STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. CASE NO.: 18-6215TTS

CRAIG DUDLEY,

Respondent.
_____/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

COMES NOW, PETITIONER, BROWARD COUNTY SCHOOL BOARD, FLORIDA's, ("SCHOOL DISTRICT") Superintendent, Robert W. Runcie, by and through his undersigned attorney, files this, his Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit A and, in support thereof, states as follows:

Background

There is only one issue in this case, and it is very simple. It is – whether, given the Administrative Law Judge's ("ALJ") finding of fact,[1] just cause exists for the School Board to terminate Craig Dudley's ("Respondent") employment.

[1] Petitioner stipulates that, even though it might dispute some of the ALJ's credibility determinations and non-findings, the School Board is bound by those findings, and non-findings, under the standards set forth in § 120.57(1)(l), Fla. Stat., because there is some evidence in the record to support them. This does not mean that Petitioner agrees with the ALJ's credibility

The ALJ's findings of fact, include:

6. On the morning of May 18, 2018, Respondent reported to work under the influence of cocaine and alcohol.

7. As a result, Respondent did not fully cover his early morning cafeteria duty, did not fully attend his assigned homeroom, and did not attend his first period class. A fellow physical education teacher, Cindi Ancona, was forced to cover Respondent's first period class. During the portions of the periods in which Respondent was not present in his classroom and in which Ancona was not covering his class, his students were left unsupervised.

10. In the course of questioning Respondent about where he had been during his first period class, Phillips surmised, and informed Respondent that she had reasonable suspicion, that he was under the influence of controlled substances.

13. Respondent consented to the drug and alcohol testing.

15. The breath alcohol testing indicated that Respondent had blood alcohol levels of .101 and .095, both of which exceed the blood alcohol level of .04 that Petitioner has adopted as the threshold for being under the influence of alcohol. . . .

18. The results of Respondent's drug test were received by the Risk Management Department on or about June 1, 2018. Respondent tested positive for cocaine.

19. Respondent does not dispute that he was under the influence of alcohol and cocaine while at school on May 18, 2018, and also does not dispute accuracy of the results of the blood alcohol and drug tests.

28. Respondent was forthright in admitting that he suffers from a substance abuse problem.

30. Respondent has come to realize that he cannot overcome his substance abuse problem on his own and that there is no shame in asking others for help in dealing with his problem.

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determinations. It only means that Petitioner acknowledges that those determinations are within the purview of the ALJ.

31. To that end, Respondent participated in, and has completed, the Evolution substance abuse program, which consisted of counseling sessions three to four days a week, for a three—to— four—month period, and attending therapy classes and meetings each week.

34. In order to avoid backsliding, Respondent remains in weekly contact with one of his therapists at Evolution, and attends meetings three to four times a week, to place himself in an environment that enables and fosters his success in fighting his substance abuse problem.

35. Since commencing Evolution, Respondent has not engaged in alcohol or drug use.[2]

Based on those, and other findings, the ALJ concluded that Respondent:

A. Committed misconduct in office,

B. Engaged in conduct constituting incompetency,

C. Engaged in conduct constituting gross insubordination,

D. Engaged in conduct constituting willful neglect of duty,

E. Violated Policy 2400(1) by reporting to work while under the influence of controlled substances,

F. Violated School Board Policy 4008, subsections (B)1 and 8, and

G. Violated Policy 4008(C).

Nevertheless, the ALJ recommended that:

[2]The ALJ effectively determined that Respondent's self-serving testimony on these matters was true, without any corroborating evidence, such as confirming drug and alcohol tests, or even written confirmation of his claim that he continued to have weekly contact with the treatment facility. Nevertheless, given the standard of review by the School Board, the Petitioner is not excepting to those factual findings because that credibility determination is within the purview of the ALJ.

. . ., Broward County School Board, enter a final order suspending Respondent from his teaching position without pay commencing on the date on which he was reassigned from the classroom; reinstating Respondent to his teaching position; and requiring Respondent to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment.

REFERENCES

The following symbols and designations will be used in the following manner:

(R.O. #) = Recommended Order/paragraph number

(PE. #/) = Petitioner's Exhibit number/page number

(HT. #/) = Hearing Transcript page number/line number

(DT. #/) = Deposition Transcript page number/line number

STANDARD OF REVIEW

There should only be a single issue in this case: Whether the Board should accept, reduce or increase the recommended penalty in the recommended order. As long as the School Board complies with statutory procedures set forth below, it has broad discretion to increase or decrease the penalty recommended by an administrative law judge. The Florida Supreme Court firmly established this rule in Crim. Justice Standards & Training Comm'n v. Bradley, 596 So.2d 661 (Fla.1992), stating:

On this question we approve the concisely stated view of Judge Altenbernd in his dissent in *Hambley v. Department of Professional Regulation, Division of Real Estate*, 568 So.2d 970 (Fla. 2d DCA 1990):

> The majority's opinion and the Fifth District's recent decision in *Bajrangi v. Department of Business Regulation*, 561 So.2d 410 (Fla. 5th DCA 1990), essentially prohibit an administrative board from altering the recommended penalty unless the board also rejects one of the hearing officer's findings of fact or conclusions of law. Such a rule is not required by section 120.57(1)(b)(10), Florida Statutes (1987)....
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> Although hearing officers are entitled to substantial deference, they are judicial generalists who are trained in the law but not necessarily in any specific profession. The various administrative boards have far greater expertise in their designated specialties and should be permitted to develop policy concerning penalties within their professions.
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> * * *
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> Section 120.57(1)(b)(10) merely requires that an agency which chooses to increase or decrease a recommended penalty must: 1) conduct a review of the complete record, and 2) state with particularity its reasons therefor in the order, by citing to the record in justifying the action. While other portions of this statute prohibit an agency from modifying a finding of fact which is supported by competent substantial evidence, nothing in the statute compels the agency to reject a finding of fact or a conclusion of law before it states with particularity its reasons for imposing a different penalty.
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> *Id.* at 971–72 (Altenbernd, J., dissenting).
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> . . . . We fully approve Judge Altenbernd's comments concerning the responsibility of professional boards and firmly believe that the legislature, in creating this process, expected the administrative boards, who have expertise in their designated specialties, to be the entities responsible for developing policy concerning penalties within their professions. ***Id.*** At 664, 665.

Unfortunately, in apparent recognition of this that broad discretion, the ALJ crafted her recommended order in a manner intended to limit or circumvent the

SCHOOL BOARD's discretion by mislabeling the actual "penalty," as also both a "finding of fact," and a "conclusion of law." In doing so, the ALJ intended to manipulate the SCHOOL BOARD's standard for review to the more stringent standards applicable to findings of fact and conclusions of law.

Fortunately, neither the SCHOOL BOARD, nor any subsequent reviewing court, is bound by the labels affixed to findings of fact and conclusions of law by the ALJ. If a finding is improperly labeled, the label is disregarded, and the SCHOOL BOARD should treat the finding as though it were properly labeled. Abrams v. Seminole County School Board, 73 So.3d 285 (Fla. 5th DCA 2011); Battaglia Properties, LTD., v. Florida Land and Water Adjudicatory Commission, 629 So.2d 161 (Fla. 5th DCA 1994).

As a result, it is critical that the School Board understand the three different standards of review that apply to the School Board's review of the recommended order, depending on whether the paragraph is properly considered a "finding of fact," a "conclusion of law," or the "penalty." The three distinct standards are as follows:

Findings of Fact

Pursuant to § 120.57(1)(l), Fla. Stat.:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that **the findings of fact were not based upon competent substantial evidence** or that the proceedings on which the findings were based did not comply with essential requirements of law. (emphasis added).

This is, by far, the most stringent standard applicable to the School Board's review of the recommended order. As will be discussed below, the ALJ improperly mislabeled several paragraphs of the recommended order regarding penalty as "findings of fact," with the obvious intent of trying to impose this standard of review on the Board. Again, the ALJ's labeling is not binding on School Board.

For properly labeled paragraphs, though, the Superintendent and the School Board must accept the ALJ's findings of fact, if they are supported any competent substantial evidence. For example, due to this standard of review, the Superintendent and the School Board must accept the ALJ's decision to find RESPONDENT's self-serving representation that he has not used drugs or alcohol since completing treatment as true. The SCHOOL BOARD may not reject the ALJ's credibility determinations. Gross v. Department of Health, 819 So.2d 997 (Fla. 5th DCA 2002). As a result, regardless of whether he agrees, the Superintendent does not challenge that determination in his exceptions, and the School Board must accept it too.

Moreover, this same standard applies to an absence of findings. The School Board may not add new findings of fact because there would be substantial competent evidence in the record to support such a finding. Fla. Power & Light Co. v. State, 693 So.2d 1025, 1026–27 (Fla. 1st DCA 1997). For example, there was

competent substantial evidence in the record that, after RESPONDENT was reassigned, a partially full bottle of vodka was found in a locked cabinet in RESPONDENT's classroom, and RESPONDENT had a key to that cabinet. Yet, the ALJ found that RESPONDENT had not possessed alcohol on District property. Due to the standard of review applicable to findings of fact, regardless of whether he agrees, the Superintendent does not challenge that determination in his exceptions, and the School Board must accept it too.

On the other hand, the SCHOOL BOARD is not required to treat the ALJ's recommended penalty as a finding of fact, merely because the ALJ labeled it as such.

Conclusions of Law

Pursuant to § 120.57(1)(l), Fla. Stat.:

> The agency in its final order **may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.** When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and **must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.** Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

This is effectively an intermediate standard for the SCHOOL BOARD's review of the recommended order. The SCHOOL BOARD has much broader discretion in its review of conclusions of law. The SCHOOL BOARD is still bound by the ALJ's

conclusions of law, except where the SCHOOL BOARD has "substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction," and the Board's substituted conclusion "is as or more reasonable than that which was rejected or modified." *Id.*

As will be discussed below, the ALJ mislabeled several penalty paragraphs of her recommended order as "conclusions of law," with the obvious intent of trying to impose this somewhat more stringent standard of review on the SCHOOL BOARD, in case the ALJ's effort to mislabel her recommended penalty as a finds of fact fails. Again, fortunately, the School Board is not bound by the ALJ's labeling.

Penalty

Pursuant to § 120.57(1)(l), Fla. Stat.:

> The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

This is the most liberal standard which applies to the SCHOOL BOARD's review of the recommended order. When it comes to penalty, **so long as the SCHOOL BOARD reviews the complete record and states with particularity its reasons therefor in the order, by citing to the record in justifying the action,**[3] the

[3] It is very important that the SCHOOL BOARD comply with these procedural requirements. Many agency actions, including SCHOOL BOARD actions, have been overturned for failure to satisfy these requirements.

SCHOOL BOARD may increase or decrease the ALJ's recommendation based on a **mere disagreement** with the ALJ's assessment of the seriousness of the offenses. Crim. Justice Standards & Training Comm'n, at. 645; Phillips v. Bd. Of Dentistry, Dept. of Health, 884 So.2d 78 (Fla. 4th DCA 2004). ("The agency stands on a different footing with regard to factual findings than it does to legal conclusions involving the specific practice being regulated. An agency may not reject an ALJ's resolution of contested facts supported by competent evidence, but it need not necessarily defer to the ALJ's conclusions as to the very law the agency was established to enforce."); Schrimsherv. School Bd. of Palm Beach County, 694 So.2d 856 (Fla. 4th DCA 1997); Chase v. Pinellas County School Board, 597 So.2d 419 (Fla. 2d Dist. 1992).

Discipline imposed on employees has repeatedly been treated as a penalty. Roberts v. Department of Corrections, 690 So.2d 1383 (Fla. 1st DCA 1997); Department of Health and Rehabilitative Servs. v. Gordon, 590 So.2d 484 (Fla. 1st DCA 1991); Neville v. Department of Labor and Employment Sec., 9 FCSR ¶ 070 (PERC 1994).

EXCEPTIONS TO RECOMMENDED ORDER

Findings of Fact

1. **R.O., ¶ 39, "Whether the charged offenses constitute violations of the applicable rules and policies 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) (whether there was a deviation from the standard of conduct is not a conclusion of law, but instead is an ultimate fact); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995) (whether a particular action constitutes a violation of a statute, rule, or policy is a factual question); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995) (whether the conduct, as found, constitutes a violation of statutes, rules, and policies is a question of ultimate fact).

The first and most obvious flaw with this "finding of fact" is that it is unquestionably mislabeled; and that, therefore, the SCHOOL BOARD must treat it as a conclusion of law.

The second fundamental flaw is that the statement is incomplete. It is **ordinarily** true that the issue of whether the charged offenses constitute violations of the applicable rules and policies 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). This makes sense, as a general rule, because, in most cases, an ALJ must weigh evidence to determine whether the employer has proven every required element to establish that a violation occurred. In other words, in most cases, the determination of whether a violation occurred is simply the "ultimate fact" based on the culmination of all the underlying facts required to prove the charge.

In certain cases, however, some elements of an offense, which are necessary to establish a violation, may be decided as a matter of law. Purvis v. Marion County School Board, 766 So.2d 492 (Fla. 5th DCA 2000); Walker v. Highlands County School Board, 752 So.2d 127 (Fla. 2d DCA 2000). For example, one of the ways in which the District may establish the charge of misconduct in office is to prove "behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties." Fla. Admin. Code r. 6A-5.056. In Purvis, the court found that some misconduct "speaks for itself," such that a school board may determine loss of effectiveness, without any direct evidence.

Moreover, in certain other cases, where the ultimate facts are increasingly matters of opinion, and those opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings. Schrimsher v. Sch. Bd. of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997).

In any event, the ALJ's incomplete statement of the law is largely academic because the ALJ still found that the District proved that

RESPONDENT committed nearly all of the violations charged.[4] Nevertheless, the Superintendent asks the SCHOOL BOARD to reject this finding of fact, as mislabeled the finding as a conclusion of law, and modify the conclusion of law to reflect the above analysis.

2. **R.O., ¶ 50 "Based on the foregoing, it is found, as an ultimate fact, that although Respondent violated the rule and many of the school board policies charged in the Administrative Complaint, under the progressive discipline policy set forth in Policy 4.9, the appropriate penalty that should be imposed on Respondent in this case is suspension without pay for the entire period during which he has been reassigned from the classroom."**

This finding is pivotal to the ALJ's effort to manipulate the standard of review. By mislabeling this paragraph as a "finding of fact," the ALJ hopes to restrict the SCHOOL BOARD's discretion to increase or decrease the recommended penalty. More specifically, by making this a finding of fact, the ALJ is attempting to require the SCHOOL BOARD to accept her recommended penalty if there is any competent substantial evidence in the record to support it, instead of the standard that actually applies to a penalty.

As discussed above, when it comes to "penalty," the SCHOOL BOARD may increase or decrease the ALJ's recommendation based on a mere disagreement with the ALJ's assessment of the seriousness of the

[4] The Superintendent is also not challenging any of the ALJ's finding's that certain charges were not established.

offenses. Crim. Justice Standards & Training Comm'n, at. 645; Phillips v. Bd. Of Dentistry, Dept. of Health, 884 So.2d 78 (Fla. 4th DCA 2004).

Moreover, discipline imposed on employees has repeatedly been treated as a "penalty." Roberts v. Department of Corrections, 690 So.2d 1383 (Fla. 1st DCA 1997); Department of Health and Rehabilitative Servs. v. Gordon, 590 So.2d 484 (Fla. 1st DCA 1991); Neville v. Department of Labor and Employment Sec., 9 FCSR ¶ 070 (PERC 1994). In fact, even the ALJ labeled the proposed discipline as "penalty" within the body of this paragraph by stating, "**the appropriate penalty** that should be imposed on Respondent in this case is suspension without pay for the entire period during which he has been reassigned from the classroom."

Contrary to established law, the ALJ's own words, and common sense, the ALJ still labeled this paragraph as a "finding of fact." Her only purported justification for such labeling is that her conclusion about her preferred application of "progressive discipline" somehow converts this paragraph from a recommendation regarding "penalty" to an "ultimate finding of fact."

The ALJ's effort to manipulate the standard of review should be rejected for several reasons. First, as a matter of basic common sense, determining proper application of "progressive discipline" is always an essential part of determining the penalty. As a result, every administrative

law judge could construct every recommended order in such a way as to include an ultimate finding of fact that the proper application of progressive discipline required a specific level of discipline. As a result, the provision in § 120.57(1)(l), Fla. Stat., authorizing the SCHOOL BOARD to reduce or increase the penalty would be rendered effectively meaningless.

Second, artificially limiting the SCHOOL BOARD's discretion to increase or decrease the recommended penalty, in the manner attempted by the ALJ is contrary to the Florida Supreme Court's decision in Crim. Justice Standards & Training Comm'n. It must be emphasized that, prior to that decision, many courts essentially prohibited an administrative board from altering the recommended penalty, unless the board also rejected one of the hearing officer's findings of fact or conclusions of law. Bajrangi v. Department of Business Regulation, 561 So.2d 410 (Fla. 5th DCA 1990) The Supreme Court rejected that approach and firmly established that the SCHOOL BOARD may increase or decrease the ALJ's recommendation based on a mere disagreement with the ALJ's assessment of the seriousness of the offenses. The ALJ's mislabeling of this paragraph is a fairly obvious effort to circumvent Crim. Justice Standards & Training Comm'n.

It seems beyond serious debate that the recommended discipline in this case is the "penalty;" but, even assuming for the sake of argument that the

recommend discipline based on progressive discipline does not qualify as "penalty," it must be rejected as a "finding of fact" and treated, at least, as a "conclusion of law." In that case, the SCHOOL BOARD can still modify the conclusions of the law, so long as the SCHOOL BOARD states with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and makes a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. § 120.57(1)(l), Fla. Stat.

In order to distinguish between findings of fact and conclusions of law, the courts have viewed matters that are "susceptible of ordinary methods of proof" are factual matters to be determined by the ALJ, while "matters infused with overriding policy considerations" are conclusions of law, left to agency consideration. Baptist Hosp., Inc. v. State Dep't of Health & Rehab. Serv., 500 So.2d 620, 623 (Fla. 1st DCA 1986); Brookwood-Walton County Convalescent Center v. Agency for Health Care Admin. Eyeglasses, 845 So.2d 223 (Fla. 1st DCA 2003).

In determining how much deference the SCHOOL BOARD must give to the ALJ's finding:

> A reviewing court will naturally accord greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual

> issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight....
>
> At the other end of the scale, where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings....
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> Thus, the substantiality of evidence supporting an agency's substituted finding of fact depends on a number of variables: how susceptible is the factual issue to resolution by credible witnesses and other evidence, how substantially the hearing officer's discarded findings are supported by such evidence, how far the factual issue tends to be one of opinion, how completely agency policy occupies a field otherwise open to different opinion.
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> Schrimsher v. Sch. Bd. of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997).

This finding is not supported facts which are susceptible to ordinary means of proof. To the contrary, it is no more than a reflection of the ALJ's recommended level of discipline based on the ALJ's opinion, entirely based upon policy considerations, about how to best apply general principles of progressive to the facts in this case.

Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled finding of fact; and, instead, treat this paragraph as an inseparable part of the ALJ's penalty recommendation.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the paragraph shall be deemed a conclusion of law. In that event, the SCHOOL BOARD modifies the conclusion of law to substitute its own conclusion that "Even considering the progressive discipline policy set forth in Policy 4.9, and the mitigating factors identified in the recommended order, due to the severity of the misconduct, the appropriate penalty that should be imposed on Respondent in this case is termination."[5]

The Superintendent recommends that the SCHOOL BOARD adopt the reasons specified in the Superintendent's exception to the "Penalty," which are incorporated herein by reference, as the SCHOOL BOARD's reasons for rejecting or modifying such conclusion of law.

3. **R.O., ¶ 51 "Additionally, Respondent should be required to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment by Petitioner."**

[5] The Superintendent's Counsel apologizes for the tedious and cumbersome process. Unfortunately, though, the ALJ labeled the same substantive recommendation as "finding of fact," "conclusion of law" and "penalty." By doing so, the ALJ created a circumstance in which, every time that same recommendation is made, the SCOOL BOARD is compelled apply all three review standards to the paragraph, regardless of how it is labeled.

For this exception, the Superintendent adopts the same analysis reflected in Exception No. 2, incorporated by reference. Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled finding of fact.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the paragraph shall be deemed a conclusion of law. In that event, the SCHOOL BOARD should reject it as moot because of the adoption of the finding recommended in Exception No. 2.

The Superintendent recommends that the SCHOOL BOARD adopt the additional reasons specified in the Superintendent's exception to the "Penalty," which are incorporated herein by reference, as the SCHOOL BOARD's reasons for rejecting or modifying such conclusion of law.

4. **R.O., ¶ 52 "This penalty is appropriate based on the fact that Respondent has not previously been subject to suspension without pay under the progressive discipline policy, and takes into account several relevant considerations: specifically, that Respondent has a substance abuse problem for which he actively sought and finally has been able to obtain real, effective help in overcoming; that he has an approximately 14 year employment history with Petitioner that only, in the last two years, entailed discipline as the result of conduct that was caused by his substance abuse problem; that he is remorseful, understands that he made poor choices, and has obtained the counseling and therapy he needs in order to correct his This penalty is appropriate based on the fact that**

Respondent has not previously been subject to suspension without pay under the progressive discipline policy, and takes into account several relevant considerations: specifically, that Respondent has a substance abuse problem for which he actively sought and finally has been able to obtain real, effective help in overcoming; that he has an approximately 14 year employment history with Petitioner that only, in the last two years, entailed discipline as the result of conduct that was caused by his substance abuse problem; that he is remorseful, understands that he made poor choices, and has obtained the counseling and therapy he needs in order to correct his performance problems through overcoming his substance abuse problem; that he is a caring and effective teacher who loves children and enjoys his teaching job; and, importantly, that no students were injured or otherwise harmed by Respondent's conduct on May 18, 2018.

For this exception, the Superintendent adopts the same analysis reflected in Exception No. 2, incorporated by reference.

Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled finding of fact; and, instead, treat this paragraph as an inseparable part of the ALJ's penalty recommendation.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the paragraph shall be deemed a conclusion of law. In that event, the SCHOOL BOARD modifies the conclusion of law to substitute its own conclusion that "Even considering the progressive discipline policy set forth in Policy 4.9, and the mitigating factors identified

in the recommended order, due to the severity of the misconduct, the appropriate penalty that should be imposed on Respondent in this case is termination."

The Superintendent recommends that the SCHOOL BOARD adopt the reasons specified in the Superintendent's exception to the "Penalty," which are incorporated herein by reference, as the SCHOOL BOARD's reasons for rejecting or modifying such conclusion of law.

5. R.O., ¶ 53 "This penalty also is sufficiently severe to deter Respondent from committing future violations of rules and school board policies, and sends the message that this is truly his last chance."

For this exception, the Superintendent adopts the same analysis reflected in Exception No. 2, incorporated by reference. In addition, the item is based on pure speculation, so it is not based on competent substantial evidence.

Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled finding of fact; and, instead, treat this paragraph as an inseparable part of the ALJ's penalty recommendation.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the paragraph shall be deemed a conclusion of law.

In that event, the SCHOOL BOARD modifies the conclusion of law to substitute its own conclusion that "Even considering the progressive discipline policy set forth in Policy 4.9, and the mitigating factors identified in the recommended order, due to the severity of the misconduct, the appropriate penalty that should be imposed on Respondent in this case is termination."

The Superintendent recommends that the SCHOOL BOARD adopt the reasons specified in the Superintendent's exception to the "Penalty," which are incorporated herein by reference, as the SCHOOL BOARD's reasons for rejecting or modifying such conclusion of law.

Conclusions of Law

6. R.O., ¶ 76 "Based on the foregoing findings of fact, it is determined that, pursuant to Policy 4.9, Respondent should be suspended without pay for the duration of the period since his reassignment from the classroom."

For this exception, the Superintendent adopts the same analysis reflected in Exception No. 2, incorporated by reference.

The Superintendent further emphasizes that, although this paragraph has a new label, this paragraph and paragraph 50 represent "penalty" recommendations. Both paragraphs address the same issue – the ALJ's recommended discipline. The substance of both paragraphs are essentially repeated as the penalty in the "RECOMMENDATION.". Again, the fact that

the ALJ characterized her same recommendation regarding discipline as a "finding of fact," "conclusion of law," and "penalty" underscores the ALJ's effort to manipulate the standard of review.

Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled conclusion of law; and, instead, treat this paragraph as an inseparable part of the ALJ's penalty recommendation.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the SCHOOL BOARD modifies the conclusion of law to substitute its own conclusion that "Even considering the progressive discipline policy set forth in Policy 4.9, and the mitigating factors identified in the recommended order, due to the severity of the misconduct, the appropriate penalty that should be imposed on Respondent in this case is termination."

The Superintendent recommends that the SCHOOL BOARD adopt the reasons specified in the Superintendent's exception to the "Penalty," which are incorporated herein by reference, as the SCHOOL BOARD's reasons for rejecting or modifying such conclusion of law.

7. **R.O., ¶ 77 "Based on the foregoing findings of fact, it is determined that he should not be terminated from his employment, and should be reinstated to his teaching position."**

For this exception, the Superintendent adopts the same analysis reflected in Exception No. 6, incorporated by reference.

Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled conclusion of law; and, instead, treat this paragraph as an inseparable part of the ALJ's penalty recommendation.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the SCHOOL BOARD modifies the conclusion of law to substitute its own conclusion that "Even considering the progressive discipline policy set forth in Policy 4.9, and the mitigating factors identified in the recommended order, due to the severity of the misconduct, the appropriate penalty that should be imposed on Respondent in this case is termination."

The Superintendent recommends that the SCHOOL BOARD adopt the reasons specified in the Superintendent's exception to the "Penalty," which are incorporated herein by reference, as the SCHOOL BOARD's reasons for rejecting or modifying such conclusion of law.

8. **R.O., ¶ 78 "Based on the foregoing findings of fact, it is concluded that Respondent should be required to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment."**

For this exception, the Superintendent adopts the same analysis reflected in Exception No. 6, incorporated by reference.

Accordingly, the Superintendent requests that the SCHOOL BOARD reject this mislabeled conclusion of law; and, instead, treat this paragraph as an inseparable part of the ALJ's penalty recommendation.

Additionally, the Superintendent recommends that the SCHOOL BOARD adopt an additional alternative finding that, in the event that a court later determines that this paragraph is not an inseparable part of the ALJ's penalty recommendation, the SCHOOL BOARD rejects the conclusion of law as moot as a result of the finding in response to Exception No. 7.

9. **R.O., Recommendation. "Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Broward County School Board, enter a final order suspending Respondent from his teaching position without pay commencing on the date on which he was reassigned from the classroom; reinstating Respondent to his teaching position; and requiring Respondent to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment."**

As discussed above, when it comes to penalty, so long as the SCHOOL BOARD reviews the complete record and states with particularity its reasons

therefor in the order, by citing to the record in justifying the action, the SCHOOL BOARD may increase or decrease the ALJ's recommendation based on a mere disagreement with the ALJ's assessment of the seriousness of the offenses. Crim. Justice Standards & Training Comm'n, at. 645; Phillips v. Bd. Of Dentistry, Dept. of Health, 884 So.2d 78 (Fla. 4th DCA 2004).

The Superintendent recommends that the School Board increase the penalty in this case to termination of employment. The correct penalty in this cause would be revocation of certification. This penalty is appropriate for the following reasons:

1. Severity of the misconduct. The danger posed by a teacher under the influence of drugs and alcohol is significant and it is readily apparent. In fact, that risk is so grave that the US 11th Circuit Court of Appeals recently authorized school district to impose random drug and alcohol testing on teachers. In doing so, the Court eloquently justified its holding by stating:

> While we cannot predict when or where a substitute teacher will face a situation in which a child's health or safety is at stake, we know with confidence that these situations will occur. There are many, many students in our nation's public schools: some 50.7 million of them this fall. See Fast Facts, National Center for Education Statistics, https://nces.ed.gov/FastFacts/. It takes no complex statistical formulation to recognize that serious emergencies arise all the time in the classroom and in the school yard: kids get sick, injured, or into fights. The public schools take prophylactic steps to ensure, as best they can, the safety of their charges. By law, each district school board in Florida must establish policies and procedures for safety, including

safety training and risk assessment. Fla. Stat. § 1006.07. Some required precautions help schools prepare for particular emergencies, ... More generally, an obvious and basic step necessary to ensure student safety is ensuring that the guardian in closest daily contact with students is able to respond, and to do so promptly and without any cognitive or physical impairment.

If schools are going to be able to handle emergencies that threaten children's safety, teachers will need to be able to identify and respond to emergencies quickly, decisively, and with sound judgment. To take one example among the many dangers that will arise, we know for sure that kids get sick. A child's illness may be benign or can be anything but benign. A child's fever may quickly develop and spike—it could be nonexistent in the morning and yet require medical attention before the end of the school day. A student may develop a life-or-death allergic reaction even more rapidly. The Centers for Disease Control and Prevention reports that four to six percent of children in this country have food allergies, often to foods as ubiquitous as peanuts, and their reactions may be life-threatening if not addressed quickly. Food Allergies in Schools, Centers for Disease Control and Prevention, https://www.cdc.gov/healthyschools/foodallergies/index.htm ("Early and quick recognition and treatment can prevent serious health problems or death."). There may be no time to waste in seeking help. Nor is there time to waste when a child falls into diabetic shock or suffers a seizure, fainting spell, or asthma attack.

Teachers must also expeditiously recognize and respond to violent situations. The hard fact of life is that during school hours, bad things can happen to kids, and those front-line responders most directly supervising students—our teachers and substitute teachers—must be able to respond properly. It is not remote, idle, or fanciful to posit with some confidence that students, particularly teenagers, will engage in conflict at school. When students get into fights, a teacher will likely be in the best position to stop it, to diffuse it before it turns serious, or to seek help if the situation intensifies. Sadly, we need only look to recent events to know that teachers may, at a moment's notice, become those most readily able to protect our students from deadly and immediate harm from outside the school as well. School shootings are a real and palpable possibility. They are not so remote as to be only a

hypothetical: in the first half of this year alone, school shooting incidents resulted in nearly three dozen deaths and numerous injuries. Denisa R. Superville & Evie Blad, A Deadly School Year: 35 People Killed in School Shootings, Education Week, May 28, 2018, https://www.edweek.org/ew/articles/2018/05/30/a-deadly-school-year-35-people-killed.html.

As acute situations arise, and we know they will, the danger posed by leaving children, especially young children, in the care of an intoxicated teacher is profound. A teacher under the influence of drugs is significantly less likely to respond promptly, efficiently, and with sound judgment than a sober and clearheaded teacher. As we have said, it is not particularly likely that intoxicated teachers will regularly find themselves in front of a classroom. In some instances, if a teacher arrived at work high or drunk, a coworker might notice that something was wrong and would intervene—but we will not require the School Board to count on this, just at the Supreme Court did not rely on railroad workers to report one another. Since the School Board considers this a danger to be guarded against, we will consider their proposed solution, rather than waving away the problem.

The probability of harm is significant because it is a function not only of the relatively small chance of an intoxicated teacher in the classroom but also of the much larger chance that an emergency will occur. If a teacher who is responsible for the wellbeing and safety of a classroom of students is intoxicated on the job, there is a very realistic probability that a serious situation requiring a swift and effective adult response would emerge. Thus, we consider the gravity of the harm that could befall a child—not to mention that child's family—if the theoretically responsible adult fails to respond properly. See Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361, 373 (6th Cir. 1998) (considering "the magnitude of the harm that could result from the use of illicit drugs on the job" as an element of the government interest in suspicionless drug testing of teachers). Even though we accept a low probability of an impaired teacher leading a classroom, the result of our calculus is that teachers, including substitutes, who are drug-addicted pose a real danger to our schoolchildren. Friedenberg v. School Board of Palm Beach County, 911 F. 3d 1084, 1098-1100 (11th Cir.).

On the morning of May 18, 2018, Respondent reported to work under the influence of cocaine and alcohol. (R.O. 6; PE. 9; HT. 163). Moreover, he had much more than a modest amount of alcohol in his system. The breath alcohol testing indicated that Respondent had blood alcohol levels of .101 and .095, both of which exceed the blood alcohol level of .04 that Petitioner has adopted as the threshold for being under the influence of alcohol. . . . (R.O. 15; HT. 129/25-130/15). In addition, results of Respondent's drug test indicated that Respondent tested positive for cocaine. (R.O. 18; H.T. 136/19-21; 137/2-14).

In doing so, RESPONDENT jeopardized the safety of students, colleagues and students. As the court said in Friedenberg, RESPONDENT created a grave risk to students. This is serious misconduct warranting termination.

2. Willful Neglect of Duty. As a consequence of being under the influence of cocaine and alcohol, Respondent did not fully cover his early morning cafeteria duty, did not fully attend his assigned homeroom (PE. 10; HT. 15/19-22; 16/3-5, 163), and did not attend his first period class (P. 12; PE. 10; HT. 24; HT. 163/15-25). A fellow physical education teacher, Cindi Ancona, was forced to cover Respondent's first period class. During the portions of the periods in which Respondent was not present in his

classroom and in which Ancona was not covering his class, his students were left unsupervised. (R.O. 7; HT. 24/19-24).

As stated above, RESPONDENT created a grave risk to his students. He also willfully neglected his safety and teaching responsibilities, thereby depriving his students of educational opportunities.

These acts, when viewed individually or together are most egregious, and warrant termination of employment.

CONCLUSION

Wherefore, the Superintendent respectfully requests that the SCHOOL BOARD reject and modify the findings of fact and conclusions of law as stated in Exceptions 1-8; and increase the penalty to termination of employment for the reasons set forth in Exception No. 9.

Respectfully submitted,

By: ***/s/ Douglas G. Griffin***
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 1st of August 2019, upon:

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By: */s/ Douglas G. Griffin*
DOUGLAS G. GRIFFIN

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 18-6215TTS

CRAIG DUDLEY,

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018), before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on April 9, 2019, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Douglas G. Griffin, Esquire
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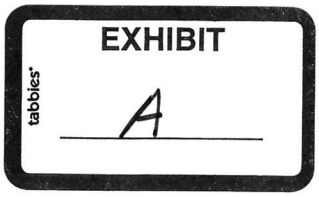

STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to terminate Respondent's employment as a teacher.

PRELIMINARY STATEMENT

On or about August 28, 2018, the Superintendent of the School Board of Broward County, Florida, notified Respondent, Craig Dudley, that he was recommending to Petitioner, Broward County School Board, that Respondent's employment as a teacher with Broward County Public Schools (hereafter, "District") be terminated. On September 5, 2018, Petitioner served an Administrative Complaint on Respondent. On October 2, 2018, Petitioner took action to terminate Respondent's employment. Respondent timely challenged Petitioner's action, and the matter was referred to DOAH to conduct a hearing pursuant to sections 120.569 and 120.57(1).

The final hearing initially was scheduled for February 12 and 13, 2019, but was continued to April 9 through 11, 2019. The hearing was conducted on April 9, 2019.

Petitioner presented the in-person testimony of Cindi Ancona, Tyrell Dozier, Ben Reeves, Sabine Phillips, Julianne Gilmore, and Aston Henry, and the deposition testimony of Phillip Lopez and Michael Suls was admitted into evidence in lieu of in-person testimony at the final hearing. Petitioner's Exhibits 1 through 41 were admitted into evidence without

objection. Respondent testified on his own behalf and did not tender any exhibits for admission into evidence.

The one-volume Transcript was filed at DOAH on May 3, 2019. Pursuant to the parties' agreement made at the close of the final hearing, the deadline for filing proposed recommended orders was set for June 3, 2019. Subsequently, pursuant to motion, the deadline for filing proposed recommended orders was extended to June 17, 2019. The parties' proposed recommended orders were timely filed and have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

Based on the parties' stipulations and the competent substantial evidence adduced at the final hearing, the following findings of fact are made:

I. The Parties

1. Petitioner, Broward County School Board, is charged with the duty to operate, control, and supervise free public schools in Broward County pursuant to article IX, section 4(b) of the Florida Constitution and section 1012.33, Florida Statutes.

2. Respondent has been employed by the District as a physical education teacher since 2004. His last teaching assignment was as a physical education teacher at Crystal Lakes Middle School in Pompano Beach, Florida.

II. Administrative Charges

3. The alleged conduct giving rise to this proceeding occurred on or about May 18, 2018.

4. The Administrative Complaint alleges that on that day, Respondent did not fully cover his early morning duty in the school cafeteria, did not fully attend his assigned homeroom, and did not attend his first period class, thereby leaving his students unsupervised for part of those periods; and reported to work under the influence of controlled substances—specifically, alcohol and cocaine.

5. As a result of this alleged conduct, Petitioner has charged Respondent, in the Administrative Complaint, with violating Florida Administrative Code Rule 6A-5.056(2), (3), (4), and (5), and specified provisions of school board policies 2400, 4008, and 4.9, discussed in greater detail below.

III. Events Giving Rise to this Proceeding

6. On the morning of May 18, 2018, Respondent reported to work under the influence of alcohol and cocaine, both of which are defined as "controlled substances" by school board policy.

7. As a result, Respondent did not fully cover his early morning cafeteria duty, did not fully attend his assigned homeroom, and did not attend his first period class. A fellow physical education teacher, Cindi Ancona, was forced to cover Respondent's first period class. During the portions of the

periods in which Respondent was not present in his classroom and in which Ancona was not covering his class, his students were left unsupervised.

8. Ancona saw Respondent at the beginning of second period. When she questioned Respondent regarding his whereabouts during first period, she noticed that he appeared confused and off-balance and that his eyes were glassy, so she sent a text message to Sabine Phillips, the Principal at Crystal Lake Middle School, regarding Respondent's demeanor and appearance.

9. Phillips and Assistant Principal Ben Reeves responded to Ancona's text message. Reeves entered the boys' locker room and found Respondent lying down in his office outside of the locker room. Phillips then entered the locker room and told Respondent that he needed to go to the office with her and Reeves.

10. In the course of questioning Respondent about where he had been during his first period class, Phillips surmised, and informed Respondent that she had reasonable suspicion, that he was under the influence of controlled substances.

11. Phillips contacted the District's Special Investigative Unit to request that Respondent be subjected to testing to determine whether he was under the influence of controlled substances.

12. Phillips followed the designated procedures, which entailed completing and transmitting a completed Incident Report

Form to the designated District personnel. The Risk Management Department determined that the requested testing was warranted and transmitted an Anti—Drug Program Passport to Phillips, who delivered it to Respondent. The Anti—Drug Passport informed Respondent that he would be subjected to controlled substances testing, and that the testing would be performed at Crystal Lakes Middle School.

13. Respondent consented to the drug and alcohol testing.

14. The Risk Management Department sent an employee health testing collector to Crystal Lake Middle School, where she conducted a breath alcohol and urine test on Respondent.

15. The breath alcohol testing indicated that Respondent had blood alcohol levels of .101 and .095, both of which exceed the blood alcohol level of .04 that Petitioner has adopted as the threshold for being under the influence of alcohol. Petitioner's third—party contractor confirmed that Respondent had a blood alcohol level of .095 at the time he was tested.

16. Julianne Gilmore, an environmental health testing specialist with the District's Risk Management Department, contacted Phillips and Respondent, notifying them both that Respondent was being placed on Administrative Reassignment and was to remain at home—i.e., not report to work—pending the result of the drug testing. This informal contact was followed by a letter dated May 21, 2018, confirming that Respondent had been placed on

Administrative Reassignment and directing him to stay home pending further notice.[1/]

17. Gilmore also advised Respondent of the availability of the District's Employee Assistance Program ("EAP"), participation in which was not mandatory.[2/]

18. The results of Respondent's drug test were received by the Risk Management Department on or about June 1, 2018. Respondent tested positive for cocaine.

19. Respondent does not dispute that he was under the influence of alcohol and cocaine while at school on May 18, 2018, and also does not dispute accuracy of the results of the blood alcohol and drug tests.

20. Upon receiving the results of Respondent's drug test, it was determined[3/] that Respondent's employment with the District should be terminated, notwithstanding that the next step in sequential progressive disciplinary process ordinarily would be suspension. A significant consideration in this decision was that Respondent had left his students unsupervised, placing their safety at risk.

21. No evidence was presented that the students in Respondent's class were actually physically or psychologically injured or harmed as a result of Respondent being absent from his classroom on May 18, 2018.

IV. Prior Discipline

22. Petitioner has a policy (Policy 4.9, discussed below) of imposing discipline in a progressive manner, which means that discipline typically is imposed in sequential steps in order to afford the employee the opportunity to correct his/her conduct and performance before he/she is suspended or terminated. The progressive discipline policy authorizes sequential disciplinary steps to be skipped for sufficiently severe misconduct.

23. Petitioner previously has disciplined Respondent.

24. On April 21, 2016, Petitioner issued a Summary of Conference memo, memorializing a conference in which Respondent was verbally admonished for having briefly left the students in his class unattended while he took an injured student to the physical education office to tend to his injury, during which time some of the students physically assaulted other students in the class.

25. On February 10, 2017, Petitioner issued a Verbal Reprimand to Respondent, reprimanding him for being tardy to, and absent from, work without following the proper protocol for entering an absence.

26. On December 1, 2017, Petitioner issued a Written Reprimand to Respondent, reprimanding him for continuing to be tardy to, and absent from, work without following the proper protocol for entering an absence.

27. On February 14, 2018, Petitioner issued another Written Reprimand to Respondent, reprimanding him for consistently failing to follow absence/tardy-reporting procedures, resulting in his students being left unsupervised. He was informed that if he again failed to adhere to the appropriate procedure, he would be subject to further discipline, including possible termination of his employment.

V. Other Key Considerations in this Proceeding

28. Respondent was forthright in admitting that he suffers from a substance abuse problem.

29. In 2016, Respondent sought help for his substance abuse issue through the District's EAP program at Phillips' suggestion, but did not complete the program--in part because he did not find its methods helpful in dealing with his problem, and in part because he believed that he could overcome his problem on his own as he always had done in his life.

30. Respondent has come to realize that he cannot overcome his substance abuse problem on his own and that there is no shame in asking others for help in dealing with his problem.

31. To that end, Respondent participated in, and has completed, the Evolution substance abuse program, which consisted of counseling sessions three to four days a week, for a three-to-four-month period, and attending therapy classes and meetings each week.

32. As a condition of participation in Evolution, Respondent was subject to random substance abuse testing. He did not test positive for alcohol or drug use during his participation in the program.

33. The spiritual counseling and substance abuse trigger counseling that Respondent received in the Evolution program have resonated with him and have helped him successfully address his substance abuse problem.[4/]

34. In order to avoid backsliding, Respondent remains in weekly contact with one of his therapists at Evolution, and attends meetings three to four times a week, to place himself in an environment that enables and fosters his success in fighting his substance abuse problem.

35. Since commencing Evolution, Respondent has not engaged in alcohol or drug use.

36. Respondent expressed remorse at his behavior and poor judgment at having reported to work under the influence of controlled substances on May 18, 2018. He testified that he did so because he previously had been reprimanded for being absent, and was concerned about missing more school. He recognized that his choice to go to school in that condition was "bad thinking at the time."

37. Respondent credibly testified that he greatly enjoys teaching and that he chose teaching as a career because he loves

working with kids, relates well to them, and believes he can help them. His colleague, Tyrell Dozier, testified that Respondent gets along well with his students and is a caring, effective teacher.

VI. Findings of Ultimate Fact

38. As noted above, the Administrative Complaint charges Respondent with having violated State Department of Education rules and specified school board policies. Specifically, Petitioner has charged Respondent, pursuant to rule 6A-5.056, with misconduct in office, incompetency, gross insubordination, and willful neglect of duty. Petitioner also has charged Respondent with violating school board policies 2400(1) and (3); 4008 B.1., 3., and 8. and certain provisions of Policy 4.9.

39. Whether the charged offenses constitute violations of the applicable rules and policies 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)(whether there was a deviation from the standard of conduct is not a conclusion of law, but instead is an ultimate fact); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995)(whether a particular action constitutes a violation of a statute, rule, or policy is a factual question); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995)(whether the

conduct, as found, constitutes a violation of statutes, rules, and policies is a question of ultimate fact).

40. Based on the foregoing, it is found, as a matter of ultimate fact, that Respondent violated some, but not all, of the rules and school board policies charged in the Administrative Complaint.

41. By engaging in the conduct addressed above, Respondent committed misconduct in office under rule 6A-5.056(2), which includes violating Florida Administrative Code Rule 6A-10.081(2)(a), by having left his students unsupervised.

42. By engaging in the conduct addressed above, Respondent engaged in conduct constituting incompetency under rule 6A-5.056(3).

43. By engaging in the conduct addressed above, Respondent engaged in conduct constituting gross insubordination under rule 6A-5.056(4).

44. By engaging in the conduct discussed above, Respondent engaged in conduct constituting willful neglect of duty under rule 6A-5.056(5).

45. Respondent violated Policy 2400(1) by reporting to work while under the influence of controlled substances. However, no evidence was presented that Respondent was in possession of, or used, a controlled substance while on school board property or at a school-sponsored activity. Rather, the

evidence establishes that Respondent consumed alcohol and used cocaine in a social setting the night before he reported to school on May 18, 2018. Therefore, the evidence does not establish that Respondent violated Policy 2400(3), as charged in the Administrative Complaint.

46. Policy 4008, subsections (B)1. and 8., requires school board employees to comply with State Board of Education rules and school board policies. As discussed above, the evidence shows that Respondent violated rule 6A-5.056(2), (3), (4), and (5), and rule 6A-10.081(2)(a). In violating these rules, Respondent violated Policy 4008, subsections (B)1. and 8. However, the evidence does not establish that Respondent violated Policy 4008B, subsection 3., as charged in the Administrative Complaint. This policy imposes on instructional personnel the duty to "Infuse in the classroom, the District's adopted Character Education Traits of Respect, Honesty, Kindness, Self-control, Tolerance, Cooperation, Responsibility and Citizenship." While Respondent's conduct in reporting to school under the influence of controlled substances on May 18, 2018, may not have constituted self-control or respect for his duties as a teacher on that specific day, no evidence was presented regarding Respondent's behavior in the classroom—whether on that day or on any other day. To the contrary, as discussed above, the evidence established that Respondent is a

caring and effective teacher in dealing with his students. Accordingly, it is determined that Respondent did not violate Policy 4008, subsection B.3.

47. The evidence establishes that Respondent violated Policy 4008(C), which requires instructional personnel to be on duty for a minimum of 7.5 hours on an instructional day.

48. However, the evidence does not establish that Respondent violated the provision in Policy 4008, "Miscellaneous" section, which states that "all members of the instructional staff shall be expected to teach a full schedule of classes, unless prior approval from the area superintendent or superintendent is obtained." Policy 4008 establishes the overarching responsibilities and duties of Principals and instructional personnel in the context of performing their employment contracts. In this context, the "full schedule of classes" provision refers to a teacher's instructional schedule assignment for the school year rather than a specific per-hour requirement. In fact, to read this provision as urged in the Administrative Complaint would render it redundant to the statement (also in the "Miscellaneous" section) that "instructional personnel must be on duty a minimum of seven and one-half hours (7 1/2) hours daily.

49. The Administrative Complaint also charges Respondent with having violated the District's progressive discipline

policy, Policy 4.9. As more fully discussed below, it is found that Respondent that did not violate this policy.

50. Based on the foregoing, it is found, as an ultimate fact, that although Respondent violated the rule and many of the school board policies charged in the Administrative Complaint, under the progressive discipline policy set forth in Policy 4.9, the appropriate penalty that should be imposed on Respondent in this case is suspension without pay for the entire period during which he has been reassigned from the classroom.

51. Additionally, Respondent should be required to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment by Petitioner.[5/]

52. This penalty is appropriate based on the fact that Respondent has not previously been subject to suspension without pay under the progressive discipline policy, and takes into account several relevant considerations: specifically, that Respondent has a substance abuse problem for which he actively sought—and finally has been able to obtain—real, effective help in overcoming; that he has an approximately 14-year employment history with Petitioner that only, in the last two years, entailed discipline as the result of conduct that was caused by his substance abuse problem; that he is remorseful, understands that he made poor choices, and has obtained the counseling and therapy he needs in order to correct his

performance problems through overcoming his substance abuse problem; that he is a caring and effective teacher who loves children and enjoys his teaching job; and, importantly, that no students were injured or otherwise harmed by Respondent's conduct on May 18, 2018.

53. This penalty also is sufficiently severe to deter Respondent from committing future violations of rules and school board policies, and sends the message that this is truly his last chance.

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has jurisdiction over the parties to, and subject matter of, this proceeding.

55. This is a disciplinary proceeding in which Petitioner seeks to terminate Respondent's employment as a teacher.

56. Respondent is an "instructional employee" as defined in section 1012.01(2). Pursuant to sections 1012.22(1)(f), 1012.27(1)(f), and 1012.33(1)(a) and (6)(a),[6/] Petitioner has the authority to suspend and terminate him.

57. To do so, Petitioner must prove that Respondent committed the alleged act, that the act violates the rules and policies cited in the Administrative Complaint, and that the violation of these rules and policies constitutes just cause for dismissal. See § 1012.33(1)(a), (6), Fla. Stat.

58. The standard of proof applicable to this proceeding is a preponderance of the evidence. McNeil v. Pinellas Cty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cty., 569 So. 2d 883 (Fla. 3d DCA 1990).

59. Section 1012.22(1)(f) authorizes Petitioner to take disciplinary action against instructional personnel. That statute states: "[t]he district school board shall suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in this chapter."

60. Section 1012.27(5) authorizes the district school superintendent to:

> Suspend members of the instructional staff and other school employees during emergencies for a period extending to and including the day of the next regular or special meeting of the district school board and notify the district school board immediately of such suspension. When authorized to do so, serve notice on the suspended member of the instructional staff of charges made against him or her and of the date of hearing. Recommend employees for dismissal under the terms prescribed herein.

61. Section 1012.33(1)(a) also authorizes the suspension and termination of instructional personnel for "just cause." The statute, in pertinent part, defines "just cause" as follows:

> Just cause includes, but is not limited to, the following instances, as defined by rule of 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.

62. Rule 6A-5.056, in pertinent part, defines "just cause" as "cause that is legally sufficient." The rule states: "[e]ach of the charges upon which just cause for a dismissal action against specified school personnel may be pursued are set forth in Sections 1012.33 and 1012.335, F.S." The rule identifies specific conduct that constitutes "just cause."

63. Petitioner charged Respondent with misconduct in office, pursuant to rule 6A-5.056(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 6A-10.080, F.A.C.[7/];

(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. ; [8/]

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

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

64. Pursuant to the facts found above, it is concluded that Respondent committed misconduct in office, in violation of rule 6A-5.056, including violating rule 6A-10.081(2).

65. Petitioner also charged Respondent with incompetency, pursuant to rule 6A-5.056(3). "Incompetency" is defined as:

[T]he inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;

2. Failure to communicate appropriately with and relate to students;

3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;

4. Disorganization of his or her classroom to such an extent that the health, safety or welfare of the students is diminished; or

5. Excessive absences or tardiness.

(b) "Incapacity" means one or more of the following:

1. Lack of emotional stability;

2. Lack of adequate physical ability;

3. Lack of general educational background; or

4. Lack of adequate command of his or her area of specialization.

66. Pursuant to the facts found above, it is concluded that Respondent's conduct constituted incompetency.

67. Petitioner also charged Respondent with gross insubordination, pursuant to rule 6A-5.056(4). "Gross insubordination" is defined to mean "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." Pursuant to the facts found above, it is concluded that Respondent committed gross insubordination.

68. Petitioner charged Respondent with willful neglect of duty. "Willful neglect of duty" is defined in rule 6A-5.056(5) to mean "intentional or reckless failure to carry out required duties." Pursuant to the facts found above, it is concluded that Respondent committed willful neglect of duty.

69. Specifically, Petitioner charged Respondent with violating school board Policy 2400, the Drug-Free Workplace policy. This policy states, in pertinent part[9/]:

> RULES
>
> 1. The Superintendent shall provide each permanent Board employee with a statement indicating that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance, including alcohol, is prohibited on all school board property and at school sponsored activities. Employees are strictly prohibited from reporting to work or being on duty while under the influence of alcohol or a controlled substance.
>
> * * *
>
> 3. Each Board employee must refrain from the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance, including alcohol, in the workplace.
>
> * * *
>
> 5. Upon request of the Executive Director of Professional Standards & Special Investigative Unit and/or his/her designee the employee shall submit to testing for the purpose of determining the alcohol content or the presence of controlled substances when reasonable suspicion is determined under applicable laws. The test should be performed in a reasonable manner through Risk Management. (F.S. 440.101) (F.S. 112.0455)
>
> An employee who tests positive shall be recommended for discipline action up to and including termination of employment. An employee who refuses to submit to testing

> will be recommended for termination of employment.
>
> * * *
>
> c. Applicants who test positive for drugs/alcohol shall no longer be considered for employment. School Board employees who test positive shall be recommended for disciplinary action up to and including termination of employment to the Superintendent.

70. Pursuant to the facts found above, it is concluded that Respondent violated policy 2400(1) by reporting to work under the influence of alcohol and cocaine, which are defined as constituting controlled substances. However, pursuant to the facts found above, it is concluded that Respondent did not violate policy 2400(3) because no evidence was presented showing that Respondent engaged in the manufacture, distribution, dispensing, possession or use of a controlled substance, including alcohol, in the workplace.

71. Petitioner also charged Respondent with violating school board policy 4008, Responsibilities and Duties. Specifically, Petitioner charged Respondent with violating sections (B)(1), (3), and (8), and two provisions in (C). Policy 4008 states, in pertinent part[10/]:

> All employees of the Board who have been issued contracts as provided by Florida Statutes . . . shall comply with the provisions of the Florida School Code, State Board regulations[,] and regulations and policies of the Board.

* * *

B. Duties of Instructional Personnel

The members of instructional staff shall perform the following functions:

1. Comply with the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida.

* * *

3. Infuse in the classroom, the District's adopted Character Education Traits of Respect, Honesty, Kindness, Self-control, Tolerance, Cooperation, Responsibility and Citizenship.

* * *

8. Conform to all rules and regulations that may be prescribed by the State Board and by the School Board.

* * *

C. Miscellaneous

* * *

Instructional personnel must be on duty a minimum of seven and one-half (71/2) hours daily.

* * *

All members of the instructional staff shall be expected to teach a full schedule of classes, unless prior approval from the Area Superintendent or Superintendent of Schools has been obtained.

72. Pursuant to the facts found above, it is concluded that Respondent violated policy 4008 B.1. and 8. by violating

rule 6A-5.056, and by violating rule 6A-10.081(2)(a) by being absent from his classroom during his homeroom and first period classes, and, thus, failing to make a reasonable effort to protect his students from conditions harmful to their physical health and/or safety. However, pursuant to the facts found above, it is concluded that Respondent did not violate policy 4008 B.3.

73. Petitioner also charged Respondent with violating specified provisions of school board policy 4.9, titled Corrective Action. Specifically, the Administrative Complaint charges Respondent with having violated a provision set forth in the "Intent & Purpose" section of the policy that states: "[e]mployees are expected to comply with workplace policies, procedures and regulations; local, state, and federal laws; and State Board Rule, both in and out of the workplace." The Intent & Purpose section of policy 4.9 further states: "[t]he District's correction action policy is designed to improve and/or change employees' job performance, conduct, and attendance." In that context, policy 4.9 prescribes the type of discipline appropriate to be imposed for the specified offenses, rather than establishing separate enforceable standards of conduct that are in addition to the standards of conduct established in other school board policies. Consistent with the concept of improving or changing employee job performance,

conduct, or attendance, policy 4.9 identifies categories of offenses and the appropriate type or range of discipline that may be imposed if the employee is shown to have engaged in conduct constituting that offense.

74. Policy 4.9, section II, states that "[u]nlawful possession, use or being under the influence of a controlled substance" constitutes a "Category B" offense, for which the recommended range is "Suspension/Dismissal." Per the language of policy 4.9, Category B offenses are:

> acts of misconduct . . . considered to be so egregious, problematic, or harmful that the employee may be immediately removed from the workplace until such time a workplace investigation is completed. The severity of the misconduct in each case, together with relevant circumstances (III(c)) will determine what step in the range of progress corrective action is followed. In most cases, the District follows a progressive corrective action process consistent with the "Just Cause" standard designed to give employees the opportunity to correct the undesirable performance, conduct, or behavior. A more severe corrective measure will be used when there is evidence that students, employees, or the community we serve was negatively impacted. It is the intent that employees who engage in similar misconduct will be treated as similarly situated employees and compliant with the principle of Just Cause.

75. Policy 4.9, section III, titled "Other Considerations," subsection (c), sets forth circumstances that are "illustrative and not meant to be exhaustive and may be

considered when determining the appropriate penalty within a penalty (II Category B) range." These include, as relevant:

1. The severity of the offense

2. Degree of student involvement

3. Impact on students, educational process and/or community

4. The number of repetitions of the offenses and length of time between offenses

5. The length of time since the misconduct

6. Employment history

7. The actual damage, physical or otherwise, caused by the misconduct

8. The deterrent effect of the discipline imposed

9. Any effort of rehabilitation by the employee

10. The actual knowledge of the employee pertaining to the misconduct

11. Attempts by the employee to correct or stop the misconduct

12. Related misconduct by the employee in other employment including findings of guilt or innocence, discipline imposed and discipline served

* * *

15. Degree of physical and mental harm to a student, co-worker or member of the public

16. Length of employment

76. Based on the foregoing findings of fact, it is determined that, pursuant to Policy 4.9, Respondent should be suspended without pay for the duration of the period since his reassignment from the classroom.

77. Based on the foregoing findings of fact, it is determined that he should not be terminated from his employment, and should be reinstated to his teaching position.

78. Based on the foregoing findings of fact, it is concluded that Respondent should be required to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Broward County School Board, enter a final order suspending Respondent from his teaching position without pay commencing on the date on which he was reassigned from the classroom; reinstating Respondent to his teaching position; and requiring Respondent to submit to random drug and alcohol testing, at his personal expense, as a condition of his continued employment.

DONE AND ENTERED this 17th day of July, 2019, in Tallahassee, Leon County, Florida.

CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of July, 2018.

ENDNOTES

[1/] Petitioner's Exhibit 18, Respondent's attendance report, lists Respondent as not being present at school on school days from May 21, 2018, through June 4, 2018. It is noted that Respondent had been ordered by letter dated May 21, 2018, from the Risk Management Department (Petitioner's Exhibit 27) to remain at home on those days, rather than reporting to school.

[2/] In connection with previous discipline of Respondent, Phillips had suggested that Respondent contact and participate in the EAP program.

[3/] This determination was made by a committee consisting of Gilmore; Ashton Henry, Director of the Risk Management Department; Phillips; Susan Rockelman, Director of Instructional Staffing; and Doug Griffin, Assistant General Counsel for the District, who is now the attorney of record for Petitioner in this proceeding.

[4/] Respondent testified that Evolution has been successful for him because it emphasizes a lifestyle change that entails making correct choices. He credibly testified that has changed his circle of friends and other aspects of his personal environment to remove circumstances and influences that acted as triggers for his substance abuse.

[5/] Respondent has agreed to this penalty, pursuant to Respondent's Proposed Recommended Order filed in this proceeding on June 17, 2019.

[6/] All references to chapter 1012, Florida Statutes, are to the 2017 version, which was in effect at the time of Respondent's conduct at issue in this proceeding.

[7/] Rule 6A-10.080 was repealed on March 23, 2016, after Respondent is alleged to have engaged in conduct constituting misconduct in office. Accordingly, this rule has not been considered in determining whether Respondent engaged in conduct constituting misconduct in office under rule 6A-5.056(2).

[8/] Rule 6A-10.081, titled Principles of Professional Conduct for the Education Profession in Florida, is a lengthy rule that sets forth numerous principles, some of which constitute defined standards of conduct and others of which constitute aspirational standards. It is noted that the Administrative Complaint does not specifically identify which of these many principles Respondent is alleged to have violated.

[9/] Only the provisions of the school board policies specifically cited in the Administrative Complaint have been addressed, because the charging document must specifically identify the provisions statute, rule, and/or policy alleged to have been violated. See Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996).

[10/] Refer to note 9, above.

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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.