

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 20-2605TTS

MARIA ACOSTA,

Respondent.

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RECOMMENDED ORDER

A duly-noticed hearing was held on September 10, 2020, via Zoom conference, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark E. Levitt, Esquire
Allen, Norton & Blue, P.A.
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Winter Park, Florida 32789

For Respondent: Eric J. Lindstrom, Esquire
Egan, Lev, Lindstrom & Siwica, P.A.
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STATEMENT OF THE ISSUE

Whether Petitioner, Marion County School Board (“Petitioner” or “Board”), had just cause to discipline Respondent for misconduct as alleged in the Administrative Complaint (“Complaint”) dated March 10, 2020.

PRELIMINARY STATEMENT

On March 10, 2020, Dr. Heidi Maier, then-Marion County Superintendent of Schools, issued the Complaint, imposing on Respondent a written reprimand and five-day suspension without pay for misconduct alleged therein. Respondent timely filed a Petition for Administrative Hearing to contest the discipline, which was referred to the Division of Administrative Hearings (“Division”) on June 8, 2020, for the assignment of an administrative law judge, pursuant to the Board’s contract with the Division.

The case was originally scheduled for final hearing live in Ocala, Florida, on September 10, 2020, but was rescheduled to a hearing via Zoom conference on September 10, 2020.

At the final hearing, Petitioner offered the testimony of Leah Grace, former school counselor at Dunnellon Middle School (“Dunnellon Middle”); Julia Roof, paraprofessional at Dunnellon Middle; Michelle Reese, guidance clerk at Dunnellon Middle; Delbert Smallridge, principal of Dunnellon Middle; Dawana Gary, the Board’s director of equity and ethics; Jaycee Oliver, the Board’s executive director of employee relations; and student L.L. Petitioner introduced Exhibits 1, 3A through 3E, and 4 through 7, which were admitted in evidence.

Respondent testified on her own behalf and proffered the testimony of Christopher McLain, whose testimony was disallowed. Respondent introduced Exhibits 2 through 6 and 8, which were admitted in evidence.

A one-volume Transcript of the hearing was filed with the Division on September 21, 2020. The undersigned granted the parties request to file proposed recommended orders 30 days after the date the Transcript was filed. The parties timely filed Proposed Recommended Orders, which have

been considered by the undersigned in preparation of this Recommended Order.

Unless otherwise noted, all references to the Florida Statutes are to the 2019 version.

FINDINGS OF FACT

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the public schools within Marion County. *See* Art. IX, § 4(b), Fla. Const.; § 1001.32(2), Fla. Stat. Petitioner is authorized to discipline instructional staff and other school employees. *See* § 1012.22(1)(f), Fla. Stat.

2. At the time of the alleged incident, Respondent was employed as a testing coordinator at Dunnellon Middle, pursuant to a professional services contract with the Board. During the 2018-2019 school year, Respondent served as a dean of discipline at Dunnellon Middle. As dean, she had dealt with discipline of students possessing drugs on campus, as well as students suspected of smoking marijuana either on a school bus or at the school bus stop.

3. Leah Grace is a guidance counselor at Dunnellon Middle. Michelle Reese is the guidance office clerk.

4. On January 30, 2020, student L.L. came to the guidance office and told Ms. Reese he wanted to speak with Ms. Grace about enrollment in a magnet program for the following school year. However, when L.L. entered Ms. Grace's office, he sat down and began crying. L.L. confided in Ms. Grace that he "had something he was not supposed to have at school." L.L. stated that he did not know who to trust.

5. L.L. was distraught and Ms. Grace was unable to calm him. She decided to contact his mother to pick him up from school. Aware that L.L.'s mother does not speak English, Ms. Grace sought help from someone at the school who spoke Spanish. Respondent speaks Spanish.

6. Ms. Grace contacted Respondent and asked her to come to the guidance office to help her with a student. When Respondent arrived at Ms. Grace's office, she observed L.L. visibly upset, sobbing with his face in his hands, rocking back and forth. Ms. Grace relayed to Respondent what L.L. had shared with her—that he “had something he was not supposed to have at school.”

7. Respondent recognized L.L. and asked him three questions in quick succession: Do you have a weapon? L.L. shook his head “no” in response; Do you plan to hurt yourself or someone else? L.L. shook his head “no” in response; and Do you have weed? L.L. nodded his head in response to the third question, indicating that he did have marijuana. L.L. confided that another student, D.G., had given the marijuana to L.L. in the cafeteria that morning to “hold on to” for him. L.L. had grown anxious during the school day about having the drugs in his possession and had come to the guidance office for help.

8. When L.L. nodded in the affirmative that he had weed on him, Respondent stated something to the effect of “that is no reason to go home.” Respondent suggested L.L. just flush the marijuana down the toilet. L.L. promptly went into a small restroom attached to Ms. Grace's office, flushed the toilet, washed his face, and began to compose himself. Afterward, Respondent told L.L. he needed to find better friends.

9. As Respondent was no longer needed for translation, she left the guidance office and returned to her duties in the testing lab.

10. Ms. Grace allowed L.L. to go to his next class, a grade-recovery course for which he was already late. Julia Roof teaches the class and had been concerned that L.L. was not in class on time. L.L. arrived at the classroom toward the end of the class period, and Ms. Roof observed that L.L. was upset. L.L. initially insisted that he was “fine,” but Ms. Roof pressed him because he was visibly upset. L.L. confided in Ms. Roof about the incident. He admitted that he had marijuana in his possession at school that day, that

another student had asked him to hold it, and that he had been to the guidance office where the marijuana had been “flushed.”

11. Neither Ms. Grace nor Respondent reported the incident to the school resource officer or anyone in school administration. Nor did either of them notify L.L.’s mother.

12. Ms. Roof reported the incident to Delbert Smallridge, principal at Dunnellon Middle, at the end of the school day.

Principal Smallridge’s Investigation

13. Mr. Smallridge has served as principal at Dunnellon Middle for nine years, and has worked in the Marion County school system in various positions for 31 years.

14. Ms. Roof reported the incident to Mr. Smallridge after school at car pickup. Before he left the school for the day, Mr. Smallridge contacted the school resource officer to notify him that there was a situation with drugs on the school campus that day. He also notified Brent Carson, director of professional practices (i.e., human resources) for the Marion County School District (“the District”), with the limited information he had obtained.

15. The following morning, Friday, January 31, 2020, Mr. Smallridge began an internal investigation into the incident. He first interviewed L.L., in the presence of Ms. Roof; took notes of the events L.L. related; reviewed the notes verbally with L.L.; as well as having L.L. read them to himself. Afterward, he asked L.L. to sign his name at the bottom of the page as his statement of the incident.

16. The next person he interviewed, Ms. Reese, came to him directly. She reported to Mr. Smallridge that she had information she felt he should know. She told Mr. Smallridge that Ms. Grace had confided in her that morning that she had allowed a student to flush marijuana in plastic bags down the toilet in her office the prior day, and that she was concerned that they may come back up or otherwise cause a plumbing problem. Ms. Reese provided and signed a written statement to that effect.

17. Mr. Smallridge also interviewed, and took a written statement from, Ms. Roof regarding the incident. Before the school day ended, he also spoke to Mr. Carson, who instructed him to complete the school-level investigation by interviewing and getting written statements from Respondent and all witnesses, and do his best to determine what had happened.

18. Mr. Smallridge interviewed Ms. Grace the following Monday, February 3, 2020, in the presence of his confidential secretary. Mr. Smallridge took notes of his interview with Ms. Grace, and Ms. Grace provided a written statement of her own. During his interview with Ms. Grace, Mr. Smallridge noted that “both [Ms. Grace and Respondent] were aware [L.L.] had drugs.” In Ms. Grace’s written statement, she stated that she “couldn’t remember” whether it was she or Respondent who told L.L. to flush the marijuana, “but I think it was me.” She stated that L.L. went to the small bathroom attached to her office, “then came out and told me he flushed it, bag and all.” Ms. Grace’s statement also confirmed that both she and Respondent were in her office when L.L. went to the bathroom.

19. Ms. Grace later resigned from Dunnellon Middle. On August 26, 2020, after her resignation, she gave a second written statement regarding the incident. In that statement, Ms. Grace claimed responsibility for telling L.L. to flush the marijuana and called it a “momentary lapse in judgement.” She felt sorry for L.L. and did not want him to get in trouble, either with the school or with law enforcement.

20. Mr. Smallridge also interviewed Respondent, who stated that, when L.L. nodded his head in response to her question, “Do you have weed,” she understood L.L. to mean that he had marijuana in his system, not on his person. Further, she claimed to have left Ms. Grace’s office shortly after she asked those questions and was not aware that L.L. had drugs on his person or that he flushed drugs in Ms. Grace’s office. Respondent also gave Mr. Smallridge a written statement.

21. In her written statement, Respondent described the events of January 31, 2020. She said that when she first observed L.L. in Ms. Grace's office, "The kid seemed sick, rocking, sobbing and not speaking." She continued, "I thought he might be intoxicated as to why he would want to go home and not to the nurse. I asked him if he had weed as if in smoked it, had it in his system. He nodded and continued to cry. I said, that is no reason to go home."

22. Mr. Smallridge gathered all the statements and notes from his investigation, scanned and sent them to Mr. Carson.

23. Jaycee Oliver is the executive director of employee relations for the District and is responsible for disciplinary issues with District employees, including hearings, grievances, mediations, and arbitrations. Ms. Oliver reviewed the documents from Mr. Smallridge, and discussed the incident with Mr. Carson and Mr. Smallridge. Ms. Oliver determined that the incident warranted a District-level investigation.

District Investigation and Discipline

24. The District investigation was conducted by Dawana Gary, director of equities and ethics, who worked with Tyson Collins, an investigator in her department. Ms. Gary was present for the interviews of both Ms. Grace and Respondent. Mr. Collins interviewed the remaining witnesses. Their interviews were recorded. Following the investigation, Ms. Gary prepared an investigative report containing written findings and conclusions.

25. Based on the investigation, Ms. Gary concluded that both Respondent and Ms. Grace violated Florida Administrative Code Rule 6A-10.081(2)(a)1., which provides that the educator's obligation to the student requires that the educator "[s]hall 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." She also concluded that both Respondent and Ms. Grace violated School Board Policy 6.27 I., which requires school board employees to comply with rule 6A-10.081.

26. Ms. Gary sent her investigative report to Ms. Oliver, along with a recommendation that both Ms. Grace and Respondent receive a written reprimand, three-day suspension without pay, and mandatory training.

27. Ms. Oliver reviewed the report and recommendation, and was surprised the recommendation was so lenient. Ms. Oliver characterized the violations as “egregious” and recommended to the superintendent that both Respondent and Ms. Grace be terminated.

28. At the final hearing, Ms. Oliver testified that Respondent’s behavior was egregious because, not only did she fail to report the incident or take other measures to protect L.L., but also that allowing the student to dispose of the drugs prevented a proper investigation into distribution of drugs on campus. She maintained that Respondent’s behavior allowed both D.G., who was allegedly selling drugs on campus, and students who may purchase or otherwise obtain drugs from him, to remain in harm’s way. Without the drugs themselves as evidence, any potential investigation was jeopardized.

29. Ms. Oliver discussed the recommendations for discipline at length with the superintendent. The superintendent made the final decision to impose a written reprimand and a five-day suspension, and require Respondent to take a course on “Reasonable Suspicion Drug Training” upon her return to work.

30. L.L.’s statement that Respondent told him to flush the drugs is the only credible evidence on which to base a finding that Respondent did in fact do so.¹ Respondent attempted to discredit L.L.’s testimony by introducing evidence (all of which was hearsay) that L.L. had previously been untruthful to teachers and had a penchant for drama. This evidence was neither credible nor reliable. L.L.’s testimony was clear: he acknowledged he had “weed;” he showed Respondent and Ms. Grace the weed; Respondent instructed him to

¹ L.L.’s statement is an exception to the hearsay rule as an admission of a party opponent. See § 90.803(18), Fla. Stat.

flush the weed; and he flushed the weed down the toilet in Ms. Grace's private restroom.

31. Ms. Grace's testimony that she was the one who instructed L.L. to flush the marijuana is also not accepted as credible. Ms. Grace's original statement to Mr. Smallridge (repeated in her first written statement) that she could not remember whether it was she or Respondent who told L.L. to flush the marijuana, was simply not credible. A middle school guidance counselor in her situation would have a clear memory of instructing a student to flush drugs down the toilet. Likewise, her memory that a teacher instructed the student to do so in her presence would likewise be significant enough to remember clearly.

32. Further, Ms. Grace and Respondent were close colleagues, frequently having lunch together, and socializing outside of school on at least one occasion. Ms. Grace's subsequent statement accepting responsibility for telling L.L. to flush the drugs was likely an attempt to protect Respondent. When she gave her second statement, Ms. Grace had already resigned from Dunnellon Middle; therefore, she could not be disciplined for falsely accepting responsibility for instructing L.L. to flush the marijuana.

33. Finally, Ms. Grace's testimony at the final hearing was too well-rehearsed to be credible. Notably, Ms. Grace had a well-rehearsed explanation for why Respondent would not have heard her tell L.L. to flush the drugs while they were sitting in her very small office, and she inserted that explanation in answer to a wholly-unrelated question. She attempted to explain Respondent's state of mind, which she could not have known. In sum, Ms. Grace's testimony was unreliable and was insufficient to establish that she, rather than Respondent, instructed L.L. to flush the marijuana down the toilet.

34. Respondent's testimony that she understood L.L. to mean he had marijuana in his system, rather than on his person, was not credible. L.L. had stated that he "had something he wasn't supposed to have at school."

Respondent asked him if he “had weed” after asking him if he “had a weapon,” clearly seeking knowledge of what he possessed at school that he knew was off limits. Further, L.L.’s testimony that he showed Ms. Grace and Respondent the weed is accepted as true.

35. Even if Respondent’s testimony that she understood L.L. to mean that he had marijuana in his system was accepted as true, that fact, coupled with her description of him as appearing ill, and possibly intoxicated,² created a responsibility to take some step to protect the student’s health and well-being. If she understood L.L. to mean that he had ingested marijuana, and he appeared to her to be ill, her statement “that is no reason to go home,” was completely unprofessional. L.L.’s mother should have been contacted to pick him up from school, and administration should have been notified so that the situation could be avoided in the future to secure L.L.’s health and safety, as well as other students potentially involved.

CONCLUSIONS OF LAW

36. The Division has jurisdiction over the subject matter of and parties to this case, pursuant to section 1012.33(6) and the Division’s contract with Petitioner.

37. Petitioner seeks to discipline Respondent, and has the burden of proving the allegations set forth in its Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence applicable to the loss of a license or certification. *Cropsey v. Sch. Bd. of Manatee Cty.*, 19 So. 3d 351 (Fla. 2d DCA 2009), *rev. denied*, 29 So. 3d 1118 (Fla. 2010); *Cisneros v. Sch. Bd. of Miami-Dade Cty.*, 990 So. 2d 1179 (Fla. 3d DCA 2008).

² Respondent testified that she should not have used the word “intoxicated” to describe L.L.’s behavior because she “did not have enough information to be able to use that word,” is also rejected as unreliable. Her written statement given in close proximity to the date of the incident is more reliable and is accepted as true.

38. Rule 6A-10.081(2)(a)1. provides that an educator “[s]hall 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.”

39. School Board Policy 6.27 I. requires school board employees to comply with rule 6A-10.081.

40. Respondent violated School Board Policy 6.27 when she instructed L.L. to flush marijuana that he had in his possession, and failed to report the incident to school administration and L.L.’s parent or guardian. Even if Respondent believed that L.L. had marijuana in his system, rather than on his person, she still violated the policy by failing to take measures to protect his health and safety. Respondent scoffed, stating “that is no reason to go home,” and allowed the student to stay at school and carry on with his classes. Further, whether Respondent believed L.L. to be in possession of marijuana or to have ingested marijuana, she was well-aware of the disciplinary consequences applicable to both situations based on her prior role as disciplinary dean.

41. By the same conduct, Respondent violated rule 6A-10.081(2)(a)1.

42. Petitioner established, by a preponderance of the evidence, just cause for disciplining Respondent as specified in the Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Marion County School Board enter a final order upholding both the charges and the discipline imposed against Respondent, Maria Acosta.

DONE AND ENTERED this 18th day of November, 2020, in Tallahassee,
Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.