

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PALM BEACH COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 01-2822
)
DENNIS W. HURST,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 15, 2003, in West Palm Beach, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jean Marie Nelson, Esquire
Palm Beach County School Board
3318 Forest Hill Boulevard, Suite C-302
West Palm Beach, Florida 33406

For Respondent: Thomas L. Johnson, Esquire
Chamblee, Johnson, Haynes
& Martinelli, P.A.
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West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent should be suspended without pay and dismissed from employment with Petitioner.

PRELIMINARY STATEMENT

On June 29, 2001, the Superintendent of the Palm Beach County School Board (School Board) issued a Petition for Suspension Without Pay and Dismissal from Employment (Petition) regarding the employment of Dennis W. Hurst with the School Board. The Petition sought Mr. Hurst's suspension and dismissal from employment for "using profanity towards students, making inappropriate comments to students, refusing to allow students to go to the bathroom and for disciplining students without merit." The Petition further alleged that such actions by Mr. Hurst were in violation of "Rules 6B-1.001(2), 6B-1.006(3)(a)(e) and (g), Florida Administrative Code; alternatively, 6B-4.009, School Board Policy 1.012, Section 231.02, Florida Statutes, for behavior exhibiting less than minimum standards for good moral character, thereby precluding Respondent from meeting the School Board's minimum standards for continuing employment in the Palm Beach County School District." Mr. Hurst contested the allegations of the Petition and requested a hearing. This matter was referred to the Division of Administrative Hearings on July 17, 2001.

The hearing in this matter was originally scheduled for October 16 and 17, 2001. Several continuances of the hearing were granted to the parties.

At hearing, the School Board presented the testimony of four witnesses (Susan St. John, principal at Starlight Cove Elementary School; Raymond Miller, Office of Professional Standards; Mr. Hurst; and Sue Slone, supervisor of Mr. Hurst at Crystal Lakes Elementary School), and entered four exhibits (Petitioner's Exhibits numbered 36, 38, 42, and 43) into evidence. Mr. Hurst did not present the testimony of any witnesses in his case-in-chief and entered no exhibits into evidence. One joint exhibit (Joint Exhibit numbered 1) was entered into evidence. Official recognition was taken of Florida Administrative Code Rules 6B-1.006, 6B-4.009, and 6B-1.001,.

Further, at the hearing, the School Board offered into evidence Petitioner's Exhibit 44, which consisted of statements of students (A. K., B. W., D. G., K. J., M. S., and N. P.) taken by the School Board and to which Mr. Hurst objected.¹ The ruling on the admission of Petitioner's Exhibit 44 was reserved, and the parties were permitted to file post-hearing memoranda of law regarding its admissibility. The parties filed memoranda of law on the admissibility of the exhibit. The undersigned ruled that Petitioner's Exhibit 44 was admitted into evidence for the

limited purpose of showing one group of documents that the School Board considered in making its decision to suspend Mr. Hurst and initiate dismissal proceedings against him.

Additionally, at hearing, Mr. Hurst offered into evidence Respondent's Exhibit 54, which was a summary of the statement of Kristi Tone, a teacher at Starlight Cove Elementary School, and to which the School Board objected. The parties were permitted to submit post-hearing memoranda of law regarding the admissibility of Respondent's Exhibit 54. Subsequent to the submission of Mr. Hurst's memorandum of law, the School Board withdrew its objection, and Respondent's Exhibit 54 is, therefore, admitted 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 more than ten days following the filing of the transcript. The Transcript, consisting of two volumes, was filed on May 12, 2003. As previously indicated, the parties filed memoranda of law subsequent to the filing of the Transcript regarding the admissibility of two exhibits. Both parties filed post-hearing submissions, however, the School Board's post-hearing submission was untimely filed. Mr. Hurst filed a Motion to Strike the School Board's post-hearing submission, and the School Board filed a response. The undersigned denied Mr. Hurst's motion.

The parties' post-hearing submissions were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Mr. Hurst holds a Florida teaching certificate.

2. Mr. Hurst was employed as a teacher with the School Board. He has been employed with the School Board since 1984. Mr. Hurst taught at Poinciana Elementary School, Citrus Cove Elementary School, Crystal Lakes Elementary School, and Lake Worth Middle School. At each of these schools, Mr. Hurst received disciplinary actions.

3. No dispute exists as to paragraph numbered 7 of the Petition, which states: "On or about September 3, 1996, Respondent [Mr. Hurst] received a written reprimand from his principal for failing to allow a child to use the restroom causing her to wet her pants and, as a result, incur public humiliation; failing to use good judgment by going to a student's house unannounced, at a time when parents are not normally at home, for the purpose of informing the parents that the child had not turned in a math paper; and for his continued use of sarcastic comments towards parents. Respondent [Mr. Hurst] did not grieve or otherwise appeal the imposition of this discipline."

4. No dispute exists as to paragraph numbered 8 of the Petition, which states: "On or about March 10, 1998, Respondent

[Mr. Hurst] received a formal written reprimand for inappropriate behavior because of his use of offensive nicknames towards students, including the use of phrases such as "shut-up" and "hiney," and for not reporting a child who had left Respondent's [Mr. Hurst's] class to go to his school's front office. Respondent [Mr. Hurst] was advised that his use of sarcasm and teasing of students must stop immediately, or he would be considered grossly insubordinate and more serious disciplinary action would be taken. Respondent [Mr. Hurst] did not grieve or otherwise appeal the imposition of the discipline."

5. No dispute exists as to paragraph numbered 9 of the Petition, which states: "Between February 4, 1999 through February 10, 1999, Respondent [Mr. Hurst] served a five (5) day suspension without pay for pushing a student and using profane language towards the student. Respondent [Mr. Hurst] did not grieve or otherwise appeal the imposition of the discipline."

6. No dispute exists as to paragraph numbered 10 of the Petition, which states: "On or about February 1, 2001, Respondent [Mr. Hurst] began serving, and did serve, a ten (10) day suspension without pay for inappropriately touching a student and for making inappropriate romantic/sexual comments towards a co-worker while working as a teacher at Crystal Lakes

Elementary School. Respondent [Mr. Hurst] did not grieve or otherwise appeal the imposition of the discipline."

7. No dispute exists as to paragraph numbered 11 of the Petition, which states: "Subsequent to the aforementioned suspension, Respondent [Mr. Hurst] was transferred to Starlight Cove Elementary School. His first day of work was on or about February 15, 2001."

8. At each disciplinary action, Mr. Hurst was advised and directed that any future inappropriate conduct would result in further disciplinary action, up to and including dismissal.

9. During the 2001-2002 school year, Mr. Hurst was employed with the School Board pursuant to a professional services contract.

10. At hearing, Mr. Hurst did not deny the previous disciplinary actions. Furthermore, he agreed that the pertinent time period for proving the allegations of fact of the Petition was February 15, 2001 through March 16, 2001.

11. Mr. Hurst is a member of the collective bargaining unit represented by the Palm Beach County Classroom Teachers Association (PBCTA).

12. Mr. Hurst was aware that the School Board engages in progressive discipline. Furthermore, he was aware that the use of profanity and other inappropriate conduct for which he was

previously disciplined was not allowed and violated the laws and rules under which the School Board operated.

13. At Starlight Cove Elementary School (Starlight Cove), Mr. Hurst was to assist where needed. He was eventually assigned to assist another teacher, Mr. Barrett, with his fifth grade class. Mr. Hurst's assignment with Mr. Barrett's fifth grade class was to be a temporary assignment.

14. Mr. Barrett's class was one of the most challenging classes at Starlight Cove. The students needed structure and a disciplinarian. Mr. Barrett had no problems with his class.

15. In the beginning, Mr. Hurst and Mr. Barrett were in the classroom together. Some time later, Mr. Barrett took leave for the birth of his child, which resulted in Mr. Hurst's being in the classroom alone, as the sole teacher.

16. Temporary and substitute teachers usually have a difficult time with students in the area of discipline. Students, recognizing that a teacher is temporary or a substitute, generally become discipline problems.

17. On or about March 2, 2001, Mr. Hurst was the sole teacher. One of the students in the fifth grade class complained to Mr. Hurst that another student had used profanity. Mr. Hurst gave the class, what he considers his routine lecture on the use of profanity, giving them examples as to what may be

accepted language and as to what may be unacceptable language for which the students could be disciplined.

18. On or about March 2, 2001, after school, the principal of Starlight Cove, Susan Saint John, inquired of Mr. Hurst about his routine lecture on profanity because she had received several written communications from the students in his class, complaining that he had used profanity. At hearing, Ms. Saint John testified that Mr. Hurst informed her that he used both a profane word and alphabet substitutes for profane words in his examples during his routine lecture. Moreover, Ms. Saint John testified that her notes of the incident, which were made at the time of her conversation with Mr. Hurst and which showed that he used the word "ass," were accurate. Mr. Hurst denies that he used profanity but insists that he used only alphabet substitutes for the profane words.

19. The more credible evidence is that Mr. Hurst used both alphabet substitutes for profane words and used the profane word "ass" in his routine lecture.² The evidence also shows that students complained of Mr. Hurst using profane language although the evidence is insufficient to show that he used all the profane words, other than "ass," complained of by the students.

20. The evidence is insufficient to show that Mr. Hurst used profanity other than in the routine lecture and that he used any other profane word than "ass."

21. The evidence is insufficient to show that Mr. Hurst was advised that the use of alphabet substitutes for profane words was unacceptable and would be contrary to the directive for him not to use profane words.

22. The use of profanity, whether by words or alphabet substitutes, by teachers with students constitutes unethical conduct.

23. Ms. Saint John reported the incident to the School Board's Professional Standards department on or about March 2, 2001, but the intake sheet for Professional Standards was not completed until about a week later.

24. Since 1996, Starlight Cove has used a system of discipline for students that uses color codes from green to red. The color of green is the beginning point and indicates that a student is following the rules. If a student fails to follow the rules, the colors progress from green to yellow (a warning) to red. The color code system is posted in classrooms and in the teachers' faculty handbook.

25. Mr. Barrett used the color code system of discipline, and it was posted in his classroom.

26. On March 2, 2001, Ms. Saint John was frequently called to the classroom at which Mr. Hurst was substituting for Mr. Barrett for discipline reasons. Her prior experience with the class was that Mr. Barrett had control of the class and that

she had not been called into the classroom for discipline problems. Furthermore, previously, when persons, other than Mr. Barrett, were in charge of the class, she had been infrequently called to the class for discipline reasons.

27. When Ms. Saint John entered the classroom on March 2, 2001, one of the things that she noticed was the color code had been changed from green to yellow and red. Based upon her prior experience with the class, she assumed that Mr. Hurst was incorrectly utilizing the color code system of discipline since the color had changed to yellow for the entire class. At no time did she discuss her assumption with Mr. Hurst.

28. Mr. Hurst denied incorrectly using the color code system. However, he admitted that he "bluffed" the students into behaving appropriately by telling them that he would change the color code for the entire class from green to yellow.

29. Because the students were well-behaved when Mr. Barrett was in the classroom, Mr. Hurst had no opportunity to observe Mr. Barrett using the color code system.

30. Ms. Saint John does not recall specifically advising or training Mr. Hurst on the use of the color code system. The color code system is reviewed at faculty meetings. Mr. Hurst attended the faculty meetings.

31. Mr. Hurst was aware of the color code system and of how to use the system.

32. The evidence is insufficient to demonstrate that Mr. Hurst incorrectly or inappropriately used the color code system.

33. On March 16, 2001, Mr. Hurst was transferred to Lake Worth Middle School.

34. On June 29, 2001, the Petition was executed by the Superintendent of the School Board. An investigation was performed before the determination was made to seek suspension and termination of Mr. Hurst from employment with the School Board. As part of the investigation, statements from some of the students in Mr. Hurst's class were taken. These statements by the students, as well as the previously indicated disciplinary actions against Mr. Hurst, were some of the documents relied upon by the School Board for the determination to seek suspension and termination of Mr. Hurst. After the determination to suspend and terminate was made, the statements were sworn to by the students.³

35. The evidence at hearing shows that, based upon the evidence before the School Board at its meeting, the School Board's action to suspend and dismiss Mr. Hurst was reasonable.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the

parties thereto, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

37. The School Board sets forth in the first paragraph of the Petition, in pertinent part, that the Petition is filed for Mr. Hurst "using profanity towards students, making inappropriate comments to students, refusing to allow students to go to the bathroom and for disciplining students without merit; in violation of Rules 6B-1.001(2), 6B-1.006(3)(a)(e) and (g), Florida Administrative Code; alternatively, 6B-4.009, School Board Policy 1.013, Section 231.02, Florida Statutes, for behavior exhibiting less than minimum standards for good moral character, thereby precluding Respondent [Mr. Hurst] from meeting the School Board's minimum standards for continuing employment "

38. Section 231.36, Florida Statutes (2001), provides in pertinent part:

(4)(c) Any member of the district administrative or supervisory staff and any member of the instructional staff, . . . who is under continuing contract may be suspended or dismissed at any time during the school year; 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 a crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. . . .

39. The Collective Bargaining Agreement between the School Board and the PBCTA provides at Section M, Discipline of Employees (Progressive Discipline) in pertinent part:

1. Without consent of the employee and the Association [PBCTA], disciplinary action may not be taken against an employee except for just cause, and this must be substantiated by clear and convincing evidence which supports the recommended disciplinary action.

* * *

5. Only previous disciplinary actions . . . as provided in paragraph #7 below may be cited.

* * *

7. Except in cases which clearly constitute a real and immediate danger to the District or the actions/inactions of the employee constitute such clearly flagrant and purposeful violations of reasonable school rules and regulations, progressive discipline shall be administered as follows:

* * *

c. Suspension Without Pay. A suspension without pay may be issued to an employee, when appropriate, in keeping with provisions of this Section, including just cause and applicable laws. . . .

d. Dismissal. An employee may be dismissed (employment contract terminated or non-renewed) when appropriate in keeping with provisions of this Section, including just cause and applicable laws.

40. The School Board has the burden to prove by clear and convincing evidence that Mr. Hurst committed the actions complained of and the violations in the Petition.

41. Mr. Hurst does not refute the prior disciplinary actions. He takes the position that, if the School Board proves the actions complained of regarding the use of profanity and the inappropriate use of the color code system for discipline, the School Board can discipline him with suspension and dismissal. However, Mr. Hurst contends that the School Board failed to prove the he committed the actions complained of.

42. Because no dispute exists, regarding the prior disciplinary actions, the School Board demonstrated that Mr. Hurst had committed the actions and been disciplined for the actions set forth in paragraphs numbered 7 through 11 of the Petition. See Findings of Fact numbered 3 through 7.

43. The School Board also demonstrated that Mr. Hurst was disciplined previously for using profane words and was directed not to use profane words. Further, the School Board demonstrated that, on or about March 2, 2001, Mr. Hurst used the profane word "ass," albeit, in what he categorizes as his routine lecture on profanity to the fifth grade students at Starlight Cove.

44. Florida Administrative Code Rule 6B-4.009, Criteria for Suspension and Dismissal, provides in pertinent part:

(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.

* * *

(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.

45. Florida Administrative Code Rule 6B-1.001, Code of Ethics of the Education Profession in Florida, provides:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore

strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) 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.

46. Florida Administrative Code Rule 6B-1.006, Principles of Professional Conduct for the Education Profession in Florida, provides in pertinent part:

(1) The following disciplinary rule shall constitute the 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.

(f) Shall not intentionally violate or deny a student's legal rights.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background

and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

47. The School Board argues that Mr. Hurst has committed misconduct in office through his actions complained of and, therefore, should be suspended and dismissed.

48. Mr. Hurst was previously disciplined for using profane language and was counseled and directed not to again use profane language. The School Board demonstrated that, on or about March 2, 2001, Mr. Hurst used profane language, the profane word "ass," and alphabet substitutes for other profane words in his lecture with students. He was aware that, because of his prior discipline, involving the use of profane language, he should not be using profane language under any circumstances with students. Using the profane word "ass" in a lecture as to what was or was not acceptable profane language by the students is of no consequence. Under usual circumstances, such action may be acceptable but Mr. Hurst's circumstances were not usual because he was disciplined and counseled and directed not to use profane language with students.

49. Mr. Hurst was subject to progressive discipline. The prior disciplinary actions should be considered along with this action by Mr. Hurst.

50. The School Board demonstrated that Mr. Hurst committed misconduct in office as defined by Florida Administrative Code

Rule 6B-4.009(3). Just cause exists for the School Board suspending and terminating Mr. Hurst.

51. The School Board did not pursue its position that Mr. Hurst failed to exhibit good moral character. The School Board is, therefore, considered to have abandoned such position. Furthermore, the evidence fails to demonstrate that Mr. Hurst failed to exhibit good moral character as defined.

RECOMMENDATION

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

RECOMMENDED that the Palm Beach County School Board enter a final order:

1. Suspending Dennis W. Hurst as a teacher.
2. Dismissing Dennis W. Hurst from employment.

DONE AND ENTERED this 31st day of December, 2003, in Tallahassee, Leon County, Florida.

Errol H. Powell

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 December, 2003.

ENDNOTES

^{1/} None of the students testified at hearing. Three of the statements involve Mr. Hurst's behavior at Starlight Cove. The remaining three statements involve his behavior for the ten-day suspension at Crystal Lakes Elementary School. The students names are redacted for this hearing.

^{2/} Mr. Hurst made an admission that he used the word "ass" when Ms. Saint John questioned him after school regarding his routine profanity lecture to the students.

^{3/} The statements of the students comprise Petitioner's Exhibit 44.

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.