STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 20-5416TTS

PHYLLIS G. KIRKLAND,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by Zoom teleconference on May 25, 2021, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Michele Lara Jones, Esquire
Miami-Dade County School Board
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For Respondent: Branden M. Vicari, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a teacher, failed to comply with attendance policies, as Petitioner, a district school board, alleges; and, if so, whether the school board has just cause to suspend Respondent from her position for five days without pay.

PRELIMINARY STATEMENT

At a meeting on December 9, 2020, Petitioner Miami-Dade County School Board ("School Board" or the "district") voted to suspend Respondent Phyllis G. Kirkland ("Kirkland") for five days without pay. Petitioner alleges that Kirkland, a middle-school teacher, violated attendance policies on two separate occasions during a single week in January 2020 by giving insufficient or untimely notice that she would be taking off a whole day of work due to an acute allergic reaction she was then having.

Kirkland timely requested a formal administrative hearing by letter dated December 15, 2020. Petitioner referred the matter to DOAH for further proceedings, and this file was opened on December 18, 2020. Upon assignment, the undersigned set the final hearing, which eventually took place on May 25, 2021.

Meantime, on February 1, 2021, Petitioner filed its Notice of Specific Charges. Therein, Petitioner alleged that, in addition to violating attendance policies, Kirkland "refused[, on February 5, 2020,] to speak to the administrator or answer any questions of the administrator regarding a leave request." This allegation was abandoned at hearing and will not be addressed further herein.

At the final hearing, Petitioner called two witnesses, Maria Zabala and Bernard Osborn. Petitioner's Exhibits 4 and 5 were offered, also, and received in evidence. Kirkland testified on her own behalf, and Respondent's Exhibits 5 and 6 were admitted as well.

The final hearing transcript was filed on July 22, 2021. Each party timely filed a Proposed Recommended Order ("PRO") on August 2, 2021. The parties' PROs have been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2020.

FINDINGS OF FACT

1. The School Board is the constitutional entity authorized to operate, control, and supervise the Miami-Dade County Public School System.

2. At all times relevant to this matter, including specifically the 2019-2020 school year, Kirkland was employed as a teacher at John F. Kennedy Middle School ("School"). Kirkland has been a district employee for approximately 35 years.

3. The incidents for which the School Board proposes to suspend Kirkland for five days without pay occurred on two separate dates, namely Monday, January 27, 2020, and Thursday, January 30, 2020. As alleged by the district in its Notice of Specific Charges dated February 1, 2021, Kirkland violated the School's attendance policies as follows:

> 14. On January 27, 2020, Respondent [Kirkland] failed to comply with the attendance policies by calling after her work start time to say she would be late and thereafter calling to say she would not be at work for the day.
>
> 15. On January 20 [sic], 2020, Respondent failed to comply with the attendance policies by taking a full day of leave without notifying the [School's] administration.

4. A Summary of Conference-for-the-Record ("CFR Summary"), which the district prepared on or about March 2, 2020, includes the additional allegations regarding the January 27, 2020, incident, that Kirkland "called the school at 8:03 am to say that [she] would be late. [She] called again at 9:58 am saying [she] would not be in for the day."

5. Regarding the January 30 incident, the CFR Summary contains the more specific allegation that Kirkland "called the school at 8:46 m [sic]

stating [she] was sick and would be taking half a sick day in the morning. [Kirkland] did no [sic] call or confirm that [she] would need a full sick day, which [she] took."

6. It is undisputed that, during the week of January 27, 2020, Kirkland suffered an acute allergic reaction that required several trips to the doctor, including an admission to the emergency room on January 28, 2020. It is also undisputed that Kirkland had plenty of accrued sick leave, and that she was approved to take leave on the dates in question. There are, in short, no allegations that Kirkland called in sick without a legitimate reason. Nor is it alleged that Kirkland had unexcused absences. There are, further, no allegations of excessive absenteeism or tardiness. This case boils down to whether Kirkland gave sufficient and timely notice to the School of her need to take off work on January 27 and 30, 2020, due to a genuine medical condition. The district failed to prove that she did not.

7. Kirkland had a doctor's appointment at 8:00 a.m. on January 27, 2020. Because her doctor's office is located near the School, she planned to arrive at work on time, by 8:30 a.m., after seeing the doctor. Kirkland had kept appointments with her doctor at this hour in the past without needing to take time off, so she had reason to believe that she could stay on schedule. In this instance, however, the doctor was running behind. Kirkland called the School at around 8:03 a.m. to advise that she would be late for work as a result.

8. Kirkland was seen by her doctor at approximately 9:00 a.m. In addition to the allergic reaction, Kirkland's blood pressure was high. The doctor told Kirkland not to report to work that day. Kirkland followed her doctor's advice and called the School right after her appointment ended. There is no evidence of the precise time of this second phone call, but Kirkland testified credibly that she placed it as soon as possible after learning that she should stay home and rest, and the district alleges that it received her call before 10:00 a.m., which is consistent with Kirkland's testimony.

9. The district failed to adduce persuasive evidence of any specific attendance policy that Kirkland might have violated on January 27, 2020. The complaint seems to be that she should have called the School sooner to say that she would not be coming in to work that day. There is no evidence, however, that Kirkland was *required* to call sooner than she did. Nor is there proof that it was objectively unreasonable, under the circumstances, for her to have called when she did, which was (i) shortly after learning that her doctor thought it best she not work that day, and (ii) before 10:00 a.m.

10. Kirkland returned to see her doctor on the morning of January 30, 2020. This visit was prompted, again, by an acute allergic reaction. There is no dispute that Kirkland called the School not later than around 8:45 a.m. to request a half-day's sick leave. As on the previous visit, however, the doctor advised Kirkland, after examining her, that she should not return to work that day. There is a dispute of fact as to what happened next.

11. The district alleges that Kirkland failed to notify the School that she would not be coming in to work at all that day. Kirkland, for her part, testified that she did, in fact, call the School to advise that she would be unable to work that day. Kirkland testified, further, that she watched her doctor send a fax to the School, which contained medical information about Kirkland, including a note to the effect that Kirkland was not cleared to work on January 30, 2020.

12. The district called no witnesses having personal knowledge of whether Kirkland's testimony concerning the notice she claims the School was given regarding her absence from work on January 30, 2020, is truthful or untruthful. Nor, to prove the nonexistence of notice, did the district adduce evidence showing the absence of an entry in any record where such an entry routinely would have been made in the ordinary course of business, had notice of Kirkland's taking the day off to recover from an acute allergic episode been given. Accordingly, the district failed to prove its allegation that Kirkland took a full day of sick leave on January 30, 2020, without timely

requesting such leave.[1] Kirkland's testimony that she called the School that morning to report that she would be, unexpectedly, out for the day, and that her doctor faxed the School a contemporaneous note substantiating the medical grounds for such absence, is unrebutted and, thus, credited.[2]

DETERMINATIONS OF ULTIMATE FACT

13. The district has failed to prove its allegations against Kirkland by a preponderance of the evidence. It is, therefore, unnecessary to make findings of fact concerning Kirkland's disciplinary history, if any, for purposes of applying the progressive discipline policy in this case, as there is no current basis for discipline.

CONCLUSIONS OF LAW

14. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

15. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it

[1] The district also failed to prove the existence of a specific attendance policy requiring Kirkland to request the day off for medical reasons within a particular time frame. Now, the undersigned is aware, as a matter of common knowledge and from ordinary experience, that any employee who is expected to show up for work at a time certain risks an adverse employment action for failing to report for duty without giving his or her employer reasonable advance notice. Had the evidence shown that Kirkland did this, the undersigned would consider such conduct to be deserving of some corrective action, even in the absence of a specific policy. He doubts whether a five-day suspension would be warranted for an isolated occurrence taking place in the context of an acute (albeit non-emergency) medical condition, but that question need not be reached here because the district did not establish the alleged failure to give notice.

[2] In addition to being unrebutted, Kirkland's testimony is consistent with the undisputed facts that her doctor had advised her not to work due to a genuine medical condition, and that she had enough sick leave accrued to cover her absence. It is difficult to imagine why Kirkland would *not* have notified the School that she needed to take the whole day off, since she had nothing to lose by doing so, and (as far as the instant record shows) nothing to gain by failing to call in.

should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." *Jacker v. Sch. Bd. of Dade Cty.*, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983) (Jorgenson, J. concurring).

16. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. *See Lusskin v. Ag. for Health Care Admin.*, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); *Klein v. Dep't of Bus. & Prof'l Reg.*, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); *Willner v. Dep't of Prof'l Reg., Bd. of Med.*, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), *rev. den.*, 576 So. 2d 295 (Fla. 1991).

17. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance of the evidence, each element of the charged offense(s). *See McNeill v. Pinellas Cty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1996); *Sublett v. Sumter Cty. Sch. Bd.*, 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); *MacMillan v. Nassau Cty. Sch. Bd.*, 629 So. 2d 226 (Fla. 1st DCA 1993).

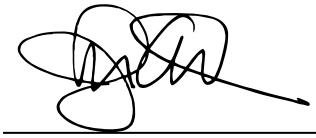
18. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

19. The district presented insufficient proof that Kirkland violated a specific attendance policy, failed to conform to an articulable standard of conduct, or even acted unreasonably under the circumstances.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board enter a final order exonerating Phyllis G. Kirkland of all charges brought against her in this proceeding, reinstating Kirkland to her pre-dismissal position, and awarding Kirkland back salary as required under section 1012.33(6)(a).

DONE AND ENTERED this 10th day of August, 2021, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 10th day of August, 2021.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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