

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL BOARD OF DADE COUNTY,)
FLORIDA,)
)
Petitioner,)
)
vs.) CASE NO. 93-3963
)
KENNETH INGBER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on October 22, 1993, in Miami, Florida.

APPEARANCES

For Petitioner: Madelyn P. Schere, Esquire
School Board of Dade County
1450 Northeast Second Avenue, Suite 301
Miami, Florida 33132

For Respondent: William DuFresne, Esquire
DuFresne and Bradley, P.A.
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Miami, Florida 33129

STATEMENT OF THE ISSUE

The issue presented is whether Respondent is guilty of the allegations contained in the Notice of Specific Charges filed against him, and, if so, what action should be taken against him, if any.

PRELIMINARY STATEMENT

By correspondence dated July 8, 1993, Petitioner notified Respondent that it was suspending Respondent from his employment and initiating dismissal proceedings, and Respondent timely requested a formal hearing regarding that determination. This cause was thereafter transferred to the Division of Administrative Hearings to conduct the formal hearing. Petitioner filed its Notice of Specific Charges on July 23, 1993, and clerical errors in that Notice were corrected at the commencement at the final hearing in this cause without objection.

Petitioner presented the testimony of Lillian Coplin, Edith Norniella, Glenda Harris, and Joyce Annunziata. Respondent testified on his own behalf and presented the testimony of Yvonne Perez, Howard Fabian, Gerry Di Roberto, and Shirley Ingber. Additionally, Petitioner's Exhibits numbered 1-41 were admitted in evidence.

Both parties submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent Kenneth Ingber has been employed by Petitioner and assigned under a continuing contract to West Little River Elementary School.

2. During Respondent's 23 years of employment by Petitioner, he resigned/retired twice. He was rehired by Petitioner after each resignation, the last rehiring taking place for the 1985/86 school year. His then-principal, Glenda Harris, hired him with the knowledge that he was an admitted recovering alcoholic. He told her that he was under control. She told him that she would give him a chance but that he would have to meet the expectations that all teachers have to meet.

3. From the 1985/86 school year through the 1990/91 school year, Harris rated Respondent acceptable on his annual evaluations; however, during the 1989/90 school year, Respondent had an attendance problem when he began drinking again. Harris tried to get Respondent to obtain help, but he felt he could do it on his own. He deteriorated during that year but improved during the 1990/91 school year.

4. During the time that Harris supervised Respondent, she had a problem with his not having lesson plans. He felt that he did not need them.

5. For the 1991/92 school year, Respondent came under the supervision of Principal Lillian Coplin. Coplin was never advised of Respondent's alcoholism.

6. On January 29, 1992, Respondent left school early without permission. He also failed to attend a Global Awareness Workshop scheduled for that day. Coplin discussed these failures with him on January 30, 1992.

7. On January 31, 1992, Respondent arrived at work late and left early. The official working hours are from 8:15 a.m. to 3:20 p.m., but Respondent only worked from 9:47 a.m. to 2:50 p.m. On February 7, 1992, Coplin directed Respondent to observe the working hours set by the collective bargaining agreement between the Dade County Public Schools and the United Teachers of Dade (Labor Contract).

8. On February 27 and March 2, 1992, Respondent failed to have lesson plans.

9. On February 27, 1992, Assistant Principal Edith Norniella observed Respondent smoking outside of his classroom, but within view of his students. Prior to that date, Norniella had observed him smoking on school grounds on August 30, 1991, November 14, 1991 and February 18, 1992. On each of these occasions, she told him not to smoke on school grounds. Coplin had also told him several times not to smoke on school grounds.

10. On March 3, 1992, Coplin directed Respondent to adhere to Petitioner's non-smoking rule. Norniella saw him smoking on school grounds at least two more times after that.

11. On March 3, 1992, Coplin also directed Respondent to develop lesson plans according to the Labor Contract.

12. On March 27, 1992, all teachers were given a site directive to turn in parent logs, gradebooks, and daily schedules before leaving for spring-break on April 3, 1992.

13. On April 3, 1992, Respondent reported to work at 9:25 a.m. in spite of the directive given on February 7, 1992. On that same date, Respondent also failed to comply with the directive to turn in parent logs, gradebooks, and daily schedules. Moreover, by April 22, 1992, he still had not complied with that directive.

14. On April 22, 1992, a conference-for-the-record was held with Respondent to discuss his attendance problems and other failures to comply with School Board rules, Labor Contract provisions, and administrative directives. During the conference, he stated that he lost the gradebook but that the principal would not like it anyway. He also admitted that he did not maintain a parent log. Respondent was warned that any further violation of directives would be considered gross insubordination. He was also issued a written reprimand and directed to comply with School Board rules, Labor Contract provisions, and site directives. He was advised of the School Board's Employee Assistance Program (EAP), a program which offers assistance to employees in overcoming personal problems that may be affecting their work. Respondent declined the assistance and treated the matter as a joke by posting the EAP referral on his classroom door.

15. On May 27, 1992, Respondent was formally observed in the classroom by Norniella, using the Teacher Assessment and Development System (TADS). Respondent was rated unacceptable in preparation and planning and in assessment techniques. He did not have lesson plans, student work folders with tests, or a gradebook. It was impossible to assess his students' progress.

16. Respondent was given a prescription to help him correct his deficiencies. Prescriptions are activities which the employee is directed to complete. He was directed to write detailed lesson plans and to turn them in to Norniella weekly. He was to prepare two teacher-made tests and submit those to Norniella for review. He was also to complete some activities concerning assessment techniques from the TADS prescription manual. His prescription deadline was June 16, 1992.

17. On June 2, 1992, Respondent was wearing a "pocket-knife" on his belt. Both Coplin and Norniella considered the pocket-knife to be a weapon in violation of the School Board rule because, although Respondent did not physically threaten anyone with the knife, the wearing of such a knife was intimidating to students and to Coplin. The matter had come to Coplin's attention through a complaint from the parent of a student. In addition, both administrators believed that wearing a knife set a bad example for the students and did not reflect credit upon Respondent and the school system.

18. On June 3, 1992, a conference-for-the-record was held to address the knife incident. Respondent was issued a written reprimand and directed to cease and desist from bringing the pocket-knife to school. He was further advised that any re-occurrence of that infraction would result in additional disciplinary action.

19. On June 5, 1992, a conference-for-the-record was held to address Respondent's performance and his future employment status. During the conference, he admitted to not having had a written lesson plan during the May 27 observation. He was told of the Labor Contract provision which requires weekly lesson plans reflecting objectives, activities, homework, and a way of monitoring students' progress. He was also warned that if he did not complete the prescription from that observation, he would be placed on prescription for professional responsibilities and given an unacceptable annual evaluation.

20. On June 19, 1992, a conference-for-the-record was held with Respondent. He had failed to correct his deficiencies and had failed to complete his prescription. Moreover, he still had not turned in his gradebook, parent log, and daily schedule, as directed on March 3, 1992. He was given an unacceptable annual evaluation because of his deficiencies in professional responsibility. Respondent verbally disagreed with that decision stating that the unacceptable evaluation was for simple paper-pushing requirements.

21. The prescription for professional responsibilities required Respondent to review from the faculty handbook School Board policy on grading criteria, to submit his gradebook on a weekly basis to Coplin, to maintain a gradebook and a log of parent conferences, to maintain daily attendance, to submit student assessment records to Coplin for review prior to submission of the nine-week grade report, and to complete the prescription from the May 27 observation by September 15, 1992.

22. Respondent's annual evaluation for the 1991/92 school year was overall unacceptable and was unacceptable in the category of professional responsibility.

23. On September 20, 1992, a conference-for-the-record was held with Respondent because he was still wearing a "pocket-knife" in spite of the prior directive. He was directed not to wear the knife or the knife case. Respondent stated that he would not do as directed.

24. On October 9, 1992, Respondent was formally observed in the classroom by Coplin and was rated unacceptable in preparation and planning and in assessment techniques. He did not have a lesson plan, student work folders, tests, or a gradebook. It would not be possible to evaluate the students' strengths and weaknesses. Moreover, if an administrator were called upon to explain to a parent why a student got a particular grade, the administrator would not have been able to do so.

25. Respondent was prescribed activities to help him correct his deficiencies. He was directed to write detailed lesson plans and to turn them in to Norniella weekly. He was directed to complete specific activities in the TADS prescription manual dealing with lesson planning and assessment techniques and to prepare two teacher-made tests and to submit all to Coplin for review. The prescription was to be completed by October 30, 1992.

26. By November 13, 1992, Respondent was exhibiting a pattern of excessive and unauthorized absences. The absences were unauthorized because he failed to call the school prior to his absences as required by directives contained in the faculty handbook. He was advised that his absences were adversely impacting the continuity of instruction for his students and the work environment. He was given directives to report his absences directly to the principal, document absences upon return to the worksite, and provide lesson plans and materials for use by the substitute teacher when he was absent.

27. On November 13, 1992, it was noted that Respondent had not met the prescription deadline of October 30, 1992. Coplin gave Respondent a new prescription deadline of November 30, 1992. In addition, she made a supervisory referral to the EAP because of Respondent's excessive absences, unauthorized disappearance from work, poor judgment, and failures to carry out assignments.

28. By the end of November, 1992, Respondent had accumulated 21 absences. While he was absent, there were no gradebook, lesson plans or student folders for the substitute teacher. The substitute teacher was told to create a gradebook, lesson plans, and student work folders. All was in order when Respondent returned to work.

29. On December 11, 1992, Respondent was formally observed in the classroom by Norniella and was rated unsatisfactory in preparation and planning, in techniques of instruction, and in assessment techniques. Because his techniques of instruction were also rated unacceptable, Respondent recognized for the first time that his teaching performance was being criticized. He had dismissed the prior criticisms as simply problems with creating a "paper-work trail".

30. Respondent was rated unacceptable in preparation and planning because he did not have a lesson plan. Norniella gave him a chance to turn in the lesson plans the following Monday, but he failed to do so.

31. Respondent was unacceptable in techniques of instruction because he used the same materials and methods for all students regardless of their individual needs. Respondent failed to establish background knowledge before beginning the lesson. The sequence of the lesson was confusing to Norniella. Respondent covered three different subjects (vocabulary, science, and math), all within a period set aside for language arts.

32. Respondent was given a prescription to help correct his deficiencies. He was directed to write lesson plans and to turn them in to Norniella on Fridays. He was to observe a reading/language arts lesson by another sixth-grade teacher. He was directed to maintain at least two grades per week in each subject for each student. He was also directed to complete specific activities in the TADS prescription manual relating to preparation and planning, techniques of instruction, and assessment techniques. He was directed to complete the prescription by January 15, 1993. He failed to complete any of the prescription activities.

33. On January 4, 1993, a conference-for-the-record was held with Respondent to address his performance and future employment. His absences and reporting procedures were also discussed as was his failure to comply with his prescription and prior directives. During the conference, Respondent was rude, agitated, and disrespectful. He yelled at the principal. His behavior did not reflect credit upon himself and the school system. He treated the conference as a joke.

34. As of January 20, 1993, Respondent still had no gradebook. On January 25, 1993, he was notified that upon his return to the school site, there would be a conference-for-the-record to deal with his noncompliance with the directives to maintain a gradebook and to complete his prescription activities.

35. A conference-for-the-record was held with Respondent on March 3, 1993. It was noted that because of his absences, he had failed to meet the prescription deadline on January 15, 1993. Coplin gave him a new deadline of March 11, 1993.

36. Respondent failed to meet the March 11, 1993, prescription deadline. Moreover, he still had not completed his prior prescription for professional responsibility. Because of these failures, Coplin extended the 1992 professional responsibility prescription through June 1993.

37. On March 26, 1993, Respondent was formally observed in the classroom by Coplin and was rated unsatisfactory in preparation and planning and in assessment techniques. While Respondent had some lesson plans, he did not have one for each subject taught during the day. The student folders contained no tests.

38. Respondent was prescribed activities to help him correct his deficiencies. He was directed to develop weekly lesson plans and to submit them on Wednesdays for the principal to review. He was also to complete an assessment techniques activity from the TADS prescription manual and was to submit the activity to Coplin for review. His prescription was to be completed by April 23, 1993.

39. On April 1, 1993, Respondent was placed on prescription for professional responsibilities for failure to comply with School Board rules, Labor Contract provisions, and school site policies and directives concerning lesson plans, student assessment, record keeping, and maintaining a gradebook. He was directed to develop weekly lesson plans for each subject taught and to submit those to the principal for review. He was directed to read Article X of the Labor Contract and to submit a summary to the principal for review. He was directed to review the section of the faculty handbook concerning maintaining a gradebook. He was directed to maintain an updated gradebook with at least two grades per week per subject and to label the grades. He was directed to maintain a parental conference log in the gradebook. He was directed to submit his gradebook to the principal for weekly review.

40. On May 12, 1993, Coplin advised Petitioner's Office of Professional Standards (OPS) that Respondent had failed to comply with the directive of November 13, 1992, concerning procedures for reporting absences. He had been absent on April 13, 16, 23, 27, and May 5, 6, 7, 10, and 11, 1993, without calling the principal in advance. Respondent claims that he called the school secretary at her home before 7:00 a.m. every time he was absent, except for one time. Although the secretary told him he would have to speak directly to the principal, he chose not to call the school when Coplin was there. Calling the secretary does not absolve him from his responsibility to comply with the principal's directive to speak to her personally.

41. On May 19, 1993, Respondent was sent a letter directing him to schedule a conference at OPS. Respondent did not do so. On that same day, Coplin was advised by EAP that EAP was closing Respondent's case due to his noncompliance with the program.

42. Respondent was absent without authorized leave from April 23 - June 17, 1993. Moreover, he had 106 absences for the school year. Nine of these were paid sick leave, and 97 were leave without pay. The school year has 180 student contact days.

43. Because of Respondent's absences and failure to follow leave procedures, Coplin was not able to secure a permanent substitute teacher. Respondent's students were subjected to frequent changes in substitute teachers and a lack of continuity in their education.

44. Respondent's annual evaluation for the 1992/93 school year was overall unacceptable and unacceptable in the categories of preparation and planning, assessment techniques, and professional responsibility. Because of Respondent's absences, the usual conference-for-the-record could not be conducted, and Respondent's annual evaluation was sent to him by mail.

45. Respondent failed to complete all prescriptions given him by Coplin and by Norniella.

46. By letter dated June 15, 1992, OPS notified Respondent that he was willfully absent from duty without leave. He was given an opportunity to provide a written response and was advised that failure to do so would result in the termination of his employment.

47. On July 6, 1993, a conference-for-the-record was conducted by Dr. Joyce Annunziata at OPS. The conference was held to discuss the pending dismissal action to be taken by Petitioner at its meeting of July 7, 1993. During the meeting, Respondent was extremely disoriented, turned his back on Annunziata, did not take the meeting seriously, made irrelevant comments, carried a stuffed purple animal which he talked to and through, and had watery, bloodshot eyes. He also wore his "pocket-knife" to the conference.

48. Petitioner suspended Respondent and took action to initiate dismissal proceedings against him on July 7, 1993.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

50. Section 231.36(4)(c), Florida Statutes, provides that a member of the instructional staff may be suspended or dismissed at any time during the school year for misconduct in office, incompetency, gross insubordination, and willful neglect of duty. Count I of the Notice of Specific Charges filed in this cause alleges that Respondent is guilty of gross insubordination and willful neglect of duty, defined by Rule 6B-4.009(4), Florida Administrative Code, as follows:

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

51. Petitioner has met its burden of proving that Respondent is guilty of gross insubordination and willful neglect of duties. Respondent, on a constant and continuing basis, refused to obey reasonable orders properly given him by his principal. For in excess of one year, Respondent refused to prepare lesson plans, maintain a gradebook and student folders, and keep a log of parent contacts. He refused to stop smoking on school grounds. He refused to follow his principle's orders regarding reporting his absences and regarding coming to work on time and staying at work for the entire work day.

52. The dispute regarding Respondent's "pocket-knife," alone, reflects the willful and intentional nature of his refusal to comply with directives given to him by his principal. Respondent did not carry what he calls a "pocket-knife" in his pocket; rather, he wore a knife in a knife case on his belt. Although Respondent correctly argues that he did not wield his knife so as to intimidate or threaten others, the reason for wearing a knife on one's belt for all to see is to intimidate and threaten others. When Principal Coplin properly ordered Respondent to cease wearing a knife and knife case on his belt, he told her he would not comply. Although he eventually ceased wearing the knife, he defiantly continued wearing the knife case, taking the position that the knife case was not a dangerous weapon. Since one could not just look at Respondent's knife case and ascertain that it did not contain a knife, the continued wearing of the knife case by Respondent was behavior intended to intimidate and threaten others, in open defiance of the authority of Coplin.

53. Count II of the Notice of Specific Charges alleges that Respondent is guilty of incompetency due to inefficiency and/or incapacity as defined by Rule 6B-4.009(1), Florida Administrative Code, as follows:

- (1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. . . .
 - (a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience. . . .
 - (b) Incapacity: (1) lack of emotional stability. . . .

Petitioner has met its burden of proving that Respondent is guilty of incompetency due to both inefficiency and incapacity.

54. Section 231.09, Florida Statutes, directs teachers to perform those duties required by School Board rules relating to teaching efficiently and faithfully, using required materials and methods, complying with recordkeeping requirements, and fulfilling contractual obligations. Respondent has violated School Board rules establishing a tobacco-free workplace, the maintaining of parent contact logs, the procedures for properly evaluating student progress and for obtaining approval for leave time, and forbidding the possession on school property of weapons including pocket-knives used to threaten other individuals. Respondent has repeatedly violated similar provisions in the Labor Contract between the School Board of Dade County and the teachers' union. The evidence further reveals that Respondent's excessive absences interfered with his

students' continuity of education, and there is some evidence that his students may have been deprived of a minimum educational experience. Lastly, Respondent's lack of emotional stability is evidenced by his chronic alcoholism which he has not controlled and his blatant defiance of authority.

55. Count III of the Notice of Specific Charges alleges that Respondent is guilty of misconduct in office, as defined by Rule 6B-4.009(3), Florida Administrative Code, as follows:

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

56. Respondent has shown a lack of professional concern for his students and has failed to maintain the respect and confidence of his colleagues, as required by the Code of Ethics. Additionally, he has failed to protect his students from conditions harmful to their learning in that he has caused a lack of continuity in the education of students assigned to his class and has taught students, by his conduct, that wearing a knife on one's belt is appropriate behavior. Such behavior does violate the Principles of Professional Conduct. Petitioner has, accordingly, proven Respondent guilty of misconduct in office.

57. Count IV of the Notice of Specific Charges alleges that Respondent is guilty of willful absence without leave, in violation of Section 231.44, Florida Statutes. That statute provides that the employment of any School Board employee who is willfully absent from duty without leave shall be subject to termination by the School Board. Respondent refused to follow the procedures established for him to report his absences, and the evidence is clear that such absence from his duties without authorized leave was willful. Petitioner has proven that Respondent's employment should be terminated not only pursuant to Section 231.44 but also pursuant to Section 231.36(4)(c), Florida Statutes, because Respondent's willful absence without leave also constitutes willful neglect of duty and gross insubordination, misconduct in office, and incompetency under the facts of this case.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered sustaining Respondent's suspension without pay and dismissing Respondent from his employment with the School Board of Dade County, Florida.

DONE and ENTERED this 12th day of January, 1994, at Tallahassee, Florida.

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
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Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 1994.

APPENDIX TO RECOMMENDED ORDER
DOAH CASE NO. 93-3963

1. Petitioner's proposed findings of fact numbered 1, 3-27, and 29-56 have been adopted either verbatim or in substance in this Recommended Order.

2. Petitioner's proposed finding of fact numbered 2 has been rejected as not constituting a finding of fact but rather as constituting a conclusion of law.

3. Petitioner's proposed finding of fact numbered 28 has been rejected as being irrelevant to the issues under consideration in this cause.

4. Respondent's proposed findings of fact numbered 1-4 and 7-9 have been adopted either verbatim or in substance in this Recommended Order.

5. Respondent's proposed findings of fact numbered 5 and 14-16 have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

6. Respondent's proposed finding of fact numbered 6 has been rejected as being irrelevant to the issues under consideration in this cause.

7. Respondent's proposed findings of fact numbered 10-13 have been rejected as not being supported by the weight of the evidence in this cause.

COPIES FURNISHED:

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The Honorable Doug Jamerson
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.