

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, AS COMMISSIONER)
OF EDUCATION,)
)
Petitioner,)
)
vs.) Case No. 02-3134PL
)
ELIZABETH H. WEISMAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on September 24, 2002, in Tallahassee, Florida, before Diane Cleavinger, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Matthew K. Foster, Esquire
Edward T. Bauer, Esquire
Brooks, LeBoef, Bennett & Foster, P.A.
863 East Park Avenue
Tallahassee, Florida 32301

For Respondent: John O. Williams, Esquire
Williams & Holz, P.A.
211 East Virginia Street
The Cambridge Centre
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether disciplinary action should be taken against Respondent's educators certificate.

PRELIMINARY STATEMENT

The Commissioner of Education filed an Administrative Complaint charging Respondent with having violated Section 231.2615(1)(c), (f), and (i), Florida Statutes, and Rule 6B-1.006(3)(a), (e) and (g), Florida Administrative Code. Specifically, the Administrative Complaint alleges that on April 6, 2001, while employed as a teacher at the Second Chance School in Leon County, Florida, Respondent inappropriately disciplined student J.M. by kicking him in the buttocks and calling various students at various times "rat bastard," "bitch," "bi-sexual," "jackasses," and "lying scumbag."

Respondent disputed the above allegations and requested a formal hearing pursuant to Section 120.57(1), Florida Statutes, to contest the proposed agency action. The matter was referred to the Division of Administrative Hearings.

In the Prehearing Stipulation filed September 19, 2002, the parties agreed that the issues of fact that remained to be litigated were whether Respondent pushed student J.M. in the buttocks with her foot in an attempt to produce his exit from the classroom, and whether Respondent called student W.F. a "rat bastard" and referred to her students in the class as "jackasses." The parties further agreed that the facts alleged did not support a finding that Respondent committed an act of moral turpitude contrary to Section 231.2615(1)(c), Florida

Statutes, or that Respondent discriminated against a student on the basis of race, color, religion, sex, age, or other protected classification in violation of Rule 6B-1.006(3)(g), Florida Administrative Code. Accordingly, the issues of law that remained to be litigated were whether Respondent violated Section 231.2615(1)(f) and (i), Florida Statutes, and Rule 6B-1.006(3)(a) and (e), Florida Administrative Code. All other allegations are dismissed.

At the hearing, Petitioner presented the testimony of three witnesses. Respondent testified on her own behalf, and presented the testimony of one witness, and offered one exhibit into evidence.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on October 17, 2002, and October 18, 2002, respectively.

FINDINGS OF FACT

1. In the 2000-2001 school year, Respondent, Elizabeth Weisman, held a Florida Teaching Certificate No. 475382. The certificate covered the areas of elementary education and mathematics and was valid through June 30, 2005. When the events herein occurred, Respondent was employed as a dropout prevention teacher at Second Chance School in Tallahassee, Florida. The school is part of the Leon County School District. There is no evidence that Respondent has been disciplined by

Petitioner on any prior occasion since she began teaching in Leon County in October 1980.

2. Second Chance School is a school for children with disciplinary problems and who have a history of being extremely disruptive and cannot be handled in a regular school setting.

3. Ms. Weisman was in a difficult position when she started teaching at Second Chance School. She was assigned to teach outside her field and was replacing a teacher who was not as strict a disciplinarian or as demanding of performance as Ms. Weisman. In general, her students did not react well to the increase in discipline and expectations of performance and likely caused increased referrals to the principal's office. Both Ms. Weisman and the students had to adjust to each other

4. On April 6, 2001, J.M. entered Respondent's classroom. Respondent asked him to leave her classroom. He was not supposed to be in the classroom because he had been referred to the principal's office the day before for discipline. J.M. attempted to comply with Respondent's request, but a number of students entering the room blocked him from leaving. Respondent made a shooing motion with her hands to J.M. and raised her foot to indicate for J.M. to leave the room. The gestures were done in a playful manner and were intended as such. While Ms. Weisman's foot was raised, she accidentally brushed or pushed J.M.'s buttocks with her foot. J.M. could feel the push.

However, it did not cause him to lose his balance or cause any harm to him whatsoever. The evidence did not demonstrate that J.M. was unduly embarrassed or otherwise affected academically by the incident. Indeed, the incident gave J.M. a good story to tell to others at school. The evidence did not demonstrate that the push was inappropriate or violated any state rules or statutes governing teachers. There was no evidence that Ms. Weisman was less effective as a teacher due to this incident.

5. W.F. testified that on two occasions he witnessed Respondent state to the class that they were "acting like jackasses." J.F.'s testimony was vague and inconsistent. Specifically, W.F. testified that on the first occasion, Respondent stated to the class that they were "acting like jackasses" after class members refused to return to their seats during an altercation between two students occurring outside the classroom. The classroom students were generally cheering the fight on. With respect to the second instance, W.F. testified that Respondent made the statement after W.F. and several of his classmates tricked Respondent into placing her hand on a pencil sharpener covered with glue. W.F. conceded the description was an accurate description of the behavior of the students at the time. At no time did Respondent call an individual student an improper name. Although W.F. testified he was embarrassed by

Ms. Weisman, W.F.'s testimony is not persuasive on this point. Nor is it realistic to conclude any significant embarrassment given the bold nature of W.F.'s behavior which preceded these comments.

6. W.F. also testified on direct examination that he witnessed Respondent call the class "a bunch of rat bastards." Again W.F.'s testimony was vague and inconsistent. During cross-examination, however, W.F. testified that the remark was made to a specific female student during a verbal altercation between the student and Respondent. However, Respondent denies ever using or knowing the term "rat bastard." Given Respondent's demeanor, the inconsistency, and the unreliability of the other evidence, Respondent's testimony is the more credible.

7. There was no credible evidence that any student was ever affected in any way by these incidences. No evidence of any change in grades or reduced test scores was introduced at the hearing. An increase in disciplinary referrals was noted by the principal, but that increase was not shown to be tied to these incidences. The increase, if any, was more likely to be due to the fact that she was a new teacher, teaching out of field, who was more strict with her students and demanded more from them. Moreover, statistics supporting this perceived increase in disciplinary referrals was not offered at the

hearing. Indeed, later testing showed Ms. Weisman's students improved their test scores. However, the testing was for a different year and class. It was not clear that the same students were being tested. The improvement does show that Ms. Weisman is an effective teacher.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. Section 120.57(1), Florida Statutes.

9. Petitioner bears the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

10. Count 2 of the Administrative Complaint alleges that, by virtue of the misconduct described above, Respondent's effectiveness as an employee of the School Board was seriously reduced in violation of Section 231.2615(1)(f), Florida Statutes. Based on the evidence presented, there is insufficient evidence to conclude that Respondent's effectiveness as a teacher was seriously impaired. Therefore, Count 2 of the Administrative Complaint should be dismissed.

11. Count 4 of the Administrative Complaint alleges that by virtue of the misconduct described above, Respondent failed to make reasonable effort to protect students from conditions harmful to learning in violation of Rule 6B-1.006(3)(a), Florida

Administrative Code. Again, there is insufficient evidence to conclude that by accidentally pushing student J.M. with her foot and referring to the class as "jackasses," Respondent failed to make a reasonable effort to protect students from conditions harmful to learning. In fact, no harm or reasonably potential harm is shown by the evidence. Two incidences of poor language of a very minor nature and one accidental touching do not demonstrate conditions harmful to learning amounting to a violation of Rule 6B-1.006(3)(a), Florida Administrative Code. The fact that the principal issued a reprimand, in this case, does not support the conclusion that a violation warranting State discipline has occurred since the employer has greater latitude in discipline than the State, which is strictly governed by statutes and rules. Therefore, Count 4 should be dismissed.

12. Count 5 of the Administrative Complaint alleges that by virtue of the misconduct described above, Respondent intentionally exposed a student to unnecessary embarrassment or disparagement contrary to Rule 6B-1.006(3)(e), Florida Administrative Code. There is insufficient evidence that Respondent intentionally exposed students to unnecessary embarrassment by stating that they were "acting like jackasses" and by pushing student J.M. with her foot. Therefore, Count 5 should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Education Practices Commission enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 23d day of December, 2002, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23d day of December, 2002.

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.