

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 19-6520TTS

DEBRA TURNBULL,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge (“ALJ”) Robert S. Cohen of the Division of Administrative Hearings (“DOAH”) on March 23, 2021, by Zoom video teleconference.

APPEARANCES

For Petitioner: Jean Marie Middleton, Esquire
V. Danielle Williams, Esquire
School District of Palm Beach County
Office of General Counsel
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For Respondent: Mark S. Wilensky, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Debra Turnbull’s (“Ms. Turnbull” or “Respondent”), employment with Petitioner, Palm Beach County School Board (“School Board” or “Petitioner”), as an elementary teacher, should be terminated, based upon the statements of the nature of the controversy set

forth in the Joint Second Amended Pre-hearing Stipulation filed by the parties.

PRELIMINARY STATEMENT

On October 29, 2019, Donald E. Fennoy, II, Ed.D., Petitioner's superintendent ("Superintendent"), issued Respondent a Notice of Recommendation for Termination from Employment. The letter informed Respondent that, at the School Board Meeting on November 20, 2019, the Superintendent would recommend her suspension without pay and termination of her employment. The stated basis for the Superintendent's action was that just cause existed to warrant Respondent's termination for: (1) Failure to Exercise Best Professional Judgment; (2) Gross Insubordination; and (3) Continued Failure to Follow Policy/Rule or Directive.

The letter further informed Respondent that she could appeal by either a grievance pursuant to the collective bargaining agreement ("CBA"), or by submitting a request for a hearing before DOAH. On November 20, 2019, the School Board adopted the Superintendent's recommendations to suspend Respondent without pay and to terminate her employment. Respondent timely requested an administrative hearing to challenge Petitioner's proposed action, and the matter was referred to DOAH to conduct a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes.

A Notice of Hearing was entered scheduling a final hearing on March 16 and 17, 2020. As a result of the onset of the COVID-19 public health emergency, and the granting, for good cause shown, of several joint and unopposed continuances, the final hearing was held on March 23, 2021. At the hearing, Petitioner presented the testimony of Respondent, Debra Turnbull; Principal Scott McNichols; Information Technology ("IT") witness

Gregory York; Vicki Evans-Paré, director of Employee and Labor Relations, Palm Beach County Public School District (“District”); and Emily Goodson, a former school teacher at Forest Hill Elementary School (“Forest Hill”), via deposition testimony. Respondent testified on her own behalf at the hearing and called Assistant Principal Sean Higgins as a witness. Petitioner’s Exhibits 1 through 3, 5 through 22, 24 through 27, 29, and 34 were admitted into evidence. Respondent’s Exhibits 2, 5, and 10 were admitted into evidence.

A one-volume Transcript of the final hearing was filed on April 29, 2021, and the parties timely filed proposed recommended orders. Both proposed recommended orders have been duly considered in the preparation of this Recommended Order. All references to Florida Statutes are to the version in effect at the time of the incidents giving rise to the proposed termination of Respondent’s employment as a teacher.

On June 29, 2021, prior to this Recommended Order being completed, Ms. Turnbull filed Respondent’s Notice of Additional Authority regarding an arbitration ruling between the Palm Beach County Classroom Teachers Association and Petitioner. Petitioner filed a response, Petitioner’s Opposition to Respondent’s Notice of Additional Authority, on July 1, 2021. On July 6, 2021, Respondent filed a Motion to Strike Petitioner’s Improper Argument. Based upon the undersigned’s review of the notice, response, and motion to strike, the notice was not relied upon in the preparation of this Recommended Order for the reason that the arbitration ruling, not something that the undersigned is even required to accept as precedent, relates primarily to a verbal reprimand being untimely issued and not placed in the employee’s personnel file within 45 days of its issuance. Since the only verbal reprimand described in the current matter was not used as a step in the progressive discipline of Ms. Turnbull, this supplemental authority is not

directly relevant to the issues before the undersigned and will not be relied upon in the findings and conclusions that follow.

FINDINGS OF FACT

1. The School Board is the constitutional entity authorized to operate, control, and supervise the District. Pursuant to Article IX, section 4(b) of the Florida Constitution, and section 1001.32, Florida Statutes, Petitioner has the authority to discipline employees pursuant to section 1012.22(1)(f), Florida Statutes.

2. Respondent is an experienced teacher who has been trained in the proper method of interacting with co-workers and students, exercising best professional judgment, and following rules, policies, and directives.

3. At all times relevant, Respondent was employed with Petitioner as a teacher at Forest Hill and had been assigned there for approximately two years, initially serving as a second-grade, dual language teacher.

4. At all times relevant, Respondent's employment was governed by the CBA between the District and the Classroom Teachers Association, School Board policies, and Florida law.

5. Respondent was notified, by a Notice of Recommendation for Termination of Employment, dated and acknowledged by her on October 29, 2019, that she was being recommended for a 15-day suspension and subsequent termination due to: (1) Failure to Exercise Best Professional Judgment; (2) Gross Insubordination; and (3) Continued Failure to Follow Policy/Rule or Directive, when she screamed and yelled at her students. An Administrative Complaint, detailing the charges, was served on Respondent, through her attorney, on December 9, 2019.

6. A few months after being assigned to the dual language class, Respondent was moved to a position in the Forest Hill computer lab, which was part of the fine arts rotation for students. As a media specialist, Ms. Turnbull was responsible for checking library books in and out; helping

children find books; reading aloud with children; helping students with independent reading; developing lessons to encourage the students to interact with media other than books; and working in a partnership with the home room teachers to support them in special projects and research.

7. The students' homeroom teacher is not present during the media center visit by that teacher's students, and routinely drops the students off at the beginning of the 30-minute time block, returning to pick them up at the conclusion of the visit.

8. On or about April 12, 2019, Ms. Turnbull was working on a project with third and fourth-grade classes. She had been given broad discretion in developing a project for the third and fourth graders to celebrate the Everglades. The project was designed to have the children investigate and do research on various aspects of the Everglades, then produce a project to demonstrate what was learned.

9. Ms. Turnbull decided to have each child do some individual research on a topic related to the Everglades, followed by their presenting their findings in a form with which they were comfortable.

10. She gathered numerous books about the Everglades, a video or a DVD to play about the Everglades, and expected that the project would ultimately end up in an Everglades museum that would be displayed in the media center for the rest of the school's students to visit and learn about the Everglades. She imposed a deadline on the students to have the project completed within three class sessions.

11. In administering the Everglades project, Ms. Turnbull's intent was that all of the children would research a topic in which they had a true interest. She gave an initial class in how to research and suggested some ideas for project topics. She and the students of each class brainstormed a list of approximately 15 topics that interested the children, which were placed on the board for all the children to see.

12. Ms. Turnbull explained to the students that she would go around the room, so that each student could select the topic on which he or she would like to work, but that no more than four students in each class could work on a single topic, in order to enhance the learning experience for all by having more topics covered.

13. Ms. Turnbull tallied the number of students who selected each topic, and, once a topic was chosen by four students, subsequent choosing students were redirected and limited to the other topics, which were ample for the class sizes.

14. Once the topics were selected and assigned, the classes brainstormed different types of project presentations which could be used. Students were able to produce a diorama, an advertising poster, a research report, or other methods of presenting their projects. Ms. Turnbull used the same rule, that once four students selected a particular method of presentation, that mode would be closed. Similar to the selection of topics, Ms. Turnbull tallied the number of students who selected each presentation method, and, once a mode was chosen by four students, subsequent choosing students were redirected to other choices.

15. On April 12, 2019, Ms. Turnbull met with the students from Ms. Goodson's third-grade homeroom class, who were dropped off at the media center for their second project session. As they arrived, Ms. Turnbull directed the students to sit at the media center tables, where she had a whiteboard set up, and she and the students began to interact and list the various Everglades topics which interested them.

16. On that day, the students had recently returned from spring break. Ms. Turnbull explained that all teachers know that, after spring break, students are looking towards the end of the school year and are not always focused. She felt that, as sometimes happens, "they were just not with me that day." They were somewhat uncooperative and talking to each other, rather than listening to what she was saying.

17. Ms. Turnbull had never had a particular problem with that class. It was one of the classes that she looked forward to seeing because they “had a good time together and got things accomplished.” However, on that day, the students were not following the directions she was giving them with respect to choosing the topic for their projects and then choosing their mode of presentation for the topic.

18. Ms. Turnbull gave Ms. Goodson’s students specific directions that no more than four people could choose the same project and that, once there were four students who had selected a particular topic or project, that topic or project was no longer in play, and the next students who chose had to select something else.

19. The students were not paying attention, and, when somebody tried to be the fifth or sixth person to choose the same topic, Ms. Turnbull would again tell the selecting student that there could be no more than four in a grouping and pointed to the board where the students could see four tally marks next to that topic. She would explain that the topic had closed and that something else had to be chosen. Soon thereafter, it would happen again with another student. When she had gone through the entire class, and when the tally marks were totaled, the numbers did not match, meaning that some students had not even made their selections.

20. Gregory York, the IT person assigned to Forest Hill since 2004 or 2005, is responsible for fixing all technical problems at the school. Mr. York testified that he was in the media center on April 12, 2019, to discuss a repair issue with Respondent when he heard her yelling and screaming at a student who had raised her hand. Mr. York further testified that he and Ms. Turnbull “got into a little shouting match as well [when he explained why he could not fix her VCR], so [he] just left.” He described Respondent’s tone of voice as a “very high-pitched tone. Aggravated. ... Loud and upset.” He specifically recalled a particular incident with one student as follows:

But the one that I kind of recall was with that one particular student when direction was given to raise their hand and when she raised the hand, I guess the answer wasn't good enough and it just got ... it wasn't just -- I don't know, I don't know what word to use, but it was just ... I just felt like the student was just following directions and it seemed like she just got in trouble for following directions, from me, that's all I'm saying.

21. Mr. York admitted, on cross-examination, that "at the beginning, I don't recall the whole conversation because I was too focusing [*sic*] with the IT person and then as I -- as we -- as I settled down, that's when I can pretty much hear -- not hear, but I can see the environment and the tone has changed and that's what I remember." He did not remember what was being said when he claimed that the tone changed.

22. Mr. York also remembered, on April 12, 2019, that a student raised her hand to ask a question. He did not recall the entire conversation, but said "it was like an upset conversation and everything and the student just wanted to ask the question and couldn't answer it or whatever... it was just... just the whole ordeal was just loud."

23. Mr. York said that, after getting yelled at, "to me for following directions, she did not see -- she seemed a little hurt about it or whatever." He claimed to "just remember the incident with the one student in particular, with the student raising their hand and, you know, she was just... It was an incident of her yelling at the kid and, you know, the kid got sad and everything like that."

24. Although he did not recall in any detail what was said or being done, Mr. York claimed "I just felt like the student was just following directions and it seemed like she just got in trouble for following directions from me, that's all I'm saying." He did not know why the student raised her hand or what she said.

25. On cross-examination, Mr. York admitted that the hand raising “had something to do with voting, and, like I said, I heard that part and I remember the student just following direction, raising their hand and -- ... raising their hand to speak or maybe vote. I remember that part, the students raised their hand and she asked the student go ahead. And when she said what she had to say, it just went bad after that.” He repeated that he was within ten feet of Ms. Turnbull when this exchange took place, but did not recall whether Ms. Turnbull was explaining that there were already too many students who had made the particular selection.

26. Also on cross-examination, after having his memory refreshed with his prior written statement and deposition testimony, Mr. York admitted that while he did not recall what Ms. Turnbull was “yelling” at the kids, he recalled her yelling or screaming at Assistant Principal Higgins about books.

27. Ms. Turnbull testified that she was not yelling at the children. She admitted that the situation was getting a bit annoying and that, as time went by, and the same situation kept occurring over and over, she became what she termed, “a little bit more stern.” On cross-examination, Ms. Turnbull conceded that she has a loud voice and that sometimes people misinterpret a loud voice or enthusiasm as raising her voice. She explained that she was “a New Yorker,” having a style and expressing herself in a way that some consider “loud, animated, excited and boisterous.”

28. Because the media center door is kept locked, teachers returning for their students typically knock on the door. Ms. Goodson did not knock on the door, but was somehow let into the media center, although she did not immediately ask for her students to leave the media center while Ms. Turnbull continued to work with them. Ms. Turnbull could not recall how long Ms. Goodson observed her students in the media center. Ms. Goodson recalled and estimated being in the media center for about 30 minutes.

29. Ms. Goodson waited in the media center as Ms. Turnbull continued beyond the allotted class time with her students. Eventually, Ms. Goodson

indicated that she had to return to her classroom with her students. There was a brief discussion between Ms. Turnbull and Ms. Goodson as the class was leaving. Ms. Turnbull asked Ms. Goodson if she would spend time in her classroom having the students choose topics and methods of presentation, as she had observed that those matters were not completed in the media center that day. Ms. Goodson, she testified, responded that “they are a low class.”

30. Ms. Turnbull assumed Ms. Goodson was referring to academic ability, and responded that, even if they are low, this was not an academic exercise, but was rather a situation of making a choice and following directions. Neither teacher was yelling; instead, they were speaking quietly, because the children were in close proximity to them. Ms. Goodson had never discussed her students’ academic level with Ms. Turnbull until that day. Ms. Turnbull never thought of the class as a “low class.” She would have approached the lesson differently had Ms. Goodson advised that she believed her class was incapable of following two-step or three-step directions. Ms. Turnbull felt that Ms. Goodson spoke about her students as a “low class” in an effort to explain or excuse their behavior that day.

31. When asked about the allegation that she yelled at Mr. Higgins when he was in the media center while Ms. Goodson and her class were present that same day, Ms. Turnbull testified that, since he was an assistant principal, she considered Mr. Higgins to be her boss. She would never yell at him, she testified. Ms. Turnbull felt that Mr. Higgins was someone to whom she could talk, and had she thought that he did something wrong with a book, she would have spoken with him. She did not recall any interaction with Mr. Higgins that day, or even that Mr. Higgins was in the room.

32. In her deposition testimony, Ms. Goodson recalled that, at some point, Mr. Higgins was in the media center. She recalled Ms. Turnbull “went off for a couple minutes on him, saying next time do this, this and this. That’s not how we do it here, something like that.”

33. Mr. Higgins testified during Ms. Turnbull's case. He knows Ms. Turnbull and was familiar with this case. Mr. Higgins was aware that he had been identified as having been present in the media center during the alleged incident of April 12, 2019. He testified that he did not recall any incident that took place with Ms. Turnbull. He provided a statement during the investigation at a time shortly after the alleged incident wherein he stated that he did not hear anything from Ms. Turnbull on that date. He recalled being asked by Mr. York to assist with repairing the VCR.

34. Mr. Higgins testified that Ms. Turnbull did not yell at him. Mr. Higgins said that he was not the type of person who would accept being yelled at without taking some action since he is the assistant principal and Ms. Turnbull is a media specialist. Mr. Higgins testified that he "returned the book, kind of finished the tech issue with work and walked out." Mr. Higgins did not witness any yelling, screaming, or anything like that.

35. Similarly, Ms. Turnbull did not recall any interaction with Mr. York on that day, although she recalled that some time before that day she had asked Mr. York to remove a cassette that had gotten stuck in her VCR. She conceded that, although she did not recall him being there, he could have been in the media center on that date.

36. Ms. Turnbull recalled the student Mr. York mentioned in his testimony, although she did not recall her name. The student had a physical exceptionality and used an assistive device to walk. Ms. Turnbull was not aware of the student having any intellectual exceptionality. Like Mr. York, she did not observe the student crying at any point, and testified that she did not observe her upset or with a quivering lip. Ms. Turnbull did not intend to disparage or embarrass the student.

37. Scott McNichols is the principal at Forest Hill. He testified that homeroom teacher Ms. Goodson reported an incident with Ms. Turnbull. Mr. McNichols had Ms. Goodson complete a witness statement. When Ms. Goodson provided the statement, Mr. McNichols contacted the school

district labor relations department. Mr. McNichols spoke to no other witnesses about the matter.

38. In general, classes at Forest Hill were heterogeneous with all different kinds of students mixed together. Ms. Goodson's class was not an exceptional student education ("ESE") class. She had some students with Individual Education Plans ("IEPs"), and some without. The level of the students in Ms. Goodson's class was not advertised to the public. A teacher on the art wheel would only know whether Ms. Goodson's class had ESE students if the ESE contact informed her. Mr. McNichols had no way to know whether the ESE contact informed a teacher as to the existence and nature of a student's IEP. Ms. Turnbull specifically testified that the ESE contact never informed her of such matters concerning Ms. Goodson's class.

39. Ms. Vicki Evans-Paré is the director of Employment and Labor Relations for the District. She has held that position for a little over two years and is responsible for handling the CBA and employee discipline, along with other duties. With regard to employee discipline, it is her office that investigates and maintains discipline files. After consultation with the Superintendent regarding his decision as to employee discipline, her office is responsible for drafting the notice of recommendation to the employee that the Superintendent signs.

40. With regard to Respondent's case, Ms. Evans-Paré testified that she is familiar with Ms. Turnbull's discipline file. As a records custodian for Petitioner, she provided clear and uncontroverted testimony with regard to the CBA's provisions for progressive discipline and skipping steps when there is either an immediate danger to the health, safety, and welfare of students or district and/or a flagrant and purposeful violation of the rules. As the director, she makes recommendations regarding discipline to the Superintendent, and she found that Ms. Turnbull had a history of making inappropriate comments to students and acting inappropriately and had previously been given warnings and reprimands; such that, skipping steps, to

suspension, was warranted given that prior discipline was not having an effect at all on Respondent's behavior.

41. Ms. Evans-Paré further testified as to the past practice under the CBA relating to the use of a verbal reprimand with written notation relative to notice of previously given directives. The CBA refers to the personnel file in Article II, Section B, under Rights and Responsibilities. In that provision, it states that "no item can be used to the detriment of an employee unless it is a part of his/her personnel file." The two verbal reprimands that were offered into evidence were not being offered for progressive discipline purposes, but as allowed under Article II, Section M - Discipline of Employees, as follows:

5. Only previous disciplinary actions which are a part of the employee's personnel file or which are a matter of record as provided in paragraph #7 below may be cited.

* * *

7. Except in cases which clearly constitute a real and immediate danger to the District, a District employee, and/or a child/children or the actions/inactions of the employee clearly constitute flagrant or purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered as follows:

a. Verbal Reprimand with a Written Notation - Such written notation shall not be placed in the employee's personnel file maintained at the District headquarters, but will be placed in a file at the school/department and shall not be used to the further detriment of the employee after twelve (12) months of the action/inaction of the employee which led to the notation. The written notification shall be maintained at the school site/department pursuant to the District's Records Retention Schedule.

42. Under the discipline section, the verbal reprimands are certainly a matter of record that is permitted to be cited to, and the phrase "to the

detriment of the employee” that is in the section regarding the personnel file, was not included. The terms in the CBA regarding the verbal reprimand and personnel file are not ambiguous. Therefore, they must be given their ordinary meaning. *Rivercrest Cmty. Ass’n, Inc. v. Am. Homes 4 Rent Props. One, LLC*, 298 So. 3d 106, 111 (Fla. 2d DCA 2020).

43. Respondent acknowledged that she was trained in the Code of Ethics and that she had received previous directives regarding appropriate interaction with students, failure to exercise best professional judgment, and insubordination. She further acknowledged that she had received the allegations against her in the pre-determination notice and packet. Respondent has a prior disciplinary history.

44. Respondent received a Written Reprimand on or about February 24, 2004, while working at Addison Mizner Elementary School, for “actions that violated the Code of Ethics, Sections 2(a) and (e).” At the time, Respondent inappropriately addressed five students (three ESE students, one “504” student, and a “regular” education student) when she “withheld the Valentine’s Day classroom party” for “talking,” for “forgetting materials,” and for “being off task.”

45. Respondent received a Written Reprimand on or about June 5, 2014, from the Office of Professional Standards at the District for violations of School Board policies: 5.002, Prohibition of Bullying and Harassment; 3.02, Code of Ethics; 3.01, Commitment to the Student, Principle I; and 1.013, Responsibilities of School District Personnel and Staff; as well as Florida Administrative Code Rules 6A-10.080, Code of Ethics for the Education Profession in Florida, and 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida. At the time, Respondent “allowed the students to publicly assess their peers, deciding which students were creating a distraction, and which students were ‘hard-working.’” Respondent also “segregated” the students by sitting the “distracting” students in the back and also disparaging a student in front of the class “by

suggesting that he should have learned certain skills when he was in kindergarten.”

46. Respondent received a Written Reprimand on or about May 21, 2018, from the Office of Professional Standards at the District for “[failing] to exercise [her] best professional judgment, ethical misconduct, inappropriate interaction with students, and for failure to follow policy, rule, or directive.” At the time, Ms. Turnbull said “shut up” and “stupid” during work hours, and the students said they perceived it as being directed at them. Later on, during the Pre-Determination Meeting (PDM), Ms. Turnbull stated, “The District can go to hell,” while school administration recalled her saying “You go to hell.”

47. Respondent received a Verbal Reprimand (Written Notation) on or about April 17, 2019, while working at Forest Hill, for her unprofessional conduct towards employees during duty hours and for failing to exercise her best professional judgment. At the time, an employee borrowed a Sharpie from Ms. Turnbull’s desk. Respondent reacted by addressing the employee “in a rude and confrontational manner” in the presence of “students and volunteers.” Later, Respondent “went after [the employee] again, continued berating her (disrespecting the personal space between both of [them]), and even mocked her.”

48. The District’s process for determining the discipline to be imposed on Ms. Turnbull in this matter went through Ms. Evans-Paré, the director of Employee and Labor Relations for the District. She testified about the practices of her department and that Ms. Turnbull had received letters and notices of hearing, reassignments within the District, and a copy of the investigative report, which was prepared by another individual, who did not testify in the case.

49. Ms. Evans-Paré testified that progressive discipline begins with a Verbal Reprimand with Written Notation for teachers. It then goes to Written Reprimand, suspension of any number of days, and then to

termination. She believes that the employer can “jump steps” and that the CBA permitted that practice when there was “a real and immediate danger to the District, to students, to faculty, to adults, and then also if it’s a flagrant and purposeful violation of the rules.” She explained that steps were skipped in this case

because of the nature of the allegation. Additionally, that it was a flagrant and purposeful violation. This is something that has been going on for years with making inappropriate comments to students, acting inappropriately. So[,] at a certain point you just move forward and progressive discipline, you can jump steps because the warnings, the other reprimands, they weren’t having any effect at all. And it was continually doing harm to students.

50. Ms. Evans-Paré testified that the purpose of progressive discipline, and all the notices referenced in her testimony, is to ensure that the employee be told that an action is wrong and that the employee is not to repeat it, and to provide the opportunity to adjust his or her behavior accordingly. She admitted that its purpose was to give a person the opportunity to be advised that particular conduct was wrong and, therefore, be able to avoid it in the future.

51. In her testimony, Ms. Evans-Paré stated that the recommendation of District administrators that went to the School Board in this case was for termination. She recommended termination, based on the fact that statements made by Respondent were to disabled ESE students, and what she termed the number of statements calling them “stupid” and “slow.” Ms. Evans-Paré claimed that Ms. Turnbull “did them over and over. Enough is enough.”

52. Notwithstanding that testimony, Ms. Evans-Paré testified that only the School Board can suspend a teacher without pay. On cross-examination, she made it clear that pursuant to Florida Statutes, the ultimate decision

maker concerning employee discipline, even beyond herself, is the Superintendent, and then, beyond him, the School Board. She did not testify as to any formal action taken by the School Board in this case and did not reference or provide any document which set forth any action by the School Board.

CONCLUSIONS OF LAW

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

54. In accordance with the provisions of article IX, section 4(b) of the Florida Constitution, district school boards have the authority to operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the state constitution or general law. A school board's authority extends to personnel matters and includes the power to suspend and dismiss employees. §§ 1001.32(2), 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

55. In Florida, the district superintendent has the authority to make recommendations for dismissal of school board employees, and the school boards have the authority to suspend, without pay, school board instructional staff with professional service contracts for "just cause." §§ 1001.42(5), 1012.22(1)(f), and 1012.33(6)(a), Fla. Stat.

56. Ordinarily, when a school board seeks to terminate a respondent's employment, the school board bears the burden of proving the allegations in its notice of specific charges by a preponderance of the evidence. *See McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476 (Fla. 2d DCA 1996); *Allen v. Sch. Bd. of Dade Cty.*, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); and *Dileo v. Sch. Bd. of Dade Cty.*, 569 So. 2d 883 (Fla. 3d DCA 1990). However, where, as here, the School Board has agreed through collective bargaining to a more demanding evidentiary standard, it must act in accordance with the applicable contract. *See Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672-73 (Fla. 1993); *Palm*

Beach Cty. Sch. Bd. v. Zedrick Barber, Case No. 15-0047 (Fla. DOAH Aug. 31, 2015; PBCSB Oct. 13, 2015).

57. Article II, Section M of the applicable CBA, of which the undersigned has taken official recognition, provides that “disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.” *Id.*

58. The School Board’s burden here, accordingly, is to prove the facts alleged as grounds for suspending and terminating Ms. Turnbull by clear and convincing evidence. Regarding that standard of proof, in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a “workable definition of clear and convincing evidence” and found that of necessity such a definition would need to contain “both qualitative and quantitative standards.” The court held that:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id.

59. The Florida Supreme Court later adopted the *Slomowitz* court’s description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the *Slomowitz* test, adding the interpretive comment that “[a]lthough this standard of proof may be met where the evidence is in conflict, ... it seems to preclude evidence that is ambiguous.” *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) (footnote omitted).

60. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

61. The Superintendent is statutorily obligated to require compliance and observance by all personnel of all laws, policies, and directives of the School Board, the State of Florida, and the federal government. Pursuant to section 1012.27(5), the Superintendent has the authority to recommend to the School Board that an employee of the School Board be suspended and terminated from employment. Only the School Board can ultimately suspend a teacher without pay:

(f) Suspension, dismissal, and return to annual contract status.--The district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in this chapter.

§ 1012.22(1)(f), Fla. Stat.

62. The record in this case establishes that there is just cause to suspend Respondent from teaching without pay in support of the first charged violation, Inappropriate Interaction with Student(s), in violation of the following School Board policies:

- a. School Board Policy 3.02(5)(a)(ii), Code of Ethics -- Exposing a student to unnecessary embarrassment or disparagement;
- b. School Board Policy 3.02(4)(d), Code of Ethics -- To treat all students and individuals with respect and to strive to be a fair person;
- c. School Board Policy 3.02(4)(e), Code of Ethics -- To create an environment of trust, respect and non-

discrimination, by not permitting discriminatory, demeaning or harassing behavior to students or colleagues;

d. 6A-10.081(2)(a)1., F.A.C., Principles of Professional Conduct for the Education Profession in Florida -- 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; and

e. 6A-10.081(2)(a)5., F.A.C., Principles of Professional Conduct for the Education Profession in Florida -- Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

63. School Board Policy 3.02 specifically advises employees that a violation of the Code of Ethics may result in administrative discipline action, up to and including suspension or dismissal:

2. Application and Enforceability:

This Code of Ethics applies to all Board Members and employees and extends to guests, invitees, and volunteers while they are on District Property or are participating in District-related events. Violations of this Code of Ethics may result in administrative or disciplinary action, up to and including suspension, dismissal, or other actions as required by law. This Code may apply when the conduct of the employee occurs on or off District Property, at a school sponsored event or non-school sponsored event.

64. On or about October 31, 2018, Respondent electronically signed the Code of Ethics Acknowledgement Receipt, indicating that she completed the mandatory annual Code of Ethics training and agreed to comply with School Board Policy 3.02, Code of Ethics, throughout her employment.

65. The record in this case establishes that there is just cause to impose discipline on Respondent's employment as a teacher in support of the second

charged violation, Failure to Exercise Best Professional Judgment, is in violation of the following School Board Policies:

- a. School Board Policy 3.02(4)(a), Code of Ethics -- To provide the best example possible; striving to demonstrate excellence, integrity and responsibility in the workplace;
- b. School Board Policy 3.02(4)(b), Code of Ethics -- To obey local, state and national laws, codes and regulations;
- c. School Board Policy 3.02(4)(f), Code of Ethics -- To take responsibility and be accountable for his or her actions or omissions;
- d. School Board Policy 3.02(4)(j), Code of Ethics -- To create an environment of trust, respect and non-discrimination, by not permitting discriminatory, demeaning or harassing behavior of students or colleagues;
- e. 6A-10.081(1)(b), F.A.C., Principles of Professional Conduct for the Education Profession in Florida -- The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity; and
- f. 6A-10.081(1)(c), F.A.C., Principles of Professional Conduct for the Education Profession in Florida -- Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

66. The record in this case establishes that there is just cause to impose discipline on Respondent's employment as a teacher in support of the third charged violation. Gross Insubordination: Continued Failure to Follow Policy, Rule or Directives, is a violation of the following School Board Policies:

a. School Board Policy 3.10(6) -- The District requires its employees to carry out their responsibilities in accordance to School Board Policy 1.013 (as may be amended), their job descriptions and reasonable directives from their supervisors that do not pose an immediate serious hazard to health and safety or clearly violate established law or policy.

b. School Board Policy 1.013(1) -- It shall be the responsibility of the personnel employed by the district board to carry out their assigned duties in accordance with federal laws, rules, state statutes, state board of education rules, school board policy, superintendent's administrative directives and local school and area rules.

67. Respondent's counsel has made a major part of his argument that various documents that were contained in Ms. Turnbull's employee file are hearsay and should not be considered when determining the proof of the matters asserted that happened in the media center on April 12, 2019. He is correct that many notes and other documents are hearsay that was unsupported by the author of the statements or were not shown to fall within an exception to the hearsay rule. The undersigned, however, employing the progressive discipline doctrine employed by the District through its CBA, finds that Ms. Turnbull's actions in the media center, as well as her history of discipline as evidenced by formal reprimands she received in the past, support the imposition of discipline here. What remains for discussion is the extent and duration of such discipline.

68. The CBA between the parties contains a provision for progressive discipline as follows, in pertinent part:

ARTICLE II RIGHTS AND RESPONSIBILITIES

* * *

SECTION M – Discipline of Employees
(Progressive Discipline)

1. Without the consent of the employee and the Association, disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence, which supports the recommended disciplinary action.

* * *

5. Only previous disciplinary actions which are a part of the employee's personnel file or which are a matter of record as provided in paragraph #7 below may be cited.

6. Where just cause warrants such disciplinary action(s) and in keeping with provisions of this Section, an employee may be reprimanded verbally with written notation, reprimanded in writing, suspended without pay or dismissed upon the recommendation of the immediate supervisor to the Superintendent. Other disciplinary actions(s) may be taken with the mutual agreement of the Parties.

7. Except in cases which clearly constitute a real and immediate danger to the District, a District employee, and/or a child/children or the actions/inactions of the employee clearly constitute flagrant or purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered as follows:

a. Verbal Reprimand with a Written Notation - Such written notation shall not be placed in the employee's personnel file maintained at the District headquarters, but will be placed in a file at the school/department and shall not be used to the further detriment of the employee after twelve (12) months of the action/inaction of the employee which led to the notation. The written notification shall be maintained at the school site/department pursuant to the District's Record Retention Schedule.

b. Written Reprimand - A written reprimand may be issued to an employee when appropriate in

keeping with provisions of this Section. Such written reprimand shall be dated and signed by the giver and the receiver with provisions of Article II, Section B of this Agreement.

c. Suspension Without Pay - A suspension without pay may be issued to an employee, when appropriate, in keeping with provisions of this Section, including just cause and applicable laws. The length of the suspension also shall be determined by just cause as set forth in this Section. The notice and specifics of the suspension without pay shall be placed in writing, dated and signed by the giver and the receiver of the suspension. The specific days of suspension will be clearly set forth in the written suspension notice which shall be filed in the affected employee's personnel file in keeping with provisions of Article II, Section B of this Agreement.

d. Dismissal - An employee may be dismissed (employment contract terminated) when appropriate in keeping with provisions of this Section, including just cause and applicable laws.

69. In light of Respondent's disciplinary history, the next step of discipline, under Article 17 of the CBA, would be suspension without pay. Ms. Evans-Paré testified, accurately, that the CBA allows for skipping steps in progressive discipline where the employee's actions are deemed to be flagrant or purposeful violations of reasonable school rules and regulations or clearly constitutes a real and immediate danger to the health, safety, and welfare of the students, a District employee, or the District.

70. Beginning with the Administrative Complaint filed in this matter, continuing through discovery, and culminating with the final hearing, scant, if any, allegations were set forth to demonstrate that Ms. Turnbull's actions throughout her tenure as an instructional employee of the District ever rose to where her conduct "clearly constitute[d] a real and immediate danger to the District," as set forth in the CBA. Moreover, with the increased

requirement in this District that the specific charges brought against instructional personnel must be proven by clear and convincing evidence (rather than, as in most school districts, a preponderance of the evidence), Petitioner has fallen short here of proving that Respondent's employment should be terminated.

71. However, based upon Ms. Turnbull's prior disciplinary history and the handling of matters witnessed on April 12, 2019, when she raised her voice and made direct or implied insults to the students in her care that day and to the IT employee, Mr. York, the next level of progressive discipline is warranted, namely, a suspension without pay. This is further supported by an additional Verbal Reprimand (written notation) on April 17, 2019, not even a week following the most recent one leading to this matter coming before DOAH. While Respondent clearly needs to remedy the perception or reality that her actions can be explained by the fact that she is a "loud" person, she must take responsibility for the fact that her past transgressions have all related to personal interactions with colleagues and students. Her actions on April 12, 2019, however, did not rise to the level where "skipping steps," under the progressive discipline provision of the CBA, is warranted, especially where, under this particular CBA, the burden of proof on Petitioner is to prove the allegations against Respondent by clear and convincing evidence.

72. The number and age of the prior disciplinary actions taken against Respondent, coupled with the fact that the incident complained of herein was a single incident, not a series of incidents over a short period of time, do not provide clear and convincing evidence of misconduct by Respondent that should result in skipping progressive discipline steps, which would result in termination of her employment. In short, there was no clear and convincing evidence produced by Petitioner to support a departure from the principles of progressive discipline adopted in the CBA. A 15-day suspension, without pay, and a restoration of Respondent's additional lost back pay and benefits is

both the more appropriate and reasonable resolution of this matter, than the suspension plus termination of employment sought by Petitioner, and that is supported by application of the terms of the CBA.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Palm Beach County School Board enter a final order finding that “just cause” exists to discipline Ms. Turnbull, by upholding her prior suspension, without pay, for 15-days, and restoring all benefits and back pay that have been lost/withheld since November 21, 2019.

DONE AND ENTERED this 7th day of July, 2021, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of July, 2021.

COPIES FURNISHED:

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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.