

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. LUCIE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 19-2907TTS

TANGELA SMITH,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on March 10 and 11, 2020, at video teleconferencing sites in Fort Pierce and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara L. Sadaka, Esquire
St. Lucie County School Board
Legal Department
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Port St. Lucie, Florida 34986

For Respondent: Mark S. Wilensky, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether there is just cause to terminate Tangela Smith's employment with the St. Lucie County School Board based upon the allegations made in its Petition for Termination.

PRELIMINARY STATEMENT

By letter dated January 23, 2019, Tangela Smith ("Respondent" or "Smith") was notified that the St. Lucie County School Board ("Petitioner" or "School Board" or "District") took action to terminate Respondent's employment.

On February 8, 2019, Respondent timely elected to dispute the reasons for the termination and requested a hearing.

On February 12, 2019, at the regularly scheduled School Board meeting, the School Board suspended Respondent without pay, and the matter was referred to the Division of Administrative Hearings ("DOAH"). The matter was assigned to the undersigned administrative law judge.

A Petition for Termination was filed on May 30, 2019. The School Board charged Smith with violations of School Board Policies 6.301(2), 6.301(3)(b)1., 6.301(3)(b)10., 6.301(3)(b)12., 6.301(3)(b)16., 6.301(3)(b)19., 6.301(3)(b)29., and 6.301(3)(b)34., and Florida Administrative Code Rules 6A-10.081(2)(a)1. and 6A-5.056.

A final hearing was originally scheduled for August 28 and 30, 2019. After several continuances for good cause, the case proceeded as rescheduled on March 10 and 11, 2020.

At hearing, Petitioner presented the testimony of six witnesses: Robert Craig Logue, principal; Mackenzie Buck, third-grade teacher; Linda Auciello, first-grade teacher; Mikki Watson, third-grade teacher; Rhiannon Myers, third-grade teacher; and Aaron Clements, director of employee relations. Petitioner's Exhibits numbered 1 through 10, 12 through 14,

and 18 were admitted into evidence. Respondent testified on her own behalf but did not offer any exhibits for admission into evidence.

At the close of the hearing, the parties stipulated that the proposed recommended orders would be due 30 days after the filing of the transcript. The two-volume Transcript of the final hearing was filed with DOAH on April 29, 2020.

The undersigned granted an Unopposed Motion for Extension of Time to File Proposed Recommended Orders, and the deadline was extended to July 1, 2020. Both parties filed timely proposed recommended orders, which have been considered in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to the Florida Statutes (2019).

FINDINGS OF FACT

1. Petitioner is a duly-constituted school board charged with the duty to operate, control, and supervise all free public schools within St. Lucie County, Florida, pursuant to Article IX, section 4, of the Florida Constitution.

2. In 2008, Smith started working at Mariposa Elementary School (“Mariposa”). She was employed as a self-contained¹ exceptional student education (“ESE”) teacher for grades kindergarten to second grade (“K-2”).

3. Smith’s employment was pursuant to a professional services contract, and the Collective Bargaining Agreement between the School Board and the Classroom Teachers’ Association.

4. Robert Craig Logue (“Principal Logue” or “Logue”), the principal at Mariposa, served as Smith’s supervisor.

¹ A self-contained classroom has a teacher with students that are assigned to that classroom with that teacher all day long.

5. Logue evaluated Smith for the 2008-2009 school year and placed her on a Performance Review Plan in 2009 to assist Smith with some performance areas she needed improvement in to better serve the students.

6. In 2010, Smith successfully completed the Performance Review Plan.

7. For the next eight years, Smith continued her employment at Mariposa as a self-contained ESE classroom teacher.

8. During the 2016-2017 school year, Principal Logue moved Smith out of a self-contained classroom and reassigned Smith to a facilitated support teacher position.²

9. In 2016, when Smith had some difficulty maintaining the schedule to see ESE students for push-in services, Principal Logue observed and made adjustments in the classroom to resolve the scheduling problems.

10. During the 2017-2018 school year, Smith was reassigned back to a self-contained K-2 classroom.

11. On May 8, 2018, Principal Logue evaluated Smith for the 2017-2018 school year. Logue informed Smith to maintain a strict schedule because she did not always follow the times of her lesson plans and taught certain subjects in non-scheduled time blocks. Logue also expressed that he had concerns and wanted Smith to improve her classroom management.

12. The evaluation stated:

While you are being recommended for reappointment for 2018-2019, there are a number of areas that I would like you to work on for the next year. Specifically, my expectation is you will maintain a strict schedule with the students you serve, while meeting their varied needs. Additionally, I would like to see you improve your classroom management to ensure the safety and academic success of your students. I am optimistic that with effort you can improve in these areas.

² A facilitated support teacher goes into or pushes into the general education classrooms and works with the ESE students that are in that classroom in small groups typically while at the same time the classroom teacher is there working with the remainder of the general education students.

13. For the 2018-2019 school year, Principal Logue changed Smith’s assignment back to an ESE facilitated support resource teacher at Mariposa.

14. During the school year, Smith was responsible for push-in services for ESE students grades kindergarten through third. She walked from classroom to classroom, sometimes across the school campus, to provide ESE services in assigned teachers’ classrooms for 30-minute time blocks during the day. Smith’s facilitated support push-in weekly schedule was the following:

Tangela Smith Facilitate Support Schedule

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
7:55 – 8:25	CAFETERIA DUTY	CAFETERIA DUTY	CAFETERIA DUTY	CAFETERIA DUTY	CAFETERIA DUTY
8:30 – 9:00	MTSS- 1 ST GRADE	MTSS- 1 ST GRADE	MTSS- 1 ST GRADE	MTSS- 1 ST GRADE	MTSS- 1 ST GRADE
9:00 – 9:30	K READING- NEMETH	K READING- CARABALLO	K READING- NEMETH	K READING- CARABALLO	K READING- NEMETH
9:30 – 10:00	1 ST READING- AUCIELLO	1 ST READING- AUCIELLO	1 ST READING- AUCIELLO	1 ST READING- AUCIELLO	1 ST READING- AUCIELLO
10:00 - 10:30	3 RD READING- BUCK	3 RD READING- BUCK	3 RD READING- BUCK	3 RD READING- BUCK	3 RD READING- BUCK
10:30 – 11:00	3 RD MATH- MYERS	3 RD MATH- BUCK	3 RD MATH- MYERS	3 RD MATH- BUCK	3 RD MATH- MYERS
11:00 – 11:30	3 RD MATH- WATSON		3 RD MATH- WATSON		3 RD MATH- WATSON
11:30 – 12:00	2 ND MATH- ALVES	2 ND MATH- BROWN	2 ND MATH- ALVES	2 ND MATH- BROWN	2 ND MATH- ALVES
12:00 – 12:30	K MATH- NEMETH	K MATH- CARABALLO	K MATH- NEMETH	K MATH- CARABALLO	K MATH- NEMETH
12:30 – 1:00	1 ST MATH- AUCIELLO	1 ST MATH- AUCIELLO	1 ST MATH- AUCIELLO	1 ST MATH- AUCIELLO	1 ST MATH- AUCIELLO
1:00 – 1:30	LUNCH	LUNCH	LUNCH	LUNCH	LUNCH
1:30 – 2:00	2 ND READING- ALVES	2 ND READING- BROWN	2 ND READING- ALVES	2 ND READING- BROWN	2 ND READING- ALVES
2:00 – 2:55	RESOURCE	RESOURCE	RESOURCE	RESOURCE	RESOURCE
2:55 – 3:10	PARENT PICK UP DUTY	PARENT PICK UP DUTY	PARENT PICK UP DUTY	PARENT PICK UP DUTY	PARENT PICK UP DUTY

15. Smith’s role in each of her assigned classrooms was to pull ESE students to provide small group instruction and to assist the ESE students based on their specific individual education plan (“IEP”) goals and learning needs.

16. During the end of August and September 2018, Principal Logue received complaints and reports from teachers that Smith was not showing up to her assigned classrooms and providing push-in services to ESE students pursuant to their respective IEPs.

17. At some point, Linda Auciello (“Auciello”), a Mariposa first-grade teacher, began to have concerns that her students with disabilities were not

receiving the services required by their IEPs because Smith was not showing up to provide their support at the scheduled times.

18. On or about August 26, 2018, Auciello complained to Principal Logue that Smith was testing other students and not assisting her students after Smith reported to her classroom at 9:36 a.m., then left right after her arrival, because the office called looking for Smith. Before she left, Smith explained to Auciello that she was going to Rhiannon Myers' ("Myers") classroom for a test, which Auciello later double checked and confirmed Smith was performing third-grade testing.

19. On September 7, 2018, Logue received an email from Auciello that stated:

I have not seen my ESE support person for reading all week. She says she has been testing for 3rd grade reading. Today I needed her to test my student for our math assessment and she said yes, but she first had to go get Ms. Buck's 3rd grade students to test at the same time. I guess I do not understand why she is testing other grades at this time of year during my scheduled time.

20. Smith recognized that her schedule was extremely tight without allotted time in the schedule for her to even walk to her next classroom on the Mariposa campus.

21. On September 11, 2018, Smith addressed scheduling issues with Principal Logue. She informed him that she was having problems having any time to talk to the teachers about what was going on with her ESE students in their class.

22. Principal Logue responded to Smith's request for scheduling assistance by email dated September 12, 2018, that stated:

As I looked over your schedule, I can find at least two additional times that you could meet with them. You have planning each day from 7:40-7:55 and then again from 8:30-9:00 am. Your duty time in the am is from 7:55 to 8:25, so it would not

conflict with either of these times. You will have 45 minutes where you could either meet with these teachers (if they are available), or time that you could email them to see how your students are doing in their classes.

Included in his email response, Logue also included his evaluation comments from Smith's 2017-2018 Final Evaluation, dated May 8, 2018, with Logue's expectations that he wanted Smith to maintain a strict schedule.

23. On September 14, 2018, Auciello emailed Principal Logue again that Smith had not shown "up at all today." She also informed him by email that she was attaching a log of Smith's attendance for the week that she had kept, which showed Smith only provided 90 minutes of the five hours of ESE support she was scheduled to provide in her classroom.

24. Auciello tracked Smith's attendance on her cell phone. Auciello's weeklong log of Smith's attendance indicated that Smith was 15 minutes late on September 10, 2018, and did not show up for math that day; a substitute teacher reported to Auciello that Smith was a no show all day on September 11, 2018; Smith showed up at 9:45 a.m., 15 minutes late on September 12, 2018; and, on September 13, 2018, Smith was on time for reading and math.

25. On September 24, 2018, Auciello reported to Principal Logue by email that Smith did not show up for reading time but arrived in her classroom later, at 12:20 p.m., attempting to make up time. Smith inquired if it was all right if she came back at 1:00 p.m. instead of 12:30 p.m. "because they needed [me] for math testing." Auciello agreed to let Smith reschedule and provide support later even though the scheduled lesson would be over when she returned, but Smith never returned that day to provide support.

26. As a result of Smith not showing up and providing push-in services to the ESE students in Auciello's class, two children, P.V. and G.N., lost approximately 3.5 hours of services each.

27. Mackenzie Buck (“Buck”), a Mariposa third-grade teacher, also developed a concern about Smith failing to provide services to the seven ESE students in her classroom because, when Smith was either late or did not show up, ESE students did not get IEP services on those days.

28. On September 26, 2018, Buck emailed Principal Logue and Angela Patton (“Patton”), Mariposa vice principal, informing them of her concerns about Smith’s various absences and tardiness. In her email, she detailed that, on August 17 and 20, 2018, Smith showed up at 10:15 a.m. instead of 10:00 a.m. and Smith had three no shows on August 31, September 7, and 24, 2018. Buck also reported Smith failed to provide testing accommodations because she did not show up for several testing days.

29. Smith worked with the ESE students, C.H., A.T., L.M.L., J.M., J.T., and B.B., in Buck’s classroom. Buck was especially concerned about Smith not showing up because one of her ESE students had a difficult time communicating and needed Smith’s specialized instruction.

30. Most of the time Buck neither received prior notice that Smith was going to be a no show for push-in services nor was Smith able to make up the time missed from Buck’s class.

31. Myers, a Mariposa third-grade teacher, who taught in a self-contained general education classroom with five ESE students, at some point, also noticed that Smith was not showing up consistently to provide facilitated support services to her ESE students on the three days Smith was scheduled to be in her classroom.

32. Myers started keeping track of when Smith missed a scheduled push-in block during a time when Smith was scheduled to be in the classroom to provide services for the students after William Spies (“Spies”), ESE department chair, requested she do so. Myers believed Smith failed to show up and provide services on September 7, 14, 17, 19, 21, and 24, 2018. Smith also failed to show up to provide support during student testing for Myers.

33. Between August 17 and September 24, 2018, five of Myers's students, A.C., A.R., D.H., S.M., and G.L., each lost three hours of specialized instruction when Smith did not show up to provide services for a total of 15 hours.

34. During the 2018-2019 school year, Smith's duties also included providing support during unit testing for students. Often such a role required that Smith give the test and oversee the test for the ESE students.

35. Smith prioritized testing on her schedule after the ESE department chair instructed Smith that third grade took precedence when it came to testing.

36. The other two Mariposa facilitated support teachers did not have testing as a job duty like Smith.³

37. Smith provided tests in her classroom in the first-grade hallway, which was a different part of the campus from the third-grade classrooms.

38. Smith tested first, second, and third grades.

39. To test students, Smith would pick the students up from their various classrooms and walk them to a testing classroom on a different part of the Mariposa campus. After getting the students to the testing classroom, Smith prepared the students for the test by putting up barriers between each student.

40. When Smith tested the ESE students, testing time varied according to the individual student's IEP. Oftentimes, the tests took longer than the general education tests because ESE students' IEPs usually were allotted "100 percent of the time for testing," which was as long as they needed time to complete the test. Most testing sessions were longer than the 30-minute blocks of Smith's schedule. Smith had to remain with the students until the last one completed testing.

³ Smith's detailed testimony about the difference in job duties from the other two facilitated support teachers is held to be credible.

41. Mikki Watson (“Watson”), a Mariposa third-grade teacher, had 18 students in her self-contained classroom. Three students, A.M., M.H., and J.G.,⁴ were receiving ESE services from Smith who provided push-in support on Monday, Wednesday, and Friday from 11:00 a.m. to 11:30 a.m.

42. Watson started tracking the student services Smith provided at the beginning of the year on a school calendar by marking the days the students received services by Smith.

43. Watson noted on her calendar that Smith did not report to her classroom to provide services on September 10, 12, 14, 17, and 21, 2018, and each of her ESE students missed a total of 2.5 hours for a total of 7.5 hours.⁵

44. Smith was able to assist Watson with her testing. Smith took ESE students to her classroom to test, and, oftentimes, those students would get extra time with testing based on their IEP.

45. Principal Logue believed that Smith should have worked on IEPs during her planning periods before, during, or after school.

46. However, ESE Department Chair Spies directed Smith’s work and instructed her to complete IEP assignments during time blocks, including her scheduled push-in classroom time. Spies assigned Smith to work with IEP plans and FTE forms to secure payments for the School Board. Smith followed the instructions she was given from the ESE department chair.

47. Smith utilized the Portal to Exceptional Student Education Resources, (“PEER”), a database used to write students’ IEPs. PEER documents show each time a teacher is on the computer in the portal working on an IEP. Each

⁴ Watson testified that students N.G.-R. and D.H. were not provided services by Smith in September 2018.

⁵ The undersigned reduced the amount of Watson’s missed hours asserted by the School Board. Since N.G.-R. and D.H. were not Smith’s students during September, they should not be included in the calculation. Therefore, the hours of services missed has to be reduced. Instead of multiplying 2.5 hours by five students, the actual number of students to multiply by is three. Therefore, the total number of service hours Smith failed to provide Watson’s three students is 7.5 not 12.5.

individual that utilizes PEER has their own login and password to sign in on the system.

48. At various times on September 24, 2018, when Smith was scheduled to be in a classroom performing push-in services, Smith was logged in as working on PEER.

49. The ESE department chair also assigned Smith to participate in IEP meetings during the two blocks in her schedule from 11:00 a.m. to 11:30 a.m. on Tuesdays and Thursdays when Smith did not have push-in classroom duty.

50. Principal Logue received teacher complaints about Smith neither testing students nor servicing her ESE students during the scheduled classroom times she was assigned to push-in and provide support. However, Logue never addressed the scheduling issues, missing specialized ESE instruction, conflicting job duties, or testing with Smith.

51. Logue created a chart attempting to document Smith's combination of alleged hours of instruction she missed including student's name, grade level, teacher, date, and time missed. Logue added up a cumulative amount to get a total of minutes lost. His calculation included N.G.-R. and D.H. and totaled 47.5 hours from August 17 through September 24, 2018.

52. On or about September 25, 2018, Logue filled out an Employee Reporting Form ("reporting form") that he forwarded to Aaron Clements ("Clements"), director of the Office of Employee Relations for St. Lucie Public Schools, reporting that Smith was failing to follow her schedule and show up to service her ESE students on more than one occasion. Clements was assigned to investigate the allegations.

53. On September 26, 2018, Principal Logue was in the school parking lot and saw Smith in the parking lot. Smith spent seven minutes retrieving her work computer she had accidentally left in her car. Logue returned inside the school building after Smith reentered. Logue went to Smith's assigned

classroom, but she was not there assisting ESE students. Logue neither emailed her about the parking lot incident nor discussed it with her.

54. That same day, the School Board placed Smith on Temporary Duty Assignment (“assignment”) pending an investigation of the allegations that Smith failed to provide push-in services. The assignment was Smith’s first disciplinary action. She had never been warned, reprimanded, or directed in writing or verbally that she was not present in the classrooms at the times she was scheduled to be there.

55. After receiving the reporting form and other documentation provided by Principal Logue, Clements met with Smith twice, on November 8 and December 7, 2018, to discuss the allegations of her failing to show up to provide push-in services to ESE students.

56. At each meeting, Smith was provided an opportunity to respond to the allegations raised. After completing his investigation, Clements concluded that Smith intentionally failed to provide ESE services to the students and violated numerous School Board’s policies.

57. The matter ultimately was brought to the attention of the school superintendent, who by letter advised Smith that a determination had been made that there was just cause to terminate Smith based on the numerous School Board policies she violated and that he, therefore, would recommend such to the School Board. The School Board followed the school superintendent’s recommendation, and Smith timely requested an appeal to the disciplinary action.

ULTIMATE FINDINGS OF FACT

58. During the 2018-2019 school year, Smith was a facilitated support teacher that had various days where she either was late or missed her scheduled classroom time. When Smith missed classroom time, those ESE students assigned to her did not receive their specialized instruction.

59. Smith missed classroom time because she was unable to fulfill all her facilitated support job responsibilities because her job duties had conflicting

times. In addition to her scheduled classroom time, she was also assigned other duties such as ESE testing or IEP preparation, which were sometimes to be performed at the same time she was to provide push-in services.

60. Smith's tardiness was directly attributable to her daily schedule of multiple 30-minute classroom segments of time without even a minute break between each 30-minute allotted block before Smith was to be in the next classroom providing push-in services to ESE students. No time was scheduled for Smith to walk between classes or set up for the next class.

61. At hearing, Smith credibly testified, "I don't have sufficient time to fulfill [the] schedule."

62. All Smith's duties she performed benefitted ESE students.

63. ESE Department Chair Spies told Smith what to do related to ESE services, and she was expected to follow his instructions.

64. No evidence was presented at hearing that Smith misused her work time. Instead, the record only showed Smith had conflicting duties to perform at the same time. She was expected to attend her daily classroom schedule and provide ESE testing or work on IEP-related assignments at the same time.

65. At hearing, Smith testified credibly and persuasively, "I couldn't be in two places at one time. So, I just tried to make up the time with the students I missed."

66. At times, when Smith was scheduled to be with students in a teacher's classroom, the ESE department chair instructed Smith to complete FTE forms in his office to secure payments for the District.

67. Other times, Smith would test ESE students, and, because most ESE students had no time limits for testing, Smith would still be testing when she was supposed to be providing push-in services.

68. When Smith was unable to make scheduled classroom times, because she was performing other job duties, she attempted to try to make up for some of her push-in services missed. However, most of the time Smith was

not able to make up the time because either the teachers or her ESE students were unavailable at the new time.

69. At hearing, Smith testified compellingly that, “I did the best I could when testing was over to try to make up time.”

70. Smith’s schedule was so tight that she did not even have time to talk to teachers about her students.

71. On September 11, 2018, Smith acknowledged her scheduling challenges and tried to resolve them by notifying Principal Logue that she was having problems performing her push-in duties. Smith specifically expressed her inability to talk to the teachers to get a handle on what her students were doing.

72. By email the next day, Logue pointed to times before and after school or Smith’s planning periods, where the ESE chair scheduled Smith to attend IEP meetings, as time periods Smith could meet with other teachers. Logue also dropped in the same language from her 2017-2018 evaluation regarding his expectation that she follow a strict schedule.

73. After Smith notified Principal Logue of her time challenges, besides the email, he did not suggest or provide Smith any extra time or adjust or change her unmanageable work schedule in order to meet with the teachers and complete her scheduled duties.

74. Smith could not have met Principal Logue’s expectations because the strict schedule had no breaks to get from one classroom to the next classroom, and Smith also had numerous conflicting duties to perform at the same time.

75. At hearing, Auciello testified that it was not unreasonable for Smith to arrive late to class because of the way the schedule was structured and the fact that Smith had to travel from classroom to classroom.

76. After addressing her challenges with Principal Logue, Smith continued to try to juggle her schedule and complete all her job duties that oftentimes had time conflicts.

77. Smith prioritized third-grade testing following the instructions of the ESE department chair who told her to make that her work priority.

78. Principal Logue was well aware that Mariposa ESE students were missing specialized instruction because teachers were reporting and complaining to Logue that Smith was either late or failed to show up to provide ESE facilitated support. He also received complaints that Smith was testing other students at various times when Smith should have been in a particular teacher's classroom.

79. Auciello specifically complained to Principal Logue on two occasions that instead of Smith being in her room providing her students push-in specialized instruction, Smith was testing elsewhere.

80. After receiving the teacher complaints about Smith, Logue never notified nor addressed the no show allegations with Smith, took any action to remedy the missed services or did anything to rectify Smith's time conflicts to prevent any further recurrences. Logue did not even issue any orders or directives regarding her failure to show up for facilitated support.

81. Logue's first action regarding the allegations against Smith was to report her to human resources on September 25, 2018.

82. Logue's chart outlining Smith's alleged hours of missed instruction totals 42.5 hours after removing N.G.-R. and D.H., the two students included in the original calculations not assigned to Smith.

83. Smith has never been warned, reprimanded verbally or in writing, or suspended during her tenure with the School Board.

84. On September 26, 2018, Smith received her first discipline when she was placed on leave while Clements investigated the allegations of her failure to follow her schedule.

CONCLUSIONS OF LAW

85. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

86. District superintendents are authorized to make recommendations for dismissal of school board employees, and school boards may dismiss school board instructional staff for “just cause.” §§ 1001.42(5), 1012.22(1)(f), 1012.27(5), and 1012.33(6)(a), Fla. Stat.

87. The School Board is seeking to terminate Respondent from employment and has the burden of proving that it has just cause to terminate Respondent’s employment as a teacher.

88. Petitioner’s burden to prove the charges against Respondent must be met by a preponderance of the evidence. *Allen v. Sch. Bd. of Dade Cty.*, 571 So. 2d 568 (Fla. 3d DCA 1990); *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990).

89. The preponderance of the evidence standard requires that the proof against Respondent be by the greater weight of the evidence, or evidence that “more likely than not” tends to prove the allegations. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).

90. Whether Respondent committed the charged offenses 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. 1st DCA 1985); *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995).

91. Section 1012.33(6)(a), Florida Statutes, provides that the teacher “may be suspended or dismissed at any time during the term of the contract,” but only “for just cause” as provided in paragraph (1)(a) of the statute.

92. Section 1012.33 provides:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to

s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory under s.1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s.1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

93. Florida Administrative Code Rule 6A-5.056 also defines “just cause” and specifies the criteria for dismissal, which provides, in pertinent part:

6A-5.056. Criteria for Suspension and Dismissal.

[“Just cause” means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued are set forth in Sections 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined:

* * *

(2) “Misconduct in Office” means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

94. In the Petition for Termination filed in this proceeding, the School Board charges Smith with violating a variety of School Board policies, as well as administrative rules, by alleging that Smith's failure to show up to service her ESE students establishes "just cause" for her termination.

95. Petitioner relies on School Board Policies 6.301(2), 6.301(3)(b)1., 6.301(3)(b)10., 6.301(3)(b)12., 6.301(3)(b)16., 6.301(3)(b)19., 6.301(3)(b)29., and 6.301(3)(b)34. as the focal point of this case for Respondent's charges.

96. School Board Policy 6.301 provides, in pertinent part:

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

(3) Disciplinary Guidelines for Employees

* * *

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

1. Insubordination

* * *

10. Failure to follow a direct order in the normal performance of an employee's job

* * *

12. Negligence

* * *

16. Neglect of duty

* * *

19. Violation of any rule, policy, regulation, or established procedure

* * *

29. Any violation of the Principles of Professional Conduct for the Education Profession, the Standards of Competent and Professional Performance, or the Code of Ethics for Public Officers and Employees

* * *

34. Failure to correct performance deficiencies[.]

97. Petitioner charged Respondent with violating the Principles of Professional Conduct for the Education Profession in Florida, Florida Administrative Code Rule 6A-10.081(2)(a)1., which 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.

PRINCIPLES OF PROFESSIONAL CONDUCT FOR THE EDUCATION PROFESSION IN FLORIDA

98. In Petitioner's Petition for Termination and Proposed Recommended Order, Petitioner asserts that Smith harmed students' learning by failing to provide over 40 hours of specialized instruction push-in services to her ESE students in the classroom. Teachers have a duty to protect students from harmful conditions. However, the evidence in this matter does not support the School Board's position. Petitioner's argument is rejected because Petitioner did not assess the teacher's standard of conduct to determine harmfulness or the reasonable effort made in the instant case. First, evidence regarding a teacher's actions in the face of the alleged harmful conduct must be evaluated. Next, the standard of conduct determination is assessed based on whether the same or similar type of action of a "reasonable teacher" would have taken place under similar circumstances. *See Sch. Bd. of Broward Cty. v. Lynn Deering*, Case No. 05-2842 (Fla. DOAH July 31, 2006).

99. Evaluating Smith's alleged harmful actions by applying *Deering* shows that Smith made reasonable efforts to perform all her conflicting job duties. The evidence in the instant case demonstrates that Smith's no show at scheduled times was because she had required duties that conflicted. All of Smith's duties were for the benefit of ESE students, whether she was providing push-in services, ESE testing, or IEP preparation. To that end, the record shows that Smith was incapable of performing all the duties assigned because the time often conflicted. Likewise, any teacher in Smith's position would have had the identical challenges to perform all the push-in services with the testing duties that the other facilitated support teachers did not

have, and other mandatory conflicting job duties assigned by the ESE department chair. Additionally, Smith acted sensibly by prioritizing the third-grade testing as instructed by the ESE department chair who acted in a supervisory capacity. Smith also initiated attempts to make up push-in hours missed. Furthermore, Principal Logue was made aware of Smith's conflicting job duties, but made no adjustments to rectify any conflicts, took no action to catch up the missing services, or did anything to prevent recurrences. Therefore, Smith's determination to try to juggle and complete the conflicting duties, while sometimes missing push-in services, and her practical efforts to try to make up missed push-in sessions were the actions of a reasonable teacher under similar circumstances, and Smith's conduct is not deemed harmful in violation of rule 6A-10.081(2)(a)1. Since Petitioner failed to meet its burden to show that Smith violated the Principles of Professional Conduct for the Education Profession in Florida, rule 6A-10.081(2)(a)1., no violations of School Board Policies 6.301(2) and 6.301(3)(b)29. were committed by Smith.

NEGLIGENCE & NEGLECT OF DUTY

100. Petitioner also charged Smith with negligence and neglect of her duty by not providing the alleged over 40 hours of push-in services to her ESE students in the classroom, and Petitioner maintains that Smith's 2018-2019 evaluation specifically directed Smith to maintain a strict schedule with students. School Board Policies 6.301(3)(b)12. and 6.301(3)(b)16. fail to define negligence or neglect of duty. However, Merriam Webster Dictionary defines "negligence" as "failing to exercise the care expected of a reasonably prudent person in like circumstances" and "neglect" as "to leave undone or unattended to especially through carelessness." <https://www.merriam-webster.com/dictionary/negligence> (last visited August 25, 2020). <https://www.merriam-webster.com/dictionary/neglect> (last visited August 26, 2020).

101. The evidence proves that Smith juggled her conflicting job duties, making every effort to complete all of them as any reasonable teacher in a

like position would have done under like circumstances, as discussed above in paragraph 99, with the inflexible jam-packed work schedule. The evidence also shows that her actions were prioritized and not careless, and, if Smith was not in the classroom, she was testing ESE students, working on IEP assignments, or providing services for ESE students, which were all her duties. Therefore, Petitioner has failed to sustain the charge of negligence and neglect of duty against Smith in violation of School Board Policies 6.301(3)(b)12. and 6.301(3)(b)16.

FAILING TO CORRECT PERFORMANCE DEFICIENCY

102. The School Board also charged Respondent with failing to correct her performance deficiency. However, in this case, the School Board did not offer any persuasive evidence to establish that Respondent was informed of any performance deficiencies other than the Performance Improvement Plan that Respondent successfully completed in 2010. Therefore, Petitioner fails to meet its burden that Respondent violated School Board Policy 6.301(3)(b)34. by failing to correct her performance deficiency.

INSUBORDINATION

103. Petitioner also charged Smith with violating School Board Policies 6.301(3)(b)1. and 6.301(3)(b)10. Although the School Board does not have a definition for insubordination in its policies, the term is defined in rule 6A-5.056, which prescribes “criteria for suspension and dismissal of instructional personnel,” and provides, in pertinent part, as follows:

(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.

104. In this matter, the evidence demonstrates that Principal Logue neither discussed Smith’s absences with Smith after the teachers brought them to his attention nor provided Smith any directives regarding such. Instead, the record shows Smith tried to perform all her conflicting job duties,

including prioritizing her duties as instructed by the ESE department chair. Principal Logue's evaluation from the 2017-2018 school year and email relaying to Smith his expectation that she follow a strict schedule does not support Petitioner's assertion that such was a directive. Instead, the evidence indicates that at no time did Smith refuse an order or direction related to her no shows because Logue never addressed the no show allegations with her. To that end, the record is void of any evidence that Smith intentionally refused to obey or follow a direct order in the normal performance of her job. Therefore, Petitioner failed to prove Smith violated School Board Policies 6.301(3)(b)1. and 6.301(3)(b)10.

105. In sum, Smith's actions do not fall within the parameters of misconduct in office pursuant to rule 6A-5.056 as alleged by Petitioner. Therefore, Smith is not guilty of violating rule 6A-5.056.

106. Additionally, since Smith's conduct did not violate any of the aforementioned rules, policies, regulations, or established procedures to which she was charged, Petitioner has failed to sustain the charge against Respondent for violation of School Board Policy 6.301(3)(b)19.

107. Accordingly, the School Board has failed to prove that Respondent's actions alleged in the Petition for Termination are violations of School Board Policies 6.301(2), 6.301(3)(b)1., 6.301(3)(b)10., 6.301(3)(b)12., 6.301(3)(b)16., 6.301(3)(b)19., 6.301(3)(b)29., and 6.301(3)(b)34. or rules 6A-10.081(2)(a)1. and 6A-5.056, and, therefore, just cause for termination has not been established.

RECOMMENDATION

Upon consideration of the Findings of Fact and Conclusions of Law reached, it is

RECOMMENDED that the St. Lucie County School Board enter a final order (1) rescinding its previous decision to suspend Smith without pay pending

dismissal and (2) awarding Smith the back salary, plus benefits, that accrued during the administrative proceedings.

DONE AND ENTERED this 31st day of August, 2020, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
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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.