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DIVISION OF ADMINISTRATIVE HEARINGS

BEFORE THE ORANGE COUNTY SCHOOL BOARD

ORANGE COUNTY SCHOOL BOARD

Petitioner,

Case No.: 02-0214 JSM-CLOS

v.

NATHANIEL PACKER

Respondent.

_____/

INTEGRATED FINAL ORDER

FINDINGS OF FACT

1. The Orange County School Board (School Board) employed Respondent during the 2001-2002 school year as a physical education teacher, or "coach", at Westridge Middle School (Westridge), pursuant to Section 231.36 and a collective bargaining agreement between the School Board and the Orange County Classroom Teachers Association. Respondent had taught at Westridge in a similar capacity for approximately four or five years before the 2001-2002 school year.

2. On November 14, 2002, Respondent had finished roll call for his physical education class, and students in the class were "dressing out" inside the boys locker room. Another coach had given candy to some students in his class for good behavior. The coach gave Respondent some of the candy to reward students in Respondent's class for their good behavior.

3. Respondent began passing out candy to students in Respondent's class. R.S. was a student in the first coach's class. R.S. approached Respondent and tried to take some candy from Respondent. Respondent refused to give any candy to R.S., explaining to R.S. that R.S. had already received candy from the other coach.

4. R.S. ignored Respondent's instructions and persisted in his attempt to take candy from Respondent. Respondent told R.S. to "back off" but R.S. persisted. R.S. put his hands on Respondent's hands and in the candy in an attempt to reach the candy. At the same time a group of students rushed toward Respondent to receive the candy.

5. Respondent tried to separate himself from R.S. at the same time that Respondent backed away from the onrushing group of students. Respondent touched R.S. on the shoulder with an open hand and pushed R.S. away from Respondent. Respondent was neither angry or agitated. The force that Respondent applied to R.S. caused R.S. to fall backwards into a locker where he hit his back on a combination lock. R.S. testified that "It hurt". Respondent testified that he was wrong for touching R.S. but denied trying to hurt R.S.

6. Other students began taunting R.S. They called R.S. a "wussy" and yelled that R.S. had been beaten up by Respondent. R.S. began to cry and left the locker room to get Principal Lorenzo Phillips.

7. The school administration investigated the matter and, on November 27, 2001, relieved Respondent of his duties with pay. On December 17, 2001, Petitioner filed an Administrative Complaint seeking to dismiss Respondent from his teaching position.

8. Section 232.27 authorizes Respondent to keep good order in the classroom or other places in which the teacher is in charge of students. Section 232.27(1)(i) authorizes Respondent to use reasonable force to protect himself or others from injury.

9. Section 232.27 does not apply to the November 14, 2001 situation because Respondent never testified that he needed to restore order or that he feared injury to himself or others. The primary factual issue is whether Respondent touched/pushed R.S. contrary to prior directives and reprimands.

10. The testimony of eyewitness students called by Petitioner differed greatly as to what happened between Respondent and R.S.

11. E.S. testified that "everybody started jumping on Coach Packer." E.S. did not see Respondent make contact with R.S. because E.S. really wasn't paying attention.

12. L.P. is a good friend of R.S. L.P. testified that the whole class crowded around Respondent and that Respondent jabbed R.S. with a closed fist from a distance of approximately six inches. However, R.S. did not lose his balance and was not in pain. Respondent is significantly larger and stronger than R.S.

13. E.M. first testified that he did not see Respondent make contact with R.S. but saw R.S. fall on the floor. E.M. later testified that he saw R.S. fall on the floor. E.M. later testified that he saw Respondent push R.S. in the side. E.M. testified that he was in the cafeteria at the time rather than in the locker room.

14. F.D. testified that Respondent merely touched R.S. and tried to calm him down. F.D. testified that Respondent applied no force to R.S.

15. R.S. testified that Respondent punched him in the chest and that he fell into a locker. (T – 74, 75, 79, 80).

16. Respondent testified that he put his hands on R.S.'s shoulders; used a little bit of force and that R.S. fell backwards into a locker (T – 120, 121, 122).

17. The ALJ's credibility findings are entitled to deference. However, this case does not turn on credibility findings about what the witnesses saw because both Respondent and R.S. testified that Respondent touched/pushed R.S. and that R.S. fell into a locker. Moreover, Respondent testified that he was wrong for touching R.S.

18. The issue is whether Respondent touched/pushed R.S. in violation of prior directives and reprimands. The School Board finds that such a touching/pushing occurred in violation of prior directives and reprimands. Respondent's testimony that he was wrong for touching R.S. is an admission that he acted in violation of prior directives and reprimands.

19. The touching/pushing of R.S. by Respondent on November 14, 2001 violated Management Directive A-4, entitled "Physical, Emotional or Sexual Abuse of Students or Sexual Harassment of Adults by Employees of the School Board of Orange County, Florida." Management Directive A-4 states in pertinent part:

> No students of the Orange County Public Schools should be subjected to physical, emotional, or sexual abuse by an employee. Therefore, any principal, administrator, or work location supervisor who observes or receives a complaint that a student has been physically, emotionally, or sexually abused by an employee of the School Board or Orange County, Florida shall immediately notify the Employee Relations Department. . .

20. Prior to November 14, 2001, Petitioner had issued three directives and two written reprimands to Respondent for touching students and failing to exercise reasonable care.

Respondent did not challenge any of those disciplinary actions. Respondent's touching/pushing of R.S. on November 14, 2001 violates the terms of the prior directives and reprimands.

21. Petitioner issued the first written directive to Respondent on May 18, 1999. The directive instructs Respondent to avoid touching students "except as absolutely necessary to effect a reasonable and lawful purpose." Respondent's touching/pushing of R.S. on November 14, 2001 was not absolutely necessary to effect a reasonable and lawful purpose and therefore violated the May 18, 1999 written directive.

22. The written directive issued on May 18, 1999, also prohibits Respondent from verbally intimidating a student. Respondent's instruction for R.S. to "back off" did not verbally intimidate R.S. because R.S. ignored verbal instructions from Respondent and persisted in his physical pursuit of candy.

23. The written directive issued on May 18, 1999, also required Respondent to report any incident immediately to the administration. Respondent did not have time to report the incident to the administration. R.S. reported the incident immediately while Respondent was still responsible for his class. The administration immediately investigated the report from R.S.

24. On October 13, 1999, Petitioner issued another directive to Respondent after a physical confrontation between Respondent and two students. The directive was identical to the first directive except that it added:

> Touching a student in a manner that serves no education or lawful purpose may encourage the appearance or use of force.

The touching/pushing of R.S. by Respondent on November 14, 2001 violated the October 13, 1999 directive.

25. On October 13, 1999, Petitioner also issued a written reprimand to Respondent, dated October 7, 1999. The written reprimand is effective for five years and states in part:

> On October 6, 1999, a meeting was held to discuss allegations of misconduct on your part. In that meeting we discussed two physical confrontations that took place between you and your students. In he first case you admitted thumping a student's chest in an incident. In the second incident you admitted to stepping on a student's foot to stop him from running, but could not recall how the student received a scratch on his neck.
>
> I am especially concerned about your conduct because you were clearly in violation of directives issued to you in the past. For this reason, this written reprimand is being issued along with a separate letter of directives. I am advising that if there is another confirmed complaint of a similar nature, a recommendation may be made to terminate your employment.

The touching/pushing of R.S. by Respondent on November 14, 2001 was a confirmed complaint of a similar nature which violated the October 7, 1999 written reprimand.

26. On May 19, 2000 Petitioner issued another directive to Respondent dated May 18, 2000. The directive addressed negligent conduct by Respondent. The wording of the directive was almost identical to the two previous directives issued to Respondent. For reasons similar to those previously stated, the touching/pushing of R.S. by Respondent on November 14, 2001 violated the May 18, 2000 directive.

27. On May 19, 2000, Petitioner issued a written reprimand to Respondent dated May 18, 2000. The written reprimand is effective for five years and states in part:

> This letter shall serve as a summary of our meeting on May 15, 2000, and as a letter of reprimand. In that meeting we discussed an incident in which two students fell to the ground while participating in an activity. You neglected those students in that you failed to determine if they were injured. Furthermore, your disregard was evident in a

> statement you made to another student when you told the student to "kick them up."
>
> It is my conclusion that you were negligent by failing to exercise reasonable care, and that you failed to appropriately perform your duties. I am especially concerned because this is not the first time I have had to issue directives or a reprimand regarding your conduct. I am not advising you that if there is another incident that rises to the level of a discipline. I may recommend your termination . . . .

The touching/pushing of R.S. by Respondent on November 14, 2001 was "an incident that rises to the level of discipline" which violated the May 18, 2000 written reprimand.

28. The collective bargaining agreement between Petitioner and the Orange County Classroom Teachers Association applies in this case. Article XII of the collective bargaining agreement, entitled "Discipline", states at Section A1:

> An employee may be disciplined only for just cause, and discipline shall be imposed only for a violation of an expressed rule, an expressed order, an expressed policy or a reasonable expectation of management which should have been know to the employee.

29. The collective bargaining agreement at Article XII, Section A2, further states, in relevant part:

> Any teacher may be suspended or dismissed at any time during the year, provided the charges brought against him are based on . . . misconduct in office . . ., gross insubordination, [and] willful neglect of duty . . . in accordance with Florida Statutes.

30. Section 231.36(1)(a) applies to this proceeding. Section 231.36(1)(a) provides in part:

> Each person employed as a member of the instructional staff in any district school system . . . shall be entitled to and shall receive a written contract . . . [that] 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 the rule of the State Board of Education: misconduct in office . . . gross insubordination, [and] willful neglect of duty . . . .

31. The allegations in the Administrative Complaint are limited to misconduct in office, gross insubordination, willful neglect of duty, and conduct unbecoming a public employee. Rule 6B-4.009(3) defines misconduct in office, and Rule 6B-4.009(4) defines gross insubordination and willful neglect of duty. Case law is the only authority cited by Petitioner to define conduct unbecoming a public employee.

32. Rule 6B-4.009(3) defines misconduct in office 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 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.

33. The Code of Ethics of the Education Profession, as set forth in Rule 6B-1.001, in relevant part, requires that:

> [t]he educator values the worth and dignity of ever person . . . [and] [t]he educator's primary professional concern will always be for the student.

34. The Principles of Professional Conduct for the Education Profession are contained at Rule 6B-1.006 and state in relevant part:

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

35. Rule 6B-4.009(4) defines "gross insubordination: and "willful neglect or duties" for instructional personnel. Gross insubordination and willful neglect of duty mean:

> a constant or continuing intentional refusal to obey direct order, reasonable in nature, and given by and with proper authority.

36. Respondent's actions on November 14, 2001 constituted misconduct in office because by touching/pushing R.S., Respondent showed no concern for R.S. or R.S.'s safety and evinced a total disregard for R.S.'s mental and/or physical health and safety. Respondent's actions on November 14, 2001 also impaired his effectiveness as a teacher because his actions were witnessed by numerous students.

37. Respondent's actions on November 14, 2001 constituted gross insubordination and neglect of duty. Respondent's actions in touching/pushing R.S. violated Petitioner's Management Directive A-4 in that Respondent subjected R.S. to physical and emotional abuse. Respondent's actions on November 14, 2001 also violated prior written directives and reprimands which warned Respondent to avoid touching students except as absolutely necessary

to effect a reasonable and lawful purpose. The prior written directives and reprimands were direct orders to Respondent which were reasonable in nature and given by someone with the proper authority. Respondent's actions on November 14, 2001 subjected R.S. to embarrassment.

38. Conduct unbecoming a public employee is conduct that falls below a reasonable standard or conduct prescribed by the employer. Touching/pushing a student is unprofessional and disrespectful of the student. Such actions endanger the health, safety and welfare of students. R.S. fell backwards into a locker and was then subjected to ridicule by fellow students. Respondent's conduct falls below the reasonable standard of conduct that the Petitioner has prescribed and has a right to expect from an employee.

39. Just cause exists to terminate Respondent from his employment pursuant to Section 231.36(1)(a) Fla. Stat. Respondent's actions in touching/pushing R.S. on November 14, 2001 were improper, unprofessional and involved misconduct, gross insubordination and willful neglect of duty. Respondent's conduct violated the terms of the collective bargaining agreement between Petitioner and the Orange County Classroom Teachers Association.

40. Respondent arguably may have used poor judgment in deciding to pass out candy in the locker room on November 14, 2001. His action may have precipitated the chaos in the locker room. However, the Administrative Complaint does not charge either Respondent or the other physical education teacher with poor judgment in passing out candy.

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the parties and subject matter of this case. Section 120.57(1) and 120.569. DOAH provided the parties with adequate notice of the administrative hearing.

42. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any proposed disciplinary action. McNeill v. Pinellas County School Board, 678 S.2d 475, 477 (Fla. 2d DCA 1996); Allen v. School Board of Dade County, 571 S.2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So.2d 883, 884 (Fla. 3d DCA 1990). Similar fact evidence of the prior use of unreasonable force by Respondent is not admissible to show Respondent's propensity to use unreasonable force on November 14, 2001. Section 120.57(1)(d).

43. Gross insubordination may arise from a single act which constitutes a violation of a previously given order to refrain from identified conduct. Johnson v. School Board of Dade County, Florida, 578 So.2d 387 (Fla. 3d DCA 1991). Gross insubordination may also arise from a single act of disrespect for the authority of supervisors. Jacker v. School Board of Dade County, 426 S.2d 1149 (Fla. 3d DCA 1983). This is exactly what occurred in this case. Respondent violated at least three previous direct orders to avoid touching students except as absolutely necessary to effect a reasonable and unlawful purpose. In doing so, Respondent was guilty of gross insubordination per Johnson.

44. Respondent's conduct on November 14, 2001 also constituted willful neglect of duty because the definition of willful neglect of duty under Florida Administration Code Rule 6B-4.009(4) is the same as gross insubordination.

45. Respondent's actions on November 14, 2001 constituted misconduct in office because by touching/pushing R.S., Respondent demonstrated no regard for the dignity of R.S. as a student and exposed R.S. to actions which were or could have been harmful to R.S.'s mental

and/or physical health or safety. Because the incident of November 14, 2001 was in front of and witnessed by a number of students; R.S. was intentionally exposed to unnecessary embarrassment. The public nature of the November 14, 2001 incident was so serious as to impair Respondent's effectiveness in the school system. School Board of Dade County v. Dileo, 1990 WL 749341 (Fla. Div. Admin. Hrgs.).

46. Conduct unbecoming a public employee is also grounds for termination of employment. Seminole County Board of County Commissioners v. Long, 422 So.2d 938, 940 (Fla. 5th DCA 1982). Conduct unbecoming a public employee is conduct that falls below a reasonable standard of conduct prescribed by the employers. Id.

47. Just cause for discipline exists when the acts or conduct of an employee involve misconduct and are rationally and logically related to the employee's job duties. Just cause is not limited to items enumerated in a list of offensive conduct in applicable rules or the collective bargaining agreement. Dietz v. Lee County School Board, 647 So.2d 217 (Fla. 2d DCA 1994). Respondent's prior acts of misconduct may be considered in determining the existence of just cause for termination. C.F. Industries, Inc. v. Long, 364 So.2d 864 (Fla. 2d DCA 1978); Johnson, 578 So.2d at 387.

48. Respondent's actions on November 14, 2001 constituted conduct unbecoming a public employee and, as such, satisfied the just cause standard for termination in Section 231.36(1)(a), Florida Statutes and Petitioner's collective bargaining agreement. Dietz, supra. Respondent's actions on November 14, 2001 were the latest in series of physical confrontations with students.

49. The actions of Respondent on November 14, 2001 constituted misconduct in office, gross insubordination, willful neglect of duty, conduct unbecoming a public employee and just cause to terminate Respondent's employment under the applicable collective bargaining agreement and Section 231.36(1)(a), Fla. Stat.

Based upon a review of the complete record and, for the reasons stated in this Final Order, the School Board hereby terminates Respondent's employment.

DONE AND ORDERED this 1ST day of ~~March~~ APRIL, 2003 in Orlando, Orange County, Florida.

The School Board of Orange County

By: Judge "Rick" Roach

Member Shea dissents and would adopt the ALJ's Recommended Order.

Filed with the Clerk of the School Board of Orange County this 2nd day of ~~March~~ APRIL, 2003.

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