

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 02-1666
)
NATALE MALFA,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on June 19, 2002, in Largo, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jacqueline Spoto Bircher, Esquire
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For Respondent: Ted E. Karatinos, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent violated Section 231.3605(2)(c), Florida Statutes (2001), by engaging in alleged harassment, inappropriate interactions with colleagues, or misconduct. (All chapter and section

references are to Florida Statutes (2001) unless otherwise stated).

PRELIMINARY STATEMENT

On April 17, 2002, Petitioner suspended Respondent without pay from his position as a non-instructional employee with the Pinellas County School Board (the School Board). Respondent timely requested an administrative hearing.

At the administrative hearing, Petitioner presented the testimony of seven witnesses and submitted 16 exhibits for admission into evidence. Respondent presented the testimony of three witnesses and submitted 21 exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the two-volume Transcript of the hearing filed on July 10, 2002. Petitioner timely filed its Proposed Recommended Order (PRO) on July 18, 2002. Respondent timely filed his PRO on July 19, 2002.

FINDINGS OF FACT

1. On March 13, 2000, the School Board employed Respondent as a Plant Operator at Seminole High School. The School Board transferred Respondent to Tarpon Springs High School on May 22, 2000.

2. On August 2, 2000, Respondent earned a satisfactory evaluation from his supervisor. The evaluation stated that he

is a "hard worker," a "good team worker," and "he works well with others."

3. On February 15, 2001, Respondent earned a Better Than Satisfactory evaluation from his supervisor. The evaluation stated that Respondent is a "good team worker" and is "always willing to help others."

4. On September 17, 2001, the School Board promoted Respondent to Night Foreman at Cypress Woods Elementary School (Cypress Woods). The two individuals who had previously served as Night Foremen were Barbara Moore (Moore) and Kevin Miller (Miller).

5. At Cypress Woods, Sharon Sisco (Sisco) was the Principal, Marilyn Cromwell (Cromwell) was the Assistant Principal, and Candace Faull (Faull) was the Head Plant Operator. As Head Plant Operator, Faull supervised Respondent as well as Moore and Miller. Each Night Foreman had "poor communication problems" with Faull.

6. Between the fall of 2000 and the spring of 2002, Respondent, Moore, and Miller each supervised individual Plant Operators at Cypress Woods, including Alice Mertz (Mertz). Mertz had problems with taking instructions from each Night Foreman and with taking complaints "over their head[s]" directly to Faull.

7. Faull attempted to "set up" both Miller and Moore for disciplinary action by the School Board. During the fall of 2000, the School Board received numerous complaints from Miller and Moore about the abuse they suffered at Cypress Woods.

8. On October 10, 2000, Sisco issued specific directives to Faull, instructing her "not to make or engage in negative conversation [with] . . . the crew (or other staff) regarding the Night Foreman." On March 14, 2001, Sisco reprimanded Faull and again counseled her "not to make or engage in negative conversation made by the night crew (or other staff) about the night foreman."

9. On March 20, 2001, Cromwell instituted a Success Plan. The Plan instructed the Plant Operations crew to "refrain from gossip and negative comments about each other." The Plan required the Plant Operations crew to maintain a Communications Log. During the spring of 2001, Cromwell monitored the behavior of the Plant Operations staff through regular meetings.

10. The Plant Operations crew continued its historical behavior after the School Board promoted Respondent to Night Foreman at Cypress Woods in the fall of 2001. On February 1, 2002, Respondent earned a Better Than Satisfactory evaluation

from Sisco. The evaluation stated that Respondent is a "great team worker" who "gets along with staff."

11. On February 28, 2002, Respondent touched Mertz on her buttocks in the break room at Cypress Woods in the presence of at least two other people in the room. The physical contact occurred when Mertz walked past Respondent on her way out of the break room.

12. Respondent admits that his hand made contact with the buttocks of Mertz. However, Respondent claims that the contact was incidental, not intentional, not inappropriate, and did not satisfy the definition of sexual harassment.

13. Mertz did not confront Respondent but left the room. However, Mertz later filed a sexual harassment complaint with her employer.

14. Campus police investigated the matter on March 1, 2002. The investigation included statements from Mertz, Respondent, and Mr. Todd Hayes (Hayes), one of the individuals who was present in the break room at the time of the incident. All three testified at the administrative hearing and provided written statements during the investigation. Mertz and Respondent also provided deposition testimony during pre-hearing discovery. Respondent also provided an additional statement on March 5, 2002, during an interview with Michael

Bissette (Bissette), Administrator of the School Board's Office of Professional Standards (OPS).

15. On March 18, 2002, Bissette determined that Respondent had committed harassment, inappropriate interaction, and misconduct in violation of School Board Policy 8.25(1)(m), (p), and (v), respectively. School Board Policy 8.25(1)(m), (p), and (v) authorizes disciplinary action for each offense that ranges from a caution to dismissal. Bissette recommended to the Superintendent of the School Board that the School Board dismiss Respondent from his employment.

16. By letter dated March 18, 2002, the Superintendent notified Respondent that Respondent was suspended with pay from March 13, 2002, until the next meeting of the School Board on April 16, 2002. If the School Board were to adopt the recommendation of dismissal, the effective date of dismissal would be April 17, 2002. Respondent requested an administrative hearing, and the School Board suspended Respondent without pay on April 17, 2002, pending the outcome of the administrative hearing.

17. Some inconsistencies exist in the accounts provided by Mertz. For example, Mertz claims in her testimony that the incident occurred "around 2:30 p.m." The investigation report by the campus police shows that Mertz claimed the incident occurred around 3:00 or 3:30 p.m.

18. Other inconsistencies exist between the accounts by Mertz and Hayes. For example, Mertz testified that five people were in the break room at the time of the incident and that she did not confront Respondent or say anything to Respondent. Hayes recalls that only four people were in the room and that Mertz did turn and say something to Respondent such as, "Oh stop it."

19. Inconsistencies regarding the time of the incident, the number of people in the break room, and whether Mertz said anything to Respondent at the time are not dispositive of the material issues in this case. The material issues are whether the physical contact by Respondent was intentional, sexual, and offensive, whether it was inappropriate, and whether it constituted misconduct within the meaning of School Board Policy 8.25(1)(m), (p), and (v), respectively.

20. Respondent claims that he touched Mertz accidentally while he was putting his keys into a pocket at the particular time that Mertz walked in front of Respondent. Mertz walked between Respondent and Hayes in a manner that prevented Hayes from observing the actual contact by Respondent. However, Hayes did observe Respondent's movements up to the time of the actual contact.

21. When Respondent was approximately a foot away from Mertz, Respondent moved his left hand from his side in an

upward direction with his palm up and fingers extended to a point within an inch or so of the right buttock of Mertz. Respondent's arm was always extended and did not move in a sideways direction that would have occurred if Respondent had been putting keys into his pocket or reaching for keys in his pocket or on his belt. Respondent had a smirk on his face and laughed. The testimony of Hayes at the administrative hearing concerning Respondent's hand and arm movements was consistent with the accounts by Hayes in two written statements provided during the investigation.

22. Mertz felt Respondent grab her right buttock. She felt Respondent's hand tighten on her buttocks. Mertz did not feel Respondent inadvertently touch her. The physical contact Mertz felt on her buttocks was consistent with the observations by Hayes. The testimony of Mertz at the administrative hearing concerning the physical contact is consistent with accounts by Mertz in three written statements provided during the investigation and in her pre-hearing deposition.

23. Respondent's testimony concerning his hand movements in the break room does not possess the consistency present in the accounts by Mertz and Hayes. When asked on direct examination what happened, Respondent testified:

A. I was walking towards the cabinet to get the flags after we'd had a meeting, to

leave; she walked by me -- I -- walked behind her. I had my keys clipped to my right side of my belt and they were flopping against my leg.

I wasn't going to need my keys so I started to reach over with my left hand to open my pocket because I had my keys in my right hand to put them in, because my pants were tight and there was a top pocket to put them in and as my hand came up and around that's when I hit her, I brushed against her.

Transcript (TR) at 284.

24. On cross-examination, counsel for Petitioner asked questions that provided Respondent with an opportunity to reconcile his testimony with ostensibly divergent accounts during the investigation.

Q. The day after the incident you wrote a statement for the police officer, didn't you?

A. Yes, I did.

Q. And in the statement you said Ms. Mertz asked you to grab her can, didn't you?

* * *

A. Yes, this is what I wrote but I misquoted it. She said that she was going to grab her can.

Q. But you wrote in the statement that Alice said, grab my can? Is that what you wrote?

A. That's what I wrote but that "my" is her, not me.

* * *

Q. Let me ask you . . . Did you write in your statement, "and with my left hand I whacked at her to say, hey"?

A. Yes. But I was using that as a description on the type of motion it was. It was like a, you know, a hey, type of motion that I came across.

TR at 285-286.

25. In Respondent's initial written statement to campus police, Respondent wrote that he whacked at Mertz with his "open" left hand as if to say hey but did not know where contact was made. In a second written statement to campus police, Respondent wrote that he whacked at Mertz with the "back" of his left hand. In an interview with Sisco, Respondent claimed that he and Mertz were just joking. During direct examination, Respondent did not testify that he whacked at Mertz as if to say "hey." Rather, Respondent testified that his left hand inadvertently came in contact with Mertz as a result of Respondent reaching for his keys.

26. The account provided by Respondent during direct examination at the hearing is consistent only with Respondent's testimony in his pre-hearing deposition. The statements given during the investigation are closer in time to the actual event.

27. The actions of Hayes and Mertz immediately following the incident are consistent with their testimony that Respondent intentionally grabbed the buttocks of Mertz in a

sexual manner. Hayes asked another individual in the break room if she had observed the incident. He later reported the incident to Faull before speaking to Mertz. Mertz was initially shocked and left the break room; she later reported the incident to her employer.

28. The physical contact by Respondent created an offensive environment for Mertz. Mertz was initially completely in shock. She then became angry and eventually became so angry she "wanted to strangle" Respondent. Mertz cried and was very upset when she completed a written statement for Sisco. She did not tell her husband immediately because she did not want to upset him.

29. Respondent's physical contact with Mertz constituted sexual harassment within the meaning of School Board Policies 8.24 and 8.241. The physical contact was "unwanted sexual attention," "unwanted physical contact of a sexual nature," and "physical contact" that had the purpose of creating an "offensive environment" within the meaning of School Board Policies 8.24(2)(a), (2)(b)4, and 8.241(2)(a)1, respectively.

30. Respondent's physical contact with Mertz violated the prohibitions in School Board Policy 8.25(1)(m), (p), and (v). The physical contact was harassment that created an offensive environment in violation of School Board Policy 8.25(1)(m). It was an inappropriate interaction that violated

Policy 8.25(1)(p). It was misconduct that violated Policy 8.25(1)(v).

31. Respondent has no prior disciplinary history. The physical contact engaged in by Respondent is his first offense and is a single isolated violation of applicable School Board policy.

32. Respondent has never asked Mertz on a date, never seen her outside work, never made any sexual comments either to her or about her, and has never touched her when they were working alone together on the night shift.

CONCLUSIONS OF LAW

33. DOAH has jurisdiction over the parties and the subject matter. Section 120.57(1). The parties received adequate notice of the administrative hearing.

34. Respondent is an "educational support employee" within the meaning of Section 231.3605(1)(a). Petitioner has the authority to discharge an educational support employee, and any appeal by the employee may be governed by Petitioner's rules. Section 231.3605(2)(c).

35. Petitioner has the burden of proof in this case. Petitioner must show by a preponderance of the evidence that Respondent committed the offenses with which he is charged and the reasonableness of any proposed penalty. MacNeill v.

Pinellas County School Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996).

36. Petitioner showed by a preponderance of the evidence that Respondent engaged in sexual harassment, defined in School Board Policies 8.24(2)(a), (2)(b)4, and 8.241(2)(a)1; and violated School Board Policy 8.25(1)(m), (p), and (q). The testimony of Mertz and Hayes was credible and persuasive and consistent over time as to their description of Respondent's hand and arm movements in the break room on February 28, 2002. Respondent's various explanations of what transpired in the break room were neither credible nor persuasive. They were ambiguous as to detail and inconsistent over time. Evidence of long-standing personnel issues involving three night foremen, including Respondent, Faull, and workers they supervised was not sufficient to impeach the testimony of Mertz and Hayes or to show that either was motivated to lie under oath.

37. Petitioner failed to show by a preponderance of the evidence that the proposed penalty is reasonable. The penalties authorized for violations of School Board Policy 8.25(1)(m), (p), and (q) range from caution to dismissal. The penalties are reasonably presumed to be progressive. This was Respondent's first offense and was a single isolated incident. Respondent's employment history is otherwise exemplary.

38. Petitioner has an array of other disciplines available to it that are appropriate to the facts and circumstances in this case. One of those disciplines includes suspension without pay. Petitioner has suspended Respondent without pay for what will be five months on September 17, 2002. Suspension without pay for a period of five months is a reasonable discipline under the facts and circumstances of this case. The imposition of any greater discipline, under the facts and circumstances of this case, is an abuse of agency discretion and is not supported by the facts and circumstances in this case.

39. Petitioner could have insulated itself from the need to exercise agency discretion by charging Respondent with engaging in inappropriate sexual behavior in violation of School Board Policy 8.25(1)(a). Dismissal is the only discipline authorized for a violation of School Board Policy 8.25(1)(a), irrespective of whether the violation is a first offense. Petitioner chose not to charge Respondent with violating School Board Policy 8.25(1)(a), but seeks to punish Respondent in the same manner as if Respondent had violated School Board Policy 8.25(1)(a). During his testimony at the administrative hearing, the OPS Administrator failed to adequately explicate any intelligible standards or emerging

agency policy that justifies the proposed exercise of agency discretion.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of the three charged offenses, suspending Respondent without pay from April 17 through September 17, 2002, and reinstating Respondent to his former position on September 18, 2002.

DONE AND ENTERED this 6th day of September, 2002, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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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.