STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 21-0068TTS

NICOLE S. REID,

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 June 3, 2021, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Christopher J. La Piano, Esquire
Miami-Dade County School Board
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a teacher, made some unkind remarks to a student one day in her third-grade class, as Petitioner, a district school board, alleges; and, if so, whether the school board has just cause to suspend Respondent from her position for ten days without pay.

PRELIMINARY STATEMENT

At a meeting on December 9, 2020, Petitioner Miami-Dade County School Board ("School Board," the "District," or "Petitioner") voted to suspend Respondent Nicole S. Reid ("Reid") for ten days without pay. Petitioner alleges that Reid, an elementary school teacher, made unkind remarks to one of her students, telling him in effect that she would rather not have him in her class.

Reid 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 January 6, 2021. Upon assignment, the undersigned set the final hearing, which eventually took place on June 3, 2021.

At the final hearing, Petitioner called three witnesses, namely students D.M. and J.T, along with D.M.'s mother, A.M. Petitioner's Exhibits 1 through 4, as well as the first pages, respectively, of Petitioner's Exhibits 5 through 7, were received in evidence without objection. Reid testified on her own behalf and offered no exhibits.

The final hearing transcript was filed on August 19, 2021. Each party timely filed a Proposed Recommended Order ("PRO") on August 30, 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, Reid was employed as a third-grade teacher at the North County K-8 Center. Reid has been a District employee for approximately 21 years.

3. The alleged incident upon which the School Board relies as the grounds for suspending Reid occurred, according to the Notice of Specific Charges, on Thursday, September 26, 2019. It is alleged that "[o]n that date [Reid] stated to student D.M. that the best birthday and Christmas present she had received was when D.M. was absent from school. She also told D.M. that she did not want him in her class but was stuck with him."

4. D.M.'s hearing testimony matched the District's principal allegation nearly verbatim. In his recollection, "Ms. Reid said that it was the best birthday slash Christmas gift ever because I wasn't there on Thursday, and she said she doesn't want me in the classroom and that she is stuck with me, and that if I want to, I could leave the classroom and she can pick on anybody."[1]

[1] It is not clear exactly when, or for how long, D.M. was absent. On direct examination, D.M. responded affirmatively when the School Board attorney suggested that he had been out "for a few days," but, in his own words, D.M. specifically mentioned only "Thursday," which happens to be the day of the week on which the alleged incident allegedly occurred. Perhaps D.M. was simply mistaken about which day he had been out, or maybe his absence had occurred a week or more before the alleged incident. On cross-examination, D.M. said that he might have been absent due to a dental appointment, which would not likely have required a "few days" off, or even, ordinarily, a full day for that matter. To be sure, this confusion is not fatal to the School Board's case. Still, if D.M. had been out, e.g., for the three days (Monday through Wednesday) immediately preceding the alleged incident, that fact—which was not proved—would have made the School Board's case stronger. Conversely, if D.M. had been out of class only for one day (likely), and if his absence had taken place a week or more before the alleged incident (possible), there is less likelihood of Reid's having made the comments at issue. This is because, generally speaking, a shorter absence likely would make less of an impression, and a more remote one would be more likely forgotten—and vice versa.

5. D.M. frequently misbehaved in class and was often in trouble. Although it was still early in the school year, by the time of the alleged incident, Reid already had spoken with D.M.'s mother several times about D.M.'s poor conduct in the classroom. Nevertheless, according to D.M., Reid made the alleged remarks for no reason, out of the blue, without any provocation such as misbehavior on D.M.'s part, and indeed in the absence of any circumstances which might have prompted Reid to say such things. Perhaps ironically, however, D.M.'s testimony, which is unrebutted, weakens the District's case. Common experience teaches that comments of the kind in question are more likely to be made in the heat of the moment, when angry or upset, than without some contemporaneous provocation, real or perceived. To be clear, it is not inconceivable that a teacher would make such remarks gratuitously, as D.M. claims happened in this instance; it is just more likely that such comments would be made in a moment of exasperation.

6. The only corroborating eyewitness presented by the School Board was D.M.'s close friend, J.T., who testified that Reid "was, like—she was, like, 'D.'—she was, like, 'I'm so glad that D. wasn't there those few days." When later prompted with a leading question, whereby the District attorney asked J.T. whether Reid had mentioned "anything about birthday or Christmas gifts," J.T. answered, "Yeah. She said it was the best Christmas gift."[2]

7. Reid flatly denied having made the alleged comments, or anything like them, to D.M. This is not a case, in other words, where the teacher attempts to explain, put it in context, dispute the contents of, or otherwise downplay the meaning or effect of a remark that was, at least in some form, admittedly made. Reid did argue, in her testimony, that she would not have made the remarks attributed to her because (i) neither her birthday nor Christmas occurs on or around September 26 and (ii) she does not use the word

[2] J.T. clarified that the "it" in question was "[t]hat [D.M.] was absent those few days." To repeat for emphasis, however, it is unlikely, based on D.M.'s testimony, and thus, it is *not* found, that D.M. had been absent for a "few days" prior to the alleged incident. *See* footnote 1, *supra*.

"Christmas" in the classroom. The District ridicules this argument as unpersuasive. In the undersigned's view, the argument makes a fair point, but it is neither dispositive, nor compelling. Regardless of its relatively limited persuasive force, however, the argument does not undermine Reid's unconditional denial, because it is entirely consistent with her testimony that she did not make the remarks at issue.

DETERMINATIONS OF ULTIMATE FACT

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

9. To elaborate on the credibility determinations, this is basically a "he said/she said" case because D.M. and Reid have given irreconcilably conflicting testimony about the alleged incident.[3] It is not necessary, however, for the undersigned to decide which of the two witnesses was the more credible, and then to make findings of fact in accordance with that witness's testimony. This is because, whereas the District has the burden to prove that its allegations are more likely than not true, Reid need not prove her innocence.

10. At bottom, the District's evidence, although plausible, does not meet the standard of proof, as a matter of ultimate fact. At the same time, Reid's testimony, although credible as far as it goes, does not, when weighed in the

[3] J.T.'s testimony adds very little weight to D.M.'s because, as D.M.'s friend, he was not a disinterested witness, and because J.T. did not provide a unique perspective or add any relevant new fact(s) to the record. If the incident took place as alleged, moreover, then surely there would be other students, besides J.T., with personal knowledge of the event. That none were called instead of, or in addition to, J.T., whose neutrality may reasonably be doubted, is detrimental to the District's case. The testimony of D.M.'s mother likewise carries relatively little weight because she was not an eyewitness; her secondhand knowledge of the alleged incident is necessarily derivative of D.M.'s.

balance with D.M.'s testimony and the District's other evidence, support affirmative exculpatory findings. Thus, the undersigned cannot find Reid guilty as charged, and he cannot find her innocent, either. Because the District bears the burden of proof, however, its case fails, and Reid prevails.

CONCLUSIONS OF LAW

11. 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.

12. 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 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).

13. 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).

14. 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).

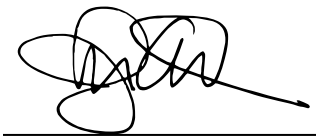
15. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. *McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

16. The District presented insufficient proof that Reid made the remarks to D.M. that she was alleged to have made. This negative determination of ultimate fact is dispositive.

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 Nicole S. Reid of all charges brought against her in this proceeding and awarding Reid back salary as required under section 1012.33(6)(a).

DONE AND ENTERED this 15th day of September, 2021, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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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.