

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,)	
)	
Petitioner,)	
)	
vs.)	Case No. 01-1171
)	
OSCAR HARRIS, JR.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 30, 2001, by video teleconference with connecting sites in Fort Lauderdale and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Charles T. Whitelock, Esquire Whitelock & Associates, P.A. 300 Southeast Thirteenth Street Fort Lauderdale, Florida 33316-1924
For Respondent:	W. George Allen, Esquire 800 Southeast Third Avenue, Penthouse Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

By letter dated February 27, 2001, the Superintendent of Schools for the Broward County School Board (Petitioner) notified Oscar Harris, Jr. (Respondent) that, among other things, he was going to recommend to Petitioner the suspension, without pay, and termination of Respondent from employment based upon an Administrative Complaint attached to the letter. By letter dated March 19, 2001, Respondent, by and through his counsel, timely requested a hearing. On March 27, 2001, this matter was referred to the Division of Administrative Hearings.

The Administrative Complaint consisted of four violations. The first violation was immorality in which Respondent was charged with violating Subsection 231.36(1)(a), Florida Statutes, and Rule 6B-4.009(2), Florida Administrative Code, by engaging in "conduct inconsistent with the standards of public conscience and good morals" and conduct which was "sufficiently notorious to bring Respondent and/or the educational profession, into public disgrace or disrespect, and impair Respondent's service in the community." The second violation was gross insubordination in which Respondent was charged with violating Subsection 231.36(1)(a), Florida Statutes, and Rule 6B-4.009(6) (sic), Florida Administrative Code, by "constant and continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority." The third violation was

moral turpitude in which Respondent was charged with violating Subsection 231.36(1)(a), Florida Statutes, and Rule 6B-4.009(6), Florida Administrative Code, by engaging in "acts of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude." The fourth and final violation was misconduct in office in which Respondent was charged with violating Subsection 231.36(1)(a), Florida Statutes, and Rule 6B-4.009(3), Florida Administrative Code, by the following: (a) violating Rule 6B-1.006(5)(a), Florida Administrative Code, by "failing to maintain honesty in all professional dealings"; (b) violating Rule 6B-1.006(5)(g), Florida Administrative Code, by "misrepresenting his own professional qualifications"; (c) violating Rule 6B-1.006(5)(h), Florida Administrative Code, by "submitting fraudulent information on a document in connection with professional activities"; (d) violating Rule 6B-1.006(5)(i), Florida Administrative Code, by "making a fraudulent statement or failing to disclose a material fact in one's own or another's application for a professional position"; (e) violating Rule 6B-1.006(5)(l), Florida Administrative Code, by "assisting entry into or continuance in the profession of any person known to be unqualified in accordance with the Principles of

Professional Conduct for the Education Profession in Florida and other applicable Florida Statutes and State Board of Education Rules"; and (f) violating Rule 6B-1.006(5)(m), Florida Administrative Code, by "failing to report to the appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes."

After engaging in discovery, Petitioner filed a Motion for Summary Final Order and Respondent filed a response in opposition. By Order dated August 24, 2001, the undersigned denied Petitioner's motion. However, the Education Practices Commission (EPC) had filed an Administrative Complaint against Respondent and the parties agreed that the facts in the EPC's case were identical to the facts in the instant case and should be adopted by the undersigned.¹ Consequently, the undersigned further ruled in the said Order that no genuine issue of material fact existed and that an evidentiary hearing would be conducted regarding penalty.

At hearing, Petitioner presented the testimony of one witness and entered 16 exhibits (Petitioner's Exhibits numbered 1-16) into evidence. Respondent testified on his own behalf, presented the testimony of five witnesses, and entered no exhibits into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for no later than September 30, 2001.

The Transcript, consisting of one volume, was filed on September 17, 2001. Petitioner timely filed its post-hearing submission on September 28, 2001. Respondent's post-hearing submission was filed on October 3, 2001. Petitioner did not object to the untimely filing and the undersigned has determined that Petitioner has suffered no prejudice by the late filing. As a result, Petitioner's and Respondent's post-hearing submissions were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent holds Florida Educator's Certificate No. 697227. The Certificate covers the areas of Social Science and Educational Leadership and was valid through June 30, 1999.²

2. At all times material hereto, Respondent was employed by Petitioner as an Assistant Principal at Crystal Lake Middle School (Crystal Lake).³

3. Respondent was employed at Crystal Lake pursuant to an annual contract.

4. On or about January 3, 1999, Respondent arranged for someone other than himself to take the Florida Department of Education's Florida Educational Leadership Examination (FELE) and for that person to submit the answers to the FELE as if

Respondent wrote them. Respondent engaged in a fraudulent scheme to receive a passing score on the FELE in order to receive a Florida Educator's Certificate for which he did not qualify.⁴

5. The fraudulent conduct was discovered. The Florida Department of Education invalidated all scores assigned to Respondent and, therefore, no score was assigned to Respondent for the FELE. Respondent was not issued a certificate.

6. Prior to January 3, 1999, Respondent had taken the FELE approximately 10 or 12 times without receiving a passing score. If he had not received a passing score on the FELE in January, Respondent would have lost his Certificate and would have been ineligible to remain an assistant principal. He "panicked" and obtained the services of the individual to take the FELE for him.

7. The local community became aware of Respondent's incident. The local news media printed articles regarding the incident. Petitioner received three or four telephone calls from concerned parents regarding the image that was being portrayed to students if Respondent was not punished.

8. Respondent subsequently hired tutors, took the FELE, and received a passing score. He was issued a certificate which expires June 30, 2004.

9. The EPC filed an administrative complaint against Respondent for the misconduct. Respondent did not contest the allegations of fact and requested an informal hearing. The EPC

issued a Final Order on April 17, 2001, imposing the following penalty: a reprimand; suspension of Respondent's certificate from the end of Petitioner's 2000-2001 school year to the day before the beginning of Petitioner's 2001-2002 school year; and probation, with conditions, for three employment years upon obtaining employment which required a certificate.

10. Having been notified by EPC regarding Respondent's conduct as to the FELE, Petitioner launched an investigation. As part of the investigation, Respondent was notified by Petitioner's Executive Director of Professional Standards and Special Investigative Unit that he was required to provide a statement to Petitioner's Investigative Unit and Respondent was given a date and time certain to provide an oral statement. Respondent was represented by counsel and several meetings for Respondent to provide the oral statement were scheduled to accommodate Respondent's counsel. Respondent failed to provide an oral statement due to the inability of his then counsel to attend the meetings. Respondent was also provided an opportunity to provide a written statement but Respondent's then counsel was unable to advise Respondent on the statement due to trial commitments. Respondent failed to provide a written statement.

11. It is not disputed that Respondent was required to provide a statement, which is considered a direct order.

Furthermore, it is not disputed that the direct order was reasonable and that it was given by and with proper authority.

12. However, it is reasonable for Respondent to follow the advice of his lawyer and to not provide an oral statement without the presence of his lawyer. Likewise, it is reasonable for Respondent to not act on submitting a written statement without his counsel advising him on the written statement. Respondent's failure to provide the oral or written statement was justifiably excused.

13. Respondent was also provided an opportunity to attend a pre-disciplinary meeting on two or three different occasions. Respondent failed to attend the pre-disciplinary meetings due to the inability of his then counsel to attend.

14. Respondent obtained new counsel and provided a statement to Petitioner, albeit during discovery in the instant case.

15. Petitioner suspended Respondent, without pay, beginning March 20, 2001 and ending June 30, 2001.

16. Respondent's annual contract was not renewed by Petitioner for the 2001-2002 school year.⁵

17. Petitioner seeks termination of Respondent's 1999-2000 annual contract.

18. Respondent is a highly regarded educator and several character witnesses testified on his behalf. Each witness was aware of Respondent's conduct regarding the FELE.

19. Respondent began his teaching career in 1992 in Tallahassee, Florida, at Fairview Middle School. He was promoted in 1994 to the position of Dean at Fairview Middle School.

20. In 1995, Respondent was hired as assistant principal by John Civettini who was the principal at Crystal Lake. Respondent was recommended to Mr. Civettini by Petitioner's former Superintendent of Schools and Respondent was recommended to the former Superintendent by Florida's then Governor Lawton Chiles. Crystal Lake had serious disciplinary problems and was in a "disruptive chaotic" state. Within two months of Respondent's arrival at Crystal Lake, he had implemented a program that had changed Crystal Lake for the better. Mr. Civettini retired in the third year of Respondent's tenure at Crystal Lake but Respondent's program continued under the new principal and Crystal Lake became one of the top middle schools in Broward County. Respondent had done an "excellent" job at Crystal Lake with the school children and had the admiration of the parents.

21. Mr. Civettini would again hire Respondent without reservation even knowing the circumstances of the conduct with which Respondent is charged. Furthermore, Mr. Civettini is not

against punishing Respondent for his conduct but he believes that termination of Respondent's annual contract is too severe.

22. If Respondent is terminated by Petitioner, according to Mr. Civettini, Respondent will not be hired by another school district.

23. Respondent's Associate Superintendent, Everette Abney, Sr., Ph.D., has "a great deal of admiration" for what Respondent accomplished at Crystal Lake. Respondent made a "difference in the lives" of the children at Crystal Lake. Dr. Abney would welcome the return of Respondent to Petitioner's employ and would return Respondent to working with children. Dr. Abney does not view the conduct with which Respondent is charged as lessening Respondent's effectiveness with the children.

24. Dr. Abney is aware of principals and other assistant principals who had engaged in more serious misconduct but who were not terminated by Petitioner. However, he was not able to give specifics regarding the incidents.

25. Respondent worked with a South Florida Pizza Hut franchise owner, Alfredo Salas, in helping minority children. Mr. Salas has great respect for the way Respondent worked with and mentored the children. Mr. Salas has no hesitation in supporting the return of Respondent to Petitioner's employ and would continue to work with Respondent with children.

26. Petitioner has imposed less severe punishment for conduct committed which was equally or more serious. One principal was arrested in the year 2000 for marijuana possession in a foreign state while on a recruiting trip for Petitioner. The incident received local publicity. Petitioner removed the principal from his position, re-assigned him to administrative procedures from August 31, 2000 to August 21, 2001, and, after the re-assignment, imposed a three-month suspension, without pay, and a reduction to an annual contract.

27. In another incident, a principal solicited business at her school in order for her father to become a vendor at her school. Her conduct was determined to be a conflict of interest.⁶ Petitioner suspended the principal for two weeks. Also, the EPC reprimanded her and placed her on probation for one year; and Florida's Ethics Commission reprimanded her and imposed a \$500 fine.

28. Taking into consideration the totality of the circumstances presented, the punishment sought by Petitioner, termination of employment, is too severe.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

30. Petitioner has the burden of proof by a preponderance of the evidence. Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990). Subsection 120.57(1)(j), Florida Statutes.

31. Section 231.36, Florida Statutes (1999), provides in pertinent part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certificated pursuant to s. 231.17 or employed pursuant to s. 231.1725 and shall be entitled to and shall receive a written contract as specified in chapter 230. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

* * *

(6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. . . .

32. Section 230.23, Florida Statutes (1999), provides in pertinent part:

The school board, acting as a board, shall exercise all powers and perform all duties listed below:

* * *

(5) PERSONNEL.--Designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees as follows, subject to the requirements of chapter 231:

* * *

(f) *Suspension and dismissal and return to annual contract status.*--Suspend, dismiss, or return to annual contract members of the instructional staff and other school employees; however, no administrative assistant, supervisor, principal, teacher, or other member of the instructional staff may be discharged, removed, or returned to annual contract except as provided in chapter 231.

33. Section 230.33, Florida Statutes (1999), provides in pertinent part:

The superintendent shall exercise all powers and perform all duties listed below and elsewhere in the law; provided, that in so doing he or she shall advise and counsel with the school board. The superintendent shall perform all tasks necessary to make sound recommendations, nominations, proposals, and reports required by law to be acted upon by the school board. . . .

* * *

(7) PERSONNEL.--Be responsible, as required herein, for directing the work of the

personnel, subject to the requirements of chapter 231, and in addition the superintendent shall have the following duties:

* * *

(e) *Suspension and dismissal.*--Suspend members of the instructional staff and other school employees during emergencies for a period extending to and including the day of the next regular or special meeting of the school board and notify the school board immediately of such suspension. When authorized to do so, serve notice on the suspended member of the instructional staff of charges made against him or her and of the date of hearing. Recommend employees for dismissal under the terms prescribed herein.

34. Rule 6B-4.009, Florida Administrative Code, provides in pertinent part:

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

* * *

(2) Immorality is defined as conduct that is inconsistent with the standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual's service in the community.

(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, FAC., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in

Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

(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.

* * *

(6) Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statute fixes the moral turpitude.

35. Rule 6B-1.006, Florida Administrative Code, provides in pertinent part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

* * *

(5) Obligation to the profession of education requires that the individual:
(a) Shall maintain honesty in all professional dealings.

* * *

(g) Shall not misrepresent one's own professional qualifications.

(h) Shall not submit fraudulent information on any document in connection with professional activities.

(i) Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.

* * *

(l) Shall not assist entry into or continuance in the profession of any person known to be unqualified in accordance with these Principles of Professional Conduct for the Education Profession in Florida and other applicable Florida Statutes and State Board of Education Rules.

(m) Shall self-report within forty-eight (48) hours to appropriate authorities (as determined by district) any arrests/charges involving the abuse of a child or the sale and/or possession of a controlled substance. Such notice shall not be considered an admission of guilt nor shall such notice be admissible for any purpose in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. In addition, shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program, or entering of a plea of guilty or Nolo Contendere for any criminal offense other than a minor traffic violation within forty-eight (48) hours after the final judgment. When handling sealed and expunged records disclosed under this rule, school districts shall comply with the confidentiality provisions of Sections 943.0585(4)(c) and 943.059(4)(c), Florida Statutes.

(n) Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

36. Petitioner failed to demonstrate that Respondent violated Subsection 231.36(1)(a), Florida Statutes (1999), and Rule 6B-4.009(2), Florida Administrative Code, as alleged. The evidence failed to show that Respondent's conduct constituted immorality as defined. The evidence failed to show that Respondent's conduct was additionally "sufficiently notorious to bring Respondent and/or the educational profession, into public disgrace or disrespect, and impair Respondent's service in the community." The evidence failed to show that Respondent's conduct would or did impair his service in the community.

37. Petitioner failed to demonstrate that Respondent violated Subsection 231.36(1)(a), Florida Statutes (1999), and Rule 6B-4.009(6) (sic), Florida Administrative Code, as alleged. The rule violated should be Rule 6B-4.009(4), Florida Administrative Code. Failing to cite the correct rule is not fatal due to the parties litigating the issue of gross insubordination. Respondent's conduct in not obeying a direct order did not rise to the level of gross insubordination, as defined. Willful is defined by Black's Law Dictionary, Fifth Edition, as follows:

Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.

* * *

Willful is a word of many meanings, its construction often influenced by its context. (citation omitted)

* * *

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. . . .

38. Respondent's failure to not provide an oral or written statement did not show willfulness. His failure was justifiably excused. Respondent's then counsel was unavailable to assist Respondent with the oral or written statement.

39. Petitioner failed to demonstrate that Respondent violated Subsection 231.36(1)(a), Florida Statutes (1999), and Rule 6B-4.009(6), Florida Administrative Code, as alleged. Petitioner failed to demonstrate that Respondent's conduct constituted moral turpitude as defined. The evidence failed to show that Respondent committed a crime or that his conduct evidenced a crime.

40. Petitioner demonstrated that Respondent violated Subsection 231.36(1)(a), Florida Statutes (1999), and Rule 6B-4.009(3), Florida Administrative Code. Petitioner demonstrated that Respondent committed misconduct in office as defined by violating Rules 6B-1.006(5)(a), (h), and (m) (sic), Florida Administrative Code. The rule violated should be Rule 6B-1.006(5)(n), not (m), Florida Administrative Code. Failing to

cite the correct rule is not fatal due to the parties litigating the issue of Respondent's failure to report the known allegation of a violation.

41. However, Petitioner failed to demonstrate that Respondent committed misconduct in office as defined by violating Rules 6B-1.006(5)(g), (i), and (l), Florida Administrative Code. Respondent held the position of assistant principal; he was not applying for a position. Further, even though Respondent was not issued a new certificate due to the misconduct committed as to the FELE in January 1999, the certificate that he held at that time was valid through June 30, 1999. The evidence failed to show that Respondent was not qualified for the position of assistant principal.

42. Respondent's suspension should be upheld.

43. However, termination of Respondent's employment, i.e., terminating Respondent's annual contract for the 1999-2000 school term, is too severe and not appropriate under the totality of the circumstances present in the instant case. The penalties imposed by Petitioner for equally or more serious conduct have not been termination.

RECOMMENDATION

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

RECOMMENDED that the Broward County School Board enter a final order:

1. Sustaining the suspension, without pay, of Oscar Harris, Jr., beginning March 20, 2001 and ending June 30, 2001.
2. Imposing other terms and conditions deemed appropriate.
3. Not terminating the annual contract of Oscar Harris, Jr. for the 1999-2000 school year.

DONE AND ENTERED this 31st day of October, 2001, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 2001.

ENDNOTES

^{1/} The EPC filed an Administrative Complaint against Respondent styled Tom Gallagher, as Commissioner of Education vs. Oscar F. Harris, Jr., Case No. 989-2166-M; and the Final Order was Case No. 00-0519-RA. The Final Order adopted paragraphs numbered 1-3 from EPC's Administrative Complaint as its findings of fact. Furthermore, the Final Order adopted counts 1-4 of the Administrative Complaint, which are as follows: Count 1--violating Subsection 231.28(1)(c), Florida Statutes, by being guilty of gross immorality or an act involving moral turpitude; Count 2--violating Subsection 231.28(1)(f), Florida Statutes, by being found guilty of personal conduct which seriously reduces his

effectiveness as an employee of the school board; Count 3--violating Rule 6B-1.006(5)(a), Florida Administrative Code, by failing to maintain honesty in all professional dealings; and Count 4--violating Rule 6B-1.006(5)(h), Florida Administrative Code, by submitting fraudulent information on a document in connection with professional activities.

2/ Facts from the EPC's Final Order.

3/ Ibid.

4/ Ibid.

5/ Petitioner's new fiscal year begins July 1st of each year. On June 30th of each year, all assistant principals' and administrators' contracts expire. At the new fiscal year, Petitioner receives names of individuals whose contracts are recommended for renewal and Petitioner votes on approval of the individuals as a whole. Respondent's name was not submitted for approval to renew his annual contract for the 2001-2002 school year.

6/ The principal represented that she was not aware that her conduct was an ethical violation, i.e., a conflict of interest. The principal's conduct is not within the jurisdiction of this Administrative Law Judge. However, for the length of time that she has been a principal, this Administrative Law Judge finds it difficult to find credible the principal's representation that she was not aware that her conduct created a conflict of interest and, therefore, was an ethical violation.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.