STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 21-0302TTS

JOSHUA CRILL,

Respondent.
_____/

RECOMMENDED ORDER

On March 26, 2021, Yolonda Y. Green, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), conducted a hearing pursuant to section 120.57(1), Florida Statutes (2020), via Zoom conference technology.

APPEARANCES

For Petitioner: Mark E. Levitt, Esquire
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, Marion County School Board ("Petitioner" or "School Board"), had just cause to terminate Respondent, Joshua Crill ("Respondent" or "Mr. Crill"), for misconduct in office as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

On November 30, 2020, Dr. Diane Gullett, Superintendent of Schools of Marion County, filed an Administrative Complaint against Respondent alleging Respondent produced a urine sample that tested positive for marijuana. The Superintendent alleged Respondent's positive urine drug screen constitutes misconduct in office and amounts to just cause to warrant disciplinary action. The Superintendent recommended that Respondent be terminated from his employment with the School Board. Respondent timely filed a request for formal administrative hearing to dispute the allegations in the Administrative Complaint, which was referred to DOAH on January 25, 2021, for assignment of an ALJ.

The case was assigned to the undersigned for a hearing. The case was initially scheduled for March 30, 2021, and was ultimately rescheduled for a hearing on March 26, 2021. The final hearing commenced as scheduled.

At the final hearing, Petitioner presented the testimony of Jaycee Oliver (Executive Director of Employee Relations), and offered Exhibits 1 through 11, which were admitted into evidence. Petitioner's Exhibit 8 was admitted over Respondent's objection. Respondent testified on his own behalf and presented the testimony of Shameka Murphy (Principal of Legacy Elementary School). Respondent offered Exhibit 1, the deposition transcript of Dr. Gullett, which was admitted into evidence.

Respondent initially listed Robert Hensel and Heather Guest as witnesses. Instead, the parties entered a stipulation regarding the testimony of the witnesses, which is reflected below in the Findings of Fact. The parties also filed their Joint Prehearing Stipulation including facts upon which they both agree, which have also been incorporated into the Findings of Fact below to the extent they are relevant.

A one-volume Transcript of the hearing was filed with the Division on April 28, 2021. The parties timely filed Proposed Recommended Orders ("PRO"), which have been considered in preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2020), unless otherwise noted.

FINDINGS OF FACT

Based on the testimony and exhibits offered at the hearing and the stipulated findings of fact in the Prehearing Stipulation, the following Findings of Fact are made.

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

2. At all times relevant to the allegations in the Administrative Complaint, Mr. Crill was employed as a teacher at Legacy Elementary School, pursuant to a professional services contract.

3. On October 20, 2020, Mr. Crill reported he was involved in an incident at school. Specifically, a student in his classroom was climbing a bookcase. Mr. Crill intervened to prevent the student from harming himself, when the student scratched Mr. Crill's arm causing a deep laceration and bleeding.

4. Mr. Crill was concerned about possible infection, and thus, he was referred to a workers' compensation doctor who provides treatment to School Board employees who are injured while working. As part of the evaluation for the possible workers' compensation-related injury, and consistent with School Board policy, Mr. Crill submitted to a routine urine drug screen.

5. The Medical Review Officer ("MRO"), Dr. Stephen Kracht, provided a report on the urine drug screen to the School Board, which found that the urine sample tested positive for marijuana.

6. Mr. Crill did not challenge the administration of the test or seek a second test to confirm the results of the first test. Mr. Crill also did not challenge the accuracy of the results of the drug screen as reported by the MRO.

7. Mr. Crill acknowledged that he used cannabidiol ("CBD") products to treat pain related to wear and tear to his shoulder resulting from his military service in the United States Marine Corps ("USMC") before his employment with the School Board.[1] At no point prior to his positive drug screen did Mr. Crill notify his supervisor or the Board that he was using CBD. He only used Ibuprofen before using the CBD products.

8. Mr. Crill pointed to his use of Tropic Twist for the positive test result. Tropic Twist is an over-the-counter product and, according to the packaging, is THC[2] infused.

9. Mr. Crill explained that he was introduced to Tropic Twist by a family friend during a gathering that took place before his injury. The family friend gave Mr. Crill the Tropic Twist package of gummies. Mr. Crill did not fully examine the package but he recalled that the package had a hemp leaf on the front and appeared similar to other CBD products that he previously used. The packaging also had the phrase "THC Infused" on the front underneath the package label, next to the hemp leaves. However, Mr. Crill testified that he did not see the language regarding "THC Infused" on the package.

[1] Mr. Crill served in the USMC from 2011 through 2015.

[2] THC (tetrahydrocannabinol), is the primary psychoactive component of cannabis (marijuana).

10. Throughout his testimony at hearing, Mr. Crill maintained that he had no knowledge that the gummies contained the active ingredient for marijuana, and as a result, he unintentionally ingested the THC. However, he acknowledged that he regularly consumed the Tropic Twist product.

11. Mr. Crill testified that he does not use marijuana or any other illegal drugs.

12. Mr. Crill has no prior history of testing positive for marijuana on a drug screen. He submitted to a pre-employment drug screen when he began working with the School Board, which returned negative. He also submitted to a drug screen prior to being hired at Legacy Elementary School.

13. The School Board maintains a drug-free workplace policy. Petitioner alleges Respondent violated policy 6.33, entitled "Alcohol and Drug-Free Workplace."

14. Pursuant to policy 6.33, section II.A., which constitutes notice to all employees of School Board, "as a condition of their continued employment" with the School Board, all employees are required to fully comply with the provisions of the Drug-free Workplace Policy.

15. Policy 6.33, section II.B., provides that "it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body."

16. Policy 6.33, section IV.B., provides that "[e]mployees on duty or on School Board property will not manufacture, distribute, dispense, possess or use illegal drugs; nor will they be under the influence of such drugs."

17. Policy 6.33, section IV.B., includes marijuana within a list of substances which are considered illegal, pursuant to section 202 of the Controlled Substances Act, 21 C.F.R. §§ 1300.11 through 1300.15.

18. Policy 6.33, section VI.B.2., provides:

> Circumstances under which testing may be considered include but are not limited to the following:
>
> * * *

> 2. Accidents on the job causing personal injury to self or others.

19. The School Board is also a party to a collective bargaining agreement, that governs, in part, terms and conditions of employment for Mr. Crill.

20. According to Dr. Gullett, the recommended disciplinary action is termination when employees violate the School Board's Drug-Free Workplace Policy.

21. Dr. Gullett issued an Administrative Complaint recommending Mr. Crill's termination due to his testing positive for marijuana on the urine drug screen.

22. Mr. Crill timely requested a hearing to challenge the proposed termination and the School Board referred the matter to DOAH for an ALJ to issue a recommended order based on those disputed facts.

23. Mr. Crill did not exhibit any signs of being under the influence of marijuana, nor did his principal, Shameka Murphy, observe any indication that Mr. Crill was under the influence. Ms. Murphy did not observe any basis to order Mr. Crill to take a reasonable suspicion drug screen, which would be required if she believed that he was under the influence of drugs or alcohol.

24. The parties also stipulated that Mr. Hensel and Ms. Guest, who were principals at some point during Mr. Crill's tenure working with the School Board, never had a basis to suspect that Mr. Crill was under the influence of drugs or had reason to direct him to submit to a reasonable suspicion drug screen.

Ultimate Findings of Fact

25. The greater weight of the evidence demonstrates that Mr. Crill tested positive for marijuana on a urine drug screen following an incident that occurred while working.

26. Petitioner proved by a preponderance of the evidence that Mr. Crill violated School Board policy, namely: The Alcohol and Drug-Free Workplace

Policy 6.33, Section II.B., by having the presence of drugs in his body while working as demonstrated by the positive urine drug screen.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the subject matter of and parties to this case, pursuant to sections 1012.33(6), 120.569, and 120.57(1), Florida Statutes.

28. Petitioner seeks to terminate Respondent's employment, 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).

29. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," *Black's Law Dictionary* 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. *See Gross v. Lyons*, 763 So. 2d 276, 289 n.1 (Fla. 2000).

30. Petitioner alleges that Respondent violated School Board policy 6.33, section II.B., by having the presence of drugs (marijuana) or alcohol in his body. Petitioner further alleges that Respondent's conduct constitutes misconduct in office and he is, therefore, subjected to termination of his employment.

31. Florida Administrative Code Rule 6A-5.056 sets forth that just cause is required for suspension and dismissal of school personnel. Just cause means cause that is legally sufficient based on each charge, which includes misconduct in office.

32. Rule 6A-5.056(2) defines misconduct in office, in pertinent part, as follows:

> (2) 'Misconduct in Office' means one or more of the following:
>
> * * *
>
> (c) A violation of the adopted school board rules[.]

33. As stated in the Findings of Fact above, Petitioner proved Respondent violated School Board policy 6.33 when he reported to work with the presence of marijuana in his body. As a result of his violation of the adopted School Board policy, Respondent's conduct constitutes misconduct in office.

34. Petitioner also established just cause for terminating Respondent due to his misconduct in office.

35. Respondent does not dispute that his urine screen returned positive for an active ingredient of marijuana. Instead, Respondent argues that his use of the Tropic Twist caused the positive drug test, which he did not know contained THC.

36. Respondent argues in his PRO as follows:

> 29. The application of the School Board's Drug-Free policy, as described by the Superintendent, to the facts of this case created an irrebuttable presumption Respondent's employment must be terminated. Under the interpretation of the policy advanced by the Superintendent there are no facts Respondent could present that could lead to anything other than termination.
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> 30. The School [Board] made no individualized determination Respondent knowingly and/or intentionally used a product leading to the positive test for marijuana. The School [Board] made clear the only relevant factor for recommendation to terminate Respondent's employment was the positive result for marijuana.

37. The plain language of policy 6.33 states that employees of the [School Board] must refrain from working with the presence of drugs or alcohol in his

or her body. There is no indication of a required element of intent or knowledge.

38. Mr. Crill cites *ReccLi America Inc. v. Hall,* 692 So.2d 153 (Fla.1997), in support of his challenge. However, *ReccLi* is not applicable here because the workers' compensation statute contained language that precluded rebuttal of the presumption that a positive drug screen caused an injury if the workplace was designated "drug-free."

39. Even if Respondent's argument that he did not intentionally or knowingly ingest marijuana, the uncontradicted evidence, and what is relevant here, established that Respondent consumed the Tropic Twist, which was infused with THC, and later tested positive for marijuana. Respondent also posed an analogy that his circumstances are similar to marijuana hidden within a brownie. However, that was not the circumstance here. Respondent testified that he was given the Tropic Twist package, looked at it long enough to see the hemp leaf, and later consumed the gummies inside the package. Unlike the brownie example, information about the contents of the package were readily visible and available to Respondent. Therefore, Respondent's argument is not persuasive.

40. Instead, Respondent's arguments offer compelling mitigating factors in this case for Petitioner to apply disciplinary action other than termination.[3] For instance, Respondent has been routinely tested for drugs between 2011 through 2019, with negative results. Respondent uses CBD products to alleviate pain that resulted from military service. He credibly testified that he does not use illegal drugs. Moreover, Respondent has been employed with Petitioner from 2015 through 2019, nearly five years, and there is no evidence that his principals, including his current principal, had

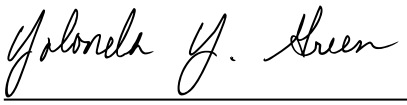
[3] The undersigned acknowledges that the remedy of suspension is also available under the applicable rule. Further, the parties made no argument that the School Board's discretion to impose a different penalty is foreclosed, or that the School Board may not consider mitigating circumstances.

any reason to suspect that he was, at anytime, under the influence of drugs. Finally, there is no evidence of any prior disciplinary action against Respondent.

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 finding that Respondent, Joshua Crill, engaged in misconduct in office and there is just cause to terminate Respondent, or impose other discipline consistent with Florida Administrative Code Rule 6A-5.056(2).

DONE AND ENTERED this 24th day of May, 2021, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of May, 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.