

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.)
) Case No. 02-2540
 MARLON J. PEARCE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Administrative Law Judge, Eleanor M. Hunter, held a final hearing in the above-styled case on March 18, 2003, in Miami, Florida.

APPEARANCES

For Petitioner: Luis M. Garcia, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Leslie A. Meek, Esquire
United Teachers of Dade - Law Department
2200 Biscayne Boulevard, Fifth Floor
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STATEMENT OF THE ISSUE

Whether the Petitioner demonstrated just cause for the dismissal of the Respondent from employment as a teacher.

PRELIMINARY STATEMENT

On June 20, 2002, the Superintendent of Schools for the Petitioner, Miami-Dade County School Board ("Petitioner" or the "School Board") notified the Respondent, Marlon J. Pearce (the "Respondent" or "Mr. Pearce"), that, at its meeting on June 19, 2002, the School Board suspended him and initiated proceedings to dismiss him from employment, citing violations of specific Board Rules and Florida Statutes. In a letter dated June 20, 2002, counsel for Mr. Pearce requested a hearing to contest his dismissal from his teaching position at Lawton Chiles Middle School. On June 25, 2002, the School Board forwarded the matter to the Division of Administrative Hearings, which assigned an administrative law judge to hear the case.

Due to the difficulty in securing witnesses during the summer school recess, the parties initially requested a hearing date in September 2002. Set for September, the case was continued, without opposition, to November 2002, based on Respondent's Motion for Continuance of Hearing. The Motion, filed on August 22, 2002, included a statement that counsel for Respondent could not prepare for the case unless the Petitioner filed a Notice of Specific Charges. Treated as a Motion for the same, an Order Requiring Notice of Specific Charges was entered on September 6, 2002. The School Board filed a Notice of Specific Charges on September 20, 2002.

The Respondent's Motion to Strike paragraphs 15 and 16 of the Notice of Specific Charges, filed on October 4, 2002, was granted to the extent that the issues raised were limited to whether the Respondent was placed on notice of the Petitioner's policy against the use of corporal punishment. The Respondent's Motion for More Definite Statement, also filed On October 4, 2002, was denied, after Petitioner's Memorandum in Opposition to Motion for More Definite Statement, filed on October 14, 2002, was considered. The Respondent's Unopposed Motion for Continuance, filed on November 20, 2002, led to agreement on a hearing date in March 2003.

At the final hearing, the Petitioner, the School Board of Miami-Dade County, Florida, presented the testimony of John G. Schoeck, former principal of North Glade Elementary School; T.H., an eighth grade student at Lawton Chiles Middle School; John T. Messenger, Detective, Miami-Dade Schools Police Department; G.G., a ninth grade student at American Senior High School; J.L., a ninth grade student at American Senior High; G.B., a ninth grade student at Michael Krop Senior High School; Alberto Iber, Assistant Principal at Lawton Chiles Middle School; J.B., a ninth grade student at Barbara Goleman Senior High School; W.V., a ninth grade student at American Senior High School; H.E., a ninth grade student at Barbara Goleman Senior High School; Karen Robinson, Principal at Lawton Chiles Middle School; and

Barbara Ward Moss, District Director, Miami-Dade School Board Office of Professional Standards, Miami-Dade County Public Schools. Petitioner's Exhibits numbered 1-6, 8-10, and 15-26 (referred to herein as P-number) were received in evidence. Official recognition was taken of Rules 6B-1.001 and 6B-4.009, Florida Administrative Code, which were marked Petitioner's Exhibit 27.

The Respondent, Marlon J. Pearce, testified on his own behalf. At the request of counsel for the Respondent, official recognition was taken of Subsection 228.041(27), Florida Statutes (2001).

The transcript of the hearing (referred to herein as Tr.) was filed April 7, 2002. The parties filed their proposed recommended orders on May 2, 2003.

FINDINGS OF FACT

1. In a Joint Pre-Hearing Stipulation, the parties agreed to the following facts:

(a) At all times material hereto, Respondent, Marlon J. Pearce was employed by Petitioner as a school teacher within the school district of Miami-Dade County, Florida, assigned to Lawton Chiles Middle School.

(b) Respondent was employed by Petitioner pursuant to the Contract between the Miami-Dade County Public Schools and the United Teachers of Dade, and subject to the rules and regulations of the State Board of Education and of the School Board in

accordance with § 1012.33(6)(a), Fla. Stat. (2002).

(c) At all times material hereto, Petitioner was a duly constituted School Board charged with the duty to operate, control and supervise all free public schools within the school district of Miami-Dade County, Florida, pursuant to § 4(b) of Article IX of the Constitution of the State of Florida and § 1001.32(2), Fla. Stat. (2002).

(d) On November 5, 2000, a conference-for-record (CFR) was held with the Respondent by the principal at North Glade Elementary School.

(e) On March 7, 2001, another CFR was held with the Respondent by the principal at North Glade Elementary School.

(f) On March 15, 2002, a CFR was held with the Respondent at the School Board's Office of Professional Standards.

(g) On May 28, 2002, a meeting was held with the Respondent at the School Board's Office of Professional Standards.

(h) At its regularly scheduled meeting of June 19, 2002, the School Board took action to suspend and initiate dismissal proceedings against the Respondent.

2. John Schoeck is currently and for the last two years has been the Principal of North Hialeah Elementary School. For the preceding five years, he was the Principal at North Glade Elementary School. While at North Glade, Mr. Schoeck hired the Respondent, Mr. Pearce, to teach physical education. (Tr. 13)

3. After a November 5, 2000, conference-for-record (CFR) with Mr. Pearce, Mr. Schoeck issued certain directives to

Mr. Pearce. Among those directives were the requirement for professional conduct with parents, students and staff, and prohibitions on using profanity, on making verbal or physical threats to parents, students or staff members, and on having verbal or physical confrontations with coworkers. (Tr. 18, 208-209, P-6)

4. Mr. Schoeck also referred Mr. Pearce to the Employee Assistance Program based on interpersonal behavior observed on the job. (Tr. 9, P-5)

5. An allegation that the Respondent hit a student in the back with his fist was unsubstantiated, in March 2001. The Respondent testified that the student was loud, easily influenced and had an attitude. (Tr. 185)

6. Another student at North Glade Elementary School became involved in a rock-throwing incident with the Respondent. The Respondent described the student as defiant. He testified that after the student threw a rock and hit him, he grabbed her arm to make eye contact, but after she "started going wild and shaking," he let her go and she fell to the ground. There was testimony that her shirt was torn when she reached the principal's office, but the Respondent denied that it was ripped when she left him. (Tr. 186-188, 212-213)

7. On March 7, 2001, Mr. Schoeck held another CFR with Mr. Pearce, as a result of certain allegations by a student and

his mother that Mr. Pearce called the student a "punk."

Mr. Schoeck found Mr. Pearce insubordinate and reiterated the directives issued after the November conference. (Tr. 24-25, 209-210, 215-216, P-9)

8. The Miami-Dade Schools Police Department ("the school's police") investigated several students' complaints alleging that Respondent had subjected them to corporal punishment. The police found the complaints to be unsubstantiated. Each time there was an incident, the Respondent was reminded of the School Board's policy prohibiting corporal punishment. (Tr. 32-33)

9. Late in the 2000-2001 school year, the Respondent was reassigned to the region office and, subsequently, for the 2001-2002 school year to Lawton Chiles Middle School (Tr. 33 and Joint Pre-Hearing Stipulation)

10. On November 7, 2001, a charge of verbal abuse, for calling a student "stupid," was substantiated against the Respondent. (Tr. 219, P-17) The Respondent testified that what he said was "stop acting stupid" because the student was loud and saying she knew why he had been fired from his other job and was quoting the Bible. (Tr. 197-198) He also said that, in the heat of the moment, he also called her stupid. (Tr. 200)

11. On November 8, 2001, the Respondent violated the School Board policy against "unseemly conduct, or the use of abusive

and/or profane language in the workplace," by using the word "nigga." (Tr. 60-67 and P-16)

12. The Respondent testified that the racial slur was made "under his breath" and not intended to be heard by students. He testified that what he said was "you're going to drive a nigga crazy," and that the comment was directed to himself, not the student. (Tr. 195)

13. The Respondent testified that he told a student "If I was your dad, I would ring your neck," because the student was disruptive, defiant and not following directions. (Tr. 195-196, 218-219)

14. In December 2001, a student was playing with a toilet valve and water was squirting out on the floor in the boys' locker room. After the student left the stall and walked over towards him, the Respondent grabbed him by the neck and shoved him. After an investigation by the school's police, the charge was found to be substantiated. (Tr. 69-88, 113-117 and P-18) The Respondent testified that he grabbed the student's shoulder but did not push him. (Tr. 201-202) Although the student had stopped spraying water at the time he confronted him, the Respondent considered his intervention appropriate because the wet floor created a safety concern. (Tr. 205, 214-215, 217-218)

15. At the same time, other students began slamming locker doors in the locker room. The Respondent called the students

involved "a bunch of assholes," and said "If you do this one more time, I could lose my job for hurting you." (Tr. 69-88, 113-117 and P-18)

16. About the same time, the Assistant Principal at Lawton Chiles Middle School, Alberto Iber, received a complaint from the parents of another student. While he was playing with an injured student's aluminum walker, the Respondent grabbed him to try to retrieve the walker and pushed him to the ground. He also said to the student "fuck you." Charges of corporal punishment and the use of profanity were substantiated. (Tr. 93-112 and P-19)

17. The Respondent admitted that he pulled the student down after saying "This is going to be the final time I ask you to sit down." (Tr. 204) He said he used the "f" word under his voice. (Tr. 205)

18. When the Respondent was first assigned to Lawton Chiles Middle School, the Principal, Karen Robinson met with him to discuss the previous incidents at North Glade Elementary School and to discuss expectations that he would abide by the School Board's rules. Each time there was an incident involving the Respondent, Ms. Robinson called the District's Professional Standards Office which referred the matters to the school's police to conduct the personnel investigations. (Tr. 119-133, 219-220)

19. After the fourth personnel investigation at Lawton Chiles Middle School, Ms. Robinson contacted the personnel director for the region. She was concerned that the incidents involving the Respondent were escalating from inappropriate verbal to more serious physical interactions with students. As a result, she recommended that Respondent's employment be terminated. (Tr. 135-136 and P-21)

20. Barbara Moss, the District Director in the School Board's Office of Professional Standards, agreed with Ms. Robinson's and the region personnel director's recommendations to terminate the Respondent's employment. (Tr. 164-165, P-22 and 23)

21. Ms. Moss, in turn, recommended that the School Board terminate Respondent's employment. She met with Respondent to notify him of the proposed action. (Tr. 165-166)

22. The Superintendent of Schools also recommended that the School Board take action to terminate Respondent's employment and notified the Respondent of that recommendation. (P-24 and 25)

23. The Superintendent also notified the Respondent when the School Board, at its meeting on June 19, 2002, took action to suspend and initiate dismissal proceedings against him for misconduct in office, gross insubordination, willful neglect of duty, and violation of School Board Rules 6Gx13-4.108, on Violence in the Workplace; 6Gx13-4A-1.21, on Responsibilities and

Duties; and 6Gx13-5D-1.07, Corporal Punishment - Prohibited. Notice of the availability of an administrative hearing to contest the action was also included. (P-24 through 26)

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569 and 120.57(1), Florida Statutes.

25.

25. The School Board has the burden of proving the allegations in the Administrative Complaint by a preponderance of the evidence. See Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990); and Dileo v. School Board of Lake County, 569 So. 2d 883 (Fla. 3d DCA 1990).

26. Rule 6B-4.009(3), Florida Administrative Code, states that:

Misconduct in office is defined 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 the 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.

27. Rule 6B-4.009(4), Florida Administrative Code, provides that:

Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order,

reasonable in nature, and given by and with proper authority.

28. School Board Rules 6GX13-5D-1.07 and 6Gx13-4-1.08 prohibit corporal punishment and violence in the workplace. In Subsection 228.041(27), Florida Statutes (2001), corporal punishment is defined as:

. . . the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rule. However, the term "corporal punishment" does not include the use of such reasonable force by a teacher or principal as may be necessary for self-protection or to protect other students from disruptive students.

29. The School Board met its burden of proving that the Respondent committed repeated acts of misconduct, by using inappropriate and profane language around or directed towards students.

30. The School Board further proved that the Respondent was grossly insubordinate, by repeatedly ignoring warnings from two principals at two schools about his verbal and physical abuse of students.

31. The School Board further proved that the Respondent violated its policies against violence in the workplace and against corporal punishment in all of the substantiated cases of corporal punishment. In none of those cases was the Respondent's

use of force necessary for his self-protection or to protect other students from disruptive students.

RECOMMENDATION

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

RECOMMENDED that the School Board enter a final order sustaining Respondent's suspension without pay on June 19, 2002, terminating Respondent's employment, and denying the Respondent back pay.

DONE AND ENTERED this 2nd day of May, 2003, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2003.

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.