

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MARION COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 21-1141

BARBARA BROWN,

Respondent.

RECOMMENDED ORDER

On May 17, 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
Allen, Norton & Blue, P.A.
Suite 100
1477 West Fairbanks Avenue
Winter Park, Florida 32789

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
Suite 110
29605 U.S. Highway 19 North
Clearwater, Florida 33761-1526

STATEMENT OF THE ISSUE

Whether Petitioner, Marion County School Board (“Petitioner” or “School Board”), had just cause to suspend Respondent, Barbara Brown (“Respondent” or “Ms. Brown”), for misconduct in office as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

On February 18, 2021, Dr. Diane Gullett, Superintendent of Schools of Marion County, filed an Administrative Complaint alleging Respondent assisted students on a standard test by permitting them to use study guides during the testing. The Superintendent alleged Respondent's conduct constitutes misconduct in office, gross insubordination, willful neglect of duty, and just cause for disciplinary action. The Superintendent recommended that Respondent be suspended for 10 days. Respondent timely filed a request for formal administrative hearing to dispute the allegations in the Administrative Complaint, which was referred to DOAH on March 26, 2021, for assignment of an administrative law judge.

This case was assigned to the undersigned for a hearing. The case was scheduled for May 17, 2021, and commenced as scheduled. At the final hearing, Petitioner presented the testimony of Jonathan McGowan (Director of School Counseling and Assessment) and Brent Carson (Director of Professional Practices). Petitioner's Exhibits 1 through 11 were admitted into evidence. Petitioner's Exhibits 3 through 6 were admitted into evidence over Respondent's objection. Respondent testified on her own behalf and presented no other witnesses. Respondent's Exhibit 1 was admitted into evidence.

A one-volume Transcript of the hearing was filed with DOAH on June 8, 2021. The parties timely filed Proposed Recommended Orders, 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 or rules will be to the 2020 version as they were the version in effect at the time of the incident alleged in the Administrative Complaint.

FINDINGS OF FACT

Based on the testimony, exhibits, and facts in the Joint Prehearing Stipulation, the following Findings of Fact are made:

Parties and Background

1. At all times material to this matter, the School Board had the duty to operate, control, and supervise public schools within the School District of Marion County. Diane Gullett is the Superintendent of the School District.

2. At all times material to this matter, Ms. Brown was employed by the School Board.

3. Ms. Brown was employed as a teacher pursuant to a professional services contract, which has been renewed on an annual basis. Ms. Brown's employment is governed by the School Board, Florida laws, Department of Education rules, and the Collective Bargaining Agreement ("CBA") between the Marion Education Association and the School Board. The CBA relevant to this matter became effective on May 12, 2020, and remains effective until 2022.

Quarterly Standards Mastery Assessment ("QSMA")

4. During an academic school year, the School Board administers the QSMA quarterly, which is administered at the end of each quarter of the year. During the 2020-2021 academic year, the School Board administered the second quarter QSMA in January 2020.

5. The QSMA is a diagnostic test used to assess student performance. The QSMA is not a statewide test, but rather a district assessment, which is permitted under Florida law.

Testing Administration and Security

6. At the beginning of each school year, the School Board administers a training for teachers for the testing administration process. Upon completion of the training, the School Board requires that each teacher sign the Test Administration and Security Agreement ("TASA"), affirming understanding of the agreement requirements.

7. The TASA provides, in pertinent part:

District assessments ... must be maintained and administered in a secure manner such that the integrity of the tests are preserved. All persons in the testing process must strictly adhere to the requirements set forth in Florida Administrative Code Rule 6A-10.042 This includes, but is not limited to:

(c) Examinees shall not be assisted in answering test questions by any means by persons administering or proctoring the administration of any test.

* * *

(f) Persons who are involved in administering or proctoring the tests or persons who teach or otherwise prepare examinees for the tests shall not participate in, direct, aid, counsel, assist in, or encourage any activity, which could result in the inaccurate measurement or reporting of the examinees' achievement.

8. The TASA attestation provides:

I have read and understand this Agreement and will comply with District Board Policy 4.61 – Security of Tests. By virtue of the foregoing, I am on notice that any actions by me that are contrary to the foregoing affirmations and acknowledgments will subject me to appropriate disciplinary action, up to and including termination from employment.

9. School Board Policy 4.61, entitled Security of Tests, provides, in pertinent part:

Statewide and District assessments shall be maintained and administered in a secure manner such that the integrity of the tests shall be preserved. All persons in the testing process shall strictly adhere to the requirements set forth in State Board of Education Rule 6A-10.042 (“Test Administration and Security”).

* * *

(B) Students shall not be assisted in answering test questions by any means by persons administering or proctoring the administration of any test.

* * *

(E) Persons who are involved in administering or proctoring the tests or persons who teach or otherwise prepare students for tests shall not participate in, direct, aid, counsel, assist in, or encourage any activity which could result in the inaccurate measurement or reporting of the students' achievement.

10. Mr. McGowan offered insight regarding testing security requirements for the 2020-2021 academic school year. The requirements outlined in the TASA apply to the QSMA. Mr. McGowan testified that there were no instructions given to the district to permit students to use study guides or any assistance during assessments. To the contrary, the district was expected to proceed as it would during a standard school year.

11. There were some accommodations for students related to the COVID-19 pandemic.¹ For example, the district permitted students to complete their tests online at home. To monitor the students, a process was created whereby a teacher without a proctor would create a separate online “support channel” to assist students when needed. While the teacher assisted the students in the “support channel,” the other students would not be actively monitored. A second accommodation for students who tested positive for COVID-19 was to permit them to complete the assessment after the standard test period.

12. Although there were accommodations for administering the assessments to students due to the pandemic, there was no change to administration of the QSMA or to the TASA.

¹ On March 9, 2020, Governor Ron DeSantis entered Executive Order 20-52, declaring that a state of emergency exists in Florida as a result of the COVID-19 outbreak. That executive order was extended by subsequent executive orders and was in effect during all times material to this matter.

13. Ms. Brown signed the TASA on August 31, 2020, which was in effect at all times material to the allegations alleged in the Administrative Complaint.

Ms. Brown also acknowledged at hearing that the TASA was not amended during the 2020-2021 school year.

Ms. Brown's Testimony

14. During the 2020-2021 school year, Ms. Brown served as a teacher at Horizon Academy, teaching physical science for grades eight and nine. She was assigned to teach four different classes.

15. Ms. Brown described the 2020-2021 school year as chaotic, abnormal, and stressful for her students. Throughout the first semester, student status was often changed between in-person and online instruction. There were times when students were in class, and then, later sent home due to COVID-19 related matters.

16. Ms. Brown, a contributor to developing the QSMA, understood that the purpose of the QSMA is to monitor progress of students. The test results are used by teachers to identify best practices for evaluating student progress.

17. The first quarter QSMA was administered using an online platform, Microsoft Teams. Thus, students were permitted to complete the exam online at home. During administration of the first quarter QSMA, Ms. Brown monitored the students using the Teams platform.

18. At times when students had questions, she moved to the "support channel" to assist students. Because she did not have a proctor to assist her, the students on the main screen were not monitored during that time.

19. The second quarter QSMA was scheduled to be administered in January 2021. Approximately two days before winter break in December 2020, the School Board notified teachers and students that second quarter QSMA test would be administered in person when the school reopened after the break. At the time, the student schedules were not stable, as they were changing often due to the pandemic.

20. Ms. Brown was responsible for administering the second quarter QSMA test to her assigned students on January 7, 2021. On the date of the QSMA, students appeared to be stressed about being sent home due to COVID-19 and concerned about their performance on the test.

21. Ms. Brown assessed her students and noticed that students in two of her classes were stressed about COVID-19 and their performance on the test. Thus, Ms. Brown made a “spur-of-the-moment” decision that it would be in the best interests of the students to be permitted to use their study guides to assist them during the test. She believed use of the study guides would empower the students during a chaotic time.

22. She instructed the students as follows: “Don’t worry about the QSMA. You’ve got the study guide. If you completed the study guide, just ... don’t let this add to your stress. Just go ahead and you can use it in the test.”

23. Ms. Brown did not ask for permission before permitting students to use the study guide. She was not authorized by any administrator to permit students to use the study guide. Ms. Brown acknowledged that the TASA was not amended to permit variations in administration of the test. She simply made a unilateral decision based on the circumstances and her experience as a teacher.

24. During the testing period, Mr. Perry and Ms. Lamb observed Ms. Brown’s students using study guides. Ms. Brown admitted to Mr. Perry that she permitted the students in her first and fourth period classes to use study guides for the QSMA. Of the approximately 49 students permitted to use the study guides, only four students used the guides. After the conversation with Mr. Perry, Ms. Brown directed the students to put away the study guides and they were no longer permitted to use them.

25. Ms. Lamb and Mr. Perry did not testify at the hearing. However, their written statements, which were included in the investigative report, were offered at

hearing. Petitioner established that the investigative report was admissible under the business records hearsay exception and the public records hearsay exception.²

However, the statements were not authenticated or adopted by the witness and thus, the written statements from Ms. Lamb and Mr. Perry cannot be considered by the ALJ in making findings of fact. The undersigned may, however, rely on these written statements to supplement or corroborate the witness testimony presented at the hearing related to the use of study guides during the quarter two QSMA.

26. Throughout Ms. Brown's 27-year career teaching, the second quarter QSMA administered on January 7, 2021, was the first time she permitted students to use a study guide during testing. Ms. Brown explained that she did not believe the testing circumstances were standard as in previous years due to the COVID-19 pandemic.

27. Ms. Brown believed that there was no unfair advantage given to the students who used study guides as she personally evaluated their performance and their performance level.

28. Throughout her career with the School Board, Ms. Brown received positive employment evaluations. Ms. Brown has a prior history of receiving a reprimand for an unrelated matter.

29. While her actions may have empowered the students, as she referred to it, her actions were a violation of the security agreement. Nonetheless, Respondent believed she was doing what was in the best interest of the children to protect their mental health.

30. The study guide included guidance for scientific terms, definitions, and steps to follow to solve an issue. However, the study guide did not provide direct answers to the questions on the QSMA. It simply was a guide for preparation for the test. The students could only use study guides that they completed prior to the test.

Additional Relevant Rules

31. School Board Rule 6.27 provides, in pertinent part, as follows: "An effective educational program requires the services of personnel of integrity, high ideals, and

² See § 90.803(6) and (8), Fla. Stat. (2020).

human understanding. All employees shall be expected to maintain and promote these qualities.”

32. Section 6.235 of the CBA provides that:

(a) Employees must not be disciplined without Just Cause. ...

* * *

(d) Generally, the District will follow a policy of corrective and progressive discipline (e.g., Verbal, [sic] Reprimand, Written Reprimand, Suspension without Pay, Termination from Employment) whereby less severe forms of discipline are issued prior to resorting to the imposition of more severe sanctions for the same or similar misconduct.

Ultimate Findings of Fact

33. The evidence offered at hearing established by a preponderance of the evidence that Ms. Brown permitted her students to use a study guide during administration of the second quarter QSMA.

34. The School Board proved by a preponderance of the evidence that Ms. Brown assisted students in answering test questions by permitting the students to use study guides during the test.

35. The School Board did not establish by a preponderance of the evidence that Ms. Brown’s conduct constituted willful neglect of duty, gross insubordination, or unethical conduct.

CONCLUSIONS OF LAW

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

37. The School 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.

38. This is an action in which Petitioner seeks to suspend Ms. Brown’s employment as a teacher with the Marion County School Board.

39. The School Board 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).

40. 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).

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

42. Section 1012.01(2) classifies Ms. Brown as "instructional personnel."

43. Section 1012.33(6)(a) states that "[a]ny member of the instructional staff ... may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a)."

44. Section 1012.33(1)(a) defines "just cause" as including, but not limited to:

[T]he following instances, as defined by the State Board of Education: immorality, misconduct in office, incompetency, two consecutive annual performance evaluation ratings of unsatisfactory under s. 1012.34, two annual performance evaluation ratings of unsatisfactory within a 3-year period under s. 1012.34, three consecutive annual performance evaluation ratings of needs improvement or a combination of needs improvement and unsatisfactory under s. 1012.34, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

45. Florida Administrative Code Rule 6A-5.056(2) defines misconduct in office, in pertinent part, as:

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

(c) A violation of the adopted school board rules. ...

46. Rule 6A-5.056(4) defines gross insubordination as “the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority misfeasance, or malfeasance as to involve failure in the performance of the required duties.”

47. Rule 6A-5.056(5) defines willful neglect of duty as “intentional or reckless failure to carry out required duties.”

48. Rule 6A-10.042 provides, in pertinent part, as follows:

Statewide and District assessments shall be maintained and administered in a secure manner such that the integrity of the tests shall be preserved.

(c) Examinees shall not be assisted in answering test questions by any means by persons administering or proctoring the administration of any test.

* * *

(f) Persons who are involved in administering or proctoring the tests or persons who teach or otherwise prepare examinees for the tests shall not participate in, direct, aid, counsel, assist in, or encourage any activity, which could result in the inaccurate measurement or reporting of the examinees' achievement.

49. Rule 6A-10.081, the Principles of Professional Conduct for the Education Profession in Florida, prescribes standards of conduct applicable to instructional personnel. The rule contains a list of aspirational conduct. However, Petitioner's administrative complaint does not specifically state which provision applies to Respondent's conduct.

50. The ethical principles in rule 6A-10.081(1) have been described as "aspirational in nature, and in most cases [are] not susceptible of forming a basis for suspension or dismissal[,]" *Sarasota County School Board v. Simmons*, Case No. 92-7278 (Fla. DOAH Nov. 9, 1993; Fla. Sarasota Cty. Sch. Bd. Aug. 21, 1994), and "of little practical use in defining normative behavior." *Miami-Dade Cty. Sch. Bd. v. Lantz*, Case No. 12-3970 (Fla. DOAH Jul. 29, 2014). By contrast, the disciplinary principles in rule 6A-10.081(2) enumerate specific "dos" and "don'ts" to put a teacher on notice concerning forbidden conduct. *See Miami-Dade Cty. Sch. Bd. v. Brenes*, Case No. 06-1758 (Fla. DOAH Feb. 27, 2007; Fla. Miami-Dade Cty. Sch. Bd. Apr. 25, 2007). "Thus, it is concluded that while any violation of [rule 6A-10.081(2)] would also be a violation of [rule 6A-10.081(1)], the converse is not true." *Id.* "Put another way, in order to punish a teacher for misconduct in office, it is necessary but not sufficient that a violation of the broad ideal articulated in [rule 6A-10.081(1)] be proved, whereas it is both necessary and sufficient that a violation of a specific rule in [rule 6A10.081(2)] be proved." *Id.*; *see Miami-Dade Cty. Sch. Bd. v. Regueira*, Case No. 06-4752 RO n.4 (Fla. DOAH Apr. 11, 2007; Fla. Miami-Dade Cty. Sch. Bd. May 25, 2007).

51. The School Board alleged that Respondent permitted students to use study guides during administration of the second quarter QSMA.

52. The School Board proved by a preponderance of the evidence that Respondent violated rule 6A-10.042 (c) and (f) and School Board Rule 4.61(c) and (f), by establishing that Respondent, as the administrator or proctor of the second quarter QSMA, assisted students in answering test questions by permitting the students to use study guides during the test.

53. The School Board also proved by a preponderance of evidence that Respondent violated rule 6A-5.056(2)(b) and (c), by establishing that Respondent violated School Board adopted rule 4.61.

54. The School Board did not prove that Respondent violated rule 6A-5.056(4) and (5). Rule 6A-5.056(4) requires that Respondent intentionally refuse to obey a direct order. While Respondent permitted students to use study guides during a test, a direct order was not involved. Respondent simply failed to comply with the rules governing administration of the tests. Furthermore, when Mr. Perry directed Ms. Brown to terminate the student's use of the study guides, Ms. Brown complied with the direct order. Thus, there is insufficient competent substantial evidence that Petitioner established that Respondent's conduct amounts to gross insubordination in violation of rule 6A-5.056(4).

55. Rule 6A-5.056(5) requires that Respondent intentionally fail to carry out duties. Respondent pursued the course of action, albeit without authorization, that she believed appropriate given the circumstances. There is not sufficient competent substantial evidence that she intentionally or recklessly failed to carry out her duties. Thus, Petitioner did not establish that Respondent's conduct was willful neglect in violation of rule 6A-5.056(5).

56. Petitioner did not prove by a preponderance of the evidence that Respondent violated rule 6A-10.081. There was not sufficient evidence offered at hearing to establish that Respondent did not maintain integrity, high ideals, and human understanding in her role as a teacher. To the contrary, Respondent permitted students to use study guides prepared by them to help with stress related to performance during a pandemic. Her conduct was directly related to her belief that she was doing what was in the best interests of her students based on the

circumstances. Thus, Petitioner did not prove that Respondent violated rule 6A-10.081.

57. Based on the findings above, pthe School Board has demonstrated, by a preponderance of the evidence, just cause in this matter to discipline Respondent.

58. Although Petitioner has established just cause to discipline Respondent's employment, the CBA provides for progressive discipline. The record did not establish competent substantial evidence that the appropriate discipline in this matter must fall outside the progressive discipline scale. *See Costin v. Fla. A&M Univ. Bd. of Trs.*, 972 So. 2d 1084, 1086-87 (Fla. 5th DCA 2008) (holding whether employee's misconduct justified dismissal based on terms of the university's progressive discipline rule was "an 'ultimate fact' best left to" the ALJ).

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 as follows:

- A. Finding that Ms. Brown violated rule 6A-5.056(2)(b) and (c), by violating board adopted rule 4.61;
 - B. Finding that Ms. Brown did not violate Rules 6A-5.056(4)(5) or 6A-10.081;
- and
- C. Issuing a written reprimand against Respondent.

DONE AND ENTERED this 8th day of July, 2021, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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 8th day of July, 2021.

COPIES FURNISHED:

Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
Suite 110
29605 U.S. Highway 19 North
Clearwater, Florida 33761-1526

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

Dr. Diane Gullett, Superintendent
Marion County School Board
512 Southeast Third Street
Ocala, Florida 34471

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

Richard Corcoran
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.