

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 12-3901TTS

JAMES B. WILKINS,

Respondent.

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RECOMMENDED ORDER

A duly-noticed hearing was conducted on June 11 through 13, 2013, in Viera, Florida, before Administrative Law Judge Robert S. Cohen of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Wayne L. Helsby, Esquire
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 and Stivers, LLC
245 East Virginia Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated School Board Policies 3210 (and, when referenced, corresponding Florida Administrative Code rules), 6610, and/or 6152, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

In a letter dated November 6, 2012, Dr. Brian Binggeli, superintendent of schools for Brevard County, Florida, notified James B. Wilkins of his recommendation to Petitioner that Petitioner terminate Mr. Wilkins for violation of School Board Policy 3210, relating to the standards of ethical conduct, for failure to protect students from conditions harmful to learning and/or to the students' mental and/or physical health and/or safety. Further, the superintendent alleged that Mr. Wilkins violated School Board Policy 3210 by intentionally exposing one or more students to unnecessary embarrassment or disparagement. The superintendent also alleged that Mr. Wilkins violated two School Board policies relating to the handling of money: 6610, relating to internal accounts; and 6152, relating to student fines, fees, and charges; and school rules. Finally, the superintendent alleged that each of these violations constituted misconduct in office and/or conduct unbecoming an instructional employee.

Petitioner terminated Mr. Wilkins at its meeting on November 20, 2012. Mr. Wilkins timely filed a request for formal hearing. This matter was then referred to the Division of Administrative Hearings.

In a letter dated May 3, 2013, the superintendent informed Mr. Wilkins that he had become aware of additional grounds for

termination (Additional Charge or May 3, 2013 Additional Charge).

They were stated as follows:

It has recently been discovered that on more than one occasion, you rubbed your body up against a female member of the band, told her that you loved her, stroked her hair and told her that you loved her long blond hair. This is in violation of School Board Policy 3210, Standards of Ethical Conduct.

According to the letter, the Additional Charge was intended to "supplement [the superintendent's] previous correspondence dated November 6, 2012" and the actions alleged "provide additional just cause to terminate [Mr. Wilkins'] employment as a teacher and cancel [his] Professional Service Contract under Section 1012.33(4)(c)."

On May 13, 2013, Mr. Wilkins' counsel filed a Motion to Strike Additional Charge seeking to strike the May 3, 2013 Additional Charge. On May 15, Petitioner's counsel filed Notice of Filing Supplementary Agency Action Letter--the superintendent's letter of May 3, 2013. On May 20, Petitioner filed a Response to Respondent's Motion to Strike Additional Charge.

On May 13, 2013, Respondent filed a Motion in Limine or in the Alternative a Motion to Strike concerning several of the charges in the original notice of termination, dated November 6, 2012. The motion asserted that by including charges against Mr. Wilkins in this proceeding for which he had already been

disciplined or was otherwise counseled by a district administrator, Petitioner was subjecting Mr. Wilkins to double jeopardy and unfair labor practices. On May 20, Petitioner filed a response to the Motion in Limine. Following a May 29, 2013, motion hearing, an order was entered denying Respondent's Motion to Strike Additional Charge. The order granted in part, and denied in part, Respondent's Motion in Limine which effectively precluded Petitioner from reopening matters at the final hearing alleged in Petitioner's notice of November 6, 2012, for which Respondent was previously disciplined or counseled.

Allegations Not at Issue in This Proceeding

As a result of the ruling on the Motion in Limine, most allegations addressed in the November 6, 2012, dismissal letter are not at issue in this proceeding. As such, those allegations may not form the basis of discipline in this matter, except in the sense that progressive discipline may apply. Those issues, as presented in the termination letter, are:

Section A - Inappropriate Comments to Students

Paragraph 2, relating to sports bras. This issue was specifically addressed in the Letter of Reprimand and the Professional Development Assistance Plan (PDAP).

Paragraph 3, relating to B.O.'s initial allegations. This issue was specifically addressed in the Letter of Reprimand.

Section B - Mistreatment of Students

Paragraph 1, relating to exercises, except, Petitioner contends, the issue of adult supervision remains. However, this issue, too, was among the parent complaints addressed at the conference on October 1, 2012. Summary of Conference, October 3, 2012, dealing with complaint from three parents.

Section C - Parent Volunteer

This issue was specifically addressed in the conference on September 24, 2012, and documented in the Summary of Conference, dated October 1, 2012.

Section D - Nicknames

This issue, including ethnic nicknames, was among the parent complaints, and Mr. Wilkins response was addressed at the conference on October 1, 2012. Summary of Conference, October 3, 2012, dealing with complaint from three parents.

Section E - Inflicting Physical Injury

Although addressed the prior year, this issue concerning A.S., led to an investigation by the Palm Bay Police Department and Department of Children and Families in October 2012. Mr. Wilkins was placed on leave on October 4, 2012, pending an investigation by these agencies. No action was taken against Mr. Wilkins by these agencies, nor was any action taken by the school district.

Section F - Humiliating a Student

This issue was dealt with in the Summary of Conference memorandum, dated October 1, 2012.

Allegations Remaining at Issue

The allegations in the superintendent's letter of November 6, 2012, remaining at issue in this proceeding are:

Section A - Comments

Paragraph 1, relating to a comment about "oral sex."

Section B - Mistreatment of Students

Paragraph 1, only as it relates to the contention that the issue of adult supervision of exercises was performed by students for rule infractions was not previously known about by district administrators.

Paragraph 2, only as it relates to the bus/bathroom incident.

Section G - Mishandling of Funds

May 3, 2013 Additional Charge

The Additional Charge concern B.O., a female student.

At the hearing, Petitioner offered 38 exhibits and Respondent offered 17 exhibits that were entered into evidence. Petitioner called ten witnesses. Respondent called five witnesses. The proceedings were recorded, and a three-volume Transcript was filed with the Division of Administrative Hearings. The parties timely submitted their proposed

recommended orders, which have been carefully considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

The Parties

1. Petitioner, Brevard County School Board ("School Board" or "Petitioner"), is the constitutional entity authorized to operate, control, and supervise the public schools in Brevard County, Florida.

2. Beginning in 2009, Respondent, James B. Wilkins ("Wilkins" or "Respondent"), was employed by Petitioner as the band director at Heritage High School. In 2012, Wilkins held a Professional Services Contract.

3. Wilkins has over 30 years' experience working with bands in Florida and North Carolina. He previously taught in Duval and Orange counties, and his personnel files were reviewed and references checked when he was considered for the position at Heritage High School.

4. Petitioner and Brevard Federation of Teachers, Local 2098, are parties to a collective bargaining agreement ("CBA"). Among its terms, the CBA requires just cause for dismissal.

5. Wilkins previously worked for the Orange County School Board, and during his employment, received letters of reprimand

in November 2000 (inappropriate physical force and corporal punishment with students and failure to adequately supervise students under his control), April 2004 (shouting match with a student and use of profanity), April 2004 (grabbing a student by the arm and use of profanity), November 2007, and February 2008. During the hearing, Wilkins testified he could not recall the incidents at Orange County Public Schools where he was accused of the use of profanity with students and inappropriate physical force.

6. Wilkins was also previously employed by the Duval County School Board, where he received a letter of reprimand in November 1994 for his use of profanity. Wilkins also received an unsatisfactory rating on his 1995 evaluation for his use of profanity on several occasions despite warnings, and for failure to follow policies or financial procedures.

7. As the band director at Heritage High School, Wilkins taught classes and was also responsible for the extracurricular activities of the band, including marching band and orchestra. Wilkins was also responsible for following the School Board's rules regarding the finances of the band program, as well as the supervising and disciplining of students.

Fall 2012

8. John Tuttle was principal of Heritage High School from its opening in 2009 until October 2012. Tuttle hired Wilkins for

the position of band director because he was the best applicant. He knew at the time he hired Wilkins that Wilkins was a strict disciplinarian. Wilkins' organization of the band taught the students responsibility and discipline.

9. Tuttle wanted a band that would showcase the band and its community until the athletic programs could develop. By 2012, the band had been very successful and received many accolades. Tuttle's evaluations of Wilkins each year rated Wilkins "Effective" in each category, the highest rating possible. Wilkins built a strong booster organization for the band that assisted with student financial obligations. Further, Tuttle recognized that Wilkins had established the Heritage Band "as our showcase program." He also noted that Wilkins wrote the "drill music and dance routines" for the band.

10. When Wilkins interviewed for the position, Tuttle asked him what he would like, if he got the job. Wilkins told Tuttle that he would like someone to have the responsibility for money.

11. Tuttle worked previously with Ms. Teresa Torsiello, a parent, when he was principal at Bayside. When Torsiello asked permission for her daughter to attend Heritage, Tuttle gave her the impression that he would approve the transfer only if she would organize the football program and help set up other fundraising activities at Heritage, including the band. Torsiello knew district financial rules, and Tuttle trusted her.

12. Torsiello soon became the president of the Band Parents Association at Heritage. There was no assistance in how to organize the various parent programs from school district personnel. Torsiello assisted several organizations at Heritage in setting up their programs, including the football program and the band.

13. The Band Parents Association had a constitution and by-laws. Torsiello implemented an accounting program called Charms, which allowed the Band Parents Association to keep track of individual student financial accounts and other matters (such as medical needs and contact information), it could generate receipts, keep track of inventory and produce various reports (such as monthly and year-end financial reports). Parents could access their student's information on-line by using a password. The Band Parents Association met to approve expenditures (with proper receipts), and it used its monthly reports to check the school's internal account balance.

14. The Band Parents Association maintained several accounts. These included: the school's internal account; an account at the Brevard Foundation; a bank account; and a petty cash fund. Every organization at every school Torsiello has ever been involved with has had its own petty cash fund, including the football program at Heritage. Tuttle recognized that he cannot control what the Band Parents Association does with its money-

whether they donate to the school (through the internal account or the Foundation) or how they handle it. He can only control the money that comes through the band director and the bookkeeper. The Band Parents Association had to vote to donate money that it raised in order to place it in the school's internal account.

15. Wilkins never handled money until Ms. Martin, the band parent treasurer resigned. He had emphatically stated that he did not want to handle money; he did not even have a password to the Charms accounting program. Although he might have to authorize purchases from the school's internal account or the Foundation account, he was not allowed to be the lone signer.

16. Tuttle dealt with various complaints against Wilkins in the fall of 2012, which are outlined in the superintendent's letter of November 6, 2012, and discussed in the Preliminary Statement, above. Tuttle "felt like a group of parents were out to get him (Wilkins) and they were going to continue drumming up, pulling up things that happened in the past that may have already been dealt with until they did." Following the Palm Bay Police Department and Department of Children and Families investigation, in which the agencies found no violation to pursue, the media scrutiny started.

17. After the media attention, "investigations" were taken away from Tuttle and handled by Ms. Debra Pace and Dr. Mark

Mullins. Neither testified as to any complaints they were investigating. They went to Heritage to see what they could dig up. Due to the nature of some of the allegations in this proceeding, it is apparent that they were seeking one or more reasons to terminate Wilkins.

Allegations

18. In a letter dated November 6, 2012, the superintendent, Dr. Brian Binggeli, notified Wilkins of his intent to recommend his termination of employment to the School Board. Although the letter contained a number of allegations, most of those are not the subject of this proceeding following the ruling on the Respondent's Motion in Limine. The remaining issues are set forth below, under the appropriate section letter and title.

A. Inappropriate Comments of a Sexual Nature to Students

19. At paragraph 1, the superintendent alleges that Wilkins engaged in the following conduct: "You said to two students that a female member of the band played her woodwind instrument in a manner that looked like an act of oral sex (the exact language you used is too graphic to repeat in this public record)."

B. Mistreatment of Students

20. Paragraph 1 of this section concerns exercises performed by students and alleges that Wilkins engaged in the following conduct:

You directed the student who is the "Sergeant at Arms" of the band to discipline students who you or your appointed student leaders in the band determined committed an infraction by taking the students to a separate room with no adult supervision to perform exercises utilized as punishment including push ups, sit ups, panther spreads, rocking chair, 6 inch killer, duck walks and the "Heritage Special". You admitted this practice and acknowledged that some students became upset (crying) because of the strenuous nature of the "punishment". You recently added the names of two female students to the discipline list because you stated they were not wearing sports bras. You readily admitted that you did not monitor the discipline list for fairness or consistency, and you kept no permanent record of who was disciplined or the level of intensity of the discipline sessions.

21. Paragraph 2 of this section concerns bathroom use and water breaks and alleges that Wilkins engaged in the following conduct:

You also denied students access to bathrooms and water during various band practices and events. On one occasion during the Extreme Makeover event in Titusville last school year a female student who was not allowed to use the bathroom at a McDonalds [sic] wet herself and was humiliated in front of her peers. Students interviewed indicated that the water breaks were regularly permitted after 45-50 minutes of strenuous physical activity at practices and performances. If someone was about to "pass out," you would allow them a drink of water. The restrictions you placed on student's [sic] access to water and bathrooms subjected them to the potential of physical harm. . . .

G. Mishandling of Funds

22. The superintendent alleges that Wilkins engaged in the following conduct relating to the handling of funds:

You have violated School Board Policy 6610 and School Board Policy 6152 by maintaining two separate accounts for school based funds. One account was utilized for deposit of checks and was properly operated as a school based internal account. You improperly maintained a separate, unauthorized cash box in which cash collections from band students for band fees and other charges were kept with a separate receipt book. The cash collections were maintained by a single parent, and there was no governance by a Band Booster Board or official parent officer group over expenditures of the funds, other than your direction. When questioned about this separate account on October 16, 2012, you first denied knowledge of its existence. You then denied handling any money. You said that you had forgotten about the money box and the funds contained therein until earlier that morning, when you turned the money box over to the school bookkeeper. You then denied having any knowledge of how much money was in the cash box when you turned it in to the bookkeeper. You also denied several times any knowledge of a second receipt book, separate from the official district-issued receipt book used for the band's internal account. You later admitted the use of two separate receipt books, one for the internal account and a separate one for cash receipts. You also later admitted that you independently authorized the use of \$50.00 for a cash prize at the September parent meeting. Then you were shown the cash register receipt which you said the former Band Treasurer signed when she turned the cash box over to you, but you were unable to explain the negative difference between the amount turned over to you by the former Band Treasurer, \$800.35, and the amount you turned

in to the bookkeeper earlier that day, \$680.00. You were both evasive and dishonest about the lack of proper receipts for deposits and expenditures, and the shortage of cash versus receipts when the monies were turned in. You finally admitted that the cash was regularly spent in any manner you deemed necessary with no accountability. At the end of the October 16 interview your briefcase was examined and a clear plastic document holder with additional receipts and cash, \$21.00, was found. When questioned[,] you claimed that was some money and receipts you also intended to turn in. District leadership later learned that you previously paid yourself a salary above and beyond the salary and supplement you have regularly received as the Band Director at Heritage High, out of the cash box, for summer band camp: \$2,250 in 2011 and \$3,000 in 2012. A review of cash fund collected, according to the receipt book, indicates that \$4,551.00 was collected between July 16, 2012, and September 7, 2012. Receipts turned in show expenditures at B.J.'s, Sam's, Winn Dixie, etc, total \$3225.27, leaving a difference of \$1,325.73. With \$680 submitted to the Heritage bookkeeper on 10/16, and an addition \$21.00 recovered from your briefcase, at least \$621.73 [sic] is unaccounted for.

Additional Charge

23. By letter dated May 3, 2013, the superintendent notified Wilkins of the additional grounds that involved B.O., a female student, for his termination. The Additional Charge was never presented to Petitioner for its consideration.

Basis for Termination

24. At page 4 of the November 6, 2012, termination letter, the superintendent sets forth the legal basis for terminating Wilkins' employment. That basis is set forth, below:

Your actions as described in paragraphs A, B, C, D, E, and F above violate the Brevard Public School Code of Ethics, Policy 3210, and The Code of Ethics And The Principles of Professional Conduct of the Education Profession in Florida by failing to protect the students from conditions harmful to learning. You have jeopardized the students' mental and physical health and safety, by intentionally exposing students to unnecessary embarrassment or disparagement. These actions constitute misconduct in office and conduct unbecoming an instructional employee. (emphasis added).

Your actions as described in paragraph G. are a violation of School Board Policy and rules of Heritage High School regarding the collection and expenditure of funds and further constitute misconduct in office. (emph).

These actions as described above provide just cause to terminate your employment as a teacher and cancel your Professional Service Contract under Section 1012.36(6) (a), Fla. Stat.

Pursuant to the Collective Bargaining Agreement between the Brevard County School Board and the Brevard Federation of Teachers, you have a right to request a meeting with me to discuss my recommendation to terminate your employment. To request a meeting you must advise me in writing within five (5) days after receipt of this letter. If you wish to contest these charges you have the right to request a hearing. To request a hearing you must submit a written request to

my office within fifteen (15) days after receipt of this letter.

25. The Additional Charge fails to cite to corresponding provisions of the Florida Administrative Code or state the misconduct in office charge.

Inappropriate Comments of a Sexual Nature to Students

26. At section A, paragraph 1 of the termination letter, the superintendent alleged that Wilkins made graphic reference to "oral sex" to two students concerning the way a female student was playing her woodwind instrument. Petitioner neither alleged, nor offered proof at hearing, that the student about whom the alleged comment was made heard the comment.

27. The Letter of Reprimand issued to Wilkins in September 2012 by Tuttle dealt with comments of a sexual nature. Petitioner contends that the alleged comment concerning "oral sex" was not known by district personnel until October 15, 2012, when Pace and Mullins began interviewing students. As such, it is an enhanced allegation that may be considered in this proceeding for disciplinary purposes.

28. Those present at the time Wilkins is alleged to have made the offending comment in August or September 2012 were Wilkins; T.S., a male student; and H.J., a female student.

29. T.S. first testified that Wilkins said, "It looks like she is doing something inappropriate." H.J. agreed and stated

that Wilkins made no reference to "oral sex." H.J. merely took Wilkins' comment to mean that the student was playing the instrument wrong in that the mouthpiece was inserted too deeply into her mouth which could lead to injury if the band member fell while marching. Further, H.J. was not offended by Wilkins' comment that the student was playing the instrument inappropriately. However, H.J. did feel that her words were being twisted by Pace and Mullins.

30. Upon further probing by Petitioner's counsel, T.S. testified that he had written in his statement that Wilkins said that it looked like the student was "sucking dick," because of the way the student held the mouthpiece in her mouth. T.S. admitted that he was frustrated by Pace and Mullins, because they badgered him about making a statement. When asked by Respondent's counsel whether the words "sucking dick" were his, T.S. stated, "that's what they (Pace and Mullins) told me." Whatever Wilkins said, T.S. was not offended by the comment.

31. Wilkins denies making any statement to T.S. or H.J. about oral sex. He testified that he wanted T.S. and H.J. to "fix her playing position because it looks inappropriate." One of Wilkins' concerns was that if the student tripped with the mouthpiece in that position, she could injure herself.

32. Based on the testimony of the witnesses, the evidence does not support the assertion that Wilkins made a sexual reference concerning the woodwind player.

Mistreatment of Students

Exercises

33. At section B, paragraph 1 of the termination letter, the superintendent made several allegations against Wilkins concerning the use of exercises as a consequence for rule infractions, including when students fail to dress properly (sports bra). Other bands in the district such as Palm Bay High, Melbourne High, and Cocoa High, and other organizations at Heritage, such as cheerleaders, use exercises for this purpose and place officers in a position of responsibility over their members. As noted in the Preliminary Statement above, Tuttle previously dealt with issues concerning these exercises when he dealt with earlier complaints.

34. Petitioner, however, contends that the issue of adult supervision of these exercises was not raised until J.V.Z., the sergeant-at-arms, was interviewed by Pace and Mullins in mid-October 2012 and thus the allegation may now be a matter for further discipline.

35. There is no allegation that any student was ever injured performing these exercises.

36. The issue of adult supervision of these exercises was in fact raised by D.S., a band parent, in her complaint to Tuttle. Tuttle dealt with D.S.'s complaint with Wilkins on October 1 and a Summary of Conference was issued on October 3, 2012.

37. Various students and Wilkins testified as to the process and practice of using exercises as a consequence for rule infractions. Petitioner charged Wilkins with failure to supervise these exercises, because the exercises were conducted in a separate room. However, all the rooms in the band area have windows from ceiling to "door knob." Wilkins maintains that he always had a direct line of sight as to what was going on in the area where the exercises were conducted. The students who testified on this issue agreed that Wilkins always had a line of sight view of the officers supervising and the students performing the exercises. These students include J.V.Z., T.S., T.T., and S.O.

38. Based on the testimony of the witnesses, the more credible evidence supports that there was adult supervision of this activity, as Wilkins always had a line of sight as to those performing the exercises and those supervising them.

Bathrooms and Water

39. The allegation at section B, paragraph 2 concerns student access to bathrooms and water. The general issue of

student access to bathrooms and water was reviewed previously by Tuttle. There was no evidence that Wilkins denied any student access to a bathroom or water.

40. However, with this allegation, Petitioner specifically charged Wilkins with denying a female student access to a bathroom causing her to wet herself on the bus ride home from the Extreme Makeover Event in 2010.

41. Pace now acknowledges that S.O. is the student at issue. Petitioner made this allegation without confirming the name of the student, S.O., who was allegedly the one who wet herself. Even when S.O. provided district officials, including Pace, with a written statement contradicting the allegation prior to Petitioner's vote on the superintendent's recommendation to terminate Wilkins, the superintendent went forward with this unsubstantiated charge.

42. S.O. testified that no one from the school district ever talked to her about the allegation. S.O. stated that she did not realize she had to use the restroom until after the bus was underway. However, she did not wet herself on the bus.

43. Wilkins was not on the same bus as S.O. and never knew about S.O.'s need to use the restroom until he received the termination letter. Petitioner offered no testimony to contradict S.O.'s testimony at hearing.

44. Based on the evidence presented, this allegation is unsupported in its entirety. Further, the allegation was based merely on rumor, and the District failed to follow-up when S.O. came forward. It is unclear why this allegation was even pursued in light of S.O.'s statements made prior to and the testimony of other witnesses at the hearing. Wilkins did not deny S.O. access to a bathroom causing her to wet herself.

Mishandling of Funds

45. A major focus of this hearing concerned Petitioner's allegations at section G of the November 6, 2012, termination letter. At this section, Petitioner alleges Wilkins mishandled funds in violation of School Board Policy 6610, relating to internal funds, and 6152, relating to student fees, fines, and charges. However, in order to understand how these rules apply in the instant matter, it is necessary to review several sections of the Internal Funds Procedure Manual referenced at School Board Policy 6610A, as well as School Board policies related to student and outside organizations.

Internal v. External Funds

Internal Accounts Procedure Manual

46. In general, the Internal Funds Procedure Manual (referred to herein as the "Manual") outlines how "internal funds" are to be handled at the school level. Additionally, the

Manual distinguishes between the handling of "internal funds" as opposed to "external funds."

Internal Funds Defined

47. Internal funds are defined in the Manual as follows:

Internal Funds are defined as all monies collected and disbursed by school personnel within a school, for the benefit of the school, or a school sponsored activity. Funds relating to all school-sponsored functions or activities are to be accounted for within Internal Funds. (emphasis added).

Internal Funds . . . are considered unbudgeted public funds under the control and supervision of the District School Board. All funds handled by District employees shall be included in and become part of Internal Funds, unless accounted for in the District level accounting system. . . .

School Internal Funds shall be expanded [sic] for the purpose for which they were collected and in accordance with the provisions of this [M]anual. Florida Statutes, State Board Administrative Rules and the School Board of Brevard County Bylaws, Rules & Policies are the governing requirements and must be complied with by all and, in case of conflict, will take precedence over this [M]anual. (emphasis added).

External Funds Defined

48. No School Board policy mentions "external funds"; therefore, there is no conflict with any School Board policy as to how those funds are addressed in the Manual.

49. External funds are defined in the Manual as follows:

The monies arising from activities or projects conducted or sponsored by outside organizations, or for which such organizations are exclusively responsible, are monies of the organization and are not school monies, even though the activities may be held on school premises. These monies are not subject to deposit or accountability as school monies; such funds are not internal funds, unless they are donated to the school for specific or general purposes. (emphasis added).

50. External funds may be raised by organizations under several different names, examples include "outside organization," "PTA," "parent or civic groups," or "booster parents." There is no differentiation in the School Board policy or the Manual as to how, or if, these groups differ in anything but name or whether they may be treated differently by the District or a school. For instance, there is no distinction between a "booster" organization and one that calls itself a "parent" organization. In particular, there is no requirement that an organization be a 501(c)(3) organization under the Internal Revenue Code. Often these groups are referred to in the Manual and in School Board policy as merely "outside," "parent," or "cooperative" organizations.

Cooperative Organizations

51. Cooperative organizations, under whatever name, are required to file annual reports with the school. "All

organizations operating in the name of the school, which obtain monies from the public, shall be accountable to the District for receipt and expenditure of those funds, in the manner prescribed by the District."

52. Section H(1) of the Manual states that "the District prefers that the cooperative (or support) organizations be accounted for in the benefitting school's internal funds." The Manual also recognizes, "if the cooperative organization chooses not to be accounted for in the school's internal funds, the organization is required to provide (annual) information to the District as outline below." (emphasis added).

53. If an organization chooses not to account for all its funds in a school's internal account, there is no restriction in any School Board policy, the Florida Manual (discussed below), or the Internal Funds Procedure Manual on how that organization "holds" its funds, as opposed to accounting for them. For example, the cooperative organization may have its own bank accounts--checking, savings, money market, etc. It may hold some funds in cash to use as a change or a petty cash fund. Or, it may place the funds with the Brevard Schools Foundation or in the school's internal fund.

54. Section H of the Manual provides examples of types of cooperative organizations and requires an annual report from each that must be provided to the school (principal) by August 31 each

year. A sample form is provided at A20 of the Manual.

Information required includes financial information on all accounts, total funds raised, itemized expenditures, and total expenditures.

55. Section H(4) of the Manual states that the "District recognizes and appreciates the service and assistance provided by the organizations. Cooperation between schools, the District, and cooperative organizations is encouraged."

56. Further, section H(5) of the Manual provides that "it is not the intent of the District to regulate these

organizations. However, completing the Cooperative Organization Annual Report complies with the requirement that these organizations are accountable to the District for receipts and expenditures since they operate in the name of the school."

(emphasis supplied) These organizations must operate according to School Board Policies 9210 and 9211, relating to "Parent Organizations" and "Parent Organizations, Booster Clubs, and Other Fund-Raising Activities," respectively. Cooperative organizations are required to keep an itemized account of monies collected and expended verified by two signatures. This section also provides that an organization may not have cash withdrawals unless approved by the principal; however, reading section H as a whole, this would only apply to funds held in the internal account of the school over which the principal has

responsibility, as it is not the intent of the District to regulate these organizations, if they choose not to be accounted for in the school's internal fund. In other words, the District recognizes that neither it, nor its employees, regulate cooperative organizations and that these organizations may have external funds.

57. Section H(13) of the Manual specifically provides that cooperative organizations do not have to use the internal account, that the District does not intend to regulate these organizations, and that the principal would not have control over outside accounts, such as those at the Foundation, in a bank, or held in cash. The cooperative organization must retain backup documentation for each bank transaction. Again, it is contemplated that these organizations may have outside accounts, and there is no restriction on what type of account they may have or how they otherwise choose to hold their funds.

58. Principals are required to have on file, for each cooperative organization, its bylaws, corporate charter, the Cooperative Organization Annual Report form, and Internal Revenue Tax Exemption Status Determination, if any, as there is no requirement for an organization to get a determination letter from the IRS. Section H(2) of the Manual merely indicates that these organizations "may" be recognized as exempt from income taxes by the IRS.

Participation by Employees

59. Neither School Board policy nor the Manual prohibits employees from handling funds. However, if a School Board employee, in his or her capacity as an employee, is involved in the collection of monies or merchandise for resale, the funds are defined as internal funds. For example, a teacher collecting money from students for a school-sponsored field trip would be required to deposit the funds into the internal account.

60. Activities in which outside or cooperative organizations may engage do not preclude participation of a District employee, if the employee is not an agent or is not in pursuit of his or her responsibilities for the District. For instance, a teacher may work a concession stand at a football game as a member of the Parent Drama Organization, and the funds would remain those of the organization until the organization decided to donate them to the school's internal fund for the Drama Club, because the School Board employee is not working at the concession stand in his or her capacity as a School Board employee. The employee is working the concession stand as a member of the Parent Drama Organization--membership in which is encouraged by School Board policy.

Financial and Program Cost Accounting and Reporting for Florida
Schools Manual ("The Florida Schools Manual")

61. The Florida Schools Manual provided by the Florida Department of Education addresses cooperative activities. These activities are defined as those "in which the school participates with outside groups such as the P.T.A. or booster clubs." These activities, which may be held on or off campus, will usually take the form of fund-raising events, such as carnivals and food sales. The Florida Schools Manual requires that the activities be approved by the principal and be beneficial to the students. Further, the manual requires that District procedures be followed to provide for appropriate accounting for funds and compliance with District policies and those provided in the Florida Schools Manual.

62. Other than this paragraph, the Florida Schools Manual does not address "external funds" at all.

School Board Policies

Policy 6610 - Internal Accounts

63. School Board Policy 6610 provides for the collection, receipt, safekeeping, and disbursement of funds to and from a school internal account. It specifically provides that wages or supplements may not be paid to any employee from internal funds, except as provided by the School Board. Fundraising by student organizations is addressed at section E of the policy. Funds

received by a parent-teacher group or other cooperative organization are external funds, unless donated to the school. Therefore, this rule recognizes that when receiving funds from students at school, a parent-teacher group must provide a parent member, rather than a student or School Board employee, to receive the funds. Otherwise, if a parent-teacher group (outside or cooperative organization) uses a student or employee for the collection of funds at school, the funds must be deposited into the school's internal account.

64. Depending on whether funds below \$200 can be adequately safeguarded, bank deposits are required to be made within three to five business days of receipt by a school's internal fund.

Policy 6152 - Students Fees, Fines, and Charges

65. Depending on whether funds below \$100 can be adequately safeguarded, this policy provides that student fees, fines, and charges collected by members of the staff are to be turned into the bookkeeper (for deposit into the internal account) within one to three business days of receipt. These charges include the cost of loss or repair to damaged equipment. The only other fees associated with the band program and authorized by the School Board are for uniform and instrument rental.

Policy 5830 - Student Fund-Raising

66. School Board Policy 5830 defines "student fund-raising" as student solicitation and collection of money in exchange for

tickets, papers, or goods or services. This policy applies only to student organizations granted permission to solicit funds. Specifically not included in this definition is when a parent or other member of an outside organization collects the funds, even if students are doing something in exchange, such as a car wash. Further, this rule does not reference parent or other cooperative organizations supporting school or student activities; although it does reference the support schools can provide other community organizations, through activities such as a canned food drive.

Policy 9210 - Parent Organizations

67. School Board Policy 9210 states in pertinent part, that "The Board supports all organizations of parents whose objects are to promote the educational experiences of District students." (emphasis added).

68. This policy requires that the principal approve any new parent organization prior to organizing. The policy also requires District employees to treat members of these organizations as interested friends and supporters of public education. The policy encourages staff members to join these organizations. Finally, School Board Policy 9210 provides that the School Board may withdraw its recognition of the organization.

Policy 9211 - Parent Organizations, Booster Clubs,
and Other Fund-Raising Activities

69. Through this policy the School Board expresses its appreciation to these organizations, whose efforts enhance the educational experience of District students and which are not provided for by the School Board. School Board Policy 9211 outlines the expectations of the School Board for parent organizations, booster clubs, and other fund-raising activities. The expectations include: open membership to District staff and community members; cooperate with the principal and abide by School Board policies. These organizations are required to provide their by-laws to the principal. These organizations may not donate to another organization from their funds, unless the money was raised for that purpose (for instance, sponsoring a team in the Relay for Life Walk).

70. School Board Policy 9211 requires that these organizations complete a facility use agreement annually. They are required to provide goals annually to the principal (part of the Cooperative Organization Annual Report). The principal (or a designee) is required to approve fund-raising activities. However, employees of the District are not permitted to sign on any group's checking account. And, these organizations may not use the District's sales tax exemption number.

Policy 9230 - Gifts, Grants, and Bequests

71. School Board Policy 9230 recognizes the Brevard Schools Foundation (the "Foundation") as the District's sole non-profit organization established to receive and disburse contributions to the schools. The policy states that all donations over \$250 should be funneled through the Foundation, so that charitable tax documentation can be supplied to the donor. The policy recognizes that equipment may be purchased by a parent organization for use in a school or at an event. Although this policy does not address a school's internal account, it does not prohibit donations directly to the internal account from an outside organization.

Summary

72. Internal funds are those collected by students or District staff in the performance of the duties for the School Board.

73. External funds are those funds raised or collected by the members of a cooperative organization. The funds are neither handled by students nor by District staff in the performance of their duties. While some of these funds may have to be remitted to the internal account for specific purposes, such as instrument or uniform rental in the case of a band, the cooperative organization can hold the remainder of the funds in any manner it deems appropriate. These funds may not be deposited into the

internal account until the cooperative organization approves the donation.

Section G Allegations

74. The allegations at Section G may be broken down into several categories: collection, receipt, holding, and disbursement of funds; door prizes; payment for writing music and preparation of marching drills; and missing money.

The Collection, Receipt, Holding, and Disbursement of Funds

75. Petitioner alleges that Wilkins maintained two separate accounts for school-based funds. One Petitioner alleged was properly maintained as a school-based account, and the other was a separate unauthorized cash-based account with a separate receipt book. Therefore, Petitioner alleges Wilkins violated School Policies 6610 and 6152. As outlined below, Petitioner is mistaken.

76. Pace was the primary witness for Petitioner on issues concerning the handling of funds. Pace based many of her conclusions about whether the Band Parents Association could maintain outside accounts on what Tuttle told her and her understanding of "booster" organizations. Tuttle testified that the Band Parents Association was no longer a "booster" organization; however, he recognized that he cannot control what the Band Parents Association does with its money--whether the Association donates the funds to the school's internal fund or

keeps it in external accounts. He can only control the money that "comes through my director and my bookkeeper." There is no distinction in School Board policy or in the Manual that a cooperative organization that has the word "booster" in its name is any different from a cooperative organization that does not. Therefore, Pace's conclusion that the Band Parents Association could not maintain outside accounts, including a petty cash fund, is incorrect.

77. Even before organizational changes, the Band Parents Association at Heritage never used the word "booster" in its name. It complied with all the requirements in the Manual relating to cooperative organizations, as well as School Board policies relating to parent organizations. It obtained recognition from Tuttle and provided him with its by-laws. It obtained permission for all fund-raising activities. It maintained various accounts with the Foundation and at one time had its own bank account as well as a change and petty cash fund. Members of the Band Parents Association raised funds from fund-raising events, as well as handled money from students. The Band Parents Association issued monthly financial statements and filed the required Cooperative Organization Annual Report.

78. Although Tuttle acknowledged that he cannot control what the Band Parents Association or other cooperative organization does with their money, Pace understands the

interplay among the various adopted School Board policies and the Manual. She does not, however, understand the difference between "internal funds" and "external funds." As such, Pace does not have an appreciation for the District's policy articulated in the Manual that the District, including its personnel, cannot tell cooperative organizations, such as the Band Parents Association, how to handle their money.

79. While it is true that School Board policy requires a cooperative organization to obtain a principal's permission to organize, once that permission is granted the principal may not "regulate" the organization beyond the authority set forth in School Board policy and the Manual, such as obtaining permission prior to holding a fund-raiser. There is no authority for a principal to require a cooperative organization to place all its funds in a school's internal account. To the contrary, the Manual recognizes that cooperative organizations, by whatever name they choose to use, may maintain outside accounts as long as the Cooperative Organization Annual Report is filed. Further, there is no requirement in School Board policy or the Manual that in order to maintain outside accounts an organization must receive a determination letter from the IRS.

80. For these reasons, two receipts books are not only permitted, but required under School Board policy and the Manual. For audit purposes, the official receipt book may only be used

for monies deposited into the internal account. Because of the other various accounts maintained by the Band Parents Association (Foundation, bank, and cash) and because of the requirement that any cooperative organization that does not use the internal account for all its funds must maintain proper records, a second receipt book was necessary.

81. The various Band Parent Association accounts and the band's school internal account were always managed by the Band Parents Association, not by Wilkins. Until Ms. Martin resigned as treasurer of the Band Parents Association, Wilkins never handled money. The money he collected from students after Ms. Martin resigned, Wilkins properly receipted by using the official receipt book for the school's internal account.

82. Based on the testimony and the exhibits entered into evidence, neither Wilkins nor the Band Parents Association did anything improper concerning the collection, receipt, holding, and disbursement of funds. Petitioner has failed to prove the allegations relating to these issues.

Cash Box

83. Petitioner alleges that Wilkins, rather than the Band Parents Association, maintained an unauthorized cash account maintained by a band parent for use at his sole discretion without any oversight by a booster or other parent group. Petitioner is mistaken.

84. Tuttle received an anonymous letter in September concerning a cash box maintained somewhere with the "band." Even though he believed that the band and the Band Parents Association could not maintain outside accounts, he decided to wait until things calm down with other allegations against Wilkins before dealing with this issue.

85. The Band Parents Association maintained its records online for use by students and parents. Further, the Band Parents Association provided monthly reports of expenditures and all its accounts, including the cash account, to parents and made those reports available to Tuttle, Ms. Lucas and Mr. McGrew (Mr. McGrew, Athletic Director, was the principal's designee for the Band Parents Association and other cooperative organizations). None of these District employees was interested in receiving these monthly reports. The monthly reports were kept in the band room at McGrew's request. Further, the Cooperative Organization Annual Report that the Band Parents Association filed with the school specified the funds in each account (internal fund, bank account, Foundation account, and cash).

86. The Band Parents Association's ability to maintain a petty cash fund pursuant to School Board policy and the Manual is addressed above. Petitioner provided no evidence that this fund was used at Wilkins "sole discretion." Torsiello, Martin, and

Wilkins testified as to the use of these monies by Wilkins and others. Wilkins, who had no physical possession of the funds until Ms. Martin resigned, always had to make a request for the use of these funds and other Band Parent Association funds (such as monies in the Foundation account). Wilkins' request for funds was not always granted; however, if it was, he was required to provide proper documentation in the form of an invoice or receipt just like everyone else.

87. There was no question raised in this proceeding that the money in the cash fund was raised by the Band Parents Association for the benefit of the band. When Wilkins received the money from Ms. Martin, he locked it up. Although it is not clear when he got it, he eventually turned it in to the bookkeeper, Ms. Lucas. Whether he should have turned the money over to her or not, is still in question, because there was no vote by the Band Parents Association to donate that money to the internal fund, merely a direction by Ms. Martin to Wilkins.

88. Moreover, it appears that the \$680 he turned over to Ms. Lucas has not been available for use by the band since Wilkins turned it in. Ms. Lucas testified that almost eight months after Wilkins turned in the money, the \$680 was still in the school's safe. She was still waiting for instructions on what to do with it. Ms. Lucas' actions are contrary to the requirement that all funds over \$200 be deposited within three

days in a financial institution. As of the date of her testimony, the band still did not have use of these funds for any purpose.

89. Based on the testimony and the evidence in this proceeding, Petitioner proved that Wilkins did not turn in the money within the time prescribed by School Board policy; however, Petitioner failed to establish that that provision applies as Wilkins did not collect this money from students and, further, the money was not "donated" by the Band Parents Association as required by the Manual. Petitioner also failed to establish that the money in the cash box was for use by Wilkins at his "sole" discretion and without oversight from the Band Parents Association. Therefore, Petitioner has failed to prove that Wilkins did anything in violation of School Board Policy 6610 and 6152 concerning the cash box.

Door Prizes

90. Petitioner alleges that Wilkins independently authorized a \$50 door prize from the Band Parents Association cash box. Petitioner is mistaken.

91. The Band Parents Association, not Wilkins, authorized door prizes for every band parent meeting in order to increase participation. After the first year, parent attendance and participation at these meetings (where fundraisers for the band were organized) fell off. Even though the students were in

attendance, their parents would sit in the car in the parking lot during the meetings. After the door prizes were authorized, parent participation increased from a dozen or so to over 100 at each meeting, as did parent participation at other events, including fund-raising activities and chaperoning trips.

92. Based on the testimony of the witnesses, Petitioner has not proven that Wilkins, rather than the Band Parents Association, independently authorized any door prize.

Payment for Writing Music and Preparation of Marching Drills

93. Petitioner alleges that Wilkins paid himself "a salary above and beyond the salary and supplement you have regularly received as the Band Director at Heritage High School, out of the cash box, for summer band camp: \$2,250 in 2011 and \$3,000 in 2012."

94. Torsiello and Wilkins testified that the payments were not for holding a band camp, but for writing music and preparing marching drills for the band to perform during football season. Although the payment was based on student attendance during band camp, it was not later increased when more students signed up for band following band camp and, consequently, adjustments had to be made to the music and drills.

95. Tuttle testified that band directors are not paid for writing music or preparing marching drills. He acknowledged that other bands pay substantial fees for this service. He believed

that Wilkins should have performed this service gratis since he possessed the special skills necessary to write and choreograph the band's music. He also testified, however, that he had no problem with Wilkins performing this service and being paid to do it by the Band Parents Association, so long as the school did not have to cover the fees.

96. Although Tuttle stated that he did not know of the arrangement between the Band Parents Association and Wilkins, Torsiello testified that she discussed and exchanged email on this issue with Tuttle prior to the Band Parents Association entering into the agreement with Wilkins for the school's second year. Wilkins thought Tuttle was aware that the Band Parents Association paid him for this service, in part due to Tuttle's acknowledgment in his evaluation that he knew Wilkins was writing the shows, something that is not part of the duties for his position with the School Board, thus saving the school or the Band Parents Association money.

97. Torsiello testified that she solicited bids and researched providers on the internet, but that Wilkins had the best price. The Band Parents Association approved payment to Wilkins to write the music and prepare the drill plans each year.

98. Pace testified that she thought this practice was unethical, because of Wilkins position. However, Petitioner did

not allege an ethics violation (i.e. self dealing) as it relates to Section G of the termination letter.

99. Based on the testimony and the evidence presented, Petitioner has failed to prove that writing music and preparing marching drills was part of Wilkins official duties. As such, Petitioner failed to prove that the Band Parents Association paying Wilkins for this service violated School Board Policies 6610 and 6152, the only policies cited by Petitioner relating to these allegations.

Missing Money

100. Petitioner alleged that Wilkins was unable to explain the \$120.35 shortage of funds from the cash box turned over to him by Ms. Martin, and the amount Wilkins turned in to Ms. Lucas, the school bookkeeper. Further, Petitioner alleged that after a review of the records, "at least \$621.73 (of other funds) is unaccounted for."

101. At hearing, Pace acknowledged that Wilkins did not steal any money. While Petitioner never attempted to present any evidence about the \$621.73 that was "unaccounted for," there was testimony concerning the \$120.35. Of that amount: \$50 went to the door prize discussed above; \$20 was used by the Band Parents Association for change for a car wash fund-raiser; \$50 was used by the Band Parents Association for change for a rummage sale fund-raiser; and \$.35 was found on Wilkins' desk.

102. Based on the testimony of witnesses, Petitioner has failed to prove any Band Parents Association money or any other (internal account) money was stolen by Wilkins or otherwise unaccounted for.

Wilkins' Demeanor

103. Although Petitioner did not charge Wilkins with failure to maintain honesty in professional dealings under School Board Policy 3210, Petitioner accuses Wilkins of making contradictory statements and being evasive and less than truthful concerning money issues throughout section G. Based on his testimony at hearing and that of other witnesses, in particular Torsiello, Wilkins simply did not know how the funding system was put in place by the Band Parents Association, because he never handled money.

104. The Band Parents Association did not even give him a password to access the computerized records, because it would have required giving him access as a site administrator and his knowledge of computers is limited. Further, Wilkins had a limited understanding of the various accounts and how they were used by the Band Parents Association. He, as well as Pace, Tuttle, and Lucas also had a limited understanding of the interplay between the various School Board policies relating to the various types of accounts and the Manual. In short, Wilkins did not know enough about the financial records to hold a

meaningful conversation about money issues, and this lack of ability was confused by Petitioner with evasiveness.

The May 3, 2013 Additional Charge

105. B.O. stated that the events alleged in the Additional Charge occurred more than once and that they occurred prior to her initial complaint. Wilkins denied the allegations.

106. In September 2012, B.O. told Tuttle and Mullins that Wilkins did not touch her. B.O. also told the Palm Bay Police Department that Wilkins did not touch her. On September 21, 2012, B.O. sent Ms. Andahar, a Department of Children and Families investigator, an e-mail in which B.O. stated that Wilkins did not touch or hug her.

107. In an e-mail to Ms. Andahar from Ms. O., B.O.'s mother, dated October 9, 2012, Ms. O. informed Ms. Andahar that B.O. had told her "lately" that Wilkins has hugged her. Ms. Andahar forwarded the e-mail to Ms. Alford, head of security for the School District. However, testifying at hearing, B.O. does not remember telling her mother this. The School District never investigated the allegation.

108. In an e-mail dated December 29, 2012, B.O. complained that no one would do anything about Wilkins, because he did not touch her.

109. Based on the testimony of credible witnesses that "Mr. Wilkins is not a hugger," as well as B.O.'s admitted goal of

facilitating Wilkins' termination, the evidence supports that Wilkins did not subject B.O. to the conduct alleged in the Additional Charge.

Summary

110. Following the initial complaint(s) in September 2012 and his response, Wilkins was placed on a Professional Development Assistance Plan (PDAP). Tuttle continued to receive complaints concerning matters that predated the PDAP after it was approved. He and Wilkins worked through those complaints which are documented in the two Summaries of Conference. Tuttle noted that Wilkins was implementing the changes contemplated by the PDAP and that he had received positive remarks from parents. However, "a group of parents were out to get him and they were going to continue drumming up, pulling things up . . . until they did." When the media "circus" started in October 2012, the "investigations" were taken away from Tuttle and assumed by Pace and Mullins. No complaints were produced on which these "investigations" were premised. From that point forward, the "investigations" were neither fair to Wilkins, nor were they based on fact.

CONCLUSIONS OF LAW

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

action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

Authority to Terminate

112. The Brevard County School Board is the duly constituted governing body of the School District of Brevard County. Sec. 4, Art. IX, Fla. Const.; §§ 1001.30 and 1001.33, Fla. Stat. A district school board has the statutory authority to adopt rules governing personnel matters pursuant to sections 1001.42(5), 1012.22(1), and 1012.23, Florida Statutes.

113. In Florida, the district superintendent has the authority to make recommendations for dismissal of school board employees, and the school board has the authority to suspend without pay school board instructional staff with professional service contracts for "just cause." §§ 1001.42(5), 1012.22(1)(f), and 1012.33(6)(a), Fla. Stat. A superintendent also has the authority to suspend instructional staff and other employees with pay "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." § 1012.27(5), Fla. Stat.

114. Only the school board has the authority to suspend employees without pay or terminate them. Once the school board has acted in approving charges, the superintendent is not free to amend charges at will without board approval. § 1012.22(1)(f).

Burden of Proof

115. 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 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990); § 120.57(1)(j).

116. 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").

Basis for Discipline

117. Just cause is defined to include misconduct in office. See § 1012.33(1)(a).

118. Florida Administrative Code Rule 6A-5.056 concerns suspension or dismissal of instructional personnel. The rule provides in pertinent part:

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

- (a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6B-1.001, F.A.C. [this rule has been transferred to rule 6A-10.080];
- (b) A violation of the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C. [this rule has been transferred to 6A-10.081];
- (c) A violation of the adopted school board rules. . . .

119. "As shown by careful reading of Rule 6B-4.009 [this rule has been transferred to rule 6A-5.056], the offense of misconduct in office consists of three elements: (1) A serious violation of a specific rule that (2) causes (3) an impairment of the employee's effectiveness in the school system." Miami-Dade Cnty. Sch. Bd. v. Regueira, Case No. 06-4752 (Fla. DOAH Apr. 11, 2007). For ease of reference, the second and third elements can be stated as one: "resulting [in] ineffectiveness." Id.

Charge Required

120. Respondent may only be disciplined for matters alleged in the charging document provided to him. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996) (reference to the statute without supporting factual allegations not sufficient to place respondent on notice of the charges against him); Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983) (Jorgenson, J., concurring). Thus in this case, the only conduct that is at issue is the conduct identified in the November 6,

2012, letter to Wilkins. The Additional Charge was not properly brought.

Charges

Paragraphs A-F

121. Several of Petitioner's factual allegations against Wilkins are based on the same violations of School Board Policy 3210. The letter of November 6, 2012, states, in pertinent part, the following:

Your actions as described in paragraphs A, B, C, D, E, and F above violate the Brevard Public School Code of Ethics, Policy 3210, and The Code of Ethics And Principles of Professional Conduct of The Education Profession In Florida by failing to protect the students from conditions harmful to learning. You have jeopardized the students' mental and physical health and safety, by intentionally exposing students to unnecessary embarrassment or disparagement. These actions constitute misconduct in office and conduct unbecoming an instructional employee.

122. The Brevard School Board Policy 3210A is in substance identical to the Principles of Professional Conduct for the Education Profession in Florida found at rule 6A-10.081 (formerly, rule 6B-1.006).

123. Petitioner failed to identify the sections of either School Board Policy 3210A or rule 6A-10.081 that Respondent allegedly violated by the appropriate designation. Instead, Petitioner chose to identify the alleged violations by the

content of the policy or rule. Those designations correspond to the following sections:

School Board Policy 3210, Standards of Ethical Conduct

A. An instructional staff member shall:

1. 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.

* * *

5. not intentionally expose a student to unnecessary embarrassment or disparagement.

Rule 6A-10.081, Principles of Professional Conduct for the Education Profession in Florida

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

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

* * *

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

Section G

124. The factual allegations of this section allege violation of School Board Policies 6610 and 6152, outlined below. Section G also alleges violation of school rules (but none was produced), as well as the general allegation of misconduct in

office. There was no alleged violation of School Board Policy 3210, the Standards of Ethics, concerning personal gain, self-dealing, or maintaining honesty in professional dealings based on the allegations in Section G.

125. School Board Policy 6610, Internal Accounts, provides in pertinent part, the following:

Internal funds are those used by a school/department which are not under the direct supervision of the District through regular county school budget sources. They are administered by each individual school/department in accordance with policies of the Board, Administrative Rules, Florida statutes, and procedures adopted by the Board.

(The definition for Internal Accounts does not reference Parent/Booster Accounts. Parent/Booster Accounts are not administered by the school/department, but by the Parent/Booster organization.)

A. Uniform Records and Accounts

Department heads and the principal of each school shall be responsible for the safe and proper handling of all monies collected and disbursed within the school and shall keep all accounts in accordance with regulations of the Board and State Board of Education and the Internal Accounts Procedures Manual. A complete and accurate record of each and every transaction and a suitable classification (chart of accounts) of all receipts and expenditures shall be kept on approved forms.

B. Receipts of Monies Collected

All funds collected within the school or department for any purpose shall be deposited

with the principal, department head, or designee, together with such substantiating records as may be required.

* * *

D. Expenditures

[This refers to assets in the possession of the school (bookkeeper).]

4. Expenditures Prohibited from Internal Funds

* * *

d. Wages or supplements to any persons engaged in regular part-time or temporary employment, except as provided by the Board.

* * *

E. Fund Raising

All fund-raising projects and activities promoted by the school or any group within or connected with or in the names of the school, are to contribute to the educational experience of the students and shall not be in conflict with Board policies or the overall instructional program. Each fund-raising project using students to solicit must have the approval of the principal.

1. Solicitation by Students

Personal or house-to-house solicitation by students is forbidden in all cases except as defined below:

* * *

f. Students may only be requested to bring money to school for parent-teacher groups which will provide one of its parent members to receive membership dues.

2. Fund Benefit

Funds collected for the benefit of a specific student organization shall be expended for the benefit of said organization unless otherwise designated in minutes of the organization. . . .

126. School Board Policy 6152, Student Fees, Fines, and Charges provides, in pertinent part, the following:

Any fees, fines, and/or other charges collected by members of the staff that total more than \$100 or that cannot be safeguarded shall be turned in to the bookkeeper within one (1) business day after collection. Any fees, fines, and/or charges collected by members of the staff that total less than \$100 and that can be safeguarded shall be turned in to the bookkeeper within three (3) business days after collection. A place such as the building safe or a locked file cabinet shall be used for securing these monies until they are deposited with the bookkeeper. At no time shall any staff member place public monies in his/her own banking accounts or commingle public monies with their own. Except in cases of extenuating circumstances, i.e., the inability to access the secure place in the building, public monies should not be taken to a person's place of residence. (emphasis added).

The Amended Charge

127. Petitioner based the factual allegations against Wilkins in its amended charge on violation of School Board Policy 3210, alone. There was no reference to which part of School Board Policy 3210 was at issue in the amended charge and no reference was made to rule 6A-10.081, or to misconduct in

office or conduct unbecoming a member of an instructional employee.

Allegations

A. Inappropriate Comments of a Sexual Nature to Students

128. Based on the Findings of Fact contained herein, Petitioner failed to prove Wilkins made the alleged comment about oral sex. Petitioner failed to establish that Wilkins violated School Board Policy 3210 or rule 6A-10.081, or that his actions constituted misconduct in office and conduct unbecoming an instructional employee with respect to this allegation.

B. Mistreatment of Students

Exercises

129. Based on the Findings of Fact contained herein, Petitioner failed to prove Wilkins failed to properly supervise students performing exercises as a consequence for violating a rule. Petitioner failed to establish that Wilkins violated School Board Policy 3210 or rule 6A-10.081, or that his actions constituted misconduct in office and conduct unbecoming an instructional employee concerning this allegation.

Bus/Bathroom

130. Based on the Findings of Fact contained herein, Petitioner failed to prove Wilkins failed to allow S.O. to use the restroom causing her to wet herself on the bus. Therefore, Petitioner failed to establish that Wilkins violated School Board

Policy 3210 and rule 6A-10.081, or that his actions constituted misconduct in office and conduct unbecoming an instructional employee with respect to this allegation.

G. Mishandling of Funds

131. Based on the Findings of Fact contained herein:

a. Petitioner failed to prove Wilkins improperly collected, receipted, held or disbursed funds for/from the school's internal account for the band or the external accounts of the Band Parents Association. It can be argued that because Wilkins did not accept the responsibility of personally collecting, receipting, holding, or disbursing funds, that he would be personally responsible for any discrepancies in the amount of funds collected, held and disbursed for whatever purposes they were intended. However, the School Board did not prove that Wilkins misused any funds or appropriated them to his personal use or for the use of others who were not entitled to them. Accordingly, any technical violations of the District's policy concerning the handling of school funds are de minimus at most.

b. Petitioner failed to prove the money in the cash box had been properly donated by the Band Parents Association requiring it to be deposited into the internal fund. The cash fund was an external account of the Band Parents Association. The money used from the cash fund while in his possession was used by the Band Parents Association for approved activities (door prizes and

fundraisers), but otherwise it was kept in a locked cabinet. Even if Wilkins were required by School Board Policy 6610 to deposit these funds in the school's internal account, any delay was excusable due to events during this period (various complaints and suspensions) and the fact that he had not dealt with school-related funds while at Heritage High School.

c. Petitioner failed to prove that Wilkins in his sole discretion awarded door prizes at the Band Parents Association meetings, as the door prizes were authorized by the Band Parents Association from its funds to increase parent participation.

d. Petitioner failed to prove Wilkins engaged in any misconduct by receiving payments from the Band Parents Association for writing music and preparing marching drills, in part because these are not duties for which he is employed by the School Board and also because the Band Parents Association approved the payments to him for providing this service. The testimony supported the fact that the Band Parents Association would have considered paying for the choreography and music writing skills of an outsider, but chose to compensate Wilkins, who was skilled in this area at a far reduced rate than the open market would demand.

e. Finally, Petitioner failed to prove that Wilkins stole any money from the cash box or that any other money was missing

or otherwise unaccounted for in the various Band Parents Association accounts.

For these reasons, Petitioner failed to prove that Wilkins violated School Board Policies 6610, relating to Internal Accounts; and 6152, relating to Student Fees, Fines and Charges; or that Wilkins' actions concerning the allegations in section G constituted misconduct in office and conduct unbecoming an instructional employee.

Additional Charge

132. Had it been proper to consider the allegations in the May 3, 2013 Additional Charge, based on the Findings of Fact contained herein, Petitioner failed to prove Wilkins engaged in the conduct with B.O., as alleged. Therefore, Petitioner failed to establish that Wilkins violated School Board Policy 3210 concerning this allegation.

133. Finally, the recitation by Petitioner of prior disciplinary actions concerning Respondent, especially those from other school districts remote in time from the current allegations, was not proven to be relevant to the charges brought here. No evidence was produced by Petitioner, other than the fact of the prior disciplinary actions, that they were close enough in time to the charges herein or that they demonstrated a pattern of misbehavior by Respondent that should have any bearing on the outcome of this matter. Accordingly, they carry no weight

with respect to the allegations giving rise to this matter and should not form the basis for any discipline herein.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Brevard County School Board, dismiss all charges against Respondent, James B. Wilkins. Further, it is RECOMMENDED that Petitioner, Brevard County School Board, reinstate Respondent, James B. Wilkins, with full back pay and benefits.

DONE AND ENTERED this 1st day of November, 2013, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.