

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
Petitioner,)
)
vs.) Case No. 01-2354
)
ANTHONY HOWARD,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on October 25, 2001, at West Palm Beach, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alan M. Aronson, Esquire
Palm Beach County School Board
3318 Forest Hill Boulevard, Suite C-302
West Palm Beach, Florida 33406

For Respondent: Jason Steven Dalley, Esquire
Anderson & Dalley, L.L.P.
Harvey Building, Suite 515
224 Datura Street
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

Whether Petitioner has just cause to terminate the Respondent's employment as an educational support employee.

PRELIMINARY STATEMENT

Respondent was employed as a behavioral interventionist at Forest Hill High School (Forest Hill) until Petitioner suspended his employment without pay on May 16, 2001, and instituted this proceeding to terminate his employment. Petitioner charged that Respondent engaged in unprofessional conduct or, in the alternative, committed acts that constitute misconduct or engaged in behavior exhibiting less than minimum standards for good moral character.¹ The gravamen of Petitioner's charges is that Respondent used inappropriate physical force on a student, which constitutes misconduct and provides just cause to terminate his employment. Respondent timely requested a formal administrative hearing, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the final hearing, Petitioner presented the testimony of five witnesses: Student 1 (the student who is the alleged victim), Student 2, Student 3, Marc Sagovac (an Assistant Principal at Forest Hill), and Wilfred P. LaChance, (Director of Petitioner's Office of Professional Standards). Petitioner presented one composite Exhibit, which was admitted into evidence as Petitioner's Composite Exhibit 1. Respondent testified on his own behalf, but he presented no additional witnesses. Respondent offered three sequentially numbered

exhibits, each of which was admitted into evidence as Respondent's Exhibits 1-3.

A Transcript of the proceedings was filed on November 13, 2001. Each party filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.²

FINDINGS OF FACT

1. Respondent was employed as a behavioral interventionist with the Palm Beach County School District during the 2000-2001 school year. A behavioral interventionist is a non-instructional employee who works primarily with students receiving services through Petitioner's Exceptional Student Education (ESE) Programs. In addition to monitoring performance and behavior of ESE students, Respondent supervised regular education students who were serving in-house suspensions, performed bus and cafeteria duty, and helped maintain discipline throughout the campus. Respondent also served as an assistant football coach.

2. Respondent received specialized training in order to perform his duties as a behavioral interventionist. He received child development training and attended approximately 12-13 workshops dealing with physical restraint and conflict resolution issues.

3. Respondent is not a member of a collective bargaining unit.

4. At the times pertinent to this proceeding, Student 1, a male, was 17-years old and a junior at Forest Hill. Student 1 is 5'10" tall and weighs approximately 260 pounds. Respondent is 6'3" tall and weighs approximately 250 pounds. Respondent is a former professional football player who routinely lifts weights.

5. On December 11, 2000, between 4:30 p.m. and 5:00 p.m., Student 1 was in the area of the outdoor basketball court watching a basketball game. Student 1 had permission to be on the campus of Forest Hill, but he should not have been in the area of the outdoor basketball court.

6. Respondent was in the weight room at Forrest Hill that afternoon demonstrating weight lifting techniques to a group of his football players. After he completed his weight lifting workout, Respondent went to the outdoor basketball court to play basketball. Respondent began playing basketball with a group of students, including students who did not play football. Student 1 could have played if he had wanted to do so.

7. Student 1 was not playing when the acts at issue in this proceeding occurred. Shortly after the game began, Student 1 was standing off the basketball court observing the game when the basketball ball was thrown out of bounds near him.

Respondent walked up to Student 1 and said, "why don't you get the ball fat boy?" In response, Student 1 used profane language and was disrespectful towards Respondent. Respondent reacted by tapping Student 1 on the cheek with his open hand.

8. Student 1 asked Respondent why he hit him, but received no response. As Student 1 attempted to walk away, Respondent tapped him again on the back of the head and the two exchanged words. Respondent was not justified in making physical contact with Student 1.

9. Student 1 again addressed Respondent using profane language. Respondent reacted by taking Student 1 to the ground using a technique that he had been trained to use to restrain students. There was a conflict in the evidence as to whether Respondent placed Student 1 in a chokehold when he took him to the ground. The greater weight of the credible evidence established that Respondent did not use a chokehold on Student 1.

10. There was also a conflict in the evidence as to whether Student 1 had become aggressive and whether Respondent was merely trying to restrain Student 1. The evidence is clear that Respondent physically restrained Student 1 because Student 1 had been disrespectful towards him, not because Student 1 had become combative. Respondent was not justified in physically restraining Student 1.

11. Student 1 was on the ground when Respondent released him from the restraining hold. As Student 1 was attempting to rise, Respondent hit him with his forearm, which forced Student 1 back to the ground. Witnesses at the basketball court told Student 1 to stay down, but he attempted to rise and saw Respondent in a three-point position typically assumed by football linemen. Almost immediately, Respondent came at Student 1 again and forearmed him back to the ground.

12. Student 1 fell back to the ground, biting his tongue as he went down. He then got up and began cursing.

13. After an interval of a few minutes, Student 1 asked Respondent why he had hit him and began to spit in the general direction of Respondent. Respondent, believing that Student 1 was spitting at him, grabbed him in the area of the neck and forced him against the fence surrounding the basketball court. Respondent told Student 1, "Don't play with me boy, I'm not a kid." Respondent was not justified in that use of force against Student 1.

14. The incident lasted over a period of several minutes. Student 2 was present during the entire incident and Student 3 was present during the latter part of the incident (when Respondent grabbed Student 1 by the neck and forced him against the fence). Both witnesses corroborated Student 1's version of

the events. No other student witnesses testified at the final hearing.

15. Student 1 complained that afternoon to a coach named Coleman about what had occurred and he also told his mother later that evening when he got home. Student 1 complained to his mother that his neck hurt and she took him to a hospital, where he was diagnosed with a sprained neck.

16. On December 12, 2000, Student 1 and his mother returned to the school and complained to Assistant Principal Mark Sagovac, about what happened the afternoon before. Mr. Sagovac thereafter spoke with Respondent, who did not deny the incident had occurred.

17. Respondent admitted to Mr. Sagovac that he called Student 1 a "fat boy" and asked him to get the ball, which had rolled out of bounds. Respondent further told Mr. Sagovac that he pushed Student 1 to the ground with his forearm and forced Student 1 up against the fence because he felt Student 1 was threatening him.

18. After speaking with Respondent, Mr. Sagovac interviewed Student 1 again and spoke to other witnesses. Some time thereafter a meeting was held between Student 1, his mother, Respondent, Mr. Sagovac, and Assistant Principal Green, who is also an assistant principal assigned to Forest Hill. The

incident was discussed again and at one point, Respondent apologized to Student 1 and his mother.

19. After the meeting concluded, Mr. Sagovac issued to Respondent a verbal reprimand with written notation for the actions he took on December 11, 2000. Prior to serving the Respondent with the verbal reprimand with written notation, Sagovac did not consult with his principal or anyone in the Petitioner 's Personnel Office or Office of Professional Standards to determine if he was complying with policy or if he was following accepted personnel practice concerning the contemplated discipline. Mr. Sagovac was not complying with school policy when he issued the verbal reprimand with written notation. Mr. Sagovac did not have the authority to discipline Respondent.

20. Shortly after the conclusion of the meeting attended by Student 1, his mother, Respondent, and Mr. Sagovac, a complaint was made to the school district's police department concerning the December 11, 2000, incident. Based upon the complaint, a criminal investigation into Respondent's actions was initiated. There was no evidence as to the status of any criminal charges presented at the final hearing.

21. Petitioner's Office of Professional Standards received information concerning the criminal investigation, which caused it to open its own administrative investigation.

22. After the Office of Professional Standards received the police report and the attached documents, the case was assigned to an investigator.

23. During the Petitioner's investigation, Respondent was placed on administrative leave with pay and assigned to duty at his home. This assignment became effective February 1, 2001.

24. After Petitioner's Office of Professional Standards completed its investigation, it prepared a report of the incident and, consistent with its rules, submitted the case for review to a case management committee. Case management review is a process whereby approximately a dozen high level employees working for the district meet at the direction of the Superintendent to review pending personnel cases which may result in the suspension of employment without pay or the termination of employment.

25. Respondent's case management committee determined that probable cause existed to sustain the allegation Respondent used inappropriate physical force on the student in question. Once probable cause was found, it further determined that the level of the force used warranted a recommendation that Respondent's employment be terminated.

26. Based upon the case management committee's recommendation to terminate Respondent for having engaged in inappropriate physical force on a student, Superintendent of

Schools Arthur C. Johnson notified Respondent by letter dated May 8, 2001, that he would recommend to the School Board at its meeting to be held May 16, 2001, that Respondent's employment be terminated and that he be suspended without pay pending the completion of the proceedings to terminate his employment. On May 16, 2001, the School Board voted to accept the Superintendent's recommendation.

27. It is the policy of the Petitioner that no employee is to use physical force with a student unless the employee is breaking up a fight, acting in self-defense, or protecting the student from hurting him or herself.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

29. The Superintendent of Schools has the statutory authority to recommend to the School Board that a school district employee be dismissed from employment pursuant to Section 230.33(7)(e), Florida Statutes.

30. The School Board may suspend or dismiss its employees for just cause pursuant to Sections 230.23(5)(f) and 231.3605(2)(b), Florida Statutes.

31. Section 231.3605(2)(b), Florida Statute provides, in pertinent part, as follows:

. . . upon successful completion of probationary period by the employee, the employee's status shall continue from year to year unless the superintendent terminates the employee for reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist. . . .

32. Petitioner has the burden of proving by a preponderance of the evidence that it has cause to terminate Respondent's employment. See Florida Dept. of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Allen v. School Board of Palm County, 571 So. 2d 565 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 596 So. 2d 853 (Fla. 3d DCA 1990); and McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996).

33. Rule 6B-1.001, Florida Administrative Code, constitutes the Code of Ethics of the Education Profession in Florida. Rule 6B-1.006, Florida Administrative Code, sets forth the Principles of Professional Conduct for the Education Profession in Florida. Rule 6B-4.009, Florida Administrative Code, provides criteria for the suspension and dismissal of instructional personnel. These rules pertain to members of the instructional personnel who hold a valid teacher's certificate. The application of the Code of Ethics and the Principles of Professional Conduct may be applied to non-instructional

employees by analogy. See Smith v. School Board of Leon County, 405 So. 2d 183 (Fla. 1st DCA 1981).

34. Pursuant to Rule 68-1.006(3)(a), Florida Administrative Code, the educator must make reasonable efforts to protect the student from conditions harmful to learning and/or to the student's mental and physical health and/or safety, and shall not intentionally expose a student to unnecessary embarrassment or disparagement.

35. Pursuant to Florida Administrative Code Rule 68-4.009(3), misconduct in office is defined as a violation of the Code of Ethics of the Education Profession and the Principles of Professional Conduct for the Education Profession in Florida which is so serious as to impair the individual's effectiveness in the School System.

36. Petitioner proved by a preponderance of the evidence that Respondent used unjustified physical force against Student 1, thereby violating Petitioner's well-established policy prohibiting an employee making physical contact with a student except under limited circumstances. Respondent is guilty of misconduct that justifies the termination of his employment.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the School Board enter a final order terminating Respondent's employment.

DONE AND ENTERED this 4th day of February, 2002, in
Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of February, 2002.

ENDNOTES

^{1/} Petitioner abandoned its theory that Respondent lacks good moral character.

^{2/} The deadline for the filing of Proposed Recommended Orders was extended to provide time for Respondent to make a public records request of Petitioner for a copy of the transcript.

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.

¹ Petitioner abandoned its theory that Respondent lacks good moral character.

² The deadline for the filing of Proposed Recommended Orders was extended to provide time for Respondent make a public records request of Petitioner for a copy of the transcript.