

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 19-2194TTS

LISA S. LEMIEUX,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Viera, Florida, on December 10 and 11, 2019, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Shannon L. Kelly, Esquire
Allen, Norton and Blue, P.A.
1477 West Fairbanks Avenue, Suite 100
Winter Park, Florida 32789

For Respondent: Mark S. Levine, Esquire
Levine & Stivers, LLC
245 East Virginia Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether just cause exists to terminate Respondent from employment with the Brevard County School Board.

PRELIMINARY STATEMENT

By correspondence dated March 26, 2019, Respondent, Lisa S. Lemieux (Respondent), was informed by Dr. Mark Mullins, superintendent of the Brevard Public Schools (Superintendent), that a recommendation seeking the termination of Respondent's employment would be submitted to Petitioner, Brevard County School Board (Petitioner/School Board), for appropriate action. In response to the correspondence referenced above, Respondent timely filed a request for administrative hearing. By correspondence dated April 25, 2019, the matter was forwarded to the Division of Administrative Hearings for a disputed fact hearing.

The disputed fact hearing was scheduled to commence on October 1, 2019. Respondent moved for a continuance, and the hearing was re-scheduled for December 1 and 2, 2019. During the hearing, Petitioner offered the testimony of Dr. Mullins, Lena Wiebelt, Dr. Karyle Green, John Hayes, Bridget Reed, and Burt Clark. Respondent did not testify, nor did she offer the testimony of any witnesses during her case-in-chief. Petitioner's Exhibits 1 through 46 were admitted into evidence. Respondent's Exhibits 1 and 2 were admitted into evidence, and Respondent's Exhibits 3 and 4 were officially recognized.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on January 16, 2020. By agreement, each party filed a Proposed Recommended Order (PRO) on February 18, 2020. The respective PROs were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the constitutional entity authorized to operate, control, and supervise the public schools in Brevard County, Florida. This includes

the power to discipline employees, such as teachers. § 4, Article IX, Fla. Const.; §§ 1001.42(5), 1012.22(1)(f), and 1012.33, Fla. Stat.¹

2. Respondent is a classroom teacher, and as such, the terms and conditions of her employment are governed by the collective agreement between the School Board and The Brevard Federation of Teachers, Local 2098.

3. Respondent has a Bachelor's degree in exceptional education. On or about November 9, 2006, Respondent, pursuant to an annual contract, was hired by the School Board to provide services as a classroom teacher. Beginning in the 2009-2010 school year, Respondent continued her employment with the School Board pursuant to a professional services contract.

4. During all times relevant to this proceeding, Respondent taught at Hoover Middle School, which is under the jurisdiction of the School Board. At the commencement of the 2014-2015 school year, Respondent taught exceptional education (ESE) students in a self-contained, supported-level class. At approximately the midway point of the 2014-2015 school year, Respondent began teaching a resource math class which was comprised entirely of ESE students.

5. Beginning in the 2017-2018 school year, and continuing through the 2018-2019 school year, Respondent taught one resource math class for a single class-period of the day, and she co-taught, or "pushed-in," for the other five instructional class periods. In both settings, Respondent taught math to ESE students.

6. By correspondence dated March 26, 2019, Superintendent Mullins advised Respondent of the following:

Pursuant to Florida Statute 1012.34, you are being recommended for termination of your Professional Services Contract due to unsatisfactory

¹ All subsequent references to Florida Statutes will be to the 2018 codification, unless otherwise indicated.

Performance The actions leading to this recommendation are as follows:

1. On October 29, 2018, you were provided a 90-day notice advising of performance-related concerns based upon three years of unsatisfactory annual evaluations.
2. Several performance review meetings were held with you, your union representative, and your school Principal to discuss your progress.
3. A review of your past evaluations indicates several attempts at corrective activities through the use of District Peer Mentors and Resource Teachers.
4. After the completion of the 90-day plan, adequate progress was not obtained and is grounds to sever the Professional Services Contract.

7. The School Board uses an “Instructional Personnel Performance Appraisal System” (IPPAS) as a guide when evaluating a teacher’s performance. According to the IPPAS manual, classroom teachers are evaluated on a rubric which consists of five dimensions. The first dimension focuses on “instructional design and lesson planning.” The second dimension focuses on the “learning environment” created and fostered by the teacher. The third dimension focuses on “instructional delivery and facilitation.” The fourth dimension focuses on “assessment,” and the fifth dimension focuses on a teacher’s “professional responsibility and ethical conduct.”

8. IPPAS is approved annually by the Florida Department of Education (FLDOE), and the School Board meets regularly with The Brevard Federation of Teachers, Local 2098, to address any issues concerning the evaluation process.

9. Teachers and evaluators receive yearly training, which covers the various components of the evaluation process.

10. Pursuant to IPPAS, and related statutory provisions, classroom teachers are evaluated annually. The overall score given to a teacher on the annual evaluation is determined by how a teacher scores in the areas of “Professional Practices Based on Florida’s Educator Accomplished Practices (Professional Practices),” and “Individual Accountability for Student Academic Performance Based on Identified Assessments (Student Performance).” The Professional Practices category accounts for 67 percent, and Student Performance accounts for the remaining 33 percent of a teacher’s annual evaluation score.

11. For purposes of quantifying a teacher’s annual evaluation, IPPAS identifies the Professional Practices category as “Part 1 of the Summative Evaluation,” and the Student Performance category as “Part 2 of the Summative Evaluation.” Part 1 of the Summative Evaluation is completed in the spring of each school year and consists of the supervising principal’s annual evaluation of the teacher, the teacher’s self-assessment, and the collaboration and mutual accountability score. The evaluative components of Part 1 of the Summative Evaluation are comprised of the previously referenced “five dimensions.”

12. Part 2 of the Summative Evaluation is determined based on student academic performance data (VAM score) as calculated by the FLDOE. VAM scores are released by FLDOE in the fall, and these scores reflect student performance for the preceding school year. Consequently, a teacher will not receive an overall annual evaluation score for the immediate preceding school year until the fall semester during which VAM scores are available. As a practical matter, this explains, in part, why the recommendation for

termination letter sent to Respondent by Superintendent Mullins was issued on March 26, 2019.²

A. 2015-2016 SCHOOL YEAR

13. Respondent, on or about April 25, 2016, received Part 1 of her Summative Evaluation for the 2015-2016 school year. Respondent received a score of 27.71 out of a maximum available score of 67 points. Respondent's Part 1 Summative score placed her in the category of "Needs Improvement."

14. On or about November 2, 2016, Respondent received Part 2 of her Summative Evaluation for the 2015-2016 school year. Respondent received a VAM score of 56.71 out of a maximum available score of 100 points. Respondent's VAM score placed her in the "Needs Improvement" category. The combined Part 1 and Part 2 scores resulted in Respondent receiving an overall annual evaluation rating of "Needs Improvement."

B. 2016-2017 SCHOOL YEAR

15. Respondent, on or about April 5, 2017, received Part 1 of her Summative Evaluation for the 2016-2017 school year. Respondent received a score of 20.42 out of a maximum available score of 67 points. Respondent's Part 1 Summative score placed her in the "Needs Improvement" category.

16. On or about November 13, 2017, Respondent received Part 2 of her Summative Evaluation for the 2016-2017 school year. Respondent received a VAM score of 50.42 out of a maximum available score of 100 points. Respondent's VAM score placed her in the "Needs Improvement" category. The combined Part 1 and Part 2 scores resulted in Respondent receiving an overall annual evaluation rating of "Needs Improvement."

² VAM scores for the 2017-2018 school year were released on or about October 19, 2018. As discussed elsewhere herein, Respondent was placed on 90 days probation following the release of her VAM score. The timing of the release of the VAM score, coupled with the 90-day probationary period and related matters, account for the March 2019 date of Superintendent Mullin's letter to Respondent.

C. 2017-2018 SCHOOL YEAR

17. Respondent, on or about May 3, 2018, received Part 1 of her Summative Evaluation for the 2017-2018 school year. Respondent received a score of 34.58 out of a maximum available score of 67 points. Respondent's Part 1 Summative score placed her in the "Needs Improvement" category.

18. On or about October 19, 2018, Respondent received Part 2 of her Summative Evaluation for the 2017-18 school year. Respondent received a VAM score of 64.58 out of a maximum available score of 100 points. Respondent's VAM score placed her in the "Needs Improvement" category. The combined Part 1 and Part 2 scores resulted in Respondent receiving an overall annual evaluation rating of "Needs Improvement."

D. A PLAN FOR ADDRESSING PROFESSIONAL DEFICIENCIES

19. The School Board, in order to address Respondent's professional deficiencies as identified during the relevant evaluation periods, provided support to Respondent through the utilization of Professional Development Assistance Plans (PDAPs). PDAPs are designed to provide a teacher with opportunities for professional development, which includes access to online resources, training activities and courses, and opportunities to work with School Board resource and peer mentor teachers.

20. The School Board, acting through Respondent's supervising administrators, agreed in the PDAPs to support Respondent's professional growth and development as follows:

By providing access to the "District Peer Mentor Teacher for collaboration on dimension 3."

By conducting "informal observations documented in ProGOE with feedback for improvement."

By providing "resources on utilizing formative assessment to check for understanding."

By providing “resources regarding implementing differentiated instruction.”

By providing “resources on the utilization of Webb’s Depth of Knowledge.”

By providing “exemplary sample lesson plans as a model ... to follow.”

By providing “pacing guide if needed.”

By meeting every two weeks to review weekly lesson plans.

By providing Respondent with “an exemplary teacher to observe, as well as a substitute [teacher] for class coverage during observation.”

By providing a list of Professional Development courses on classroom management, as well as a substitute teacher to cover Respondent’s class while she attends the course.

By providing “assistance and specific feedback from school based coaches.”

By completing “informal observations on a bi-monthly basis, and provid[ing] feedback.”

The evidence establishes that the School Board honored its commitment to Respondent as outlined in the respective PDAPs.

E. 90 DAYS OF PROBATION, AND RECOMMENDATION FOR TERMINATION

21. By correspondence dated October 29, 2018, the School Board advised Respondent of the following:

In accordance with section 1012.34(4), F.S., this shall serve as the District’s notification of unsatisfactory performance. Please be advised that your Professional Service Contract for the 2018-19 academic year is on a probationary status for ninety (90) days. Your contract is being placed on

probation due to your receiving an overall “Needs Improvement” rating on your last three (3) consecutive annual performance evaluations. See also section 1012.22, F.S.

During the next ninety (90) days, you will be evaluated periodically. You will be apprised of any progress achieved in writing. You will work with the administration of your school to assist you in obtaining opportunities to help correct any noted deficiencies.

After February 25, 2019, the ninetieth (90th) day, administration has fourteen (14) days to assess your progress. If no improvement is shown, administration will notify the Superintendent if you do not rate an overall Effective on the Summative Part 1 of your evaluation.

Sincerely,

Burt Clark, Principal
Hoover Middle School

22. Respondent, during her 90-day probationary period, continued to receive professional development services from the School Board, which included working with a peer mentor teacher, participating in CHAMPs training, receiving assistance from a math content specialist, and observing an exemplary math teacher.

23. Burt Clark was the principal at the school where Respondent worked when she was placed on probation. As the principal, Mr. Clark served as Respondent’s supervisor and was responsible for evaluating her performance. During Respondent’s probationary period, Mr. Clark regularly met with Respondent and her union representative to discuss Respondent’s progress and offer assistance. In addition to meeting with Respondent, Mr. Clark also conducted one interim evaluation, four informal observation, and two formal observations of Respondent’s performance. Mr. Clark also conducted a

number of “walk-throughs,” which provided additional insight into the status of Respondent’s professional development.

24. While it is true that Mr. Clark’s observations of Respondent mainly occurred in the classroom where Respondent was the teacher of record, as opposed to Respondent’s work as a “push-in” teacher, Mr. Clark credibly testified that he had sufficient data to assess Respondent’s performance.

25. Mr. Clark, at the end of the probationary period, determined that Respondent’s professional deficiencies remained, and on March 6, 2019, he made the following recommendation to Superintendent Mullins:

Ms. Lisa Lemieux had an overall unsatisfactory performance appraisal. We have worked with her to try to improve her instructional strategies; but, it has not been successful in changing the behavior to better serve the students assigned to her.

As defined in [section] 1012.34(4), [Florida Statutes], February 25, 2019, was the 90th day since the notification of her 90-day probation for this contract year and after demonstrating no improvement on the Summative Part 1, I have assessed that the performance deficiencies have not been corrected.

I would recommend the termination of her employment with Brevard Public Schools.

Burt Clark, Principal
Hoover Middle School

26. After receiving Mr. Clark’s recommendation to terminate Respondent’s employment, Superintendent Mullins reviewed Respondent’s last three years of evaluations, considered the extensive support and training provided to Respondent by the School Board, and concluded that termination of Respondent’s employment was warranted and justified.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57 and 1012.33(6)(a), Florida Statutes (2019).

28. In accordance with the provisions of section 4(b) of article IX of the Florida Constitution, district school boards have the authority to operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law. A school board's authority extends to personnel matters and includes the power to suspend and dismiss employees. §§ 1001.32(2), 1001.42(5), 1012.22(1)(f), and 1012.23(1), Fla. Stat.

29. Petitioner bears the burden to prove the charges against Respondent by a preponderance of the evidence. *Allen v. Sch. Bd. of Dade Cnty.*, 571 So. 2d 568, 569 (Fla. 3d DCA 1990) (citing *Dileo v. Sch. Bd. of Dade Cnty.*, 569 So. 2d 883 (Fla. 3d DCA 1990)); *McNeill v. Pinellas Cnty. Sch. Bd.*, 678 So. 2d 476, 477 (Fla. 2d DCA 1976); § 120.57(1)(j), Fla. Stat.

30. The preponderance of the evidence standard requires proof by “the greater weight of the evidence” or evidence that “more likely than not” tends to prove a certain proposition. *See Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000); *see also Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 446 (6th Cir. 2005) (holding trial court properly defined the preponderance of the evidence standard as “such evidence as, when considered and compared with that opposed to it, has more convincing force and produces . . . [a] belief that what is sought to be proved is more likely true than not true”).

31. As a classroom teacher, Respondent's employment with the School Board is governed by an instructional staff contract. §§ 1012.01(2)(a) and 1012.33, Fla. Stat.

32. Section 1012.33 provides, in part, as follows:

Each person employed as a member of the instructional staff in any district school system shall be properly certified pursuant to s. 1012.56 or s. 1012.57 or employed pursuant to s. 1012.39 and shall be entitled to and shall receive a written contract as specified in this section. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. 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.

§ 1012.33(1)(a), Fla. Stat. (emphasis added).

33. A teacher with a professional service contract “can only be terminated for just cause pursuant to section 1012.33, Florida Statutes, or based upon uncorrected performance deficiencies pursuant to section 1012.34, Florida Statutes. “ *Orange Cnty. Sch. Bd. v. Rachman*, 87 So. 3d 48, 49 n.1 (Fla. 5th DCA 2012).

34. In order for students to achieve in a public school system, it is mandatory that teachers effectively perform the duties of their position in accordance with the generally accepted standards of the profession. In 2011, the Florida Legislature amended section 1012.34 to more closely align the performance expectations of a teacher to the ratings in a teacher’s annual performance evaluation. Additionally, section 1012.33 was amended to

specifically incorporate the ratings on a teacher's annual performance evaluation into the criteria for continued employment with a school board. The offense of three consecutive ratings of "needs improvement" was added to the list of offenses constituting "just cause" for termination during the term of a contract. As described above, Respondent received a final rating of "needs improvement" for each of the three years preceding the Superintendent's recommendation to terminate her employment (2015-2016, 2016-2017, and 2017-2018).

35. Section 1012.34 prescribes the requirements for a district's evaluation system and provides that:

The department must approve each school district's instructional personnel and school administrator evaluation systems. The department shall monitor each district's implementation of its instructional personnel and school administrator evaluation systems for compliance with the requirements of this section.

§ 1012.34(1)(b), Fla. Stat.

36. The evidence establishes that the School Board's instructional evaluation systems for each of the three years at issue complied with the requirements of section 1012.34 and were approved by FLDOE. Moreover, the unrebutted testimony established that each of the administrators having evaluation responsibilities was appropriately trained with respect to the proper use of the evaluation criteria and procedures. Finally, while Respondent may disagree with the final rating each year of "needs improvement," there is no evidence that she filed a grievance challenging the procedures followed by administrators in implementing the evaluation systems and arriving at the ratings.

37. Under section 1012.34(3)(c), it is the "individual responsible for supervising the employee [who] must evaluate the employee's performance." Having established as a matter of law that the evaluation systems were

approved by the FLDOE as being in compliance with the statutory requirements, and that the administrators were trained and properly implemented the procedural aspects of the instructional evaluation systems, the ratings arrived at by the evaluators are final.

39. The School Board has established by a preponderance of the evidence that Respondent has received three consecutive ratings of “needs improvement” on her annual evaluations.

40. Section 1012.34(4)(b)1. provides as follows:

The employee who holds a professional service contract shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, if a transfer is granted pursuant to ss. 1012.27(1) and 1012.28(6), it does not extend the period for correcting performance deficiencies.

41. The evidence establishes that the School Board, in accordance with section 1012.34(4), met its obligations to Respondent during her probationary period.

42. The primary duty of a teacher is to work diligently and faithfully to help students meet or exceed annual learning goals, and to meet state and local achievement requirements. § 1012.53(1), Fla. Stat.

43. The evidence here establishes that Respondent was repeatedly unable to help her students meet learning goals. The evidence is clear that, despite

the School Board's best efforts during school years 2015-2016, 2016-2017, and 2017-2018, there was no marked improvement of Respondent's teaching skills. Her performance as a teacher continued to be deficient, thus justifying the termination of her employment by the School Board.

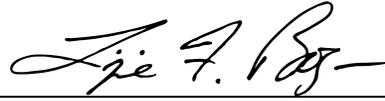
44. Respondent did not rebut the School Board's evidence as to its findings about her substandard performance. Instead, Respondent raised unsubstantiated claims that the School Board's charging document is insufficient (which it is not), that there was insufficient observational data collected to justify termination of her employment, and that the School Board did not attempt to evaluate or compare the scores of her students to those of other students in her school or district-wide. Contrary to Respondent's assertions, the record is replete with evidence sufficient to warrant termination of her employment. As for the latter assertion, Respondent does not cite to any statutory or IPPAS provision(s) which requires such a comparison, and the undersigned is otherwise unaware of any such authority.

45. Just cause exists to terminate Respondent's professional services contract.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board of Brevard County enter a final order terminating Respondent's employment as a teacher.

DONE AND ENTERED this 16th day of March, 2020, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
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this 16th day of March, 2020.

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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.