STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 18-6560TTS

DIANE LOUISE NEVILLE,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),[1] by Zoom Conference, on December 7 and 8, 2020, before Administrative Law Judge ("ALJ") Cathy M. Sellers of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Elizabeth W. Neiberger, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131

For Respondent: Katherine A. Heffner, Esquire
Robert F. McKee, Esquire
Robert F. McKee, P.A.
Suite 301
1718 East Seventh Avenue
Tampa, Florida 33605

[1] All references to chapter 120 are to the 2020 codification.

STATEMENT OF THE ISSUE

Whether just cause exists, pursuant to section 1012.33, Florida Statutes, and as alleged in the Administrative Complaint, to terminate Respondent's employment as a teacher.

PRELIMINARY STATEMENT

On November 8, 2018, Robert Runcie, as Superintendent of Schools for Broward County, filed an Administrative Complaint against Respondent, Diane Louise Neville, seeking to terminate her employment as a teacher with the Broward County Public Schools (hereafter, the "District"). On December 3, 2018, Respondent filed a Petition for Administrative Hearing. Petitioner took agency action to terminate Respondent's employment on December 12, 2018.

The case was referred to DOAH for assignment of an ALJ to conduct an administrative hearing pursuant to sections 120.569 and 120.57(1). The final hearing initially was set for February 21 and 22, 2019, but pursuant to the parties' request, was continued and rescheduled four times. The case was then placed in abeyance on October 2, 2019, to enable the parties to settle the case. Pursuant to the parties' request, the abeyance was extended six times. On April 3, 2020, the parties informed the undersigned that they were unable to settle the case, and the final hearing was rescheduled for September 23 and 24, 2020. Thereafter, pursuant to Petitioner's motion, the final hearing was again continued, and was rescheduled for December 7 and 8, 2020.

The final hearing was held on December 7 and 8, 2020. Petitioner presented the testimony of Robert Pappas, Chandra Fitzpatrick, Rashad Beals, Kathy Wernecke, and Michael English. Petitioner's Exhibit Nos. 1, 2, 8A, 10 through 14, and 15E, were admitted into evidence without objection. Petitioner's Exhibit Nos. 7A, 7B, 8B, 9A through 9E, and 15A

through 15D, were admitted into evidence over objection.[2] Official recognition was taken of the Final Order and the incorporated Recommended Order in DOAH Case No. 17-1180TTS,[3] which comprised a portion of Petitioner's Exhibit No. 3.[4] Respondent testified on her own behalf and did not tender any exhibits for admission into evidence.

The two-volume Transcript of the final hearing was filed at DOAH on January 5, 2021. Pursuant to Florida Administrative Code Rule 28-106.216, the deadline for filing proposed recommended orders ("PROs") initially was set for January 15, 2021. However, pursuant to the parties' motions, the deadline for filing PROs was twice extended, to February 15, 2021, and February 24, 2021. The parties timely filed their PROs on February 24, 2021. Both PROs have been duly considered in preparing this Recommended Order.

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[2] The remaining portions of Petitioner's Exhibit Nos. 7 through 9, and 15 were not admitted into evidence.

[3] Respondent cannot be subjected to discipline for previous violations of statutes, rules, or policies for which she already has been disciplined. *See Dep't of Bus. & Prof'l Reg. v. Villarreal*, Case No. 11-4156 (Fla. DOAH Dec. 19, 2011; Fla. DBPR Oct. 2, 2012)(multiple administrative punishments cannot be imposed for a particular incident of misconduct). However, under School Board Policy 4.9, section III, the history of disciplinary corrective actions is relevant to determining the appropriate penalty, if any, to be imposed in these proceedings. Therefore, official recognition was taken of the Final Order and the incorporated Recommended Order in DOAH Case No. 17-1180TTS solely for the purpose of determining the penalty to be imposed in this proceeding.

[4] The remaining portion of Petitioner's Exhibit 3 was not tendered or admitted into evidence.

FINDINGS OF FACT

I. The Parties

1. Petitioner is the entity charged with operating, controlling, and supervising free public schools in Broward County, pursuant to article IX, section 4(b) of the Florida Constitution, and section 1012.33.[5]

2. At all times relevant to this proceeding, Respondent was employed by Petitioner as a teacher in the District.

II. Evidence Adduced at the Final Hearing

3. Respondent was hired by Petitioner as a teacher in August 1998.

4. During the 2018-2019 school year, when the conduct giving rise to this proceeding is alleged to have occurred, Respondent was employed as a technology teacher at Gulfstream Academy of Hallandale Beach (K-8) ("Gulfstream").

5. In the 2018-2019 school year for the District, the first day of work for teachers was August 8, 2018, and the first day of school for students was August 15, 2018.[6]

6. Robert Pappas, the Principal at Gulfstream, testified that Respondent came to Gulfstream's campus two days before teachers were to report to work for the 2018-2019 school year. Pappas testified that, based on a conversation he had with Respondent at that time, he felt "a bit concerned," and that "she did not seem her normal self."

7. Respondent did not report to work on August 8, the first day of teacher preplanning, or for the following two days.

8. On August 8, Respondent reported to Kathy Wernecke, the Office Manager for Gulfstream, that her car had been run off the road in

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[5] All references to chapter 1012 are to the 2018 version, which was in effect at the time of the alleged conduct giving rise to this proceeding.

[6] The events giving rise to this proceeding occurred in August and September 2018, unless otherwise stated. For brevity, the year "2018" is not hereafter repeatedly stated in this Recommended Order.

Punta Gorda, Florida. On August 10, Respondent again contacted Wernecke, stating that her home in West Park, Florida, had been broken into and ransacked.

9. On August 13, Respondent reported to work at Gulfstream. She slipped on water on the floor of her classroom caused by a leaking air conditioner and fell. Emergency response was contacted, and Respondent was transported to a hospital. She was later released and reported back to work at the school the same day, with a dog which she identified as her service dog. The dog was not wearing a vest indicating that it was a service dog.

10. On August 14, the day before students returned to campus for the first day of school, school staff were in the school's south campus cafeteria, attending workshops. Pappas went to the cafeteria and saw Respondent dancing in the middle of the cafeteria, during a presentation being made as part of a workshop. Numerous people were present in the cafeteria, and, according to Pappas, many of them looked uncomfortable. Pappas said that her dancing was not "inappropriate," but, under the circumstances, was "peculiar."

11. Rashad Beals, the Gulfstream Security Manager for the south campus, corroborated Pappas's testimony regarding Respondent dancing in the cafeteria on August 14 during a workshop presentation.

12. Respondent had brought a dog to work with her that day, and it was with her in the cafeteria. It was not wearing a service animal vest.

13. Thereafter, Pappas met with Respondent in his office to discuss her having brought a dog onto the campus that day. He explained that if she needed to have a service dog accompany her to work, she was entitled to do so, but she needed to complete the required paperwork in order to have the dog in the classroom with students present. He stated that if she needed the dog to accompany her to work, he would provide a substitute teacher and would find her office space where she could work without being with students while the service animal paperwork for her dog was being processed.

14. Based on Pappas's discussion with Respondent, it was his understanding that Respondent was going to complete and submit the paperwork required for her to have the dog accompany her in the classroom when students were present.

15. Pappas testified, credibly, that during the meeting, Respondent made several statements about her personal life that were inappropriate in a professional setting—specifically, that she liked to dance in the nude; that her mother was a high-paid prostitute; that her father was in the Mafia; and that drug addicts had taken over her homes in Panama City and West Park. Pappas testified that Respondent's overall demeanor was inconsistent, and that she seemed very anxious and "discombobulated."

16. Additionally, Beals and Wernecke, both of whom were present at Pappas's meeting with Respondent on August 14, corroborated Pappas's testimony regarding the tone and substance of Respondent's statements during the meeting.[7]

17. At the meeting, Respondent claimed, among other things, that she had set up a community homeless shelter in Panama City, and was known for having done so; that her Jaguar had been stolen; that she worked at a prison; and that she was a girl, as well as a 33-year Navy Chief. She also stated that she owned a home on Fletcher Street in Hollywood, which had been broken into, and that she had been sexually assaulted two days ago. She also stated that she was married to a millionaire for 22 years, and that when he refused to loan her money to purchase the community center, she divorced him.

18. Pappas asked Respondent if she wished to contact the District's Employee Assistance Program, but she refused.

19. After the August 14 meeting was over, Beals and Officer Michael English, the school detective, walked with Respondent to the school parking

[7] Additionally, Wernecke took notes at the August 14 meeting and a subsequent meeting held on August 21. Those notes, which supplemented her testimony at the final hearing, were admitted into evidence as Petitioner's Exhibit No. 8B.

lot. Pursuant to Pappas's direction, Respondent gave her lanyard and room keys to English.

20. As a result of Respondent's behavior, Pappas wrote a "Fit for Duty" memorandum to the District's Director of Risk Management on August 15, describing Respondent's behavior between August 8 and August 14.

21. Respondent did not report to work on August 15—which was the first day for students—or on August 16 or 17, and she did not request leave through the appropriate process.

22. On or about August 15, Respondent contacted Officer English to let him know that she was taking vacation—she claimed, pursuant to Pappas's suggestion—and was driving to North Carolina.

23. On August 16, Pappas informed Respondent, by email, that she was not approved for personal leave, and that if she did not report to work by August 20, she would be considered to have abandoned her job.

24. On August 17, Respondent called the Gulfstream office to let Wernecke know that she was taking five weeks of sick leave.[8] In the course of the discussion, Respondent told Wernecke that her fiancé was with her, and that she was taking him to a doctor's appointment in Virginia. Respondent also stated that she would not be returning to her West Park home because crack addicts were living there, and that she had reported the matter to the police, but they told her that it was "her problem." She told Wernecke that she had given full power of attorney to a colleague with whom she had worked at the prison, so that if anyone from the school needed to reach her, they needed to contact the person to whom she had given power of attorney. She mentioned that she would be back at school on September 22.

25. On August 20, Respondent spoke with Wernecke to let her know that she (Respondent) was back in West Palm Beach; that her rental car was about to run out of gas; that someone was going to send her $1,000.00 by

[8] Respondent did not follow the required process for taking sick leave.

Western Union, but that she had to have that person committed for abuse she had witnessed; that she was trying to get a tracking number on the money transfer; and that she had visited four "slum" Western Union facilities, but could not get her money. She also asked if her car was at school, and stated that she had it towed there and had placed a cover over it, because she could not leave it at her home because of the crack addicts occupying her home. She stated that she was homeless until her in-laws returned.

26. Respondent reported to work late on August 20. She was inappropriately dressed for school, and was not prepared to teach. She did not teach that day, and left the campus shortly after she arrived.

27. Respondent reported to work on August 21, 2018. Pappas met with Respondent that day, to discuss the paperwork required for Respondent to bring her dog to school. Wernecke was present at the meeting, and, at Respondent's request, a teacher's union representative also attended the meeting.

28. At the meeting, Respondent made clear that she needed the dog with her, but she had not submitted the completed paperwork.[9] Pappas told her that it was not necessary for her to take the days off during which the paperwork was being processed, and that he would provide a place for her to work at the school.

29. During the meeting, Respondent again began discussing personal matters. She mentioned her parents' professions, and that her houses were inhabited by drug addicts. She also stated that her future millionaire husband was a violent schizophrenic who abused her; that she had been asked 15 years ago, by his family, to be a part of his life and take care of him; that he has had five driving-under-the-influence incidents; and that she still was marrying him in September. She also remarked that she would not kill anyone. She talked about a blood clot traveling through her body, and stated

[9] The credible evidence establishes that Respondent did not, at any point, submit completed paperwork authorizing her to have a service dog with her on campus while teaching.

that she could not eat and was losing weight. She exhibited bruises on her arms, and at one point, lifted her shirt to show that she had bruises on her body.

30. When Pappas and Wernecke asked if they could call 911 and suggested that she see her doctor, she refused, stating that she would use days off to take care of the paperwork for her dog and get better.

31. Pappas described her demeanor in the August 21 meeting as often "loud" and "aggressive."

32. After the meeting concluded, Respondent left the campus for the rest of the day, and did not teach her classes.

33. As previously noted, Pappas had requested that the District require Respondent to undergo a Fitness for Duty Evaluation.

34. On August 21, the District's Director of the Risk Management Department for the District sent a letter to Respondent, by certified mail and overnight delivery, ordering her to attend a Fitness for Duty Conference on the Gulfstream north campus on Thursday, August 23.

35. Respondent did not attend the scheduled Fitness for Duty Conference on August 23. She provided no explanation as to why she did not attend the conference.

36. As a result of her failure to attend the Fitness for Duty Conference, Respondent was informed, by letter dated August 23 and sent again on August 29, that she would be required to undergo a Fitness for Duty Evaluation. The letter, which was signed by the District's Director of Risk Management, directed her to choose a physician, with optional second and third choices, from the list provided, and to contact the District's Employee Health Testing Specialist, Julianne Gilmore, who would make the appointment. Importantly, this letter informed Respondent that "[f]ailure to do so will be deemed gross insubordination leading to disciplinary action up to and including termination."

37. The letter also directed Respondent not to return to Gulfstream unless directed to do so by Risk Management. She was directed to remain at home, with pay, pending the outcome of the Fitness for Duty psychological examination.

38. Gilmore scheduled the Fitness for Duty Evaluation appointment with Respondent's first choice of physicians, Dr. Robert Wernick, for September 17.

39. Respondent was notified, by certified mail dated September 5, of the date, time, and location of the appointment. The letter stated: "Note: This is a mandatory appointment and your failure to attend can result in disciplinary action up to and including termination of employment for failure to comply with School Board Policy 4004."

40. On September 13, Respondent contacted Gilmore by email at approximately 5:30 p.m., requesting that she be provided transportation to the appointment because her right arm was immobilized. Gilmore responded at 5:42 p.m., informing Respondent that the District did not transport employees to their appointments, so that she would need to make other arrangements as necessary to ensure her attendance at the appointment.

41. Respondent did not attend the Fitness for Duty evaluation appointment on September 17, nor did she contact the District to inform anyone that she was unable to attend the appointment.

42. Respondent testified, at the final hearing, that she had requested transportation because "my right arm stopped working, and I was taken to the emergency room, and they said my arm had to be immobilized until I could go to an orthopedic doctor. . . . That was about three or four days before the fitness for duty exam."

43. However, when asked on cross-examination when the condition with her arm started, Respondent testified "I don't know." Further, when asked when she went to the emergency room regarding her arm, and whether she

went to the emergency room when the condition first started, she responded "I am not sure."

44. Additionally, Respondent testified, in her deposition, that it was her *left* arm, rather than her right arm, that had been injured as a result of falling in the classroom on August 13, and needed to be immobilized.

45. Respondent also testified at the final hearing that she had tried to reschedule the appointment, but was told that the District was unable to reschedule the appointment. However, there is no evidence corroborating Respondent's claim that she attempted to reschedule the appointment, or that she was told that the appointment could not be rescheduled.

46. On balance, Respondent's testimony regarding the reason why she failed to appear for the Fitness for Duty Evaluation on September 17 is not deemed credible.

47. Respondent previously has been subjected to discipline by Petitioner. Specifically, pursuant to the Final Order and the incorporated Recommended Order in DOAH Case No. 17-1180TTS, Respondent was suspended, without pay, for 15 days.

48. Following Respondent's failure to appear for the Fitness for Duty Evaluation, Superintendent Runcie served Respondent with the Administrative Complaint initiating this proceeding.

III. Findings of Ultimate Fact

49. Respondent has been charged in this case with misconduct in office, incompetency, gross insubordination, and willful neglect of duty under Florida Administrative Code Rule 6A-5.056; and with violating School Board Policies 4004, 4008, and 4.9.

50. Whether a charged offense constitutes a violation of applicable rules and policies is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995)(whether particular conduct constitutes a violation of a statute, rule, or policy is a factual question); *Langston v. Jamerson*, 653 So.

2d 489, 491 (Fla. 1st DCA 1995)(whether the conduct, as found, constitutes a violation of statutes, rules, and policies is a question of ultimate fact); *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985)(whether there was a deviation from the standard of conduct is not a conclusion of law, but is, instead, an ultimate fact).

Rule 6A-5.056(2) – Misconduct in Office

51. Respondent engaged in misconduct in office, as defined in rule 6A-5.056(2).

52. Specifically, Respondent's attendance at work was unreliable. She was absent, without approved leave, during the first week of school for students. Moreover, when she did return on August 20, she came to work late, inappropriately dressed, and unprepared to teach. This conduct was disruptive of her students' learning environment, in violation of rule 6A-5.056(2)(d).

53. Additionally, Respondent's lack of reliability with respect to her attendance at work reduced her ability to effectively perform her teaching duties, in violation of rule 6A-5.056(2)(e).

54. Moreover, as discussed below, it is determined that Respondent violated School Board policies 4004 and 4008, and, thus, engaged in misconduct in office under rule 6A-5.056(2)(c).

Rule 6A-5.056(3) - Incompetency

55. Respondent's conduct also constituted incompetency by inefficiency under rule 6A-5.056(3)(a).

56. Specifically, her absences from, and tardiness to, work, without having obtained approval to take leave, constituted excessive absences and tardiness, and failure to perform duties prescribed by law.

57. Additionally, her absences from, and tardiness to, work, as well as her failure to attend the Fitness for Duty Conference and Fitness for Duty Evaluation—both of which she had been ordered to attend—constituted the failure to perform duties prescribed by law.

58. Moreover, Respondent's conduct in the August 14 and 21 meetings, during which she discussed numerous personal matters, including intimate matters concerning her family and matters of a sexual nature, constituted a failure to communicate appropriately with her colleagues and administrators.

59. Respondent's conduct also constituted incompetency by incapacity under rule 6A-5.056(3)(b).

60. Specifically, Respondent's conduct in the August 14 and 21 meetings; as well as her conduct in dancing during a pre-planning workshop, which was inappropriate for the work-oriented setting; and her telephone discussions with Wernecke while she was absent without having been approved to take leave, evidence that she lacks emotional stability. Thus, it is determined that Respondent is incompetent by incapacity.

Rule 6A-5.056(4) – Gross Insubordination

61. Respondent's conduct in failing to attend the Fitness for Duty Conference on August 23 and the Fitness for Duty Evaluation on September 17 constituted gross insubordination.

62. Both the August 21 letter ordering Respondent to attend a Fitness for Duty Conference on August 23, and the August 23 letter sent again on August 29, ordering Respondent to attend a Fitness for Duty Evaluation, constituted direct orders by the District's Director of Risk Management, who was imbued with the proper authority to issue such orders to implement School Board Policy 4004. Given Respondent's conduct described herein, which gave rise to Pappas's request for the evaluation, it is determined that these direct orders were reasonable in nature.

63. Moreover, Respondent was expressly informed, in the August 23 letter ordering her to attend the Fitness for Duty Evaluation appointment on September 17, that her failure to do so would be deemed gross insubordination, which would lead to disciplinary action, up to and including termination. Nevertheless, Respondent did not attend the appointment.

64. As discussed above, there is no credible evidence showing that, once Respondent was informed that the District would not provide transportation to the September 17 appointment, she made any effort to secure other transportation to the appointment.

65. For these reasons, it is determined that Respondent's conduct, in failing to attend the August 23 Fitness for Duty Conference and the September 17 Fitness for Duty Evaluation, constituted gross insubordination under rule 6A-5.056(4).

Rule 6A-5.056(5) – Willful Neglect of Duty

66. Respondent's unexcused absences from work at the beginning of the 2018-2019 school year, including during the first week of school for the students, constituted an intentional failure to carry out her required duties.[10]

67. Additionally, for the reasons discussed above, Respondent's actions in failing to attend the Fitness for Duty Conference and the Fitness for Duty Evaluation constituted an intentional failure to carry out duties required by her employment with the District.

68. Accordingly, it is determined that Respondent's conduct constituted willful neglect of duty under rule 6A-5.056(5).

School Board Policy 4004

69. School Board Policy 4004, set forth below, requires District employees to take a physical or psychological examination when deemed advisable by the superintendent or his or her designee. Here, Pappas determined, based on Respondent's conduct that he witnessed, that Respondent should be required to take a Fitness for Duty Evaluation, pursuant to School Board Policy 4004.

[10] "Intentional" is defined as "done with intention" or "on purpose." Dictionary.com, https://dictionary.com/browse/intentional# (last visited July 6, 2021). The evidence establishes that Respondent's actions in missing work were done "on purpose," in the sense that they were not accidental. To that point, there was no evidence presented from which it reasonably can be inferred that Respondent's actions in missing work were accidental.

70. Respondent did not take the Fitness for Duty Evaluation that had been ordered and scheduled for her.

71. To the extent Respondent attempted to explain why she did not attend the September 17 Fitness for Duty Evaluation appointment, that explanation was not credible.

72. In her PRO, Respondent attempts to justify her failure to undergo the Fitness for Duty Evaluation, ordered by the District's Risk Manager, by noting that she previously had completed a Fitness for Duty Evaluation in January 2018, pursuant to a request by the Florida Department of Education, and had been deemed fit for duty.

73. Respondent's previous compliance with an order from the Florida Department of Education—a completely separate entity—at an earlier time, is beside the point. Here, Respondent's direct supervisor determined, based on behavior he observed, that Respondent should be required to undergo a Fitness for Duty Evaluation pursuant to School Board Policy 4004. Respondent was ordered by the District to undergo the evaluation, and an appointment for the evaluation was scheduled for her. She failed to attend that appointment, and demonstrated no credible basis for doing so.

74. Respondent's failure to take the Fitness for Duty Evaluation constitutes a violation of School Board Policy 4004.

School Board Policy 4008

75. School Board Policy 4008, set forth in relevant part, below, requires all employees of Petitioner who have been issued contracts to comply with, among other things, Florida Department of Education rules and applicable School Board policies.

76. As found above, Respondent violated provisions of rule 6A-5.056 and did not comply with School Board Policy 4004. Accordingly, it is determined that she violated School Board Policy 4008.

CONCLUSIONS OF LAW

77. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

78. This de novo proceeding is designed to formulate agency action, not review agency action taken earlier and preliminarily. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981); *Capelleti Bros., Inc. v. Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978); *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Accordingly, the purpose of this proceeding is to determine anew, based on the competent substantial evidence in the record, whether just cause exists to terminate Respondent's employment as a teacher with the District.

79. Respondent is classified as "instructional personnel," as that term is defined in section 1012.01(2).

80. Section 1012.33(6)(a) states, in pertinent part: "any member of the instructional staff may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a)."

81. "Just cause" is "cause that is legally sufficient." Fla. Admin. Code R. 6A-5.056. Just cause includes, but is not limited to, misconduct in office, incompetency, gross insubordination, and willful neglect of duty. § 1012.33(1)(a), Fla. Stat.

82. In order to suspend and terminate Respondent's employment as a teacher, Petitioner must prove that she committed the conduct alleged in the Administrative Complaint; that the alleged conduct violates the statutes, rules, and policies cited in the Administrative Complaint; and that the violation of these statutes, rules, and policies constitutes just cause to suspend and terminate her employment. *See Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990); *Balino v. Dep't of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)(unless provided otherwise by statute, the burden of proof is on the party asserting the affirmative of the issue). It is axiomatic that conduct not specifically charged in the Administrative Complaint cannot

constitute the basis for disciplinary action. *See Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

83. The standard of proof applicable to these proceedings is a preponderance, or greater weight, of the evidence. *McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); *Dileo*, 569 So. 2d at 884.

Rule 6A-5.056

84. Rule 6A-5.056, Criterial for Suspension and Dismissal, states, in pertinent part:

> (2) "Misconduct in Office" means one or more of the following:
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> * * *
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> (c) A violation of the adopted school board rules;
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> (d) Behavior that disrupts the student's learning environment;
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> (e) Behavior that reduces the teacher's ability . . . to effectively perform duties.
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> * * *
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> (3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.
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> (a) "Inefficiency" means one or more of the following:
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> 1. Failure to perform duties prescribed by law;
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> * * *
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> 3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;
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> * * *

> 5. Excessive absences or tardiness.
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> (b) "Incapacity" means one or more of the following:
> 1. Lack of emotional stability;
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> * * *
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> (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.

85. Based on the foregoing Findings of Fact, it is concluded that Respondent engaged in misconduct in office pursuant to rule 6A-5.056(2); is incompetent, as provided in rule 6A-5.056(3); engaged in gross insubordination, as provided in rule 6A-5.056(4); and engaged in willful neglect of duty, as provided in rule 6A-5.056(5).

School Board Policy 4004

86. School Board Policy 4004, titled "Physical and/or Psychological Examination," states:

> At any time during the course of employment when it shall be deemed advisable by the superintendent/designee, an employee may be required to take a physical or psychological examination.
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> RULES
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> 1. The Board authorizes the Superintendent to establish procedures to carry out the intent of this policy.
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> 2. The affected employee shall select the name of a medical doctor, psychologist or psychiatrist from a list maintained by the Division of Personnel, Policies, Government and Community Relations.

> 3. Where the employee is found to be unable to function satisfactorily, the Division of Personnel, Policies, Government and Community Relations shall take appropriate action.

87. Based on the Findings of Fact, above, it is concluded that Respondent violated School Board Policy 4004.

88. Accordingly, it is concluded that just cause exists, pursuant to section 1012.33(1)(a), to terminate Respondent's employment for having violated School Board Policy 4004.

School Board Policy 4008

89. School Board Policy 4008, titled Responsibilities and Duties (Principals and Personnel), states, in pertinent part:

> All employees of the Board who have been issued contracts as provided by Florida Statutes, or annual work agreements as provided by the Board[,] shall comply with the provisions of the Florida School Code, State Board regulations[,] and regulations and policies of the Board.
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> * * *
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> B. Duties of Instructional Personnel
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> The members of instructional staff shall perform the following functions:
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> * * *
>
> 8. Conform to all rules and regulations that may be prescribed by the State Board and by the School Board.

90. Based on the Findings of Fact, above, it is concluded that Respondent violated School Board Policy 4008.

91. Accordingly, it is concluded that just cause exists, pursuant to section 1012.33(1)(a), to terminate Respondent's employment for having violated School Board Policy 4008.

School Board Policy 4.9

92. School Board Policy 4.9, titled Corrective Action,[11] states, in pertinent part:

> Employees are expected to comply with workplace policies, procedures and regulations; local, state, and federal laws; and State Board Rules, both in and out of the work place.
>
> The District's corrective action policy is designed to improve and/or change employees' job performance, conduct, and attendance. Supervisors are encouraged to continually provide coaching, counseling, feedback and/or additional support to help ensure each employees' success. It is the intent of the School Board to treat all employees fairly and equitably in the administration of corrective action, while also ensuring employees are held accountable and responsible for the expectations of their position.
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> This policy applies to all District employees except temporary and substitute employees.
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> * * *
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> DEFINITIONS
>
> For purposes of this policy, the terms: . . . "Just Cause" is defined as a standard of reasonableness

[11] Petitioner also charged Respondent with "violating" School Board Policy 4.9. The "Intent & Purpose" section of the policy that states: "[e]mployees are expected to comply with workplace policies, procedures and regulations; local, state, and federal laws; and State Board Rule, both in and out of the workplace." The Intent & Purpose section of School Board Policy 4.9 further states: "[t]he District's corrective action policy is designed to improve and/or change employees' job performance, conduct, and attendance." This context makes clear that School Board Policy 4.9 prescribes the type of discipline appropriate to be imposed for the specified offenses, rather than establishing a separate enforceable standard of conduct that is in addition to the standards of conduct established in other school board policies. Consistent with the concept of improving or changing employee job performance, conduct, or attendance, School Board Policy 4.9 identifies categories of offenses and the appropriate type or range of discipline that may be imposed if the employee is shown to have engaged in conduct constituting that offense. *See Broward Cty. Sch. Bd. v. Dudley*, DOAH Case No. 18-6215 (Fla. DOAH July 17, 2019), at ¶ 73, *modified in part*, BCSB Case No. 10-22-19-1 (BCSB Dec. 20, 2019)(modified only as to penalty imposed).

used to evaluate whether a preponderance of evidence exists that a person has committed the alleged act or acts, and that the alleged act or acts warrant corrective action.

I. CORRECTIVE ACTION

(a) In dealing with employee misconduct, corrective action shall be issued except in situations where immediate steps must be taken to ensure student/staff safety and loss prevention.

(b) The types of corrective action may include, but are not limited to the following employment actions: verbal reprimands, written reprimands, suspension without pay, demotion, or termination of employment. There are other types of actions to encourage and support the improvement of employee performance, conduct or attendance that are not considered disciplinary in nature. These actions may include, but are not limited to: coaching, counseling, meeting summaries, and additional training.

* * *

(d) There are other acts of misconduct (See Section II, Category B) considered to be so egregious, problematic or harmful that the employee may be immediately removed from the workplace until such time a workplace investigation is completed. The severity of the misconduct in each case, together with relevant circumstances (III (c)), will determine what step in the range of progressive corrective action is followed. In most cases, the District follows a progressive corrective action process consistent with the "Just Cause" standard designed to give employees the opportunity to correct the undesirable performance, conduct or attendance. A more severe corrective measure will be used when there is evidence that students, employees, or the community we serve was negatively impacted. It is the intent that employees who engage in similar misconduct will be treated as

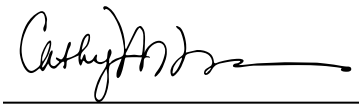
similarly situated employees and compliant with the principle of Just Cause.	
(CATEGORY B) OFFENSE	OUTCOME
* * *	
m) Any violation of The Code of Ethics of the Education Profession in the State of Florida - State Board of Education Administrative Rule	Reprimand/Dismissal

93. Given that Respondent previously has been suspended from her employment without pay for 15 days, and based on Petitioner's progressive discipline policy established in Policy 4.9, it is concluded that the appropriate penalty for having committed the violations of rule 6A-5.056 and School Board Policies 4004 and 4008 charged in the Administrative Complaint is to terminate Respondent's employment as a teacher with the District.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Broward County School Board, enter a Final Order in this proceeding terminating Respondent's employment as a teacher.

DONE AND ENTERED this 6th day of July, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of July, 2021.

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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.