

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-3509TTS

DATTY MCKENZIE,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on October 20, 2014, with sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Tria Lawton-Russell, Esquire
The School Board of Broward County
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For Respondent: Robert F. McKee, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent for 10 days without pay.

PRELIMINARY STATEMENT

On July 22, 2014, at its scheduled meeting, Petitioner, Broward County School Board ("School Board"), took action to suspend Respondent, Datty McKenzie ("Respondent"), for 10 days without pay. Respondent was advised of her right to request an administrative hearing within 15 days.

On July 22, 2014, Respondent timely requested an administrative hearing. Subsequently, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing.

At the request of the parties, the final hearing initially was set for September 15, 2014. On September 2, 2014, the School Board filed an unopposed motion to continue the final hearing. On September 2, 2014, the undersigned entered an Order resetting the final hearing for October 20, 2014.

The Administrative Complaint contains certain factual allegations, and based on those factual allegations, the School Board charged Respondent with the following violations in three counts: (1) Misconduct in Office; (2) Incompetency; and (3) Violation of School Board Policy 4008(B).

The final hearing commenced as scheduled on October 20, 2014, with both parties present. At the hearing, the School Board presented the testimony of Lakeshia Bass, Griselle Rivera-Martinez, Fila Vaz, Desmond Wellington, April Nixon, Tanya Reid,

Janet Phelps, Orinthia Dias, and Susan Cooper. The School Board's Exhibits 1 through 8 were received into evidence upon stipulation of the parties. Respondent testified on her own behalf and presented the additional testimony of Kerlaine Louis. Respondent did not offer any exhibits into evidence.

The initial final hearing Transcript was filed on November 21, 2014. On November 26, 2014, the parties filed a joint motion to extend the time within which to file proposed recommended orders until December 12, 2014. On November 26, 2014, the undersigned entered an Order granting the motion. On December 5, 2014, an amended final hearing Transcript was filed. The parties timely filed proposed recommended orders, which were given consideration in the preparation of this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violations.

FINDINGS OF FACT

1. The School Board is a duly-constituted school board charged with the duty to operate, control, and supervise the public schools within Broward County, Florida.

2. At all times material to this case, Respondent was employed by the School Board as a kindergarten teacher at Park Lakes Elementary School ("Park Lakes"), a public school in Broward County, Florida.

3. The proposed discipline is based upon conduct occurring on Thursday, May 15, 2014, during the 2013-2014 school year. During the 2013-2014 school year, Kerlaine Louis was a paraprofessional assigned to Respondent's class.

4. On May 15, 2014, Respondent and Ms. Louis took thirteen of Respondent's kindergarten students to the City of Lauderdale Mullins Park Pool Facility ("pool facility") to participate in a water-safety class.^{1/}

5. To get to the pool facility on May 15, 2014, Respondent, Ms. Louis, and the thirteen students rode together on a standard Broward County school bus.

6. The bus picked up Respondent, Ms. Louis, and the thirteen students from Park Lakes at approximately 11:00 a.m. Respondent and Ms. Louis loaded the students onto the school bus at that time. Approximately 10-15 minutes later, the bus arrived at the pool facility with all of the thirteen students present.

7. The bus drove directly from the school to the pool facility, and dropped Respondent, Ms. Louis, and the thirteen students off in front of the building where the pool facility is located. The pool is located behind the building.

8. The thirteen students were scheduled to start their water-safety class at 11:30 a.m. The class was scheduled to end at 12:00 p.m. However, due to bad weather, the class was canceled.

9. Respondent learned of the cancellation of the class after arriving at the pool and exiting the school bus with the children. Because the class was canceled, Respondent, Ms. Louis, and the thirteen students gathered in the patio area located in the back of the pool facility (behind the building and near the pool), where they waited under a covered patio area for the school bus to return to pick them up and bring them back to the school.

10. Respondent brought some paperwork with her to work on at the pool facility. While waiting on the bus to return, the students interacted with each other. During this time, Ms. Louis spent most of her time pre-occupied with an exceptional student in the class who is autistic.^{2/} No lifeguards were on duty or in close proximity to the students and nobody was in the pool.

11. While waiting for the bus to return to the pool facility, Respondent left the patio area and went inside the building.

12. Respondent returned to the patio area in the back of the pool facility after being gone approximately five minutes. As she returned to the patio area, Respondent saw the bus coming around the front of the building.

13. The bus returned to the pool facility at approximately 12:00 p.m. to pick up Respondent, Ms. Louis, and the thirteen students. Respondent gathered the children to walk them to the

area where they would board the bus. Because it was raining, Respondent, Ms. Louis, and many of the children quickly boarded the bus. Shortly thereafter, the bus departed for the return trip to Park Lakes.

14. However, by the time the school bus returned to the school at approximately 12:30 p.m., only Respondent, Ms. Louis, and eleven of Respondent's students were on the bus. Two of Respondent's students were left behind at the pool facility, unsupervised after Respondent and Ms. Louis left the pool facility without checking to see that all of the students were accounted for.

15. Respondent did not realize that two of her students had been left behind at the pool facility until sometime after returning with the other students to her classroom at Park Lakes.^{3/}

16. The two students that were left behind at the pool facility had gone to the bathroom. The bathroom is located along an exterior corridor of the building.

17. Taking attendance and conducting a "head-count" of kindergarten students is an essential duty of a kindergarten teacher. Taking attendance and conducting a "head-count" of kindergarten students is required of all kindergarten teachers at Park Lakes at every transition point during a field-trip. A

transition point occurs whenever there is movement of the children.

18. Taking attendance and conducting a "head-count" of Respondents' students who were participating in the water-safety class at every transition point was necessary to insure that all of Respondents' students who were participating were accounted for and remained safe. The responsibility for that task fell on Respondent.

19. Respondent was expected to take attendance and conduct a "head-count" of the students taking the water-safety class as they were leaving the classroom; as they were exiting the school; as they were boarding the bus; and while they were in route to the pool facility. Respondent was also expected to take attendance and conduct a "head-count" of the students taking the water-safety class when they exited the pool facility; as they boarded the bus to return to the school; while they were on the bus in route back to the school; and upon the students' return to the school after departing the bus.

20. At hearing, Respondent acknowledged that she failed to take attendance or conduct a "head-count" of her students prior to boarding the bus at the pool facility to return to the school. Furthermore, Respondent acknowledged at hearing that she failed to take attendance or conduct a "head-count" of her students while on the bus during the return trip to the school, or at the

school after returning to the school. At hearing, Respondent conceded that she "dropped the ball" by failing to take attendance and conduct a "head-count" of her students before getting on the bus at the pool to return to the school, on the bus during the return trip to the school, and when she returned to the school.

21. Had Respondent taken attendance and a "head-count" of her students while at the pool facility just prior to boarding the bus to return to the school, or while on the bus before leaving the pool facility, she would have discovered that two of the students were missing, and the children would not have been left behind at the pool facility.

22. Respondent was visibly upset and remorseful of her conduct at the hearing.

23. Within five minutes after the school bus departed to return to the school, April Nixon, a lifeguard at the pool facility who was inside the building, encountered the two children standing in an interior hallway of the pool facility. Ms. Nixon immediately called Park Lakes to report that the two students had been left behind; she locked all of the doors, and she remained with the students from the point she discovered them until two Park Lakes employees came to pick them up at approximately 1:25 p.m., and return them to the school.

24. Significantly, for several minutes after the bus departed to return to the school, the two students were unsupervised, and their physical health and safety were in jeopardy. They could have easily wandered into the pool and drowned; walked further outside of the facility where they could have been kidnapped; or walked into a large lake, which is located very close to the perimeter of the pool facility-- accessible through a short walk through an unlocked door.

25. Respondent failed to make reasonable effort to protect the two students from conditions harmful to their physical health and safety by failing to take attendance and conduct a "head-count" of the students in her class on multiple occasions on May 15, 2014, including: 1) when the students exited the pool facility to return to the bus; 2) as they boarded the bus at the pool facility to return to the school; 3) while they were on the bus in route back to the school; and 4) upon the students' return to the school after departing the bus.

26. Respondent's conduct on May 15, 2014, also demonstrates incompetency due to inefficiency.

CONCLUSIONS OF LAW

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

28. Respondent is an instructional employee, as that term is defined in section 1012.01(2), Florida Statutes (2013). The School Board has the authority to suspend instructional employees pursuant to sections 1012.22(1)(f), 1012.33(4)(c), and 1012.33(6)(a).

29. To do so, the School Board must prove, by a preponderance of the evidence, that Respondent committed the violations alleged in the Administrative Complaint, and that such violations constitute "just cause" for suspension.

§§ 1012.33(1)(a) and (6), Fla. Stat.; Mitchell v. Sch. Bd., 972 So. 2d 900, 901 (Fla. 3d DCA 2007); Gabriele v. Sch. Bd. of Manatee Cnty., 114 So. 3d 477, 480 (Fla. 2d DCA 2013).

30. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280, n.1 (Fla. 2000). The preponderance of the evidence standard is less stringent than the standard of clear and convincing evidence applicable to loss of a license or certification. Cisneros v. Sch. Bd. of Miami-Dade Cnty., 990 So. 2d 1179 (Fla. 3d DCA 2008).

31. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d

387, 389 (Fla. 1st DCA 1995); McMillian v. Nassau Cnty. Sch. Bd.,
629 So. 2d 226, 228 (Fla. 1st DCA 1993).

32. Sections 1012.33(1)(a) and (6) provide in pertinent part that instructional staff may be suspended during the term of their employment contract only for "just cause." §§ 1012.33(1)(a) and (6), Fla. Stat. "Just cause" is defined in section 1012.33(1)(a) to include "misconduct in office" and "incompetency."

33. Section 1001.02(1), Florida Statutes, grants the State Board of Education authority to adopt rules pursuant to sections 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.

34. Consistent with this rulemaking authority, the State Board of Education has defined "misconduct in office" in rule 6A-5.056(2), effective July 8, 2012, which provides:

(2) "Misconduct in Office" means one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C.;

35. Rule 6A-10.080, titled "Code of Ethics of the Education Profession in Florida" (formerly numbered as rule 6B-1.001), provides:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

36. While rule 6A-5.056(2)(a) provides that violation of the Code of Ethics rule constitutes "misconduct," it has been frequently noted that the precepts set forth in the above-cited "Code of Ethics" are "so general and so obviously aspirational as to be of little practical use in defining normative behavior." Miami-Dade Cnty. Sch. Bd. v. Anderson, Case No. 13-2414, 2013 Fla. Div. Adm. Hear. LEXIS 861, *16-17 (Fla. DOAH Dec. 30, 2013); Walton Cnty. Sch. Bd. v. Hurley, Case No. 14-0429, 2014 Fla. Div. Adm. Hearing LEXIS 223, *19 (Fla. DOAH May 14, 2014); Miami-Dade Cnty. Sch. Bd. v. Parris, Case No. 14-271, 2014 Fla. Div. Adm. Hear. LEXIS 446, *28-29 (Fla. DOAH Aug. 26, 2014).

37. Rule 6A-5.056(2)(b) incorporates by reference rule 6A-10.081, which is titled: "Principles of Professional Conduct for the Education Profession in Florida." Rule 6A-10.081 (formerly rule 6B-1.006) provides, in pertinent part:

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

38. Consistent with its rulemaking authority, the State Board of Education has defined "Incompetency" in rule 6A-5.056(3), effective July 8, 2012, to mean "the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity." Consistent with its rulemaking authority, the State Board of Education has defined "Inefficiency" in rule 6A-5.056(3)(a), effective July 8, 2012, to mean: "Failure to perform duties prescribed by law."

39. Turning to the present case, the School Board proved by a preponderance of the evidence that Respondent's conduct on May 15, 2014, constitutes misconduct in office. A critical duty of a kindergarten teacher is to keep students safe. Kindergarten teachers are entrusted with the care of their students during school hours.

40. Respondent engaged in misconduct in office by failing to make reasonable effort to protect the two students who were

left behind at the pool from conditions harmful to their physical health and/or safety. Respondent failed in her legal duties to make reasonable effort to protect the two students from conditions harmful to their physical health and/or safety by failing to take attendance and conduct a "head-count" of her students on multiple occasions on May 15, 2014.

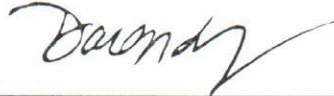
41. Respondent's breach of her legal duties as set forth above also constitutes incompetence due to inefficiency. Respondent breached her duties on more than one occasion on May 15, 2014, by failing to take attendance and conduct a "head-count" of her students at several key transitions.

42. The School Board failed to prove by a preponderance of the evidence that Respondent engaged in any conduct rising to the level of a violation of School Board Policy 4008(B). No such policy was offered into evidence at the hearing. Moreover, the School Board does not address this issue in its Proposed Recommended Order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Broward County School Board enter a final order suspending Respondent without pay for 10 days.

DONE AND ENTERED this 8th day of January, 2015, in
Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of January, 2015.

ENDNOTES

^{1/} The field-trip was part of a two-week water safety program for each of the five kindergarten classes at Park Lakes. The program taught basic water skills. The program began on May 12, 2014, and ended on May 22, 2014. Not all of the students from each kindergarten class attended the program. Only those students whose parents gave permission to attend the program actually went to the pool facility.

^{2/} Respondent's class contains some exceptional education students, including autistic children. As a paraprofessional, Ms. Louis's duties are primarily to assist the exceptional education students in Respondent's class. As they waited for the bus to return, Ms. Louis focused primarily on one autistic child, who exhibited various behaviors, including attempting to put various non-food items into his mouth.

^{3/} Neither of the two students left behind at the pool facility are exceptional education students.

COPIES FURNISHED:

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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.