SARASOTA COUNTY SCHOOL BOARD

SARASOTA COUNTY SCHOOL BOARD,

Petitioner,

v. **DOAH CASE NO. 16-2570TTS**

JUDY CONOVER,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

COMES NOW Respondent, JUDY CONOVER ("Ms. Conover" or "Respondent"), by and through the undersigned counsel, hereby files her exceptions to the Recommended Order issued by Administrative Law Judge Lynne A. Quimby-Pennock ("the ALJ") on January 5, 2017 ("the RO"). In light of these exceptions, it is respectfully requested that the RO be rejected and a final order assessing no—or, at the least, less—disciplinary action be issued. In support thereof, Respondent states:

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

1. Ms. Conover is currently employed by Petitioner, SARASOTA COUNTY SCHOOL BOARD ("Petitioner"). At all times material to the matters alleged in Petitioner's Administrative Complaint, Ms. Conover was employed as a teacher.

2. In letters dated February 22, 2016 and April 26, 2016, Petitioner notified Ms. Conover of its intention to terminate her employment.

3. A hearing as to whether Petitioner could satisfy its burden to justify its proposed termination of Ms. Conover was held on October 19-21, 2016.

4. Following the conclusion of the hearing, the ALJ issued the RO recommending that Ms. Conover be terminated. The entirety of the ALJ's reasoning for that recommendation is contained within paragraph 48 of the RO and states as follows:

> 48. Petitioner satisfied its burden and proved by a preponderance of the evidence that Respondent executed the MOU, and then committed further transgressions. Having considered all of the facts set forth above, the undersigned concludes that termination of employment is appropriate.

II. EXCEPTIONS TO THE RO

Exception 1

Assuming that Petitioner could demonstrate that "just cause," as required by section 1012.33, Florida Statutes (2016), was established, termination is not the appropriate disciplinary action to take. Indeed, pursuant to the Instructional Bargaining Unit Collective Bargaining Agreement ("CBA"), termination could not be the appropriate remedy.

The CBA, which governs the application of discipline in this proceeding,[1] provides for progressive discipline. See J.E. at 60-61. More specifically, the CBA provides for progressive discipline based upon "reasonably related" acts of misconduct. Id. at 60. The CBA reads, in relevant part, that

> H. Previous charges or actions that have been brought forth by the administration may be cited against the teacher if these previous acts are reasonably related to the existing charge. All previous charges or actions must have been shared with the teacher.
>
> . . . .
>
> 2. Where just cause warrants such action(s), a teacher may be . . . dismissed upon recommendation of the immediate supervisor to the Superintendent of Schools. Except in cases that constitute a real immediate danger to the district or other

[1] See, e.g., Mixon v. Escambia Cnty. Sch. Bd., No. 10-2338, 2011 Fla. Div. Adm. Hear. LEXIS 772 at *16-20 (Fla. DOAH Jan. 28, 2011).

> flagrant violation, progressive discipline shall be administered as follows:
>
> a. Verbal reprimand (Written notation placed in site file.)
>
> b. Written reprimand placed in personnel and site files.
>
> c. Suspension with or without pay.
>
> d. Dismissal.

Id. at 60-61 (emphasis added). In light of the clear and unambiguous language of the CBA, termination in this proceeding would only be justified if the acts of misconduct Ms. Conover allegedly engaged in were "reasonably related" to any misconduct she may have engaged in previously.

While the RO contains a number of factual findings concerning Ms. Conover's prior disciplinary history, see RO at ¶¶ 36a.-f., and extensive testimony was taken on the matter during the hearing, the RO contains no finding that Ms. Conover's most recent "transgressions" are at all related to her prior misconduct. See generally RO. Nor did Petitioner at any time proffer an argument that Ms. Conover's most recent acts of misconduct were "reasonably related" to her prior acts. Consequently, it is undisputed that Ms. Conover was never previously disciplined with respect to grading, permitting her paraprofessional to enter grades on her behalf into Gradebook,[2] failing to attend a professional learning community ("PLC") meeting, or inappropriately interacting with colleagues. Therefore, in accordance with the plain terms of the CBA, termination was not appropriate. At most, a written reprimand would be appropriate pursuant to the plain terms of the CBA.

Accordingly, the RO's conclusion that termination is appropriate, see RO at ¶48, is erroneous even assuming that Petitioner could establish "just cause." Therefore, it is respectfully

[2] Whether this is a proper subject for discipline is discussed infra.

requested that the RO be rejected and a final order assessing a lesser discipline (at most a verbal or written reprimand) be issued.

Exception 2

Relatedly, the RO erred in concluding that termination was appropriate pursuant to the terms of a Memorandum of Understanding ("MOU") entered into between Ms. Conover and Petitioner. See RO at ¶¶ 20, 34-35, 48. It was undisputed, and there is no finding in the RO to the contrary, that the MOU incorporated the progressive discipline terms of the CBA discussed supra. See id. at ¶20 ("Ms. Conover understands that the next step of progressive discipline called for under the terms of the Instructional Bargaining Unit Agreement should there be a further transgression of the rules could be termination of her employment."). As discussed supra, the terms of the CBA are clear that progressive discipline must be predicated on "reasonably related" acts of misconduct. Despite the clear and unambiguous language of the CBA and the MOU, the RO relied on the testimony of Scott Lempe to impermissibly circumvent the plain language of both the CBA and the MOU.

According to Mr. Lempe, and countenanced by the RO, progressive discipline under the CBA is simply a counting game. See RO at ¶35; see also id. at ¶48. This factual finding of the RO effectively writes out the requirement of the CBA that misconduct be "reasonably related" to prior misconduct. Contrary to the findings of the RO, progressive discipline under the CBA is not simply a matter of counting to four (4) (or five (5)); rather, progressive discipline under the CBA establishes a system where teachers are provided the opportunity to correct "reasonably related" acts of misconduct. Consequently, the RO erred in concluding that the MOU and CBA permitted for termination simply because Ms. Conover has exceeded four (4) disciplinary incidents. See, e.g., Kipp v. Kipp, 844 So. 2d 691, 693-94 (Fla. 4th DCA 2003) (holding it is

inappropriate to consider the subjective meanings ascribed to a clear and unambiguous agreement).

Exception 3

Relatedly, the RO erred in making the following factual finding:

> 35. . . . . Respondent again acknowledged her understanding of the MOU provision: "that the next step of progressive discipline called for under the terms of the Instructional Bargaining Unit Agreement should there be a further transgression of the rules could be termination of her employment."

RO at ¶35. Such information is completely irrelevant in this proceeding. As discussed, the language of the MOU and CBA are clear and unambiguous with respect to what discipline could potentially follow the issuance of the MOU. The MOU simply incorporates the progressive discipline terms of the CBA and states a truism: that "further transgression of the rules could [result in the] termination of her employment." Id. (emphasis added). Of course, as discussed, such further transgressions could only result in, or warrant, termination if they were "reasonably related" to prior acts of misconduct and Ms. Conover was at the point in progressive discipline where termination was appropriate.

Consequently, Ms. Conover's personal understanding of the MOU was irrelevant. See, e.g., Kipp, 844 So. 2d at 693-94. That the RO made a factual finding regarding the same and then seemingly held it against Ms. Conover, see RO at ¶¶ 35, 48, was erroneous for failing to abide by the plain and unambiguous terms of both the CBA and the MOU. See., e.g., Kipp, 844 So. 2d at 693-94.

Exception 4

In the RO, the applicable (generally speaking) statutes and regulations are quoted at length. See RO at ¶¶ 42-44. The RO characterizes the quoted statutory and regulatory language

as "pertinent." See id. at ¶¶ 43-44. However, the RO includes provisions of law it classifies as "pertinent" that are not at issue in this case. See id. (including inefficiency for reason of "[e]xcessive absences or tardiness," incompetency for reason of incapacity, gross insubordination, and section 6A-10.081(1)(a)-(c), Florida Administrative Code).

"A district school board employee against whom a dismissal proceeding has been initiated must be given written notice of the specific charges prior to the hearing." Broward Cnty. Sch. Bd. v. Deering, No. 05-2842, 2006 Fla. Div. Adm. Hear. LEXIS 367 at *8 (Fla. DOAH July 31, 2006); see also State ex rel. Williams v. Whitman, 156 So. 705, 709-10 (Fla. 1934). Specifically, the written notice "should 'specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges have been violated and the conduct which occasioned [said] violation.'" Deering, 2006 Fla. Div. Adm. Hear. LEXIS 367 at *8 (citation omitted) (alteration in original); see also Whitman, 156 So. at 709-10. "Once the district school board . . . has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated, and none other." Deering, 2006 Fla. Div. Adm. Hear. LEXIS 367 at *8 (citations omitted). Petitioner's Administrative Complaint did not include a number of the allegedly "pertinent" provisions included in the RO. See Pet.'s Admin. Compl. ¶¶ 57-58. Consequently, disciplinary action could not be taken against Ms. Conover of the basis of charges for which she was not provided adequate notice.

In light of the lack of any reasoning in the RO as to what "transgressions" Ms. Conover committed and why such "transgressions" constituted "just cause," it should be rejected. It is entirely possible that the RO relied upon statutory and regulatory provisions that did not provide the basis for Petitioner's Administrative Complaint.

Exception 5

Relatedly, the RO made findings with respect to Ms. Conover's paraprofessional having entered grades into gradebook on her behalf. See RO at ¶¶ 13, 24, 27. These findings were then used to justify the RO's recommendation that Ms. Conover be terminated. See id. at ¶48. It was error to justify a decision to discipline—more specifically, to terminate—Ms. Conover on the basis of the findings contained in paragraphs 13, 24, and 27 of the RO.

Petitioner's Administrative Complaint clearly predicates the disciplinary action sought on the basis of three acts of misconduct: (1) Ms. Conover's failure to post grades in a timely manner, (2) Ms. Conover's failure to attend a PLC meeting, and (3) Ms. Conover's allegedly inappropriate interaction with Scherzer. See Pet.'s Admin. Compl. at ¶¶ 47, 50-51; see also Pet.'s Am. Pre-Hrg. Statement at 2. In accordance with the law set forth supra, disciplinary action against Ms. Conover on the basis of permitting her paraprofessional to enter grades on her behalf is not permissible because Petitioner did not seek disciplinary action against Ms. Conover on the basis of such conduct in its Administrative Complaint. The RO's findings to the contrary, see RO at ¶¶ 13, 24, and 27, are clearly erroneous.

Exception 6

In end note five (5), the RO states: "Respondent's attempted reliance on a School Board's 2016-2017 Student Progression Plan is a red heron, and not responsive to Respondent's issues as outlined in the Administrative Complaint." This finding by the RO is erroneous.

First, the Student Progression Plan ("SPP"), which has been adopted as Rule 4.80 by Petitioner, is responsive to the issues outlined in the Administrative Complaint. The SPP, an adopted school board rule, directly addresses the requirements of teachers to enter grades. Consequently, it is undoubtedly of relevance to this proceeding. Indeed, the Administrative

Complaint accuses Ms. Conover of, among other things, failing to perform her duties with respect to grading as a teacher and failing to conform with the "grading regulations" of Petitioner as required by the CBA. See Pet.'s Admin. Compl. at ¶¶ 6, 34, 40, 50, 57. Accordingly, the RO's conclusion that the SPP is immaterial is erroneous.

Second, the SPP is not a "red heron." In reaching this finding, the RO completely disregards the testimony of Mr. Lempe that the provisions of the 2016-2017 SPP were the same as the 2015-2016 SPP and that it constituted a "grading regulation" of Petitioner. Accordingly, the RO's conclusion that the SPP is immaterial is erroneous.

Exception 7

Relatedly, the ALJ erred in excusing Petitioner's omission of responsive materials and information to discovery propounded by Ms. Conover during the course of the proceedings. Specifically, Petitioner omitted the existence of the 2015-2016 SPP and the identity of Sue Medeler from its discovery responses. As became clear at the hearing, the SPP and Sue Medeler were material, or potentially material, to this proceeding. Their omission was material and clearly disadvantaged Ms. Conover's case. See RO at 4 n.5.

In discovery requests propounded throughout the course of the proceedings, Ms. Conover sought, among other things, the identity of those individuals with relevant knowledge, the production of documents memorializing Ms. Conover's job duties and responsibilities, and the production of documents evidencing the "guidelines and acceptable standards of conduct with regard to the input of grades." In its responses, Petitioner failed to identify Sue Medeler and failed to produce the 2015-2016 SPP. At the hearing, and to date, Petitioner has failed to proffer a single concrete reason justifying or explaining its non-production of this material information. The SPP is material for reasons discussed supra, and Ms. Medeler is material—or potentially

material at the least—in light of Mr. Lempe's testimony that she was the official responsible for, or possessing the greatest knowledge of, the grading regulations, policies, and requirements of Petitioner.

When the omission of this information was raised at the hearing, the ALJ erred in excusing said omissions. No objections were made with respect to the pertinent document requests and Ms. Medeler was not mentioned following requests by Ms. Conover that Petitioner's answer be clarified. Hence, there was no reason to believe information was being withheld; nevertheless, the ALJ ruled the impetus was on Ms. Conover to ferret out any omissions from Petitioner's discovery responses. Said ruling was erroneous, had the effect of permitting Petitioner to capitalize on its own noncompliance with the requirements of discovery, and, as a consequence, was inequitable and unjust.

Consequently, the RO's finding that the SPP proffered into evidence was a "red heron" is clearly erroneous and should be rejected. Petitioner's unexcused noncompliance with discovery should result in a finding that the SPP has not changed since 2015-2016 and that it is the grading regulation referred to in the CBA. Failing that, any other appropriate decision/relief should be granted.

Exception 8

The RO found that "[t]he School Board has adopted Policy 6.42 regarding its ability to approve or disapprove job descriptions. The pertinent part of the School Board's 'Teacher' job description is set forth in paragraph 5 above, and is incorporated herein." The finding of the RO that the items included in the job description were part of an adopted school board rule were clearly erroneous.

Rule 6.42, on its face, does not apply to Ms. Conover. Rather, Rule 6.42 requires Petitioner and the Superintendent to issue job descriptions. Consequently, job descriptions promulgated by Petitioner and the Superintendent are not, and cannot, be "adopted" school board rules or part of Rule 6.42. Cf. New World Comms. of Tampa, Inc. v. WTVT-TV, 866 So. 2d 1231, 1234 (Fla. 2d DCA 2003). As a consequence, it was error for the RO to find that the items contained in a job description constituted an "adopted" school board rule. The only appropriate finding is that the pertinent items included in Ms. Conover's job description do not constitute, or comprise part of, an "adopted" school board rule.

Exception 9

The RO erred in finding that Ms. Conover was required or expected to input grades into Gradebook on a more frequent basis than that required by the SPP and the 2015-2016 Timetable for Grade Reporting ("Timetable"). See RO at ¶¶ 4,11, 23, 48. In reaching this finding, the RO ignores the testimony of numerous witnesses concerning the alleged requirement or duty of entering grades on a "regular" or weekly basis, the documents directly contradicting the testimony proffered by Booker Middle School Administration officials, and the rules and regulations governing grading within the district.

First, the RO finds "teachers are to input students' grades . . . on a regular basis," and that "Booker's expectation is that grades will be inputted on a regular basis, preferably within a week of the completion of the assignment or test." This finding ignores the overwhelming weight of the testimonial evidence that there was no expectation, much less a requirement or duty, that teachers have their grades entered on a "regular" or weekly basis. One, LaSahwn Frost, Derek Jenkins, and Brian Dorn—members of Booker Middle School Administration at the time—could not agree as to the nature of the alleged duty. Two, the testimony of Jessica Scherzer, Patricia

Goodwin, Chuck Woods, and Angie O'Dell established—at most—that entering grades on a "regular" basis was considered something akin to a "best practice." The testimony of those individuals rejected the notion that, as the RO found, entering grades on a "regular basis" was an expectation or requirement. The RO did nothing to reconcile the testimony of Mr. Jenkins, Ms. Frost, and Mr. Dorn with how they actually enforced this alleged requirement.

Second, the documentary evidence created contemporaneously with the alleged misconduct engaged in by Ms. Conover also undermines the testimony of Ms. Frost, Mr. Jenkins, and Mr. Dorn. Nevertheless, the RO completely ignored this evidence in reaching its findings. For example, Petitioner's Exhibit 52 shows that no grades had been entered in Gradebook as of the date indicated on the document. Mr. Dorn's handwriting appears on the exhibit and states "[g]rades due 9/23." Despite testifying that there was an alleged requirement that grades be posted on a "regular basis," Mr. Dorn's own contemporaneous notes indicate not only that Ms. Conover's grades were not yet due (the exhibit is dated 9/18/2015), but that the grades were due on the date required by the Timetable. Similarly, other contemporaneous documents undermine the ROs finding and the testimony of the witnesses whose testimony the RO seemingly relied upon.

Third, the RO ignores the CBA and the rules and regulations regarding grading promulgated by Petitioner in reaching its finding that grades were to be entered on some "regular" or weekly basis. The CBA protects Ms. Conover, and every other teacher, from personnel policies and practices that conflict with the rules or policies of Petitioner. See J.E. at 15. As mentioned, the only rule or policies of Petitioner concerning the time for entering grades in the record are contained within the SPP and the Timetable. The RO recognized the Timetable,

but ignored the CBA and the fact that the alleged requirement found by the RO that grades be entered on a "regular" or weekly basis plainly conflicted with the Timetable. See RO at ¶11.

For the foregoing reasons, the RO's finding was erroneous. The only appropriate finding is that the only requirements for entering grades were contained within the Timetable and SPP.

Exception 10

The RO found that "[g]rades are to be entered by teachers, not paraprofessionals or volunteers." Id. at ¶13. This was erroneous. This finding ignores the testimony that Ms. Frost was aware of teachers utilizing others to enter their grades into Gradebook on their behalf. Furthermore, it ignores the significant credibility issue created by Ms. Frost's testimony on the matter and engages in no reasoning or analysis as to why it clearly found Ms. Frost's testimony more credible. For the foregoing reasons, the RO's finding was erroneous. The only appropriate finding is that there was no rule or requirement that "[g]rades are to be entered by teachers, not paraprofessionals or volunteers."

Exception 11

The RO found that "attendance is required" at PLC meetings and that "[i]n the event a teacher is off-campus during the regularly scheduled PLC meeting time, their absence may be excused." This was erroneous. In making this finding, the RO ignored the substantial testimony proffered by teachers employed at Booker Middle School, the confused testimony of Mr. Dorn, and the rules and policies of Petitioner and the CBA.

First, while Mr. Dorn and Ms. Frost testified that PLC meetings are required, the testimony from the teachers employed at Booker Middle School painted a far different picture. Several teachers testified that PLC meetings are frequently cancelled or do not happen at all for weeks on end. Moreover, despite these frequent and continued failures to hold PLC meetings,

the teachers that testified to the matter stated that they had not once been admonished by Booker Middle School Administration to hold a PLC meeting. Indeed, the teachers that testified to the matter stated that they had never been spoken to about the failure to convene these PLC meetings in any manner whatsoever. Nevertheless, the RO ignored the evidence of whether this alleged requirement was treated as such.

Second, while there was testimony concerning whether a teacher may be excused from attending a PLC meeting, it was extremely confused. Mr. Dorn's testimony of how and why absences from PLC meetings were handled shifted several times, and it was clear that there was no clear rule regarding excusals. Nevertheless, the RO ignored this issue, which went to Mr. Dorn's credibility and to the purported existence of this requirement.

Third, as mentioned supra, the CBA prohibits teachers from being subjected to personnel practices that differ from Petitioner's rules or policies. The CBA further provides that the only mandatory collaborative planning activities must occur outside the teacher's "duty day." It is undisputed that the PLC meeting in question occurred during Petitioner's "duty day." Consequently, it was error for the RO to ignore the CBA in this manner.

In light of the foregoing, the RO clearly erred in finding that the PLC meeting in question was mandatory and that absences are only excused if the teacher is off-campus. The only appropriate finding is that attendance at PLC meetings was, at most, expected and that there was no clear policy or rule regarding excusals.

Exception 12

The RO found that "Petitioner satisfied its burden and proved by a preponderance of the evidence that Respondent executed the MOU, and then committed further transgressions. Having considered all of the facts set forth above, the undersigned concludes that termination of

employment is appropriate." RO at ¶¶ 48. This was erroneous. Because the RO is devoid of any reasoning supporting the conclusion that "further transgressions" occurred, each possible basis brought forward for "just cause" is discussed.

Misconduct in Office for reason of violation Rule 6A-10.080(2)-(3)

While Rule 6A-5.056 provides that "misconduct in office" may be demonstrated through a teacher's violation of the Code of Ethics of the Education Profession in Florida ("Code of Ethics"), "it has been noted that the precepts set forth in the Ethics Code as 'so general and so obviously aspirational to be of little practical use in defining normative behavior.'" Miami-Dade Cnty. Sch. Bd. v. Diaz-Almarez, No. 12-3630TTS, 2013 Fla. Div. Adm. Hear. LEXIS 467 at *24 (Fla. DOAH July 30, 2013) (citation omitted). Therefore, any inquiry asking whether the Code of Ethics has been violated should be directed to whether the teacher's conduct violated the Principles of Professional Conduct "because violations of these specific Principles would necessarily also violate the more general and aspirational Code of Ethics." Id.; see also Deering, 2006 Fla. Div. Adm. Hear. LEXIS 367 at *19 n.10.

Without looking to the Principles of Professional Conduct for the Education Profession in Florida ("Principles"), the findings of the RO are insufficient to establish that Ms. Conover's primary concern was not always for the students and for the development of the students' potential. See generally RO. Nor are there any findings sufficient to demonstrate that Ms. Conover failed to strive for professional growth and the exercise the best professional judgment and integrity. See generally id. Further, there are no findings sufficient to demonstrate that Ms. Conover was not aware of the importance of maintaining respect and confidence of her colleagues, students, parents, and other members of the community. Last, there were no findings sufficient to permit the conclusion that Ms. Conover did not strive to achieve and sustain the

highest degree of ethical conduct. Indeed, there are no findings contained in the RO that state Ms. Conover fell short of the Code of Ethics.

Additionally, with respect to Ms. Conover's failure to attend a PLC meeting and her interaction with Ms. Scherzer on April 12, 2016, the allegation of "misconduct in office" cannot be sustained. Specifically, the Code of Ethics was repealed on March 23, 2016. Thus, it could not have served as a basis for the RO's conclusion that "further transgressions" occurred and that termination was appropriate. In any event, the RO failed to set forth any finding that Ms. Conover violated the Code of Ethics through the conduct underlying Petitioner's April 26, 2016 letter.

Misconduct in Office for reason of violating 6A-10.081(2)(a)(1)-(2), (4), (6), (9)

Rule 6A-10.081(2)(a)(1) requires that teachers "make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety." "[W]hen a teacher is charged with having failed to make a reasonable protective effort under Rule 6B-1.006(3)(a) the School Board must adduce, first, evidence regarding the teacher's actual actions in the face of a harmful condition; and, second, evidence from which the trier of fact can conceptualize a standard of conduct in the form of the action of a 'reasonable teacher' under the same or similar circumstances." Deering, 2006 Fla. Div. Adm. Hear. LEXIS 367 at *21. Consequently, Rule 6A-10.081(2)(a)(1) "does not proscribe undesired conduct; it requires desired conduct," and cannot be violated by an allegedly harmful condition created by the teacher. Id. at *24-25 (endnote omitted).

The finding in the RO are insufficient to demonstrate that Ms. Conover violated Rule 6A-10.081(2)(a)(1). Specifically, the allegedly harmful condition with respect to each charge (failing to post grades, permitting paraprofessional to enter grades, failing to attend a PLC

meeting, and inappropriately interacting with other teachers) was created by Ms. Conover. See RO at ¶¶ 22-24, 28-30, 48. Furthermore, the RO's findings cannot support a conclusion that Ms. Conover violated Rule 6A-10.081(2)(a)(1) because it contained no findings regarding whether Ms. Conover breached any reasonable duty of care or the standard of reasonable care to even be applied. See generally RO.

Rule 6A-10.081(2)(a)(2) of the Florida Administrative Code provides that a teacher shall not "unreasonably restrain a student from independent action in pursuit of learning." Like Rule 6A-10.081(2)(a)(1), this Rule prohibits "unreasonable" acts and, therefore, requires, inter alia, that evidence sufficient to establish a reasonable standard of conduct be produced. Cf. id. at *21.

The RO's findings are insufficient to demonstrate that Ms. Conover violated Rule 6A-10.081(2)(a)(2). First, the RO contains no findings that Ms. Conover either intentionally or through her actions, restrained her students from "independent action in pursuit of learning." Second, the RO contains no findings that Ms. Conover acted unreasonably in posting her grades into Gradebook on, or about, September 23, 2015. To the contrary, the RO expressly finds that Ms. Conover complied with the obligations imposed on her by the Timetable and the SPP. Therefore, concluding that Ms. Conover acted unreasonably in this case would necessarily require finding that the Timetable asks teachers to engage in conduct violative of the Principles. The only conclusion to be drawn is that Ms. Conover's adherence to the Timetable and SPP were reasonable. Third, as discussed supra, the RO erred in concluding that only teachers were permitted to input grades into Gradebook.

Rule 6A-10.081(2)(a)(4) of the Florida Administrative Code requires that teachers not "intentionally suppress or distort subject matter relevant to a student's academic program." To satisfy the requirement of intentional conduct, a School Board must establish that "the offending

conduct [was] committed with a specific intent to disobey the rule. Accordingly, '[t]here can be no violation in the absence of evidence that the teacher made a conscious decision not to comply with the rule.'" Deering, 2006 Fla. Div. Adm. Hear. LEXIS 3667 at *25-26 (citation omitted) (alteration in original) (emphasis added); see also Miami-Dade Sch. Bd. v. Anderson, No. 13-2414TTS, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *25 (Fla. DOAH Dec. 30, 2013)

The RO's findings are insufficient to support a conclusion that Ms. Conover violated Rule 6A-10.081(2)(a)(4). The RO lacks any finding that Ms. Conover engaged in the allegedly offending acts (failing to post grades, allowing a paraprofessional to post grades on her behalf, failing to attend a PLC meeting, and allegedly inappropriately interacting with colleagues) knowing that her behavior violated Rule 6A-10.081(2)(a)(4). Furthermore, the RO lacks any finding that Ms. Conover's behavior "suppress[ed] or distort[ed]" the subject matter of her students' education; indeed, there was no allegation or evidence produced that Ms. Conover did so.

Rule 6A-10.081(2)(a)(6) requires that teachers "not intentionally violate or deny a student's legal rights." Like Rule 6A-10.081(2)(a)(4), this Rule requires the School Board establish that the teacher made a conscious decision to violate the rule. Cf. Deering, 2006 Fla. Div. Adm. Hear. LEXIS 367 at *25-26. Further, this Rule requires the School Board to identify the legal rights denied, and their infringement. Id. at *26.

The findings of the RO also fail to establish a violation of Rule 6A-10.081(2)(a)(6). The RO lacks any finding that Ms. Conover engaged in the allegedly offending acts (failing to post grades, allowing a paraprofessional to post grades on her behalf, failing to attend a PLC meeting, and allegedly inappropriately interacting with colleagues) knowing that her behavior violated Rule 6A-10.081(2)(a)(6). More fundamentally, the RO lacks a finding identifying a single legal

right of students to receive their grades in a "timely manner," have only Ms. Conover post their grades into Gradebook, have a teacher who attends every PLC meeting, or have their teacher interact "appropriately" with his or her colleagues.

Rule 6A-10.081(2)(a)(9) requires that teachers "keep in confidence personally identifiable information obtained in the course of professional service, unless disclosure serves professional purposes or is required by law." It is clear from the text of the Rule that it is the student's personally identifiable information that is to be protected.

The RO lacks findings sufficient to establish a violation of Rule 6A-10.081(2)(a)(9). The RO lacks any finding that any personally identifiable information was impermissibly disclosed by Ms. Conover. Indeed, there are no findings that such information was shared with or disclosed to any individual who did not also have a right to know the information or did not, in fact, know the information.

Misconduct for reason of having violated adopted school board rules

In order to establish the violation of an adopted school board rule, the School Board must point to a rule promulgated pursuant to sections 120.536 and 120.54, Florida Statutes. See, e.g., Anderson, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *20-21; see also New World Comms., 866 So. 2d at 1234 (discussing meaning of adopted rule). In addition to being properly adopted pursuant to the Florida Administrative Procedures Act, a "rule" must be one of general applicability across the agency. See § 120.52, Fla. Stat.; see also Snow v. Ruden, McLosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 791 (Fla. 2d DCA 2005) (discussing meaning of "rule" in related statutory context); New World Comms., 866 So. 2d at 1234.

The findings of the RO fail to establish any violation of rule 6.42 by Ms. Conover. As discussed supra, rule 6.42 does not, on its face, apply to teachers. Consequently, Ms. Conover could not have possibly violated Rule 6.42 because, on its face, it does not apply to teachers.

Moreover, the findings of the RO fail to establish that Ms. Conover's actions fell short of the expectations imposed upon her by the job description promulgated by the Superintendent. Specifically, the contents of the job description contain broad, general statements. See RO at ¶5. For example, the quoted job requirements state that teachers should "[e]stablish and maintain effective and efficient record keeping procedures. Id. There are no findings in the RO that Ms. Conover failed to satisfy this broadly worded statement, or any of the other broadly worded and generalized statements quoted in paragraph five (5). Moreover, the RO expressly found that there was nothing to establish the meaning, and hence pertinence, of the job description quoted in paragraph five (5). In light of such a finding, it was clear error for the RO to make a finding that Ms. Conover breached the statements contained in the job description.

The RO also fails to set forth any findings sufficient to establish that Ms. Conover violated rule 6.27. First, the rule requires, in part, that teachers comply with the Principles. Ms. Conover did not violate the Principles she is alleged to have violated for the reasons set forth supra; therefore, that part of rule 6.27 has not been violated by Ms. Conover. Second, rule 6.27 sets out an aspirational ideal that employees maintain and promote the qualities of integrity, high ideals, and human understanding. Much like the Code of Ethics, rule 6.27 sets out aspirational goals, and, as such, is of little use in defining normative behavior and setting forth a neutral standard of conduct. Cf. Diaz-Almarez, 2013 Fla. Div. Adm. Hear. LEXIS 467 at *24; see also Anderson, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *22-23. Consequently, the RO's and Petitioner's failure to set forth any objective and neutral standard for what would violate rule

6.27, or how Ms. Conover violated it, the only appropriate conclusion is that Ms. Conover did not violate rule 6.27.

Misconduct in Office for reason of having constituted behavior that disrupts the student's learning environment

The findings contained within the RO fail to establish that Ms. Conover's behavior disrupted her students' learning environment. First, it is undisputed that Ms. Conover ultimately submitted her grades on time per the Timetable and SPP. To conclude that Ms. Conover disrupted the learning environment by virtue of her failure to submit grades on a more regular basis than that required by Petitioner would necessarily require finding that Petitioner's Timetable operates to disrupt the learning environment. Such a conclusion is wholly unreasonable and unsupported by the RO's own findings. Second, the RO is entirely devoid of any findings that Ms. Conover's decision to permit her paraprofessional to enter grades into Gradebook on her behalf worked to disrupt the student's learning environment. Third, the RO lacks any findings of an actual disruption in the learning environment, nor was any evidence proffered by Petitioner to that effect.

Misconduct in Office for reason of having constituted behavior that reduces the teacher's ability of his or her colleagues' ability to effectively perform duties

The RO's findings are insufficient to support a conclusion that Ms. Conover's conduct reduced her, or her colleagues', ability to effectively perform their duties. No findings were made that any person's effectiveness was reduced as a consequence of the actions complained of. Nor was any such evidence proffered by Petitioner.

Incompetency for reason of having failed to perform duties prescribed by law

The findings of the RO are insufficient to support a conclusion that Ms. Conover failed to perform the duties imposed upon her by law. Ms. Conover's failure to post grades on a more

regular basis than that required by the SPP and the Timetable was not a failure to perform duties prescribed by law. First, as discussed supra, the RO completely ignored the conflicting testimony regarding the nature of this alleged requirement. As stated supra, that confusion requires a finding that entering grades on a "regular" or weekly basis was not a requirement or duty. In order to be a "duty," there must be, if nothing else, clarity as to what the nature and extent of the obligation is. As mentioned, such clarity is lacking in this matter. Additionally, the evidence demonstrated that Frost and BMS administration did not evenhandedly enforce their alleged requirement that grades be entered on a "regular basis." This evidence was ignored entirely by the RO; however, it further undermines the finding that there was a "Requirement" to enter grades on a "regular" basis. Second, the RO expressly found that this alleged duty to enter grades in a "timely manner" does not stem from a law. RO at ¶¶ 11, 19. Because this alleged requirement does not stem from any legal source, it cannot be the basis for a conclusion that Ms. Conover's conduct constituted incompetency for reason of failing to perform duties prescribed by law. Cf. Anderson, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *28 ("Petitioner has failed to identify the legal source(s) from which the supposed obligations flow."); see also Snow, 896 So. 2d at 791-92 (discussing meaning of "law" in another statute).

Ms. Conover's decision to permit her paraprofessional to enter grades into Gradebook on her behalf also was not a failure to perform duties prescribed by law. The RO lacks any finding that this alleged requirement stemmed from a "law," and there is no evidence in the record that this alleged requirement was rooted in a legal source. Ms. Conover's failure to attend a PLC meeting did not constitute a failure to perform duties prescribed by law for the same reason: the RO lacks any finding, and Petitioner proffered no proof, that this alleged requirement stems from a legal source.

Finally, Ms. Conover's interactions with Scherzer on April 12, 2016 did not constitute a failure to perform duties prescribed by law. First, the RO failed to make any effort to identify any intelligible duty with respect to appropriately relating with colleagues, nor did the Petitioner proffer one. Cf. Anderson, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *28-29 (stating appropriate communications is a relative term for which an objective standard must be proffered by Petitioner). Consequently, there was nothing against which to objectively judge Ms. Conover's conduct. Second, the RO contains no finding that this "duty" stemmed from a law or legal source.

Incompetency for reason of having failed to communicate appropriately with and relate to students

The findings of the RO cannot establish that Ms. Conover failed to communicate appropriately with and relate to students when she failed to post grades on a "regular" basis during the 2015-2016 school year. First, if nothing else, it seems that Petitioner's concern with Ms. Conover's alleged failure to post grades in a "timely manner" was premised on a failure by Ms. Conover to communicate at all. See RO at ¶¶ 11, 19, 22-23. However, Rule 6A-5.056(3)(a)(2) requires that a teacher communicate inappropriately. It is impossible to communicate inappropriately if no communication occurred. Second, assuming the Rule does apply to Ms. Conover's conduct, Ms. Conover did not fail to communicate appropriately. As discussed supra, Ms. Conover's conduct complied with Petitioner's rules concerning grade reporting. Petitioner's argument in this matter would necessarily require a finding that Petitioner asks its teachers to communicate inappropriately with their students. That is patently unreasonable.

The findings of the RO cannot establish that Ms. Conover failed to communicate appropriately with and relate to students when she permitted her paraprofessional to enter grades

on her behalf into Gradebook. First, the RO lacks any finding that Ms. Conover inappropriately communicated or related with a student. Second, the RO, as well as Petitioner, failed to proffer any standard as to what inappropriate communications with a student should mean. Consequently, in the absence of such a standard, Petitioner could not establish a violation of this Rule by Ms. Conover. Cf. Anderson, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *28-29. If anything the evidence in the record, which the RO ignored, established that Ms. Conover's conduct was fairly commonplace and that Ms. Frost was aware of the practice. Thus, there could be no finding that Ms. Conover's conduct was inappropriate.

Incompetency for reason of having failed to communicate appropriately with and relate to colleagues, administrators, subordinate, or parents

"The terms 'communicate' and 'relate' are relative." Id. at *28. Consequently, a School Board must proffer an objective standard of conduct defining these terms before it can establish that a violation of the Rule has occurred. Id. at *28-29.

Petitioner has failed to establish that Ms. Conover's failure to post grades in a "timely manner" constituted a failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents. First, as mentioned above, Ms. Conover's conduct involved an alleged lack of communication. Consequently, Ms. Conover's failure to communicate at all renders it impossible for her to be found to have engaged in an inappropriate communication. Second, if Ms. Conover's conduct does fall within the ambit of this Rule, her conduct did not constitute an inappropriate communication or failure to relate. Specifically, as mentioned supra, Ms. Conover complied with Petitioner's rules and policies concerning grade reporting. See, e.g., Pet.'s Ex. 125. Consequently, Ms. Conover's conduct could not have constituted a failure to appropriately communicate or relate to parents, et al.

Petitioner has also failed to establish that Ms. Conover failed to communicate appropriately with and relate to colleagues, et al., when she permitted her paraprofessional to post grades into Gradebook on her behalf. First, neither Petitioner nor the RO proffered any standard as to what inappropriate communications with a colleague, et al., should mean. Consequently, in the absence of such a standard, Ms. Conover could not have violated this rule. Cf. Anderson, 2013 Fla. Div. Adm. Hear. LEXIS 861 at *28-29.

Incompetency for reason of disorganization of his or her classroom to such an extent that the health, safety, or welfare of the students is diminished

The findings of the RO are insufficient to establish that Ms. Conover violated this Rule by virtue of failing to post grades in a "timely manner" or her decision to allow her paraprofessional to enter grades into Gradebook on her behalf. There is no finding linking Ms. Conover's conduct to any disorganization on her part or that Ms. Conover was, in fact, disorganized. Nor is there any evidence in the record establishing that any disorganization of Ms. Conover's classroom caused any harm to her students. Likewise, there is no finding that Ms. Conover's conduct caused any harm to her students. To the contrary, the RO expressly found that Ms. Conover complained with the Timetable. See RO at ¶¶ 11, 22-23.

Willful Neglect of Duties

Rule 6A-5.056(5) defines "willful neglect of duties" as the "intentional or reckless failure to carry out required duties." To establish an intentional act, the School Board must establish that "the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." Id. at *25 (citation omitted). To establish a reckless act, the School Board must establish that the teacher acted "with a 'conscious and intentional indifference to consequences,'" and with knowledge that a failure to carry out required duties was likely to be done. W.E.B. v. State, 553 So. 2d 323, 326 (Fla. 1st DCA 1989).

As discussed supra, in order to constitute a "duty," the alleged duty must be clear and intelligible. Vagueness or uncertainty as to the nature and extent of the alleged duty undermines any claim that there was a "duty."

The RO erred in concluding, to the extent that it did, that Ms. Conover's failure to post grades on a more regular basis than required by the Timetable constituted an intentional or reckless failure to carry out required duties. First, as discussed supra, the the confusion among BMS administration and teachers requires a finding that entering grades on a regular or weekly basis was not a "duty." Further, and as discussed supra, the CBA precludes such a finding as well. The only "duty" to enter grades stemmed from the Timetable and SPP, which the RO found Ms. Conover complied with. Second, the manifest confusion among BMS administration among BMS teachers, as evidenced by testimony completely disregarded by the RO, established that it would be impossible to have intentionally violated such a vague and uncertain "duty."

The findings of the RO also fail to establish that Ms. Conover intentionally or recklessly failed to carry out her required duties when she permitted her paraprofessional to post grades into Gradebook on her behalf. First, the RO lacks any finding that Ms. Conover was aware of the alleged requirement that only she enter grades into Gradebook. As found by the RO, this was Ms. Conover's incident relating to such conduct. RO at ¶¶ 24, 36. Second, and relatedly, two facts, which were completely disregarded by the RO, undermine Petitioner's claim that there was a "duty" on teachers that only they could post their grades. One, the practice by teachers of engaging others to post grades for them on their behalf was fairly commonplace and, two, BMS administration was aware of this fact and took no disciplinary action against any other employee outside of Ms. Conover.

The findings of the RO also failed to establish that Ms. Conover intentionally or recklessly failed to carry out her required duties when she failed to attend a PLC meeting on March 8, 2016. First, as discussed supra, there was extremely confused testimony on the nature of the "duty." Further, and as discussed supra, the evidence demonstrated that PLC meetings were not held for significant periods of time with no concern expressed by BMS administration. These facts were completely ignored by the RO; however, they undermine the finding by the RO that Ms. Conover engaged in "further transgressions." Second, although the RO ignored this evidence, the confusion surrounding excusals from PLC meetings requires a finding that failing to attend could not have been intentional or reckless. Indeed, the record evidence established that Ms. Conover attempted to attend the meeting and did her best to provide Ms. Scherzer with notice. RO at ¶28.

The RO also failed to set forth findings that that Ms. Conover intentionally or recklessly failed to carry out her required duties in her interaction with Scherzer on April 12, 2016. Petitioner and the RO completely failed to provide any evidence of a duty that would encompass or address Ms. Conover's conduct on this date. Nor has Petitioner or the RO put forward any evidence of a standard of conduct applicable to this type of conduct, or why Ms. Conover fell below such a standard. To the contrary, Ms. Conover's conduct appears to be nothing materially different than what could fairly be said to likely happen on a daily basis throughout BMS and Petitioner's other schools. See RO at ¶30.

Exception 13

The RO concluded that termination was appropriate in light of Ms. Conover's prior disciplinary history. See RO at ¶¶ 20, 34-35, 36e., 48. In short, the RO concluded that Ms. Conover's activity of keeping personal notes—notes which were later discovered—containing

profanity justified her termination. Id. This finding and conclusion is erroneous for reason of violating the First Amendment to the United States Constitution and Sections 4-5 of the Constitution of the State of Florida.

The record evidence was that these notes were personal in nature and kept at Ms. Conover's desk. These notes were unquestionably protected speech under the First Amendment and Sections 4-5 of the Florida Constitution. To justify Ms. Conover's termination on the basis of such activity and speech violates the Federal and State Constitutions. Accordingly, the RO should be rejected and Ms. Conover should be reinstated to her position as a teacher.

Exception 14

The RO concluded that termination was appropriate in light of Ms. Conover's efforts to secure information relevant to an investigatory meeting she was to have with BMS administration on April 12, 2016. See RO at ¶¶ 29-31, 48. This finding and conclusion is erroneous for reason of violating the First Amendment to the United States Constitution and Sections 4-5 of the Constitution of the State of Florida.

The record evidence, as well as the RO, established that Ms. Conover was seeking information from Ms. Scherzer relevant to her pending investigatory meeting. The record evidence demonstrated that such effort was made for the purpose of seeking a redress of her grievances with Petitioner. Such activity is protected under the First Amendment and Sections 4-5 of the Florida Constitution. To justify Ms. Conover's termination on the basis of such activity violates the Federal and State Constitutions. Accordingly, the RO should be rejected and Ms. Conover should be reinstated to her position as a teacher.

III. CONCLUSION

As discussed supra, many of the findings and conclusions of the RO were erroneous. The RO overlooked material evidence and testimony and provided no reasoning for its ultimate conclusion that termination was either warranted or appropriate. Based on the foregoing, it is respectfully requested that a final order finding no cause to discipline Ms. Conover be entered. Alternatively, it is respectfully requested that a final order entering discipline less than termination (at most a written reprimand) be entered.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2017, a copy of the forgoing RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER was served via EMAIL to the following:

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