

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
Broward County School Board
Office of the General Counsel
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

For Respondent: Robert F. McKee, Esquire
Robert F. McKee, P.A.
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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 (7 1/2) 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.

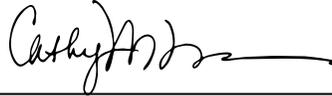
77. Based on the foregoing findings of fact, it is determined that he should not be terminated from his employment, and should be reinstated to his teaching position.

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
Division of Administrative Hearings
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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.

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.