

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case Nos. 19-3380TTS
19-3381TTS

DAGOBERTO MAGANA-VELASQUEZ,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in these cases pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),¹ by Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on August 18, 2020, by Zoom Conference.

APPEARANCES

For Petitioner: Denise Marie Heekin, Esquire
Ranjiv Sondhi, Esquire
Bryant Miller Olive, P.A.
Suite 2200
One Southeast Third Avenue
Miami, Florida 33131

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

¹ All references to chapter 120, Florida Statutes, are to the 2020 codification.

STATEMENT OF THE ISSUES

(1) Whether just cause exists, pursuant to section 1012.33, Florida Statutes,² for Petitioner to suspend Respondent from his employment as a teacher for ten days without pay in Case No. 19-3380; and (2) whether just cause exists, pursuant to section 1012.33, for Petitioner to terminate Respondent's employment as a teacher in Case No. 19-3381.

PRELIMINARY STATEMENT

By Administrative Complaint dated February 14, 2019 ("February Administrative Complaint"), Petitioner, Broward County School Board, notified Respondent, Dagoberto Magana-Velasquez, that it was seeking to suspend him from his employment as a teacher with Broward County Public Schools ("District") for ten days without pay, for alleged violations of statute, Department of Education ("DOE") rules, and School Board policies. Respondent timely requested an administrative hearing pursuant to sections 120.569 and 120.57(1), challenging his suspension.

By Administrative Complaint dated May 16, 2019 ("May Administrative Complaint"), Petitioner notified Respondent that it was seeking to terminate his employment as a teacher with the District for alleged violations of statute, DOE rules, and School Board policies. Respondent timely requested an administrative hearing pursuant to sections 120.569 and 120.57(1), challenging his termination.

By letters dated June 20, 2019, Petitioner referred both proceedings to DOAH for assignment of an ALJ to conduct a hearing pursuant to

² All references to chapter 1012 are to the 2017, 2018, and 2019 codifications, as applicable, based on when the conduct at issue is alleged to have occurred. Notably, no provisions of chapter 1012 pertinent to this proceeding were amended between 2017 and 2019; thus, during the timeframes pertinent to this proceeding, all pertinent provisions of chapter 1012 contained the same language.

sections 120.569 and 120.57(1). The matter initiated by the February Administrative Complaint was assigned Case No. 19-3380, and the matter initiated by the May Administrative Complaint was assigned Case No. 19-3381. Pursuant to motion, the matters were consolidated for purposes of conducting the final hearing and issuing a recommended order, and the 60-day hearing period set forth in section 1012.33(6)(a)2. was extended.

The final hearing initially was scheduled for December 10 through 12, 2019, in person, at a location in Broward County, Florida. Pursuant to motion, the final hearing subsequently was rescheduled to February 11 through 13, 2020; February 18 through 20, 2020; May 27 through 29, 2020; and August 18 through 20, 2020. Due to the Covid-19 pandemic, the final hearing was conducted by Zoom Conference on August 18, 2020.

Petitioner presented the testimony of Breanna Henry and John Murray at the final hearing. The deposition testimony of Nicole Voliton, Maria Formoso, Alicia Carl, Tamekia Thompson, Richard Cohen, Tevin Fuller, Whitney Malcolm, Dorcas Alou, Itzell Angeles, Julian Cardentey, Justus Bettis, Dejah Jeancharles, Amaya Mason, Breanna Westbrook, Malik Cooper, Nyeshia Dixon, Breanna Dwyer, Darius Gaskin, and J'Niya Harrell was admitted into evidence in lieu of testimony at the final hearing.^{3,4} Petitioner's Exhibits 1

³ Due to the Covid-19 pandemic and related logistics in securing witnesses' presence to testify in person at the final hearing, it is determined, pursuant to Florida Rule of Civil Procedure 1.330(3), that exceptional circumstances existed justifying the use of these witnesses' deposition testimony in lieu of their in-person testimony at the final hearing. *See Dinter v. Brewer*, 420 So. 2d 932, 934 n.1 (Fla. 3d DCA 1982)(rule 1.330 allows the use of depositions taken and offered into evidence under certain circumstances, described in the rule, "as though the witness were then present and testifying," and, thus, eliminates any hearsay objection based on the deponent's absence from the court).

⁴ The evidence in these cases, including references to "evidence presented at the final hearing," includes the deposition testimony admitted into evidence in these proceedings. All student witnesses were over 18 years of age at the time this Recommended Order was prepared; accordingly, their names, rather than their initials, have been used to identify them.

through 9 and 12 through 71 were admitted into evidence.⁵ Petitioner withdrew Petitioner's Exhibits 54 and 59 after they were admitted into evidence.

Respondent did not present any testimony at the final hearing. The deposition testimony of Respondent and Murray was admitted into evidence in lieu of testimony at the final hearing,⁶ and Respondent's Exhibit 1 was admitted into evidence without objection.

Pursuant to the parties' agreement, the record was held open after the final hearing was concluded in order to enable preparation and filing of the deposition transcripts admitted in lieu of testimony at the final hearing, and to enable Petitioner to seek enforcement of deposition subpoenas for, and depose, three witnesses.

The one-volume Transcript of the final hearing was filed at DOAH on September 17, 2020, and the deposition transcripts were filed at DOAH on September 3, 10, 16, 17, October 30, and November 30, 2020.⁷ The record was closed on November 30, 2020.

Pursuant to the parties' agreement, the deadline for filing proposed recommended orders initially was set for 30 days after the last deposition transcript was filed—i.e., December 30, 2020. The deadline for filing proposed recommended orders subsequently was extended four times, with a final filing deadline of February 12, 2021.

⁵ Petitioner's Exhibits 8, 9, 12, 18 through 31, 34, 35, 49, 51, 53, 58, and 65 through 68 were admitted into evidence over objection.

⁶ See note 3 above.

⁷ The Transcript and depositions, not including the indices, court reporter certificates, or deposition exhibits, totaled approximately 1178 pages of testimony.

The parties timely filed their Proposed Recommended Orders on February 12, 2021. The undersigned has given due consideration to both Proposed Recommended Orders in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

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

2. Respondent is employed by the District as a mathematics teacher at Miramar High School ("MHS") pursuant to a professional services contract issued in accordance with section 1012.33(3)(a). He holds a professional educator's certificate in mathematics for 6th through 12th grades.

3. Respondent was employed by the District in 2007, and has been a teacher at MHS since the 2007-2008 school year, with the exception of most of the 2015-2016 school year, during which he was administratively reassigned with pay pending the outcome of a personnel investigation. He returned to teaching at MHS for the 2016-2017 school year, and was a teacher at MHS during the 2018-2019 school year, when the conduct giving rise to these proceedings is alleged to have occurred.

II. The Administrative Complaints

A. February Administrative Complaint

4. The February Administrative Complaint, which gives rise to Case No. 19-3380, alleges that during the 2017-2018 school year and the first semester of the 2018-2019 school year, Respondent engaged in conduct that violated specified statutes, DOE rules, and School Board policies.

5. Pursuant to the February Administrative Complaint, Petitioner seeks to suspend Respondent from his employment as a teacher for ten days without pay.

6. Specifically, the February Administrative Complaint alleges that after previously having been disciplined for making racially insensitive and inappropriate comments to students, Respondent continued to use embarrassing or disparaging language toward students. As a result, a cease and desist letter was issued to Respondent on or about March 23, 2017, directing him to cease engaging in such conduct. The Administrative Complaint alleges that Respondent continued to use racially insensitive, embarrassing, and disparaging language toward students—specifically, that he referred to an African-American male student as "boy."

7. The February Administrative Complaint also alleges that Respondent threatened to remove students who talked from his class; graded students based on their behavior, rather than their work product; and failed to grade student work in a timely manner. As a result of this alleged conduct, Respondent received a meeting summary memorandum on or about December 7, 2017.

8. The February Administrative Complaint alleges that Respondent still failed to contact the parents of students who were failing and engaged in unfair grading practices, resulting in issuance of another meeting summary memorandum to him on or about April 27, 2018.

9. The February Administrative Complaint alleges that in the first semester of the 2018-2019 school year, during a Code Red Drill, Respondent is alleged to have engaged in racially insensitive conduct by disparately disciplining African-American students for engaging in the same type of conduct in which white and Hispanic students engaged, without any disciplinary consequences. The Administrative Complaint also alleges that during the Code Red Drill, Respondent was so disengaged from his students that he did not know one of his student's name and, consequently, wrote a disciplinary referral for the wrong student.

10. The February Administrative Complaint alleges that Respondent engaged in conduct demeaning to students. Specifically, it is alleged that

Respondent did not respond to student questions regarding how to do problems; embarrassed a student by saying he did not understand fifth grade math; and wrote "1 + 1" on the board to mock students in his class. He also allegedly reduced a student's class participation grade for talking.

11. The February Administrative Complaint alleges that Respondent spoke to a "black girl who is Jamaican in Creole because he assumes she is Haitian."

12. The February Administrative Complaint alleges that Respondent embarrassed and degraded a student by saying he did not understand the classwork "because it's not fifth grade math."

13. The February Administrative Complaint also alleges that Respondent demeaned students by saying "'slick stuff,' such as 'math is simple and we are used to [second] or [fifth] grade math.'"

14. The February Administrative Complaint alleges that Respondent lowered the grade of a student for talking, and told her that she and several other students were "on his 'watch list'" of students who would have their grades lowered for talking.

15. The February Administrative Complaint further alleges that when that student asked about Respondent's grading practices, he responded "you ask too much questions," causing the whole class to laugh.

16. The February Administrative Complaint alleges that on or about October 10, 2018, during the administration of the Preliminary Scholastic Aptitude Test ("PSAT"), Respondent did not follow proper testing protocol. Specifically, it is alleged that Respondent did not pick up the testing materials on time, started the test late, and did not read all of the directions to the students. It is also alleged that he did not collect book bags and cell phones and place them at the front of the room, and that a cell phone rang during the test. Additionally, he is alleged to have allowed students to talk loudly during the test.

17. The February Administrative Complaint alleges that Respondent took points off of a student's grade for talking.

18. The February Administrative Complaint alleges that Respondent refused to allow students who had missed class due to a band trip to make up their class work.

19. The February Administrative Complaint alleges that Respondent made demeaning comments about students' writing; used the word "horrible" to describe their work, which made them feel "dumb or stupid"; was "disrespectful and sarcastic"; and deducted students' class participation points for talking or asking for a pencil or paper.

20. The February Administrative Complaint alleges that Respondent talked to students in a demeaning manner about being "slow" and told students he thought the Chinese were smarter than Americans.

B. May Administrative Complaint

21. The May Administrative Complaint, which gives rise to Case No. 19-3381, alleges that in the second semester of the 2018-2019 school year, Respondent continued to engage in conduct that violated specified statutes, DOE rules, and School Board policies.

22. Specifically, the May Administrative Complaint alleges that in February 2019, Respondent threatened to put tape over students' mouths for talking; disparaged students through racially insensitive treatment and comments; and made insulting and offensive comments to students regarding their mental health and ethnicity.

23. The May Administrative Complaint also alleges that Respondent wrote a "red list" of students' names on the board who were disruptive or talking and continued to engage in inappropriate grading practices, such as lowering students' grades as a means of discipline for behavior issues.

24. The May Administrative Complaint also alleges that Respondent continued his practices of not contacting parents of failing students; not

writing referrals to deal with disciplinary matters; and failing to create a discipline plan for dealing with behavior issues in his classroom, as directed.

25. In addition, the May Administrative Complaint alleges that Respondent claimed that during the past four years, Respondent's students were manipulated by an assistant principal, Ms. Hoff, to write false statements against him, notwithstanding that Hoff had not been employed at MHS for the previous two years.

26. Pursuant to the May Administrative Complaint, Petitioner seeks to terminate Respondent's employment as a teacher.

III. Stipulated Facts Regarding Disciplinary Corrective Action History

27. The parties stipulated to the following facts regarding Respondent's history of disciplinary corrective actions while employed as a teacher with the District.⁸

28. On or about February 13, 2013, Respondent received a verbal reprimand for failing to meet the performance standards required of his

⁸ Petitioner's Corrective Action Policy, Policy 4.9, section I(b), states:

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.

Policy 4.9, Corrective Action.

Respondent cannot be subjected to discipline in these proceedings for previous violations of statutes, rules, or policies for which he has already been disciplined. *See Dep't of Bus. & Prof'l Reg.*, 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 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, and history of disciplinary and non-disciplinary corrective actions is relevant to determining whether Respondent subsequently engaged in conduct constituting gross insubordination, as charged in these proceedings.

position, by failing to follow School Board policy and procedures and engaging in unprofessional conduct.

29. On or about May 30, 2013, Respondent received a written reprimand for not following proper procedures, and being insubordinate by failing to follow such procedures after numerous directives. Specifically, he failed to contact the parents of students who had been habitually truant or were failing his class; arrived late to work several times; lied about parking in the student parking lot; and left students unsupervised on multiple occasions.

30. On November 8, 2016, Respondent received a verbal reprimand for not providing accommodations to his exceptional student education ("ESE") students; not taking attendance; not grading students' work or grading students' work inaccurately; and failing to provide feedback to students.

31. On February 7, 2017, Respondent received a five-day suspension for making racially insensitive and inappropriate comments to students. This five-day suspension resulted from a personnel investigation by the District police department into allegations that Respondent made racist and racially insensitive remarks to students. The request for the investigation was made on or about October 16, 2015. Respondent was administratively reassigned out of the classroom on November 6, 2015, and was not released from administrative reassignment until August 15, 2016. Respondent originally challenged the five-day suspension in Case No. 17-1179TTS, but later withdrew his challenge, and the case was closed on May 19, 2017. The Commissioner of Education ("COE") also filed an administrative complaint with the Education Practices Commission, based on Respondent making racially, ethnically, and/or socioeconomically-driven disparaging comments toward students. Respondent entered into a settlement agreement with the COE under which he received a written reprimand; was fined and placed on probation for one year; and was assessed costs for monitoring his probation. The written reprimand was placed in his District personnel file.

32. On or about October 27, 2017, Respondent received a letter of reprimand from the District's professional standards committee for unfair grading practices; making embarrassing remarks to students; failing to provide feedback to students; grading inaccuracies; refusing to accept work; grading student behavior rather than student work product; failing to contact parents; failing to follow a discipline plan; failing to grade student work in a timely manner; entering incorrect grades; failing to provide ESE accommodations to students entitled to receive such accommodations; and making disparaging remarks about colleagues. This letter of reprimand resulted from a personnel investigation conducted by the District police department regarding numerous allegations against Respondent. These allegations included, but were not limited to, unfair grading practices; making embarrassing remarks to students; failing to provide feedback to students; lowering grades based on behavior; failing to contact parents; grading and attendance inaccuracies; providing fake lesson plans to his assistant principal; and making remarks to a student that a fellow math teacher did not know what she was doing. The request for the investigation was made on or about November 21, 2016. Respondent did not challenge the letter of reprimand.

IV. Stipulated Facts Regarding Non-Disciplinary Corrective Action History

33. The parties stipulated to the following facts regarding Respondent's history of non-disciplinary corrective actions while he was employed as a teacher with the District.

34. On or about July 16, 2011, Respondent received a concerns and expectations memorandum for failing to follow and adhere to School Board and school policies, procedures, and regulations; failing to maintain accurate student records and follow the District grading system; and not fulfilling his responsibility as a professional educator in a timely manner, with integrity.

35. On or about October 20, 2011, Respondent received another concerns and expectations memorandum for failing to follow and adhere to School

Board and school policies, procedures and regulations; failing to maintain accurate student records and follow the District grading system; and not fulfilling his responsibility as a professional educator in a timely manner, with integrity.

36. On or about October 31, 2012, Respondent received another concerns and expectations memorandum for failing to follow the District's grading system.

37. On or about January 7, 2013, Respondent received another concerns and expectations memorandum for failing to follow and adhere to School Board and school policies, procedures and regulations; failing to maintain accurate student records of students and failing to follow the District grading system; and not fulfilling his responsibility as a professional educator in a timely manner, with integrity.

38. On January 23, 2015, Respondent received a meeting summary regarding grading criteria; students not learning in, and failing, his class; and making students feel disparaged or embarrassed. He was directed to ensure that students understand his grading criteria for classwork and homework; use strategies to help students with new knowledge; use strategies to help students practice and deepen the new knowledge in all lessons and activities; and not intentionally expose students to unnecessary embarrassment or disparagement.

39. On October 14, 2016, Respondent received a summary memorandum for his use of embarrassing language towards students; failure to contact parents or write referrals for behavior issues; and concerns about his failure to provide daily remediation. Respondent was advised that he was expected to create and maintain a positive and pleasant learning environment in the classroom; use effective instructional strategies and feedback techniques that do not embarrass students; create and follow a discipline plan for his classroom; contact parents when students are failing; write referrals for referable acts; and remediate and teach students daily. Respondent was

informed that his failure to correct these issues may result in disciplinary action.

40. On or about March 23, 2017, Respondent was issued a cease and desist letter for his continued use of embarrassing and disparaging language toward students.

41. On or about December 7, 2017, Respondent received a meeting summary for his use of embarrassing and condescending language towards the students, by referring to an African-American male student as "boy"; threatening to remove students from his class if they misbehaved during a formal observation; grading students on their behavior rather than their work product; and failing to grade student work in a timely manner. He was directed to refrain from using condescending language that makes students feel inferior in math; learn his students' names and refer to them by name; create and follow a discipline plan for his classroom without removing students unless they have completely disrupted the teaching and learning process in the classroom; enter grades in a timely manner and refrain from deducting participation points from students' grades for talking; and contact parents and write referrals for student misbehavior.

42. On or about April 27, 2018, Respondent received a meeting summary memorandum for failing to contact parents of students who had D's or F's in his classes, and for keeping inaccurate grades.

V. Findings of Fact Based on Evidence Adduced at Final Hearing

43. Based on the preponderance of the competent substantial evidence; the following Findings of Fact are made regarding the conduct charged in the February Administrative Complaint and the May Administrative Complaint.

A. February Administrative Complaint

44. The February Administrative Complaint charges Respondent with having engaged in conduct during the first semester of the 2018-2019 school year that is alleged to violate statutes, DOE rules, and School Board policies.

45. By way of background, Tevin Fuller and Julian Cardenty were students in Respondent's financial algebra class in the 2017-2018 school year. Both credibly testified that during a class in the 2017-2018 school year, Respondent called Fuller, who is African-American, "boy" and "bad boy." Both Fuller and Cardenty were offended by Respondent's use of the word "boy" in referring to Fuller, and considered it a racially demeaning remark. They reported Respondent's conduct to Assistant Principal J.P. Murray.

46. Fuller credibly testified that as a result of Respondent's disrespectful conduct toward him, he avoided attending Respondent's class.

47. As discussed above, in December 2017, as a result, Respondent previously had been issued a summary memorandum—a non-disciplinary corrective action—which instructed him to, among other things, cease using racially demeaning terms toward African-American students, and cease using condescending language that made students feel inferior regarding their mathematical ability.

48. The credible, consistent evidence establishes that during the first semester of the 2018-2019 school year, Respondent continued to make racially insensitive and demeaning comments, and engage in conduct directed toward students in his classes that they found embarrassing and offensive.

49. Specifically, several students testified, credibly, that on one occasion during the 2018-2019 school year, after Respondent gave an unannounced quiz to his financial algebra class, he stated that he would not grade the quiz papers because he could "see the F's on their foreheads," or words to that effect. The credible evidence establishes that the students considered this remark as demeaning to their ability and intelligence, and they were offended. This testimony corroborated several written statements, admitted into evidence, which were provided by students at or about the time this incident took place.

50. Two students, Malik Cooper and Nyesha Dixon, credibly testified that they witnessed Respondent belittle and mock a student, Jordan Lee, when he asked for assistance on a class assignment in Respondent's financial algebra class. Specifically, they saw and heard Respondent comment to Lee that he (Lee) did not understand the lesson because he could "only understand fifth grade math," or words to that effect. Dixon and Cooper both credibly testified that the whole class laughed at Respondent's comment to Lee. Dixon testified, credibly, that Lee appeared shocked and embarrassed by Respondent's comment. Although Petitioner did not present Lee's testimony at the final hearing, Lee provided a written statement that was admitted into evidence, describing this incident. An email from Lee's mother to Murray regarding this incident corroborates Dixon's and Cooper's testimony and Lee's reaction to Respondent's insulting comment to him.

51. Two students, Breanna Dwyer and Malik Cooper, credibly testified that on one occasion, Respondent told his students that the Chinese were smarter and learned faster than Americans, a comment that the students interpreted as belittling their intelligence.

52. Two students, Dorcas Alao and Nyesha Dixon, testified, credibly, to the effect that Respondent singled out Haitian students and made remarks to them, which those students found offensive. Specifically, they testified that Respondent would attempt to speak to Haitian students in Creole, that the students told him they found his behavior offensive, and that Respondent would "just laugh."

53. Several students credibly testified, in more general terms, that Respondent frequently spoke down to them, treated them in a condescending manner, made rude remarks to them, and was disrespectful toward them, and that his conduct and remarks were insulting and made them feel as if they were ignorant and unintelligent.

54. Additionally, one student, Whitney Malcolm, testified, credibly, that in response to her asking a question about a syntax error on a calculator,

Respondent yelled at her loudly enough for the entire class to hear. Malcolm testified, credibly, that she was embarrassed by the incident.

55. The credible evidence establishes that Respondent continued to lower students' academic course grades as a means of addressing behavioral issues, notwithstanding that he had been issued a meeting summary on April 27, 2018, directing him not to do so.

56. Specifically, several students testified, credibly, that Respondent kept a "watch list" of students for whom he deducted points off their academic course grade for behavioral issues, such as talking in class.

57. Murray credibly testified, and the MHS Faculty Handbook for the 2018-2019 school year expressly states, that student misbehavior cannot be reflected in the academic course grade, and, instead, is to be addressed in the conduct grade. Murray testified that he counseled Respondent numerous times on this issue and directed him to cease deducting points from students' academic course grades for behavior issues. The evidence regarding Respondent's history of disciplinary and non-disciplinary corrective actions bears out that he repeatedly has been directed not to lower students' academic course grades as a means of dealing with classroom behavioral issues.

58. The competent substantial evidence also establishes that Respondent did not follow proper testing protocol when administering the PSAT to his homeroom students on October 10, 2018. Specifically, notwithstanding that all teachers, including Respondent, who were administering the PSAT had been given training and provided written instructions regarding picking up the exams, reading the instructions to the students, and administering the exams, Respondent did not timely pick up the exams on the day it was administered. The exams for his homeroom students had to be delivered to the room in which he was to administer the exam, and as a consequence, he was late starting the exam administration.

59. The credible evidence establishes that Respondent instructed the students to turn off their cell phones, place them in their book bags, and put their book bags away. However, he did not collect students' book bags or require students to place their book bags at the front of the room, as expressly required by the exam proctor reminders document and the PSAT/NMBQT Coordinator Manual, both of which previously had been provided to the teachers, including Respondent, who were administering the PSAT. As a result of Respondent's failure to follow exam protocol, the students kept their book bags next to, or under, their desks, in violation of that protocol.

60. A cell phone rang during one of the testing sessions. The persuasive evidence establishes that Respondent had instructed students to silence their cell phones and put them away; thus, the cell phone ringing during a testing session was the result of a student failing to follow instructions, rather than Respondent failing to provide such instructions.

61. Two teachers, Tamekia Thompson and Richard Cohen, went to Respondent's classroom at different times on the day the PSAT was administered, to tell the students in his classroom to be quiet. Amaya Mason, a student in Respondent's homeroom class who took the PSAT that day, complained in a written statement, and subsequently testified, that students were talking during the testing sessions, while the students were in the process of taking the exam. Other students who took the PSAT in Respondent's homeroom class that day testified that students did not talk during the testing sessions, but that they did talk loudly during breaks between the testing sessions. Thus, the evidence does not definitively establish that students were talking during the testing sessions themselves.

62. As a result of these testing protocol irregularities, Alicia Carl, the Student Assessment Specialist at MHS, contacted the College Board regarding the testing conditions in Respondent's classroom. Ultimately, the students' exam scores were not invalidated.

63. The February Administrative Complaint alleges that Respondent refused to allow two students, Dejah Jeancharles and Asia Parker, to make up classwork they had missed, notwithstanding that they had excused absences due to a band trip. However, the credible evidence established that Respondent ultimately did allow the students to make up the missed work.

64. The February Administrative Complaint charges Respondent with disciplining African-American students during a Code Red Drill conducted on or about September 6, 2018, while not subjecting white and Hispanic students to discipline for engaging in the same conduct during the Code Red Drill. The students' testimony regarding whether Respondent engaged in this conduct was conflicting, and the greater weight of the competent, credible evidence fails to establish that Respondent engaged in this behavior.

65. The February Administrative Complaint alleges that on or about April 27, 2018, Respondent was issued a meeting summary for failing to contact parents of failing students and engaging in unfair grading practices.

66. Murray testified, and Petitioner presented excerpts of Respondent's grade book showing, that as of March 6, 2018, approximately 75 percent of Respondent's students were earning either D's or F's in Respondent's classes. Murray testified that MHS has a policy, stated in the 2018-2019 Faculty Handbook, that teachers "shouldn't have that many D's or F's."⁹

67. Murray testified, and Petitioner presented evidence consisting of an email from Murray to MHS Human Relations Specialist Nicole Voliton, stating that he (Murray) had spoken to parents, who told him that Respondent had not contacted them regarding their children's failing grades. Murray also testified that Respondent acknowledged to him that he had not

⁹ However, the February Administrative Complaint does not specifically charge Respondent with conduct related to the amount of D's and F's his students earned. Additionally, as discussed below, the Faculty Handbook policy does not establish a mandatory compliance standard regarding the amount of D's and F's given students on which disciplinary action can be based.

contacted the parents of all students who were failing his courses. Murray's email and his testimony regarding parents' statements made to him constitute hearsay evidence that has not been shown to fall within an exception to the hearsay rule in section 90.802, Florida Statutes, and is not substantiated by any competent substantial evidence in the record; accordingly, the undersigned cannot assign weight to this evidence.¹⁰

B. May Administrative Complaint

68. The May Administrative Complaint charges Respondent with having engaged in conduct in the second semester of the 2018-2019 school year that is alleged to violate DOE rules and Petitioner's policies.

69. The credible evidence establishes that Respondent continued to engage in conduct, directed toward his students, that was demeaning and racially insensitive.

70. Specifically, several students submitted written statements that in February 2019, Respondent threatened to tape students' mouths shut because they were talking in class. Students Dorcas Alao, Breanna Henry, and Darius Gaskin credibly testified about this incident, confirming that Respondent had engaged in such conduct toward students in his class.

71. Alao, who is of Nigerian heritage, testified, credibly, that Respondent remarked to her that if she couldn't understand something in English, he would "say it in Yoruba," or words to that effect. She also testified, credibly, that Respondent told her that she had "mental issues." She was offended by Respondent's comments and reported the incidents to Murray.

72. The credible evidence also establishes that Respondent continued to deduct points from students' academic course grades for behavioral issues, such as talking in class.

¹⁰ § 120.57(1)(c), Fla. Stat. (hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The burden of establishing that hearsay evidence falls within an exception to the hearsay rules in sections 90.803 and 90.804 is on the proponent of the hearsay. *See Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008)(evidentiary proponent has burden to establish predicate for exception to hearsay rule).

73. To this point, Alao and Henry credibly testified that Respondent deducted points from their academic course grades for talking in class. Murray corroborated this testimony, credibly testifying that he examined Respondent's grade book and confirmed that Respondent had deducted points from their grades. As a result, Henry's class grade dropped a letter grade, from an "A" to a "B."

74. Several students also testified, credibly and consistently, that Respondent did not timely grade their classwork or homework papers, so they were unable to determine what their grades were, even when they accessed the Pinnacle electronic gradebook.

75. The 2018-2019 Faculty Handbook for MHS expressly requires that grades be posted within 48 hours of collecting the assignment/test. Respondent has repeatedly been directed to timely and accurately grade classwork and homework, and to record the grades in Pinnacle so that students and parents can be apprised of student progress in the course. The disciplinary and non-disciplinary corrective actions to which Respondent previously has been subject bear this out.

76. Murray testified, credibly, that in the second semester of the 2018-2019 school year, Respondent still did not timely or accurately grade classwork, homework, or tests, as required by the Faculty Handbook, and as previously directed through disciplinary and non-disciplinary corrective actions, discussed above.

77. The May Administrative Complaint also alleges that Respondent made claims that former assistant principal Cornelia Hoff had manipulated students, during the previous four years, to write false statements about him. Murray testified, credibly, that Respondent did, in fact, make such claims. There was no evidence presented to substantiate any of Respondent's claims against Hoff, and the competent substantial evidence establishes that Hoff had not been employed at MHS for over two years at the time Respondent made such claims.

78. The May Administrative Complaint also charges Respondent with failing to contact parents, write disciplinary referrals, and create a discipline plan for student behavior issues in his classroom, as previously directed. However, Petitioner failed to present any competent substantial evidence to substantiate the allegation that Respondent engaged in this specific conduct during the *second* semester of the 2018-2019 school year, which is the period covered by the May Administrative Complaint.¹¹ Thus, Petitioner did not demonstrate that Respondent engaged in this conduct during the timeframe covered by the May Administrative Complaint.

C. Witness Credibility

79. Respondent contends, on the basis of inconsistencies between student witness's testimony and written statements regarding various details of Respondent's alleged conduct and surrounding circumstances, that these witnesses were not credible, so that their testimony should not be afforded weight in these proceedings. The undersigned rejects this contention.

80. Although the students' accounts of Respondent's conduct and surrounding circumstances were not uniformly consistent, the inconsistencies concerned minor or collateral details, which the undersigned ascribes to the fact that the students were testifying about incidents that occurred as much as two years earlier.

81. The undersigned found the student witnesses to be credible and persuasive. Crucial to this credibility determination is that the students' testimony was remarkably consistent with respect to whether Respondent

¹¹ The evidence presented regarding this charge concerned conduct that is alleged to have occurred in the *first* semester of the 2018-2019 school year, which is not addressed in the May Administrative Complaint. Notably, the February Administrative Complaint, which addressed conduct that is alleged to have occurred in the 2017-2018 school year and the *first* semester of the 2018-2019 school year, did not charge Respondent with having engaged in such conduct. See *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint violates the Administrative Procedure Act).

engaged in, and the significant circumstances pertaining to, the conduct at issue in these proceedings.

VI. Findings of Ultimate Fact

82. Under Florida law, whether conduct charged in a disciplinary proceeding constitutes a deviation from a standard of conduct established by statute, rule, or policy is a question of fact to be determined by the trier of fact, considering the testimony and evidence in the context of the alleged violation. *Langston v. Jamerson*, 653 So. 2d 489 (Fla. 1st DCA 1995); *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985). *See also McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *MacMillan v. Nassau Cty. Sch. Bd.*, 629 So. 2d 226 (Fla. 1st DCA 1993). Accordingly, whether conduct alleged in an administrative complaint violates the statutes, rules, and policies cited as the basis for the proposed disciplinary action is a factual, rather than legal, determination.

A. February Administrative Complaint

83. Here, Petitioner demonstrated, by the preponderance of the evidence, that Respondent engaged in conduct with which he was charged in the February Administrative Complaint. As discussed below, Respondent's conduct violated DOE rules, School Board policies, and Florida Statutes.

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

84. As found above, Respondent made racially insensitive comments and comments that demeaned and belittled students in his classes. The evidence also established that Respondent yelled at students. As a result, many of his students felt disrespected, embarrassed, and offended. One student, Tevin Fuller, even went so far as to avoid going to Respondent's class in order to avoid Respondent's harassment and disrespectful treatment of him.

85. Respondent's behavior toward his students constituted misconduct in office under Florida Administrative Code Rule 6A-5.056(2), because it disrupted the students' learning environment, in violation of

rule 6A-5.056(2)(d), and it reduced his ability to effectively perform his teaching duties, in violation of rule 6A-5.056(2)(e).

86. Additionally, Respondent's behavior toward his students constituted misconduct in office, pursuant to rule 6A-5.056(2)(b), because it violated rule 6A-10.081(2)(a), which establishes a teacher's professional obligations to students. Specifically, in making demeaning, racially insensitive, and embarrassing comments to students in his classes, he failed to make reasonable effort to protect his students from conditions harmful to their learning and mental health, in violation of rule 6A-10.081(2)(a)1. He also intentionally exposed students to unnecessary embarrassment and disparagement, in violation of rule 6A-10.081(2)(a)5., and harassed students on the basis of race, color, and national or ethnic origin, in violation of rule 6A-10.081(2)(a)7.

87. Respondent's racially insensitive and disrespectful comments toward his students also constituted misconduct in office under rule 6A-5.056(2)(c), because they violated School Board Policy 4008.B., regarding duties of instructional personnel. Specifically, Respondent did not comply with paragraph 1. of Policy 4008.B., because he violated the Principles of Professional Conduct of the Education Profession in Florida, rule 6A-10.081, as discussed herein. Additionally, Respondent violated paragraph 4. of Policy 4008.B., because he did not treat all students with kindness and consideration, as required by that policy.

Rule 6A-5.056(3) – Incompetency

88. In making racially insensitive and demeaning comments, and in engaging in disrespectful conduct toward his students, Respondent failed to discharge his required teaching duties. Specifically, in making such comments and engaging in such conduct, Respondent failed to communicate appropriately with, and relate to, his students, and, thus, exhibited incompetency due to inefficiency, pursuant to rule 6A-5.056(3)(a)2.

89. As discussed above, Respondent's conduct also violated rule 6A-10.081(2)(a)1., 5., and 7., and, thus, constituted incompetency due to inefficiency, pursuant to rule 6A-5.056(3)(a)1.

90. Additionally, as found above, Respondent did not follow established exam protocol when he failed to collect students' book bags and place them at the front of the room during administration of the PSAT to his homeroom class on October 10, 2018, as specified in the PSAT/NMSQT administration manual and mandated pursuant to section 1008.24(1)(f), Florida Statutes. Thus, Respondent failed to perform duties prescribed by law, which constitutes incompetency due to inefficiency under rule 6A-5.056(3)(a)1.

Rule 6A-5.056(4) – Gross Insubordination

91. As found above, on January 23, 2015, Respondent received a meeting summary regarding grading criteria; students not learning in, and failing, his courses; and making students feeling disparaged or embarrassed. On October 14, 2016, Respondent received a summary memorandum for his use of embarrassing language toward students. On February 7, 2017, Respondent received a five-day suspension for making racially insensitive and inappropriate comments to students. On March 23, 2017, Respondent was issued a cease and desist letter for his use of embarrassing and disparaging language toward students. On October 27, 2017, Respondent received a letter of reprimand from the District's professional standards committee for making embarrassing remarks to students. On or about December 7, 2017, Respondent received a meeting summary for making racially insensitive comments to a male African-American student.

92. In each of these corrective actions, Respondent was specifically and expressly directed to cease engaging in specified conduct. These directives were directly based on school and School Board policies and DOE rules, and, thus, were reasonable in nature. The directives were given by his supervisors at MHS and Petitioner, all of whom had proper authority to issue such directives.

93. As found above, Respondent continued to make racially insensitive, demeaning, and disrespectful comments to his students during the timeframe covered by the February Administrative Complaint, after repeatedly having been directed not to do so through disciplinary and non-disciplinary corrective actions. Respondent's conduct in this regard constitutes gross insubordination, pursuant to rule 6A-5.056(4).

94. As found above, Respondent continued to lower students' academic course grades as a means of dealing with classroom behavioral issues during the timeframe covered by the February Administrative Complaint, after repeatedly having been directed not to do so through disciplinary and non-disciplinary corrective actions. Respondent's conduct in this regard constitutes gross insubordination under rule 6A-5.056(4).

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

95. "Willful neglect of duty" is defined in rule 6A-5.056(5) as the intentional¹² or reckless failure to carry out required duties.

96. In continuing to intentionally engage in unauthorized grading practices by lowering students' academic course grades to address behavioral issues, Respondent engaged in willful neglect of duty.

97. In continuing to intentionally make racially insensitive and demeaning comments, and engaging in disrespectful conduct toward his students, Respondent failed to comply with authority that establishes required duties. Specifically, Respondent's conduct did not comply with School Board Policy 4008.B.4., requiring that he treat students with kindness and consideration. Additionally, his conduct did not comply with rule 6A-10.081(2)(a)1., 5., and 7., requiring that he make reasonable efforts to protect students from conditions harmful to learning; refrain from exposing

¹² "Intentional" is defined as "done with intention" or "on purpose." Dictionary.com, <https://dictionary.com> (last visited Apr. 21, 2021). The evidence establishes that Respondent's actions in this regard were done with intention or on purpose; there was no evidence presented from which it reasonably can be inferred that Respondent's actions in this regard were accidental.

students to unnecessary embarrassment or disparagement; and refrain from harassing or discriminating against students on the basis of race, national origin, or ethnicity.

Section 1008.24 – Test Administration and Security

98. Based on the facts found above, it is determined that Respondent did not follow testing protocol when he failed to collect students' book bags before administering the PSAT on October 10, 2018.

99. However, in order to violate section 1008.24, the failure to follow test administration directions must be done both "knowingly and willfully."

100. Neither "knowingly" nor "willfully" are defined in chapter 1008. Where the legislature has not defined the words used in a statute, the language should be given its plain and ordinary meaning.¹³

101. The term "knowingly" is defined as "having knowledge or information"¹⁴ or "deliberate, conscious."¹⁵ The term "willfully" is defined as "deliberate, voluntary, or intentional."¹⁶

102. The evidence fails to establish that Respondent made the deliberate decision not to collect the book bags, notwithstanding the test manual and exam directions. From the evidence in the record, it is equally reasonable to infer¹⁷ that he either did not realize that he needed to collect the book bags,

¹³ *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009). It is appropriate to refer to dictionary definitions when construing a statute in order to ascertain the plain and ordinary meaning of words used in the statute. *Id.*; *Barco v. School Bd. of Pinellas Cty.*, 975 So. 2d 1116, 1122 (Fla. 2008); *see also Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000)(when necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary).

¹⁴ Dictionary.com, <https://dictionary.com> (last visited Apr. 22, 2021).

¹⁵ Black's Law Dictionary, Deluxe 7th ed., at p. 876.

¹⁶ *See id.* at p. 1593, describing "willful" or "willfully" as meaning "only intentionally or purposely as distinguished from accidentally or negligently."

¹⁷ *See Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)(it is the presiding officer's function to, among other things, draw permissible inferences from the evidence).

or that he simply forgot to do so. The latter inference is particularly plausible, given that he was running late in beginning administration of the test.

103. Thus, it is found that Respondent did not violate section 1008.24, as charged in the February Administrative Complaint.

School Board Policy 4008 - Responsibilities and Duties (Principals and Instructional Personnel)

104. As discussed above, Respondent's racially insensitive, demeaning, and disrespectful comments toward his students violated School Board Policy 4008.B., regarding duties of instructional personnel.

105. Specifically, as discussed herein, Respondent did not comply with rule 6A-10.081, the Principles of Professional Conduct of the Education Profession in Florida, as required by paragraph 1. of Policy 4008.B.

106. Additionally, Respondent did not treat all students with kindness and consideration, as required by paragraph 4. of Policy 4008.B.

School Board Policy 6314 – Testing – Assessing Student Achievement

107. School Board Policy 6314, the text of which is set forth in the Conclusions of Law, below, establishes a District-wide policy regarding annual achievement testing. The plain language of the policy states, in pertinent part, "[a] program of *achievement testing* shall be conducted *annually . . .*," and "[t]esting within the Broward County School District should be conducted to . . . [p]rovide parents/guardians with a *yearly individual student test report* and interpretation for those students who have been tested." Policy 6314, at preamble, ¶ 2 (emphasis added). From this language, it is clear that Policy 6314 is specifically directed toward *annual achievement testing*, rather than routine classroom tests and quizzes. Further to this point, nowhere in Policy 6314 is there any language establishing a prohibition on giving unannounced class quizzes, or deciding not to count quiz grades in a class.

108. Additionally, although the February Administrative Complaint cites Policy 6314 as a basis for imposing discipline, the policy does not establish any specific standards of conduct to which instructional personnel must adhere, or which can constitute the basis of disciplinary action for lack of compliance.

109. Petitioner's Proposed Recommended Order cites Policy 6314 as a basis for imposing discipline on Respondent for having given an unannounced quiz in his class on material that he allegedly had not yet taught his class, and then deciding not to grade the quiz "because he could 'read the F's on their foreheads.'" However, as discussed above, the language of Policy 6314 makes clear that it does not apply to routine class tests and quizzes. Additionally, the February Administrative Complaint does not specifically charge Respondent with having engaged in any of this conduct. As discussed herein, Respondent cannot be disciplined for conduct which was not specifically charged in the Administrative Complaint.¹⁸

110. Therefore, even though credible testimony and other evidence was provided showing that Respondent engaged in this conduct, that evidence is relevant *only* with respect to whether Respondent made demeaning comments to his students. That conduct *was* charged in the February Administrative Complaint, and, as discussed herein, has been considered in determining that Respondent engaged in conduct constituting misconduct in office, pursuant to rule 6A-5.056(2).

School Board Policy 4.9 – Corrective Action

111. Petitioner also alleges that Respondent "violated" School Board Policy 4.9, titled "Corrective Action," as a basis for its proposal to terminate his employment.

112. As further addressed in the Conclusions of Law, below, Policy 4.9 does not establish a separately enforceable standard of conduct which may be

¹⁸ *Cottrill*, 685 So. 2d at 1372 (Fla. 1st DCA 1996). See note 11, *supra*.

violated for purposes of serving as the basis for discipline, but, rather, constitutes a policy designed to improve and/or change employee's job performance and conduct, as well as establishes Petitioner's progressive discipline policy for purposes of determining the appropriate penalty range for violations of applicable standards of conduct established in statutes, DOE rules, and School Board policies.

113. In this case, Respondent has been charged with "Category B" offenses under Policy 4.9. Section III of Policy 4.9, titled "Other Considerations," sets forth a non-exhaustive list of circumstances that may be considered in determining the appropriate penalty for Category B offenses.

114. The racially insensitive and demeaning comments that Respondent repeatedly made to his students, over a substantial period of time in his employment with Petitioner, constitute a severe offense. The evidence establishes that Respondent's comments not only offended and embarrassed his students, but also affected his effectiveness as a teacher—to the point that one student avoided going to class in order to avoid Respondent's racially insensitive and disrespectful conduct toward him.

115. Additionally, Respondent's conduct in lowering students' academic course grades to deal with behavioral issues, directly contrary to school grading policy set forth in the MHS Faculty Handbook, was severe, in that it inappropriately affected students' course grades in a negative manner.

116. Moreover, Respondent's students were directly involved in, and affected by, his conduct. To this point, Respondent's racially insensitive and demeaning comments and disrespectful conduct was directed to his students, who were offended and embarrassed by his comments and conduct. Additionally, his students' grades were directly and negatively affected by Respondent's practice of lowering academic course grades to address behavioral issues. Respondent's conduct had direct, negative impacts on his students.

117. Respondent has a lengthy corrective action history during his employment with Petitioner, dating back to 2011. He previously has received two verbal reprimands, two written reprimands, and a five-day suspension without pay. Additionally, he has received numerous non-disciplinary corrective actions during his employment with Petitioner. Collectively, he has received approximately 14 corrective actions, five of which were disciplinary, between July 2011 and November 2018. Notwithstanding these numerous corrective actions, Respondent has persisted, during the timeframe covered by the February Administrative Complaint, in engaging in much of the same conduct for which he previously has been disciplined or issued non-disciplinary corrective actions. The competent, credible evidence shows that these corrective actions have had little, if any, deterrent effect on Respondent's conduct.

118. Based on the foregoing Findings of Fact, it is determined that Respondent should receive a ten-day suspension without pay in Case No. 19-3380, for having engaged in conduct that was charged in the February Administrative Complaint and proved by a preponderance of the competent substantial evidence.

B. May Administrative Complaint

119. Petitioner demonstrated, by the preponderance of the evidence, that Respondent engaged in conduct with which he was charged in the May Administrative Complaint. As discussed below, Respondent's conduct violated DOE rules and School Board policies.

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

120. As found above, in the second semester of the 2018-1019 school year, Respondent continued to make racially insensitive and disparaging comments, and engage in demeaning and disrespectful conduct, directed toward his students.

121. Specifically, he directed racially insensitive comments toward an African-American student, Dorcas Alao, regarding her language and ethnicity. As discussed above, Alao found Respondent's conduct offensive.

122. Respondent's conduct in this regard constituted misconduct in office, pursuant to rule 6A-5.056(2). Specifically, it disrupted his students' learning environment, in violation of rule 6A-5.056(2)(d), and it reduced his ability to effectively perform his teaching duties, in violation of rule 6A-5.056(2)(e).

123. Additionally, Respondent's behavior toward his students constituted misconduct in office under rule 6A-5.056(2)(b), because it violated rule 6A-10.081(2)(a), which establishes his professional obligations to students. Specifically, in making racially insensitive and demeaning comments, he failed to make reasonable effort to protect his students from conditions harmful to their learning and to their mental health, in violation of rule 6A-10.081(2)(a)1.; he intentionally exposed students to unnecessary embarrassment and disparagement, in violation of rule 6A-10.081(2)(a)5.; and he harassed students on the basis of race, color, and national or ethnic origin, in violation of rule 6A-10.081(2)(a)7.

124. Respondent's racially insensitive and demeaning comments and disrespectful conduct toward his students also constituted misconduct in office under rule 6A-5.056(2)(c), because it violated School Board Policy 4008.B., regarding duties of instructional personnel. Specifically, Respondent did not comply with paragraph 1. of Policy 4008.B., because he violated the Principles of Professional Conduct of the Education Profession in Florida, rule 6A-10.081, as discussed herein. Additionally, Respondent violated paragraph 4. of Policy 4008.B., because he did not treat all students with kindness and consideration, as required by that policy.

125. Respondent's conduct in making unsubstantiated accusations against former assistant principal Hoff constituted misconduct in office because it violated rule 6A-10.081(2)(c)5., which establishes the professional standard that an educator shall not make malicious or intentionally false statements

about a colleague. Although the evidence does not establish that Respondent's accusations about Hoff were malicious—i.e., characterized by, or showing malice, intentionally harmful, or spiteful¹⁹—it is reasonable to infer that they were intentionally false, given that Hoff had not been employed at MHS for over two years when Respondent made those accusations, and that Murray had succeeded Hoff as Respondent's supervisor.

Rule 6A-5.056(3) – Incompetency

126. In making racially insensitive and demeaning comments, and engaging in disrespectful conduct, toward his students, Respondent also failed to discharge his required teaching duties. Specifically, in making such comments and engaging in such conduct, Respondent failed to communicate appropriately with, and relate to, his students, and, thus, exhibited incompetency as a result of inefficiency, pursuant to rule 6A-5.056(3)(a)2.

127. As discussed herein, Respondent's conduct also violated rule 6A-10.081(2)(a)1., 5., and 7., and, thus, constituted incompetency due to inefficiency, pursuant to rule 6A-5.056(3)(a)1.

Rule 6A-5.056(4) – Gross Insubordination

128. As found above, on January 23, 2015, Respondent received a meeting summary regarding grading criteria; students not learning in, and failing, his courses; and making students feeling disparaged or embarrassed. On October 14, 2016, Respondent received a summary memorandum for his use of embarrassing language towards students. On February 7, 2017, Respondent received a five-day suspension for making racially insensitive and inappropriate comments to students. On March 23, 2017, Respondent was issued a cease and desist letter for his use of embarrassing and disparaging language toward students. On October 27, 2017, Respondent received a letter of reprimand from the School Board's professional standards committee for making embarrassing remarks to students. On or about December 7, 2017,

¹⁹ Dictionary.com, <https://dictionary.com> (last visited Apr. 22, 2021).

Respondent received a meeting summary for making racially insensitive comments to a male African-American student.

129. Additionally, as discussed herein, the undersigned recommends that Respondent be suspended without pay for ten days in Case No. 19-3380, for continuing to engage in such conduct during the timeframe covered by the February Administrative Complaint. This ten-day suspension constitutes yet another disciplinary corrective action against Respondent for continuing to engage in conduct about which he repeatedly has been admonished, and has been directed to cease.

130. In each of these corrective actions, Respondent was specifically and expressly directed to cease engaging in specified conduct. These directives were directly based on school and School Board policies and DOE rules, and, thus, were reasonable in nature. The directives were given by his supervisors at MHS and Petitioner, all of whom had proper authority to issue such directives.

131. As found above, Respondent continued to make racially insensitive and demeaning comments and engage in disrespectful conduct toward his students during the timeframe covered by the May Administrative Complaint, after repeatedly having been directed not to do so through disciplinary and non-disciplinary corrective actions. Respondent's conduct in this regard constitutes gross insubordination, pursuant to rule 6A-5.056(4).

132. As found above, Respondent continued to lower students' academic course grades as a means of dealing with classroom behavioral issues during the timeframe covered by the May Administrative Complaint, after repeatedly having been directed not to do so through disciplinary and non-disciplinary corrective actions. Respondent's conduct in this regard constitutes gross insubordination, pursuant to rule 6A-5.056(4).

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

133. "Willful neglect of duty" is defined in rule 6A-5.056(5) as the intentional²⁰ or reckless failure to carry out required duties.

134. In continuing to intentionally engage in unauthorized grading practices by lowering students' academic course grades to address behavioral issues, Respondent engaged in willful neglect of duty.

135. In continuing to intentionally make racially insensitive, demeaning, and disrespectful comments and conduct toward his students, Respondent failed to comply with authority that establishes required duties. Specifically, Respondent's conduct did not comply with School Board Policy 4008.B.4., requiring that he treat students with kindness and consideration. Additionally, his conduct did not comply with rule 6A-10.081(2)(a)1., 5., and 7., requiring that he make reasonable efforts to protect students from conditions harmful to learning; refrain from exposing students to unnecessary embarrassment or disparagement; and refrain from harassing or discriminating against students on the basis of race, national origin, or ethnicity.

School Board Policy 4008 – Responsibilities and Duties (Principals and Instructional Personnel)

136. As discussed herein, Respondent's racially insensitive, demeaning, and disrespectful comments toward his students violated School Board Policy 4008.B., regarding duties of instructional personnel.

137. Specifically, as discussed herein, Respondent did not comply with rule 6A-10.081, the Principles of Professional Conduct of the Education Profession in Florida, as required by paragraph 1. of Policy 4008.B.

138. Additionally, Respondent did not treat all students with kindness and consideration, as required by paragraph 4. of Policy 4008.B.

School Board Policy 4.9 – Corrective Action

139. Petitioner also alleges that Respondent "violated" School Board

Policy 4.9, titled "Corrective Action," as a basis for its proposal to terminate his employment.

140. As previously discussed and further addressed in the Conclusions of Law, below, Policy 4.9 does not establish a separately enforceable standard of conduct which may be violated for purposes of serving as the basis for discipline, but, rather, constitutes a policy designed to improve and/or change employee's job performance and conduct, as well as establishes Petitioner's progressive discipline policy for purposes of determining the appropriate penalty range for violations of applicable standards of conduct.

141. The racially insensitive and demeaning comments that Respondent made to his students, repeatedly, over a substantial period of his employment with Petitioner, constitute a severe offense. The evidence establishes that his comments not only offended and embarrassed his students, but also affected his effectiveness as a teacher.

142. Additionally, Respondent's conduct in lowering students' academic course grades to deal with behavioral issues, directly contrary to school grading policy set forth in the MHS Faculty Handbook, was severe, in that it inappropriately affected students' course grades in a negative manner.

143. Moreover, Respondent's students were directly involved in, and affected by, his conduct. To this point, Respondent's racially insensitive and demeaning comments and disrespectful conduct was directed to his students, who were offended and embarrassed by his comments and conduct. Additionally, his students' grades were directly and negatively affected by Respondent's practice of lowering academic course grades to address behavioral issues. Respondent's conduct had direct and negative impacts on his students.

144. As discussed above, Respondent has a lengthy corrective action history during his employment with Petitioner, dating back to 2011. He has previously received two verbal reprimands, two written reprimands, and a

²⁰ See note 12, *supra*.

five-day suspension without pay. Additionally, in Case No. 19-3380, the undersigned has recommended that Respondent be suspended for ten days without pay for engaging in conduct charged in that case. Respondent also has been subjected to numerous non-disciplinary corrective actions during his employment with Petitioner. Collectively, counting the ten-day suspension that has been recommended in Case No. 19-3380, Respondent has received approximately 15 corrective actions, six of which were disciplinary in nature, between July 2011 and March 2019. Notwithstanding these numerous corrective actions, Respondent has persisted, during the timeframe covered by the May Administrative Complaint, in engaging in much of the same conduct for which he previously has been disciplined and issued non-disciplinary corrective actions. The evidence shows that these corrective actions have had essentially no deterrent effect on Respondent's conduct.

145. The competent, credible evidence establishes that Petitioner has given Respondent numerous chances, through its corrective action policy, including the progressive discipline process, to change his conduct which violated, and continues to violate, DOE rules and School Board policies.

146. The competent, credible evidence establishes that nonetheless, Respondent has continued, during the timeframe covered by the May Administrative Complaint, to engage in much of the same conduct which violates DOE rules and School Board policies, and for which he previously has received numerous disciplinary and non-disciplinary corrective actions.

147. Petitioner has closely adhered to the progressive discipline provisions in Policy 4.9, meting out multiple verbal and written reprimands, interspersed with non-disciplinary corrective actions to Respondent, before resorting to suspending him from employment—first, for five days, then for ten days—for his persistent conduct which violated DOE rules and School Board policies.

148. The purpose of Policy 4.9 is "to improve and/or change employees' job

performance [and] conduct."²¹ Despite giving Respondent numerous opportunities, through disciplinary and non-disciplinary corrective actions, to change his conduct, Respondent has not done so.

149. Given that Petitioner has closely followed the progressive discipline provisions of Policy 4.9, and the fact that Respondent has received numerous corrective actions over his period of employment with Petitioner—which have not resulted in him changing his conduct such that he does not engage in behavior which violates DOE rules and School Board policies—it is determined that, pursuant to Policy 4.9, Respondent should be terminated from his employment as a teacher.

CONCLUSIONS OF LAW

I. Jurisdiction, Burden and Standard of Proof, and Administrative Charges

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

151. In these consolidated disciplinary proceedings, Petitioner seeks to suspend Respondent for ten days without pay in Case No. 19-3380, and to terminate his employment as a teacher in Case No. 19-3381.

152. These de novo proceedings are 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 these proceedings is to determine anew, based on the competent substantial evidence in the record, whether just cause exists to suspend Respondent without pay and to terminate his employment.

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

²¹ School Board Policy 4.9, "Intent and Purpose," ¶ 2.

154. 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)."

155. "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 and incompetency. § 1012.33(1)(a), Fla. Stat.

156. In order to suspend and terminate Respondent's employment as a teacher, Petitioner must prove that Respondent committed conduct alleged in the administrative complaints; that the alleged conduct violates the statutes, rules, and policies cited in the administrative complaints; and that the violation of these statutes, rules, and policies constitutes just cause to suspend and terminate his employment. *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990). *See 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 complaints cannot constitute the basis for disciplinary action. *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

157. 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.

II. Violations of Statutes, Rules, and School Board Policies

158. In Case No. 19-3380, in which Petitioner seeks to suspend Respondent for ten days without pay, Petitioner has charged Respondent with engaging in conduct that violates section 1008.24, Florida Statutes (2018)²²; constitutes misconduct in office, incompetency, gross insubordination, and willful neglect under rule 6A-5.056(2), (3), (4), and (5);

²² Respondent's conduct alleged to violate section 1008.24 occurred in October 2018, when the 2018 version of Florida Statutes was in effect.

violates rule 6A-10.081; and violates School Board policies 4008, 6314, and 4.9.

159. In Case No. 19-3381, in which Petitioner seeks to terminate Respondent's employment as a teacher, Petitioner has charged Respondent with engaging in conduct that constitutes misconduct in office, incompetency, gross insubordination, and willful neglect under rule 6A-5.056(2), (3), (4), and (5); violates rule 6A-10.081; and violates School Board Policies 4008 and 4.9.

Section 1008.24

160. Section 1008.24, which governs state assessment test administration and security, states, in pertinent part:

(1) A person may not knowingly and willfully violate test security rules adopted by the State Board of Education for mandatory tests administered by or through the State Board of Education or the Commissioner of Education to students, educators, or applicants for certification or administered by school districts pursuant to s. 1008.22,^[23] or, with respect to any such test, knowingly and willfully to:

* * *

(f) Fail to follow test administration directions specified in the test administration manuals[.]

161. For the reasons discussed above in the Findings of Fact, it is concluded that Respondent did not violate section 1008.24 in Case No. 19-3380.

Rule 6A-5.056

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

²³ The 2018 version of section 1008.22, which was in effect at the time of the alleged conduct, applies to this proceeding. Pursuant to section 1008.22(9) and the version of rule 6A-1.09422(8) in effect on October 1, 2018, the PSAT is a test to which section 1008.24 applies.

["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:

* * *

(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.

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;
2. Failure to communicate appropriately with and relate to students;
3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents[.]

* * *

(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.

163. Based on the Findings of Fact, it is concluded, in Case No. 19-3380, that Respondent engaged in misconduct in office, incompetency due to inefficiency, gross insubordination, and willful neglect of duty, pursuant to rule 6A-5.056.

164. Based on the Findings of Fact, it is concluded, in Case No. 19-3381, that Respondent engaged in misconduct in office, incompetency due to inefficiency, gross insubordination, and willful neglect of duty, pursuant to rule 6A-5.056.

Rule 6A-10.081

165. Rule 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida, states, 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.

* * *

7. Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

* * *

(c) Obligation to the profession of education requires that the individual:

* * *

5. Shall not make malicious or intentionally false statements about a colleague.

166. Based on the Findings of Fact, it is concluded, in Case No. 19-3380, that Respondent violated rule 6A-10.081(2)(a)1., 5., and 7.

167. Based on the Findings of Fact, it is concluded, in Case No. 19-3381, that Respondent violated rule 6A-10.081(2)(a)1., 5., 7., and (2)(c)5.

School Board Policy 4008

168. Petitioner has charged Respondent with violating School Board Policy 4008, Responsibilities and Duties (Principals and Instructional Personnel). That policy states, in pertinent part:

All employees of the Board who have been issued contracts as provided by Florida Statutes . . . shall comply with the provisions of the Florida School Code, State Board Regulations, and Regulations of the Board.

* * *

B. Duties of Instructional Personnel

1. Comply with the . . . the Principles of Professional Conduct of the Education Profession in Florida.

* * *

4. Treat all students with kindness, consideration and humanity, administering discipline in accordance with regulations of the State Board and the School Board; provided that in no case shall cruel or inhuman punishment be administered to any child attending the public schools.

169. Based on the Findings of Fact, it is concluded, in Case No. 19-3380, that Respondent violated Policy 4008.

170. Based on the Findings of Fact, it is concluded, in Case No. 19-3381, that Respondent violated Policy 4008.

School Board Policy 6314

171. In Case No. 19-3380, Petitioner has charged Respondent with violating School Board Policy 6314, titled "Testing – Student Achievement Testing." This policy states:

A program of achievement testing shall be conducted annually in a professional and ethical manner to monitor the status of student achievement.

Testing within the Broward County School System should be conducted to:

1. Obtain information for the instructional staff about students strengths and weaknesses with such information to be used as a basis for improving the instruction program and determining eligibility for special programs.

2. Provide parents/guardians with a yearly individual student test report and interpretation for those students who have been tested.

3. Obtain information for dissemination to the general public concerning the status of its total school system.

* Individual needs of exceptional and bilingual students shall be considered in providing modifications of test instruments and/or procedures.

172. For the reasons addressed in the Findings of Fact, it is concluded that Respondent did not violate School Board Policy 6314.

School Board Policy 4.9

173. Petitioner also alleges that Respondent violated School Board Policy 4.9, titled "Corrective Action," as a basis for its proposed discipline. The "Intent & Purpose" section of the Policy 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."

174. The second paragraph of the Intent & Purpose section of Policy 4.9 states: "[t]he 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' [sic] success."

175. The context provided in the second paragraph makes clear that the Intent and Purpose section of Policy 4.9 does not establish a separately enforceable standard of conduct for purposes of imposing discipline, but, rather, establishes the Petitioner's progressive discipline policy for purposes of determining the appropriate penalty range for violations of standards of conduct which are established in other local, state, and federal laws and School Board policies. Thus, consistent with the concept of improving or

changing employee job performance, conduct, or attendance, 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 an offense within a specified category.

176. Policy 4.9, "Corrective Action," section I, states, in pertinent part:

* * *

(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.

177. Policy 4.9, section II, identifies Category B offenses and the penalty range applicable to those offenses. Following are the Category B offenses with which Respondent is charged. The penalty for each of these offenses ranges from "Reprimand" to "Dismissal."

* * *

m) Any violation of the Code of Ethics of the Education Professional in the State of Florida-State Board of Education Administrative Rule

* * *

p) Insubordination, which is defined as a continuing or intentional failure to obey a direct order, reasonable in nature and given by and with proper authority

* * *

r) Failure to comply with School Board policy, state law, or appropriate contractual agreements

178. Policy 4.9, section III, titled "Other Considerations," subsection (c), sets forth circumstances that are "illustrative and not meant to be exhaustive and may be considered when determining the appropriate penalty within a penalty (II Category B) range." Section III further states that "the [p]enalty [r]ange is established as an administrative guideline for administering appropriate corrective action. The purpose in providing a range of corrective action is to allow for considerations that may include the factors identified in this policy."

179. The circumstances, or factors, to be considered in determining the appropriate penalty under Policy 4.9 include, as relevant:

1. The severity of the offense
2. Degree of student involvement

3. Impact on students, educational process and/or community

4. The number of repetitions of the offenses and length of time between offenses

180. Pursuant to Policy 4.9, including the progressive discipline and penalty determination provisions, it is concluded that the appropriate penalty in Case No. 19-3380 is to suspend Respondent for ten days without pay.

181. Pursuant to Policy 4.9, including the progressive discipline and penalty determination provisions, it is concluded that the appropriate penalty in Case No. 19-3381 is to terminate Respondent's employment as a teacher.

III. Just Cause Exists for Suspension and Termination

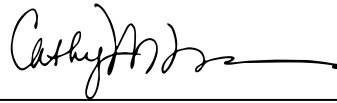
182. Based on the Findings of Fact and the pertinent statutes, rules, and School Board policies, it is concluded that, pursuant to section 1012.33 and rule 6A-5.056, just cause exists in Case No. 19-3380 to suspend Respondent without pay for ten days.

183. Based on the Findings of Fact and the pertinent statutes, rules, and School Board policies, it is concluded that, pursuant to section 1012.33 and rule 6A-5.056, just cause exists in Case No. 19-3381 to terminate Respondent's employment as a teacher.

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 Case No. 19-3380 suspending Respondent for ten days without pay, and enter a Final Order in Case No. 19-3381 terminating Respondent's employment as a teacher.

DONE AND ENTERED this 5th of May, 2021, in Tallahassee, Leon County,
Florida.



CATHY M. SELLERS
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2021.

COPIES FURNISHED:

Denise Marie Heekin, Esquire
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131

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

Robert F. McKee, Esquire
Robert F. McKee, P.A.
1718 East Seventh Avenue, Suite 301
Tampa, Florida 33605

Ranjiv Sondhi, Esquire
Bryant Miller Olive, P.A.
One Southeast Third Avenue, Suite 2200
Miami, Florida 33131

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

Robert W. Runcie
Superintendent
Broward County School Board
600 Southeast Third Avenue, Tenth Floor
Fort Lauderdale, Florida 33301-3125

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Richard Corcoran
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.