C. has an IEP and teachers should know that his hands cramp up when writing, cutting, or using them too much.

40. Aside from the fact that this explanation was not under oath, the School Board presented no testimony from C.C.'s mother, Ms. Schinleber, or any witness who could offer details about the IEP or Ms. Mays' knowledge thereof. The School Board failed to question Principal Burkett or Investigator Marbutt about the issue. Without evidence that Ms. Schinleber told Ms. Mays of the IEP, the only reasonable inference is that Ms. Mays was unaware of it because she was not C.C.'s regular teacher.

41. The undersigned does not discount that C.C. testified hearsay testimony that his hands hurt, but the persuasive and credible evidence establishes that the pain was no worse than

when he wrote too much. C.C. also never went to the School nurse or saw a doctor as a result of this incident.

ULTIMATE FINDINGS OF FACT

42. It is well established under Florida law that determining whether alleged misconduct violates a statute or rule is a question of ultimate fact to be decided by the trier-of-fact based on the weight of the evidence. 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). Thus, determining whether the alleged misconduct violates the law is a factual, not legal, inquiry.

43. "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).

44. The School Board contends that "just cause" exists to terminate Ms. Mays because she improperly required K.G., D.G., and C.C. to clean the floor with a toothbrush on one occasion

each, which constituted "misconduct in office." § 1012.33(1)(a); Fla. Admin. Code R. 6A-5.056(2)(b), (c). The School Board alleges two violations of "the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.," and two identical violations of "adopted school board rules."

45. First, the School Board alleges that Ms. Mays breached her obligations to K.G., D.G., and C.C. by "intentionally expos[ing] [them] to unnecessary embarrassment or disparagement." Fla. Admin. Code R. 6A-10.081(2)(a)5.; Polk Cty. Sch. Bd.
R. 3210A.5. Second, the School Board alleges that Ms. Mays breached her obligations to K.G., D.G., and C.C. by failing to "make reasonable effort to protect [them] from conditions harmful to learning and/or to [their] mental and/or physical health and/or safety." Fla. Admin. Code R. 6A-10.081(2)(a)1.; Polk Cty. Sch. Bd. R. 3210A.1.

46. There is no dispute that Ms. Mays required K.G. and D.G. to each clean the floor with a toothbrush. Thus, the relevant issue as to these students is whether the School Board proved by a preponderance of the evidence that this disciplinary tactic constituted "misconduct in office."

47. However, as to C.C., the evidence did not establish that Ms. Mays required him to clean the floor with a toothbrush.

C.C. testified that he cleaned the floor with a washcloth and had no recollection of ever using a toothbrush. Because the School Board's termination notice focused solely on the use of a toothbrush as an improper disciplinary tactic, it cannot belatedly allege now that requiring C.C. to clean the floor with a washcloth constituted misconduct in office. In fact, a washcloth is more akin to a sponge, which the School Board does not contend was misconduct given its decision to proceed only on the instances involving a toothbrush. Nevertheless, the undersigned will evaluate the evidence as it relates to C.C. in the same manner as the other two students.

48. Based on the weight of the evidence detailed above, the School Board failed to establish by a preponderance of the evidence that Ms. Mays exposed the students to unnecessary embarrassment or disparagement, much less that she did so intentionally. None of the three students testified that they felt embarrassed or disparaged, and Investigator Marbutt did not believe that Ms. Mays intentionally tried to embarrass or harm them. At most, Investigator Marbutt agreed that there were "potential violations for creating physical or emotional harm and potentially humiliating the students," but he never explained how the evidence substantiated that "potential" belief. Principal Burkett also confirmed that Ms. Mays never said she intended to humiliate or inflict pain on the students.

In sum, the credible weight of the evidence does not establish that Ms. Mays violated rule 6A-10.081(2)(a)5. or School Board rule 3210A.5.

49. Likewise, based on the weight of the evidence discussed above, the School Board did not establish by a preponderance of the evidence that Ms. Mays unreasonably failed to protect the students from conditions harmful to learning, their mental and/or physical health, or their safety. No credible, competent evidence was presented that this disciplinary tactic unreasonably exposed the students to any such harmful conditions, much less a safety hazard. K.G. and D.G. offered no testimony that they suffered pain while being disciplined in this manner and, though C.C. indicated that his hands were sore, it was the same pain he experienced when he wrote too much. Principal Burkett testified that the School preferred a more positive method of discipline, but neither he nor any other witness explained how these three isolated events that were not shown to last more than 15 minutes unreasonably harmed the students. In short, the credible weight of the evidence does not support the allegation that Ms. Mays violated Rule 6A-10.081(2)(a)1. or School Board Rule 3210A.1.

50. Accordingly, the undersigned finds as a matter of ultimate fact that the School Board did not show by a

preponderance of the evidence that it had "just cause" to terminate Ms. Mays. § 1012.33(1)(a), Fla. Stat.

CONCLUSIONS OF LAW

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

52. 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.

53. Ms. Mays 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. Mays' employment with the School Board are also governed by the CBA.

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

55. 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."

56. Section 1012.33(1)(a) lists the instances that qualify as "just cause," including "misconduct in office."

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

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

58. As to the Principles of Professional Conduct, rule 6A-10.081 provides in pertinent part:

> (2) Florida educators shall comply with the following disciplinary principles. Violation of any of these principles shall

subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

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

1. Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

* * *

5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

59. Mirroring the Principles of Professional Conduct, School Board rule 3210 provides as follows:

District instructional staff members shall comply with the following disciplinary principles. Violation of any of these principles shall subject the individual to revocation or suspension of the individual instructional staff member's certificate, or the other penalties as provided by law.

A. Obligation to the student requires that the District instructional staff member shall:

1. make a reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

* * *

5. Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

60. As discussed above, the School Board has "the burden of proving by a preponderance of the evidence each element of the charged offense which may warrant dismissal." Cropsey, 19 So. 3d at 355. Preponderance is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. RLI Live Oak, LLC, 139 So. 3d at 872.

61. The School Board contends that just cause exists to terminate Ms. Mays because she (1) intentionally exposed the students to unnecessary embarrassment or disparagement; and (2) failed to make a reasonable effort to protect the students from conditions harmful to learning and to their mental and physical health and safety.

62. Based on the findings of fact and ultimate fact above, the School Board failed to establish by the greater weight of the evidence that Ms. Mays intentionally exposed the students to unnecessary embarrassment or disparagement, or unreasonably exposed the students to conditions harmful to their learning, mental or physical health, or safety, in violation of rule 6A-10.081(2)(a)1. and 5. or School Board rule 3210A.1. and 5.

63. Thus, the undersigned concludes that the School Board lacked "just cause" to terminate Ms. Mays. Because the School Board improperly suspended Ms. Mays without pay on April 30,

2018, it should immediately reinstate Ms. Mays as a classroom teacher and provide her with back pay from that date forward.

64. Although the undersigned has concluded that the School Board lacked "just cause" to discipline Ms. Mays, the School Board's request to terminate would have been an inappropriate penalty even had the violations been proven.

65. In determining the appropriate level of discipline, the School Board's progressive discipline policy must be consulted. See School Bd. of Seminole Cnty. v. Morgan, 582 So. 2d 787, 788-89 (Fla. 5th DCA 1991) ("[C]ontinuing contract teachers are afforded certain safeguards by law and the administrative rules promulgated by the State Board of Education. Collective bargaining agreements may operate within the penumbra of those statutes and rules.").

66. 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.

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

68. The School Board agrees that it did not follow progressive discipline. Instead, it contends that progressive discipline is only a recommendation and, regardless, the severity of this offense is sufficient to meet the exception.[7/]

69. As to the School Board's contention that progressive discipline is just a recommendation, the CBA is to the contrary. Article 4-4.1 explicitly provides that progressive discipline "shall be followed" subject only to the exception expressed therein. This bargained-for language is no mere recommendation. See Collins v. School Bd. of Dade Cnty., 676 So. 2d 1052, 1053 (Fla. 3d DCA 1996) (recognizing that school boards are "bound by the terms of the collective bargaining agreement," including

progressive discipline); Bell v. School Bd. of Dade Cnty., 681 So. 2d 843, 844-45 (Fla. 3d DCA 1996) (same).

70. As to whether Ms. Mays' conduct was severe enough to skip progressive discipline, that is a question of "'ultimate fact' best left to the trier of fact under these circumstances." Costin v. Fla. A & M Univ. Bd. of Trs., 972 So. 2d 1084, 1086-87 (Fla. 5th DCA 2008).

71. The CBA does not define what "course of conduct" or "offense" is severe enough to meet the exception and the School Board presented no evidence on this issue. Because this is an exception to the general rule, 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.

72. Moreover, the CBA's definition of "just cause" requires that there be a "fair and reasonable basis for disciplinary action." This means that the discipline must be both fair and reasonable based on the severity of the offense, particularly given the requirement for progressive discipline. See Bell, 681 So. 2d at 844-45 (remanding for issuance of lesser sanction given failure to follow progressive discipline and where CBA required that "degree of discipline shall be reasonably related to the seriousness of the offense and the employee's record" and teacher had discipline-free career for over 11 years); Collins, 676 So. 2d at 1053 (remanding for issuance of

lesser sanction where six-month suspension failed to follow progressive discipline, as required by CBA, and was not reasonably related to the seriousness of the offense).[8/]

73. Based on the findings of fact above, the undersigned concludes that Ms. Mays' actions, even if deemed "misconduct in office," would not justify the ultimate sanction of termination. The undisputed evidence confirms that Ms. Mays has never been disciplined during her 21-year career. She did not intentionally try to embarrass, humiliate, or inflict pain on the students; instead, she attempted to persuade them to do their work and be respectful in their own classrooms. She was forthcoming when questioned by Principal Burkett, she met with the complaining parent, and she agreed she would never engage in such activity again, even though the School Board had no explicit policy prohibiting this form of discipline.

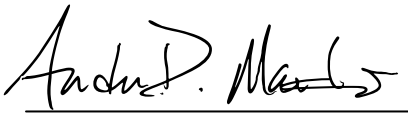
74. The undersigned also finds it relevant that Ms. Mays only used this form of discipline as a last resort and, notably, never had to use the tactic with her own students. Ms. Mays' ethical and professional obligations to teach apply primarily to her own students, for whom she bears the ultimate responsibility for their learning, development, and growth. The fact that she never needed to reach this last resort punishment with her own students is a testament to her abilities as a teacher.

75. For all these reasons, the undersigned finds that termination would be too severe a penalty, even if the violations had been proven. Instead, the proper starting place would have been at the first step of progressive discipline.

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 dismissing the charges against Ms. Mays, reinstating her employment as a teacher, and awarding her back pay to the date on which she was first suspended without pay.

DONE AND ENTERED this 4th day of March, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2019.

ENDNOTES

[1/] All rule and statutory references are to the 2018 versions unless otherwise indicated.

[2/] The Investigative Report and the Police Report both constitute hearsay. Though hearsay is admissible in administrative proceedings, it 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); see also 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 School Board failed to establish how these hearsay reports were admissible over objection in a civil action. However, there are only two exceptions that could apply—public records and business records. Under section 90.803(8), Florida Statutes, two types of public records are excepted from the hearsay rule: (1) those that set forth the activities of the agency, and (2) those that set forth "matters observed" that are based on "a public official's first-hand observation of an event." Yisrael v. State, 993 So. 2d 952, 959 (Fla. 2008). Although an additional exception exists under federal law for records "'setting forth factual findings resulting from an investigation made pursuant to authority granted by law,'" public records "that rely on information supplied by outside sources or that contain evaluations of statements of opinion by a public official are inadmissible" under Florida law. Lee v. Dep't of Health & Rehab. Servs., 698 So. 2d 1194, 1201 (Fla. 1997) (quoting Charles W. Ehrhardt, Fla. Evidence § 803.18d (1996 ed.)). Similarly, under section 90.803(6), a business record is admissible under an exception to the hearsay rule, but only if the supplier of the information in the report is "made by a person with knowledge who was acting within the regular course of the business activity." Harris, 495 So. 2d at 808-09.

Here, the Police Report is based entirely on officers' summaries of interviews of potential witnesses and the Investigative Report is based on those same summaries along with Investigator Marbutt's summary of his interview of Ms. Mays.

Because the matters in both reports are not within the investigators' first-hand observations and were supplied instead by individuals not acting within the scope of the business, neither report would be admissible over objection in a civil action. Lee, 698 So. 2d at 1201; Harris, 495 So. 2d at 808-09 (holding that investigative reports summarizing witness interviews are not admissible under the business records exception to the hearsay rule); Rivera v. Bd. of Trs. of Tampa's Gen. Empl. Ret. Fund, 189 So. 3d 207, 212-213 (Fla. 2d DCA 2016) (holding that "police reports and the transcripts of the witness interviews were clearly hearsay that would not be admissible over objection in civil actions," particularly where none of the victims testified at the hearing); M.S. v. Dep't of Child. & Fam., 6 So. 3d 102, 104 (Fla. 4th DCA 2009) (holding that DCF investigative reports were inadmissible hearsay "because the records contained witness statements made to investigators, the substance of which was not within the personal knowledge of the agency employee"); Reichenberg v. Davis, 846 So. 2d 1233, 1233-1234 (Fla. 5th DCA 2003) (holding that DCF investigative reports, and reports of the statements witnesses made to investigators, were inadmissible under the public records exception because the witnesses statements contained therein were hearsay within hearsay and not subject to an exception).

Aside from the documents themselves, both reports contain summaries of out-of-court statements of students, parents, and teachers to officers, which constitute double and triple hearsay that would not be admissible over objection in a civil action. See §§ 90.805 & 120.57(1)(c), Fla. Stat.; Holborough v. State, 103 So. 3d 221, 223 (Fla. 4th DCA 2012); J.B.J. v. State, 17 So. 3d 312, 319 (Fla. 1st DCA 2009). Except for the depositions of the three students at issue, none of the individuals who made the statements to the officers testified. The officers who conducted the investigations did not testify and, though Investigator Marbutt testified, he based his testimony and report on the officers' interviews because he never spoke to any of the students, parents, or witnesses except for Ms. Mays.

The only portion of either report that would be admissible over objection in a civil action is Ms. Mays' statement to Investigator Marbutt, which is summarized in the Investigative Report. The School Board relied on Ms. Mays' statement to prove the alleged violations and establish that she admitted to disciplining the students in this manner. Because that statement is a party admission that would be admissible over objection in a civil action, it may be used to make findings of fact here. §§ 90.803(18) & 120.57(1)(c), Fla. Stat.

In sum, the Investigative Report and the Police Report, and the out-of-court statements summarized therein (except for Ms. Mays' admission), cannot alone be used to make a finding of fact. The weight to be given such evidence, to the extent any statements therein merely explain or supplement other admissible evidence, is left to the undersigned's discretion.

[3/] The transcripts and video recordings of the depositions of the three students at issue constitute hearsay that would not be admissible over objection in a civil action. In a civil action, depositions may be admitted either under Florida Rule of Civil Procedure 1.330(a)(3) or as an exception to the hearsay rule for former testimony under the Florida Evidence Code. See Bank of Montreal v. Estate of Antoine, 86 So. 3d 1262, 1264 (Fla. 4th DCA 2012). Because the School Board failed to establish that the three students were "unavailable" to testify live at the hearing, the depositions are not admissible under rule 1.330(a)(3) or section 90.804(2)(a), Florida Statutes. And, though section 90.803(22) provides that "former testimony" taken in the same case where the party against whom the evidence is offered had a similar motive to develop the evidence is admissible regardless of unavailability, that is an improper ground on which to admit a deposition in an administrative hearing. See Grabau v. Dep't of Health, 816 So. 2d 701, 709 (Fla. 1st DCA 2002) (holding that admission of deposition under section 90.803(22) was improper in an administrative proceeding, in part because its adoption unconstitutionally infringed on the Florida Supreme Court's exclusive authority over court procedure); see also In re Amendments to the Fla. Evidence Code, 782 So. 2d 339, 342 (Fla. 2000) (refusing to adopt section 90.803(22) to the extent it was procedural due to its breadth, inconsistency with federal law and evidence codes in other states, and concerns about its constitutionality).

Thus, the depositions and the hearsay contained therein cannot alone be used to make a finding of fact. But, because much of the deposition testimony supplemented or explained other admissible evidence, they have been considered and assigned the weight deemed appropriate under the circumstances.

[4/] It is true that Principal Burkett testified that K.G.'s mother said her daughter complained of back pain, and that such complaints were reiterated in the Investigative Report and the Police Report. However, those out-of-court statements constitute hearsay two and three times over and no hearsay exception has been established. The School Board did not present the testimony of K.G.'s mother or any other witness who

could testify as to K.G.'s apparent complaints. Because K.G. never testified that she suffered any pain, harm, or embarrassment during her deposition (which is also hearsay, conflicting with the other hearsay). There is no admissible evidence to support a finding of fact with regard to back pain or any pain.

Regardless, the hearsay complaints lack reliability. Not only were they hearsay within hearsay, as reported by K.G.'s mother and Principal Burkett based on their recollections of what the other person told them, but Ms. Mays confirmed that K.G. did not scrub the floor for more than 15 minutes and never complained to her of back pain. And, though the Police Report indicates that K.G.'s mother reported that K.G. complained to her of back pain, K.G.'s teacher, Ms. Schinleber, told an officer (neither of whom testified at the hearing) that K.G. never complained when she came back to her room that afternoon.

[5/] It also bears emphasizing that Ms. Schinleber told the officer that she sent K.G. to Ms. Mays' room around 8:30 a.m., K.G. returned for "specials," went back to Ms. Mays' room around 10:30 a.m., and never complained when she returned around 2:45 p.m.

[6/] The Police Report contains out-of-court statements made by D.G.'s mother to an officer that D.G. told her he had to scrub the floor with a toothbrush in front of other children, who laughed at him and hurt his feelings, and that he had to scrub the toilet with a toothbrush, which she believed was a health hazard. However, as discussed in endnote 2, infra, the Police Report and the statements therein are hearsay (and hearsay within hearsay) for which no exception applies. And, regardless, the statements lack credibility, as D.G. never said he was embarrassed in his deposition and testified that he never had to clean the toilet.

[7/] The School Board also argues that article 16.5-2 of the CBA authorizes it to skip progressive discipline and immediately terminate a teacher anytime it believes "just cause" exists to discipline. This argument is inconsistent with the CBA's language and would render the explicit requirement for progressive discipline meaningless.

The provisions of article 16, titled "Teacher Dismissal Procedure," create processes for dealing with performance evaluations and deficiencies. For continuous contract teachers, articles 16.1-16.3 apply the NEAT procedure—Notice, Explanation,

Assistance, and Time—to handle teacher performance deficiencies. For professional service contract teachers, like Ms. Mays, article 16.4 provides a distinct process for notifying, evaluating, and remedying a teacher's performance deficiencies. In that context, article 16.5 creates exceptions to those performance evaluation procedures, including article 16.5-2, which states that "[t]his procedure does not prohibit immediate suspension and subsequent dismissal for just cause as outlined in § 1012.79, Florida Statutes, or the use of the Florida Education Practices Commission [("Commission")] procedures."

Section 1012.79 creates the Commission and details its makeup and authority, including the right to revoke a teacher's certificate if the teacher violates one of its Principles of Professional Conduct. § 1012.79(7)(b), Fla. Stat.; § 1012.795(1)(j), Fla. Stat. However, section 1012.79 says nothing about "just cause" or a School Board's authority to discipline a teacher based on a finding thereof. And, though revocation of a teacher's certificate could be grounds for immediate dismissal by the School Board, there is neither an allegation nor evidence establishing that the Commission revoked Ms. Mays' teaching certificate in this case.

Accordingly, article 16.5-2 plainly creates an exception to following certain performance deficiency procedures if there are grounds for immediate suspension and termination based on the actions or procedures of the Commission. It does not, however, create a general overriding exception to following progressive discipline. Indeed, if the School Board could jump to termination any time there is "just cause" to discipline, the explicit requirement that it follow progressive discipline—the bargained—for remedy in article 4.4-1 of the CBA – would be rendered meaningless.

[8/] Although not admitted into evidence, the undersigned notes that School Board Rule 3139.01, which is applicable to instructional teachers like Ms. Mays, provides that: "The School Board retains the right and the responsibility to manage the work force. When the discipline of a staff member becomes necessary, such action shall be in proportion to the employee's offense or misconduct, consistent with appropriate procedural and substantive due process, State law, and/or the specific provisions of any applicable collective bargaining agreement."

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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.