

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLAGLER COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 01-2070
)
JOHN A. HIGHSMITH,)
)
 Respondent.)

)

RECOMMENDED ORDER

Notice was provided, and a formal hearing was held on August 29 and 30, 2001, in Bunnell, Florida, and conducted by Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Frank D. Upchurch, Esquire
Upchurch, Bailey and Upchurch, P.A.
Post Office Drawer 3007
St. Augustine, Florida 32085-9066

For Respondent: Bill Salmon, Esquire
204 West University Avenue
Suite 8
Gainesville, Florida 32602

STATEMENT OF THE ISSUE

Whether Respondent's employment be terminated based on his misconduct.

PRELIMINARY STATEMENT

At times pertinent Respondent was employed as an assistant principal by the Flagler County School Board (Board). Subsequent to the arrest of Respondent on November 12, 2000, Respondent was suspended from his employment with pay. On November 21, 2000, Respondent was suspended without pay and on April 26, 2001, Respondent was informed that his employment was to be terminated for cause. Respondent timely requested an administrative hearing.

The matter was set for a hearing on July 31, 2001. Pursuant to a joint motion to continue the hearing, the case was subsequently set to commence on August 29, 2001, in Bunnell, Florida, and was heard as scheduled.

Petitioner presented the testimony of five witnesses and offered 23 exhibits which were admitted into evidence. Respondent presented the testimony of ten witnesses and offered one exhibit which was admitted.

A Transcript was filed on September 20, 2001. Petitioner's Proposed Recommended Order was timely filed on October 4, 2001. Respondent moved for an extension of time to file his Proposed Recommended Order. The motion was not opposed by Petitioner and was granted. Respondent was permitted to file his Proposed Recommended Order no later than October 9, 2001, and he timely

filed it. The Proposed Recommended Orders were considered in the preparation of the Recommended Order.

FINDINGS OF FACT

1. Respondent, from the beginning of the 1998-1999 school year until April 26, 2001, was employed by the Board as assistant principal in charge of the Ninth Grade Center at Flagler-Palm Coast High School (Flagler). Prior to the 1998-1999 school year, he was employed by the Board as a teacher and as Dean of Students.

2. Respondent's employment was pursuant to a contract between Respondent and the Board which provided for employment from July 1, 1999 until June 30, 2001.

3. On Sunday, November 12, 2000, Respondent attended a football game in Jacksonville, Florida, with a friend. He departed the stadium area in the late afternoon and traveled to Daytona Beach.

4. By 9:30 p.m., on November 12, 2001, he was in his Honda automobile with his friend, occupying the right travel lane of U.S. 92, about four miles west of Interstate 95. His automobile was motionless and oriented west toward Deland. U.S. 92 is a high-speed, four-lane highway, with a divided median. The speed limit in the portion of the road occupied by Respondent's automobile is 65 miles per hour. It is located in Volusia County, which is the county immediately south of Flagler County.

5. Deputy Mike Burton, of the Volusia County Sheriff's Office, was proceeding west on U.S. 92 when, at 9:30 p.m., he observed Respondent's Honda. He observed that Respondent's vehicle presented a hazard to Respondent and others. It appeared to Deputy Burton that the occupants of the Honda were unconscious. He attempted to communicate with the occupants by hailing them through the use of his patrol vehicle's loudspeaker. He failed to rouse the occupants of Respondent's Honda.

6. Deputy Burton then positioned his patrol vehicle behind Respondent's automobile and turned on his blue emergency lights so that oncoming traffic could be warned of the hazard posed by Respondent's automobile. Because the two occupants of Respondent's Honda appeared to be unconscious, Deputy Burton feared that they might be experiencing a medical problem. He called his dispatcher who summoned a rescue squad.

7. Deputy Burton knocked on the window of Respondent's Honda. Respondent woke up, and upon being told to move his car to the side of the road, pulled on to the shoulder, and fell again into a state of unconsciousness.

8. Sergeant Cook of the Volusia County Sheriff's Office arrived on the scene and he and Deputy Burton were eventually able to arouse Respondent. Deputy Burton observed Respondent to be unsteady on his feet and observed that his eyes were glassy.

Opened and unopened beer cans were found inside the passenger compartment of the vehicle and many unopened beer cans were found in the trunk.

9. Sergeant Cook also found a bottle of prescription medicine which contained Effexor.

10. Deputy Burton observed Sergeant Cook administer a field sobriety test. Based on all of his observations of Respondent, Deputy Burton determined that Respondent's faculties were impaired, although he did not have an opinion as to whether the impairment was the result of alcohol ingestion.

11. Sergeant Cook, subsequent to the administration of field sobriety tests, was of the opinion that Respondent's faculties were impaired due to the consumption of alcoholic beverages. He arrested Respondent.

12. In a search incident to the arrest a brass-colored pipe, about three inches long, was found in Respondent's right front pants pocket. There was a dark-colored residue with an odor of burnt marijuana in the bowl of the pipe. Sergeant Cook performed a field test on the residue which was positive for marijuana. Based on his observations, his field test, and his training and experience, Sergeant Cook concluded that the pipe constituted drug paraphernalia.

13. Respondent stated to Sergeant Cook, upon questioning, that the pipe was not his.

14. A videotape of Respondent was made immediately subsequent to his arrest after Respondent was transported to a Volusia County Sheriff's facility. The videotape was received into evidence. In the videotape Respondent admits to consuming alcoholic beverages during the afternoon and evening of the day he was arrested. Respondent revealed in the videotape that he had been prescribed Effexor by his doctor to alleviate symptoms of depression. During the course of the videotape, Respondent answered questions in a slow, monotone voice which contrasted sharply with his articulate testimony at the hearing.

15. As part of Respondent's nolo contendere plea to the charge of driving while under the influence of alcohol he admitted that he drove under the influence of alcohol to the extent his normal faculties were impaired. He was adjudicated guilty in the County Court of Volusia County of driving under the influence of alcohol.

16. Lawrence Richard Hunsinger is the principal of Flagler and is Respondent's immediate supervisor. He related that one of the primary missions at Flagler was character education. Educational programs addressing illegal drugs and alcohol abuse are a major facet of that mission. The hazards of driving while under the influence of alcohol or drugs is emphasized in the character education program.

17. Principal Hunsinger related that the Ninth Grade Center was somewhat autonomous in relation to the high school as a whole and stated that Respondent acted as a quasi-principal. Student discipline is one of the most important jobs entrusted to Respondent and he was expected to be a positive role model. It was important to Principal Hunsinger that he be able to trust Respondent.

18. Respondent telephoned Principal Hunsinger the day after Respondent's arrest and told him, among other things, that he found the marijuana pipe on the high school grounds and that he intended to use it as a training aid for the students.

19. The arrest of Respondent generated unfavorable newspaper articles in the local area and in the Flagler student newspaper. The arrest upset and disappointed many of the students at Flagler. The incident caused a derogation of respect for Respondent among the students.

20. Robert Nocella is the dean of students for the Ninth Grade Center. Respondent was his supervisor. He believes that the dean of students and the assistant principal must be role models.

21. It is Mr. Nocella's opinion that Respondent's effectiveness as a role model has been derogated by the incident of November 12, 2000.

22. Dr. Robert D. Williams is Superintendent of Schools for Flagler County. He received a telephone call from Respondent the afternoon of the day following Respondent's arrest. Respondent told him that he had found the marijuana pipe at the Jaguars football game in Jacksonville. Respondent expressed remorse for the events that had transpired. Respondent denied using marijuana.

23. Dr. Williams had a subsequent conversation with Respondent on Wednesday, November 15, 2000, in Dr. Williams' office. During that time, Respondent again denied using marijuana on November 12, 2000.

24. Dr. Williams had another conversation with Respondent on Friday, November 17, 2000, in Dr. Williams' office. At that time Respondent told Dr. Williams that the marijuana pipe was used for demonstration purposes in the classroom.

25. Dr. Williams opined that Respondent's conduct was inconsistent with the standards of public conscience and good morals. He further opined that Respondent's actions brought the school district and the high school into public disgrace and tarnished his reputation as well as the reputation of the school district and high school.

26. Dr. Williams has discussed this matter with persons in the community and the incident resulted in negative effects on the school system. Two parents asked that punishment

administered to their children be rescinded based on the behavior of Respondent.

27. There have been numerous recent unfortunate events involving members of the Flagler staff which have occurred in the school district. These include a teacher stalking someone, a teacher kicking a student, a teacher striking a student, and a teacher downloading pornography on a school computer. These events involved teachers, rather than administrators, and they were dissimilar from Respondent's conduct.

28. The evidence established that, on November 12, 2000, Respondent was in actual physical control of a motor vehicle while under the influence of alcohol and that he was in possession of drug paraphernalia.

29. While serving as assistant principal in charge of the Ninth Grade Center Respondent proved to be an effective administrator who fairly meted out discipline. Until the incident of November 12, 2000, he was respected and admired by both students and teachers. He was very concerned about the welfare of his students. Subsequent to the incident there were numerous persons who wanted him to be reinstated. He currently works in marine construction and his employer stated that he is a hard-working and reliable employee.

CONCLUSIONS OF LAW

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

31. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

32. In order to meet its burden of proof, the Board must establish facts upon which its allegations of misconduct are proved by a preponderance of the evidence. Dileo v. School Board of Dade County, 569 So. 2d 8834 (Fla. 3rd DCA 1990) and Section 120.57(1)(j), Florida Statutes.

33. Paragraph 5 of the contract between Respondent and the Board provided that Respondent may be removed for cause as provided by law.

34. The applicable law in this case is Section 231.36(6)(b), Florida Statutes, which provides, inter alia that:

(b) Any member of the district administrative or supervisory staff, including any principal but excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of any crime involving moral turpitude, as

these terms are defined by rule of the State Board of Education.

35. The allegations against Respondent were as follows:

a. Drunkenness on November 12, 2000, in that Respondent was publicly under the influence of alcoholic beverages to such an extent that his normal faculties were impaired, and that Respondent was arrested and found guilty of driving under the influence of alcohol.

b. Immorality, in that Respondent's conduct was inconsistent with standards of public conscience and good morals, based on Respondent's arrest for driving under the influence of alcohol, possession of drug paraphernalia, and his conviction of driving under the influence of alcohol. It was further alleged that these actions by Respondent were so serious and notorious that he was brought into public disgrace and disrespect and his service in the community was impaired.

c. Misconduct in office in that Respondent violated the Code of Ethics of the Education Profession in Florida by failing to maintain a high degree of ethical conduct, as evidenced by his actions on November 12, 2000, including driving under the influence of alcohol, refusing to take the blood alcohol breath test, and possession of drug paraphernalia. It was further

alleged that these actions by Respondent were so serious and notorious that his effectiveness in the school system was impaired.

d. Gross insubordination or willful neglect of duty, based on his repeated refusal to submit to a drug test in accordance with district policy and the directives of his superiors which were based on reasonable suspicion.

36. Drunkenness is defined by Rule 6B-4.009(5)(a), Florida Administrative Code, as occurring when an individual publicly is under the influence of alcoholic beverages or drugs to such an extent that his or her normal faculties are impaired.

Respondent was under the influence of alcohol to the extent his normal faculties were impaired while in an automobile which was motionless in the driving lane of a major U.S. highway at night. Not only was this dangerous, but it attracted public attention. Accordingly, the allegation of public drunkenness is proved.

37. Immorality is defined in Rule 6B-4.009(2), Florida Administrative Code, ". . . 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." The allegation of immorality was proved.

38. Misconduct is defined in Rule 6B-4.009(3), Florida Administrative Code, as ". . . a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, Florida Administrative Code, and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, Florida Administrative Code, which is so serious as to impair the individual's effectiveness in the school system."

39. Rule 6B-1.001, Florida Administrative Code, provides that educators must be, "Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct."

41. Respondent's actions on November 12, 2000, were sufficient to establish that he engaged in misconduct as charged.

42. The insubordination charge is not supported by the evidence because district policy in this regard was not proven and Respondent was not ordered to submit to a drug test although he was invited to do so.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered terminating the employment of
Respondent.

DONE AND ENTERED this 23rd day of October, 2001, in
Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2001.

COPIES FURNISHED:

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Honorable Charlie Crist
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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.