STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SCHOOL BOARD OF MARION COUNTY,

Petitioner,

Case No. 21-0303

vs.

DESIREE SEATON,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on April 20, 2021, via Zoom before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Mark E. Levitt, Esquire
Allen, Norton & Blue, P.A.
Suite 100
1477 West Fairbanks Avenue
Winter Park, Florida 32789

For Respondent: Desiree M. Seaton, pro se
5 Hemlock Loop Lane
Ocala, Florida 34472

STATEMENT OF THE ISSUES

Whether Respondent ("Desiree Seaton") violated Petitioner, the School Board of Marion County's ("the School Board"),[1] drug-free workplace policy;

[1] The School Board's official name is "The School Board of Marion County." § 1001.40, Fla. Stat. (2020)(providing that "[t]he governing body of each school district shall be a district school board. Each district school board is constituted a body corporate by the name of 'The School Board of County, Florida.'"). The case style has been amended accordingly.

and, if so, whether her employment with the School Board should be terminated.

PRELIMINARY STATEMENT

On December 2, 2020, the Superintendent of Schools for Marion County ("the Superintendent") issued an Administrative Complaint alleging that Ms. Seaton took a random drug test on October 27, 2020, and that the urine sample she provided tested positive for opioids. The Superintendent characterized Ms. Seaton's positive test result as "serious misconduct" and notified Ms. Seaton that the Superintendent intended to recommend that the School Board terminate her employment.

The School Board issued a letter to Ms. Seaton on December 2, 2020, notifying her that the Superintendent's recommendation would be considered by the School Board during a January 12, 2021, meeting. However, if Ms. Seaton wished to appeal the Superintendent's recommendation, the School Board's letter instructed her to submit a letter setting forth her response to the Superintendent's allegations.

Ms. Seaton issued a letter on December 11, 2020, setting forth the following response:

> 1. I hold the title of School Bus Driver, however I have not performed in that capacity since October 2, 2020 while injured on your school bus. I have been ordered by your doctors at Concerta [to] light duty and I have performed to the best of my ability. I even had a supervisor tell me if I ever needed a job with her office or the county, she would give me a recommendation. I also received several accolades from employees and other management staff. I can provide the names if necessary.

2. I did take a random test ordered by DOT.

3. I provided a urine sample and questioned the DOT why I was being selected since I am on light duty. His response [was] because I am signed in on Marion County['s] clock. This also confused me [because] I am on workman's compensation and signing in. I just did as I was told.

4. This is the only thing that I cannot answer because I did not use Percocet and I have Hydrocodone which I have a prescription to use. I am also allergic to that drug and all my medical records all the way back to the 1990s will show as such. I wanted to ask your doctor [if] poppy seeds [could] alter that test. I can provide evidence that I was eating them that week, even the morning of the testing. I wish that we could concur on the type of opiate, either way I am not going to tell you, I did not take one at night.

5. In regards to notifying my supervisor, this was not a safety concern and the Nurse Practitioner at Concentra was advised. She advised me to try the ibuprofen and one Tylenol instead. Of course that did not work. Since I was under doctor's care, I saw no need to advise my supervisor, plus the pill was only taken at night to go to sleep. I have never used that pill on school property nor during working hours. The staff there do not care about the employee. The fall I sustained should have been sent for further testing earlier. I had to go through therapy for a month before they would order [an] MRI. So far [I have a] dislocated shoulder with possible rotator cuff [damage and] that is why at night, the pain is terrible. I since got a second and third opinion. I am seeing a pain management doctor. I am scheduled for my next MRI on 12/23/2020.

6. I never used drugs or alcohol, nor brought [any] on school property.

> 7. I have never misused my prescription drugs and that would be up to a doctor to substantiate. I can provide you with [the name of] every doctor I have seen in the last four years. They will all tell you that I use pain medicines as a last resort and I am an amazing patient. I do the required therapy, I do all my appointments and follow directions.
>
> 8. In regards to OTETA[2], I completely understand their position on safety sensitive position[s]. If I was driving a bus, the first person that would know that I could not drive because I was in pain and had to take medication, would be my direct reports. I consider my life and the life of my students, which are my heart, my first priority. I can provide you with a drug test on August 3 and on October 2, the day of the accident. You will see that I was not under any influence.
>
> I would not be going through this situation right now, if not [for] being hurt on your job, by not having doctors who care about their patients, or should I say the medical insurance companies that they blame because it's just protocol. No one cares that I have cried myself to sleep because of the pain, or I had to work two jobs and do classes which was hard to concentrate through the pain. I am left handed and I cannot even brush my hair [or] hold a cup. I can provide their information as well.

The undersigned convened the final hearing on April 15, 2021. The School Board presented the testimony of Brent Carson, and Petitioner's Exhibits 1 through 10 were accepted into evidence without objection. Ms. Seaton testified on her own behalf and Respondent's Exhibits 1 through 5 and 7 through 9 were accepted into evidence.[3] The undersigned noted, but overruled, relevancy objections to Respondent's Exhibits 2, 4, and 5 through 7. With regard to Respondent's Exhibit 6, the undersigned reserved ruling on the admissibility of a portion of a news article. After taking the matter under

[2] OTETA is the acronym for Omnibus Transportation Employee Testing Act.

advisement, the undersigned concludes that the news article is uncorroborated hearsay and must be excluded from evidence. The undersigned granted an objection and excluded Respondent's Exhibit 11 from evidence.

The one-volume final hearing Transcript was filed on April 18, 2021. Both parties filed timely Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

1. The School Board maintains an alcohol and drug-free workplace. Section 6.33 of the School Board's Human Resources Manual provides that:

> It is further the intent of the School Board of Marion County to comply with the Omnibus Transportation Employee Testing Act (OTETA), regulations of the Federal Highway Administration (FHWA) contained in 49 CFR Parts 40 and 382, *et al*, Section 2345.091, Florida Statutes, the provisions of the Drug-Free Workplace Act, and other applicable state and federal safety programs. This policy shall also affirm the Board's position that an employee in a safety sensitive position may be considered impaired at any measurable level by the use of alcohol and/or controlled substances. Pursuant to OTETA and its implementing regulations, drug and alcohol testing is mandated for all safety sensitive identified employees who function in a safety sensitive position.

2. Section 6.33 further specifies that prohibited substances include "marijuana, amphetamines, opiates, phencyclidine (PCP), and cocaine." In

[3] Ms. Seaton's exhibits were misnumbered in that there was no Respondent's Exhibit 10.

addition, "[i]llegal use includes the use or possession of any illegal drug, and the misuse of legally prescribed or obtained prescription drugs." Also, "when the use of a controlled substance is pursuant to the instructions of a physician, the employee shall immediately notify his/her supervisor."

3. Section 6.33 states that random drug testing "may take place at any time, with or without proximity to driving," and that there will be random drug testing for "all identified safety sensitive positions." A "safety sensitive position" is defined as "[a]ny function for which a commercial driver's license is mandated and in which a driver operates a vehicle designed to carry sixteen (16) or more passengers, a vehicle which weighs 26,000 + 1 pounds, or a vehicle which carries a placard indicating hazardous cargo." Furthermore, drug testing shall be conducted by "independent, certified laboratories utilizing recognized techniques."

4. While the School Board maintains a drug and alcohol-free workplace, it encourages employees with chemical dependency to seek treatment:

> The School Board of Marion County recognizes that chemical dependency is an illness that can be successfully treated. It is the policy of The School Board of Marion County to seek rehabilitation of employees with a self-admitted or medically determined drug problem. The School Board of Marion County will make every effort to assist those self-admitted and/or referred employees while being treated. Employees who are unwilling to participate in rehabilitation may be subject to appropriate action, pursuant to School Board policy, applicable Florida Statutes, State Board of Education rules, and applicable provisions of collective bargaining agreements.
>
> Substance Abuse Program – At any time prior to notification of a required test, an employee is encouraged to contact the Employee Assistance program. Such employees may be required to submit to testing as a part of a treatment program.

5. The laboratory that conducts drug-testing for the School Board randomly selects individuals who will be tested during the upcoming quarter. The School Board then schedules those individuals for testing throughout the quarter so that a large number of drivers are not unavailable for work at the same time. During the next quarter, a different set of individuals are selected.

6. Brent Carson is the School Board's Director of Professional Practices. He becomes involved in employee disciplinary cases that rise above the level of a reprimand. Mr. Carson testified that the School Board has no ability to test employees other than the individuals the laboratory selects for testing:

> Q: To protect the integrity of the random testing, do you have the ability to vary from that random list provided by the outside lab?
>
> A: We have to test who they say – who they identify as the random employees.
>
> Q: So if you decided to pick and choose – if they pick someone and you said, no, I'm not going to bother with that person today, do you believe that could affect the randomness, if you will, if that's the right word, of the test procedure, that it could affect the testing procedure and call into question if you start picking and choosing who's not giving tests to people on the list?
>
> A: Yes, that would definitely, I think, impugn the efficacy of having random tests.

7. If an employee has a positive drug test for a prescription medication, then the School Board's Medical Review Officer ("MRO") gives that employee three days to produce a valid prescription for that medication. If the employee produces a valid prescription, then the positive test is deemed to be a negative test. In addition, an employee can have a urine sample retested at his or her own expense. If there is no retest and no valid prescription is

produced, then the School Board puts the employee on paid administrative leave pending the outcome of disciplinary proceedings.

8. With regard to the consequences of a positive test, the Manual states that "[c]overed employees testing positive at any level for alcohol or controlled substances are in violation of district policy and will be immediately removed from their safety sensitive positions. A violation of federal, state, or District requirements shall be grounds for dismissal."

9. Mr. Carson testified that there is no progressive discipline for safety-sensitive positions. The first time an employee tests positive for an illegal substance or one for which that employee does not have a prescription, that employee is recommended for termination. Mr. Carson testified that the Superintendent has always recommended termination for violations of the School Board's drug-free workplace policy: "Whether it's random, whether it's reasonable suspicion or whether it's a drug test based off of injury, we have always recommended the termination of the employee."

Ms. Seaton Tests Positive for Opioids

10. Ms. Seaton began working for the School Board as a bus driver in December of 2017. On February 5, 2018, Ms. Seaton signed a document acknowledging that bus drivers must "[s]ubmit to random, post accident and reasonable suspicion drug testing."[4]

11. Ms. Seaton has undergone surgeries in the past and testified that she has been prescribed hydrocodone "for years on and off depending on the

[4] Prior to the positive drug test at issue in the instant case, Ms. Seaton had no disciplinary issues and had no other positive drug tests.

surgery."[5] Ms. Seaton claims to be allergic to oxycodone, and it has been her habit to take hydrocodone only when she has excruciating pain.[6]

12. Ms. Seaton suffered a work-related injury on October 2, 2020, and described it as follows:

> I always help out where I can. So we have spare buses that we need to move from one compound to the other, and on this particular day I was taking one of the spare buses back over to another compound. As I was getting off the bus, I always grab with my right hand to the bar and my left hand on the dashboard. My hand slipped off the

[5] Ms. Seaton had a double knee replacement surgery in August of 2019 and was prescribed hydrocodone. Respondent's Exhibit 7 is a photograph of a pill bottle indicating that Ms. Seaton had been prescribed 60 hydrocodone pills. However, no date is visible from the photograph.

[6] Respondent's Exhibit 8 is a letter from a physician stating that Ms. Seaton has treated with him since December 21, 2018. The letter notes that Ms. Seaton is allergic to codeine and Premarin. There is no mention of Ms. Seaton being allergic to oxycodone. Also, hydrocodone was not among the medications this particular physician has prescribed for Ms. Seaton.

> dashboard and I went forward. And from there I suffered a rotator cuff tear and some other, like, bone spurs.[7]

13. After the accident, Ms. Seaton took a drug test on October 2, 2020, and the test returned negative results for opiates, marijuana, cocaine, amphetamines, propoxyphene, PCP, barbiturates, and benzodiazepines.

14. Medical documentation from an October 5, 2020, evaluation by a workers' compensation physician indicates Ms. Seaton had a contusion of the left elbow and shoulder, a left shoulder strain, a left elbow strain, and a neck strain. An MRI on January 5, 2021, revealed a posterior labrum tear along with a possible anterior dislocation of her left shoulder.

15. Since her accident, Ms. Seaton had been driving her mother's car because it is an automatic, and Ms. Seaton has a stick shift. Ms. Seaton flew out-of-town to visit her son in Baltimore on October 22, 2020. Because

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[7] Ms. Seaton has had a difficult recovery from her injury and is dissatisfied with the treatment she received through workers' compensation. After receiving a second opinion from her primary care physician, Ms. Seaton had shoulder surgery on February 26, 2021. At the time of the final hearing, she did not know whether the surgery would ultimately prove to be a success: "I am still in ongoing treatment. It started October 2nd. I went through holy heck with our – the way that Concentra work[s] – which is the people they use for workmen's comp – they make you go through physical therapy before you can actually get an MRI done, because they say that it's required by the insurance company. They had given me ultrasound – not an ultrasound. X-rays when I first had the injuries. And from there they said I had to go through physical therapy, I went through that a month. And then from there I went for an MRI which determined that they saw something, but they couldn't know exactly. So they, then again, another MRI, a contrast MRI. I want to say I had that done December 23rd where they finally saw that. And we still, let me still – I didn't have my surgery until February 26th. So from October 2nd to February 26th, I did not have surgery. And I was in constant pain. At nighttime with the rotator cuff, it's kind of – in the daytime it's tolerable, but at nighttime it's excruciating pain, something to do with the way the muscles go. I'm not a doctor, but – I mean, it would be online. But it's when you're laying down you're in a lot of pain. I had pain from my neck all the way shooting to my arm. It would be like a shooting pain and [ ] constant. On December 23rd, when I actually had the MRI to determine that I did have a rotator cuff tear, at that point I got tired of the Concentra doctors because they weren't doing anything for my pain, and I went to my primary care for a second opinion, [and] he sent me to a pain management doctor. As of December 30th I have been on pain management with him, which is, like, Lyrica and hydrocodone and tramadol. So between the two. I still have therapy like I go three times a week. And I'm expected – like six more weeks. I still can't – they're not feeling that I'm where I'm supposed to be at this point. I'm supposed to be able to lift my arm a certain way, and it's not. So I still have another set of therapy that I have to go through. I'm praying that everything goes back to normal. But I still have neck pain and we're waiting to see if that clears up, I might have to go back to a neck specialist next."

Ms. Seaton did not want to leave her mother without transportation, she drove her own manual-shift car to and from an airport in Orlando, 90 minutes each way. However, using her left arm for driving caused her a great deal of pain. Upon her return to Florida, Ms. Seaton took a hydrocodone during the night of Sunday, October 25, 2020, because the pain was preventing her from sleeping. The hydrocodone came from a prescription:

> A: I've had hydrocodone prescribed to me for years on and off, depending on the surgery, because I can't take oxycodone, which is the one that they're saying came up on my test. The one that I took for – on October 25th, I want to say, it was a Sunday, it was from my previous surgery that I had.
>
> ALJ: Hold on. We need to get this straight. It looks like your drug test was October 27th, according to Petitioner's Exhibit 1.
>
> A: Correct.
>
> ALJ: Are you telling me you took something prior to – just prior to October 27th?
>
> A: Correct.
>
> ALJ: What did you take?
>
> A: Hydrocodone.
>
> ALJ: Did you have a prescription for hydrocodone?
>
> A: Yes.

16. During her stay in Baltimore, Ms. Seaton ate two biscuits sprinkled with poppy seeds. On October 26, 2021, and on the morning of October 27, 2021, Ms. Seaton also ate bagels sprinkled with poppy seeds.

17. Ms. Seaton was notified during the morning of October 27, 2020, that she had been selected for drug testing that day. At that point in time, she was on light duty due to her injury and assigned to the transportation help desk.[8]

18. On approximately November 4, 2020, the testing laboratory reported that Ms. Seaton's urine sample had tested positive for oxycodone and oxymorphone.[9]

19. The School Board notified Ms. Seaton on November 5, 2020, that she had been placed on administrative leave, with pay, during the pendency of an internal investigation.

20. Mr. Carson met with Ms. Seaton on December 2, 2020, to inform her of the Superintendent's recommendation that she be terminated. Ms. Seaton told Mr. Carson that she did not know how she could have tested positive for oxycodone because she is allergic to that medication.

21. Mr. Carson and Ms. Seaton disagree about other aspects of the meeting. Specifically, Ms. Seaton claims that she mentioned during the December 2, 2020, meeting that she took hydrocodone and had a prescription for that medication. Mr. Carson does not recall Ms. Seaton making that comment.[10]

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[8] Even though Ms. Seaton was on light duty status, Mr. Carson testified that she was still subject to random drug testing: "Employees that are subject to random drug tests based off of their status because they're CDL holders and drivers, they're expected to stay in the pool for random drug tests if they are on light duty. The only time they are removed from that list is if they're in a no-work status."

[9] The laboratory report entered into evidence was not authenticated, either by a witness or by self-authentication as provided in section 90.902, Florida Statutes (2020). Furthermore, no witness was produced to testify that the laboratory report was a business record and thus subject to an exception to the hearsay rule. The laboratory report is, therefore, unreliable hearsay.

[10] During questioning by Petitioner's counsel, Ms. Seaton claimed that she told the School Board's MRO about her hydrocodone prescription:

> Q: Now, the note on the drug test that says it was positive lists oxycodone. Correct?
>
> A: Yes.

22. Mr. Carson and Ms. Seaton spoke again on January 8, 2021, and Ms. Seaton stated for the first time to Mr. Carson that she had taken a long trip during the weekend prior to the October 27, 2020,[11] drug test. She relayed that she was experiencing a lot of pain after driving and took some pills to alleviate the pain. According to Mr. Carson, Ms. Seaton did not identify the pills she took, state that she had a prescription, or offer him evidence that she had a prescription for opioids.[12]

23. As described above in the Preliminary Statement, Ms. Seaton speculated in her December 11, 2020, response to the Superintendent's allegations that the positive test result could have been caused by poppy seeds she ate in the days preceding the drug test. This was the first time that

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> Q: Do you understand that oxycodone is a different drug than hydrocodone?
>
> A: Yes. After doing research, yes. Well, actually speaking with the MRO officer, because he called it Percocet and I said, well, that's impossible because I can't take Percocet because I'm allergic to it. And so I told him, I said, all the Percocets, all those things, every time I have a surgery the doctors try to give me that and I tell them, no, I can't have that because I get really sick and break out with [a] rash and vomiting, so they don't prescribe that. That's why I get prescribed hydrocodone.
>
> Q: So you're saying that you told the MRO you took hydrocodone?
>
> A: Correct, hydro.
>
> Q: And even after you told him that, he still reported a positive test. Correct?
>
> A: He said he had to go by what he has there.

[11] October 27, 2020, was a Tuesday.

[12] Ms. Seaton explained during the final hearing that she did not provide the School Board with a copy of her prescription because no one ever asked her to do so.

Mr. Carson was aware of Ms. Seaton asserting that poppy seeds could have caused her positive test result.[13]

24. Ms. Seaton testified that she did not tell the School Board about her hydrocodone prescription because she was on desk duty following the accident and did not anticipate ever driving a school bus again:

> ALJ: I guess what I'm struggling with is given your accidents and the pain you were experiencing, it seems perfectly reasonable that you would be on some sort of opioid. I guess on the other hand, you know, if you tested positive, I guess it seems like a reasonable person would show the School Board a prescription for any kind of pain med, regardless [of] whether they tested positive, or not. I guess that's what I'm struggling a little bit with.
>
> * * *
>
> So is it your testimony that – according to my notes, there were three – there have been three conversations or discussions between you and the School Board. The first one with Mr. Carson where he told you about the positive test. And let me just clarify. During that first conversation, did you mention the hydrocodone?
>
> A: Yes, I did. With Mr. Carson in the first conversation.
>
> ALJ: All right. So you disagree with his testimony that during the first conversation you said simply, I have no idea how that tested positive?

[13] Mr. Carson testified that "[m]y brief understanding of it is that you would have to consume a great deal of poppy seeds for it to alter any type of drug test. I don't know what that limit is. But that's not something that we're able to delineate in a drug test, whether it's truly a substance or if it's poppy seeds." Mr. Carson disclosed that the basis for that aforementioned statement came from "the internet." Because the School Board elicited no testimony indicating that Mr. Carson has any independent knowledge or expertise with drug testing or a related field, the undersigned does not credit his assertion that someone would have to "consume a great deal of poppy seeds" in order to affect a drug test.

* * *

A: Yes. And I did ask him because I wanted to remember that, I said to him, as much pain as I was in, if I had to do it again, I would. But the difference is I would tell my supervisor. Because I really didn't – in the role that I was in, which was a desk job, I was not in any safety risk for anyone, I would never get on a bus, nor was I – I knew I wasn't getting on a bus any time soon with the injury that I had. But I would never, ever put anybody at risk. I wouldn't even get on a bus because my CDL, I figured my CDL was going to be taken. That's another thing - -

ALJ: Ms. Seaton, did you say, -- I may be mistaken. I thought I heard you testify that you've had a hydrocodone prescription for many years. Was that accurate or did I mishear?

A: On different occasions for surgeries, correct.

* * *

ALJ: On the day that you injured your shoulder on the school bus and hurt your rotator cuff, the injury that we were talking about, at that time did you have any hydrocodone prescription?

A: Yes.

* * *

ALJ: Were you taking hydrocodone at that time?

A: No, sir.[14]

25. During the final hearing, Ms. Seaton moved Respondent's Exhibit 7 into evidence, and a portion thereof was a picture of a prescription bottle for

[14] Ms. Seaton then testified that her trip to Baltimore resulted in her taking hydrocodone to alleviate pain in her left shoulder.

60 hydrocodone pills with Ms. Seaton's name on the bottle. Ms. Seaton offered the following testimony in support of that Exhibit:

> ALJ: So, Ms. Seaton, this picture of the prescription bottle, can you give me some background on this? When was this prescribed to you? When do you fill it? Who prescribed it to you, and why?
>
> * * *
>
> A: The original prescription was prescribed to me in August, and it was for my double knee replacement by Dr. Raymond Weiand at the Orthopedic Institute.
>
> Petitioner's Counsel: August, you said, prior to the injury, August of 2020?
>
> A: No, '19.
>
> * * *
>
> ALJ: I think you may have discussed this, but were you taking hydrocodone consistently or without a break from that date to the day of your accident and beyond?
>
> A: No, sir. I only took hydrocodone when I had excruciating pain. This is not something that I take on a regular, like – like if I have pain then I was taking it. That's why I put Exhibit 1, it will state - - it wasn't in my system.
>
> ALJ: But is your testimony that at some point after your accident which resulted in your injured shoulder, is it your testimony that you are taking hydrocodone to relieve the pain resulting from that accident?
>
> A: That is correct. The night when I returned from the trip, I was in so much – I kept waking up out of my sleep because the pain was so bad that I took

> the pill for it to go to sleep, to go back to sleep, because I did not want to miss work.
>
> ALJ: Okay. Mr. Levitt, do you have any cross on that issue regarding this exhibit?
>
> Petitioner's Counsel: Let me think --- So you have August 2019 for a knee operation, and when was the last time you took it for the knee operation? Like back in 2019, or as the judge asked, were you continuing to take it?
>
> A: I took it around my birthday, July – July 28th of the 2020, I took some then.
>
> Petitioner's Counsel: For what, for your knee?
>
> A: Yes.
>
> Petitioner's Counsel: But this was never prescribed for your shoulder. Correct?
>
> A: No, sir.

26. Ms. Seaton had left shoulder surgery on February 26, 2021. The post-operative diagnosis notes she had a rotator cuff tear and superior labral tearing.

Ultimate Findings

27. Petitioner's Exhibit 1 is the only record evidence supporting the School Board's allegation that Ms. Seaton "provided a urine sample and it was reported as a positive test for opioids." Petitioner's Exhibit 1 is a report from a laboratory indicating that the urine sample Ms. Seaton provided on October 27, 2020, tested positive for oxycodone and oxymorphone. Petitioner's Exhibit 1 is hearsay in that it is an out-of-court statement being offered to prove the truth of the matter asserted therein, i.e., that Ms. Seaton's urine sample from October 27, 2020, tested positive for opioids.

28. The School Board did not present a records custodian from the testing laboratory or otherwise attempt to have Petitioner's Exhibit 1 accepted into evidence under the business records exception to the hearsay rule.

29. There is no record evidence supplementing or corroborating that Ms. Seaton's urine sample was positive for opioids, the allegation specifically pled in the Administrative Complaint. Thus, there is no evidentiary support for the School Board's allegation that Ms. Seaton committed "misconduct in office" or that there is "just cause for discipline."

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the subject matter and parties in this case, pursuant to sections 120.569, and 120.57(1), Florida Statutes.[15]

31. The Board is a duly constituted school board charged with the duty to operate, control, and supervise all free public schools within the school district of Marion County, Florida, under section 1012.22, Florida Statutes.

32. The Board seeks to terminate Ms. Seaton's employment and has the burden of proving the allegations set forth in the Superintendent's Administrative 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).

33. 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).

34. The allegations of fact set forth in the charging document are the facts upon which this proceeding is predicated. Once the School Board has

[15] All statutory references shall be to the 2020 version of the Florida Statutes.

delineated the offense alleged to justify termination in its notice of recommendation of termination, that is the only ground upon which dismissal may be predicated. *Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005). *See also Klein v. Dep't of Bus. & Prof'l Reg.*, 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits the School Board from disciplining a teacher based on matters not specifically alleged in the notice of recommendation of termination. *See Pilla v. Sch. Bd. of Dade Cty.*, 655 So. 2d 1312, 1314 (Fla. 3d DCA 1995); *Texton v. Hancock*, 359 So. 2d 895, 897 n.2 (Fla. 1st DCA 1978); *see also Sternberg v. Dep't of Prof'l Reg.*, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985)("For the hearing officer and the Board to have then found Dr. Sternberg guilty of an offense with which he was not charged was to deny him due process.").

35. The notice of recommendation of termination alleged that Respondent's urine sample tested positive for opioids. Thus, the scope of this proceeding is properly restricted to that matter as framed by Petitioner. *M.H. v. Dep't of Child. & Fam. Servs.*, 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

36. The following are the key allegations from the School Board's Administrative Complaint that supposedly support the School Board's ultimate allegations that Ms. Seaton committed "misconduct in office" and that there is "just cause for discipline":

> On October 27, 2020, Respondent provided a urine sample and it was reported as a positive test for opioids.
>
> The use of opioids is a prohibited substance pursuant to County School Board Policy 6.33 I(B), unless the employee can produce a valid prescription and provide sufficient information to

> the Medical Review Officer (MRO)[16] so that the test result would be negative.
>
> In this case the Respondent failed to provide a valid prescription to the MRO or otherwise explain her use to the MRO. The test was, therefore, reported as a positive test of opioids. Further, Respondent had not notified her supervisor about the use of opioids as a controlled substance.

37. Petitioner's Exhibit 1 is the only record evidence supporting the School Board's allegation that Ms. Seaton "provided a urine sample and it was reported as a positive test for opioids." Petitioner's Exhibit 1 is a report from a laboratory indicating that the urine sample Ms. Seaton provided on October 27, 2020, tested positive for oxycodone and oxymorphone. Petitioner's Exhibit 1 is hearsay in that it is an out-of-court statement being offered to prove the truth of the matter asserted therein. *See* § 90.801(1)(c), Fla. Stat. (providing that "hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

38. The School Board did not present a records custodian from the testing laboratory or otherwise attempt to have Petitioner's Exhibit 1 accepted into evidence under the business records exception to the hearsay rule, and it is not subject to any other exception pursuant to section 90.803.

39. A finding of fact cannot be based on hearsay unless that hearsay is supplemented or corroborated by nonhearsay or evidence that falls under one of the hearsay exceptions. *See* § 90.803(6), Fla. Stat.

40. There is no record evidence supplementing or corroborating the allegation set forth in Petitioner's Exhibit 1. As a result, the undersigned is

[16] MRO is an acronym for "Medical Review Officer." The pertinent portion of Section 6.33 defines an MRO as "a physician with knowledge of substance abuse disorders and who has appropriate medical training to interpret and evaluate laboratory positive drug test results in a confidential manner, in conjunction with an individual medical history, and any other relevant biomedical information to determine alternative medical explanations for positive results." The School Board did not present the MRO as a witness at the final hearing.

foreclosed from finding that Ms. Seaton "provided a urine sample and it was reported as a positive test for opioids." *See* § 120.57(1)(c), Fla. Stat. (2020)(mandating that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

41. With no competent, substantial evidence to support the allegation that Ms. Seaton provided a urine sample that tested positive for opioids, any other allegations based on a positive test result must fail.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Administrative Complaint be DISMISSED.

DONE AND ENTERED this 28th day of May, 2021, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of May, 2021.

COPIES FURNISHED:

Mark E. Levitt, Esquire
Allen, Norton & Blue, P.A.
1477 West Fairbanks Avenue, Suite 100
Winter Park, Florida 32789

Dr. Diane Gullett, Superintendent
Marion County Public Schools
512 Southeast 3rd Street
Ocala, Florida 34471

Matthew Mears, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Desiree M. Seaton
5 Hemlock Loop Lane
Ocala, Florida 34472

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.