

PRELIMINARY STATEMENT

By Petition for Suspension Without Pay and Dismissal from Employment dated November 26, 2002, (Petition for Suspension), Palm Beach County Superintendent of Schools, Dr. Arthur C. Johnson, acting on behalf of the Palm Beach County School Board (Petitioner or School Board), terminated the employment contract of Respondent, Cherlyn Kelson (Respondent or Kelson), a teacher at Jupiter Elementary School (Jupiter).

Respondent timely asserted her statutory and contractual rights to contest the termination, requesting a formal hearing before DOAH.

At the final hearing Petitioner presented the testimony of Dr. Mary Gray (Professor at Florida Atlantic University); Dianne Curcio-Greaves (Professional Standards Department); Wanda Hagan (Area 5 School Board office); Learnna Ramsey (Equal Employment Opportunity Coordinator); Nuncia Lowery (Manager Multi-Cultural Department); Ann Wark (Jupiter Principal); and Respondent.

Petitioner's Exhibits numbered 1-6, 8-14, 21-23, 30-34, 35-38, 39-42a, 43-46, 56-59, 70-78, 85, 86, 88, 90, 93, 93a, 94-101d, 186, 189, 202, 203, 204 and Joint Exhibits 1 and 2 were entered into evidence without objection.

Respondent testified in her own behalf.

Respondent's Exhibits numbered 1 and 2 were admitted into evidence without objection.

A four-volume transcript of the formal hearing was filed with DOAH on July 14, 2003. Thereafter the parties submitted written Closing Arguments, as well as Proposed Recommended Orders, all of which have been carefully considered in the preparation of this Recommended Order.

Petitioner's Motion to Strike Respondent's Proposed Recommended Order is denied as moot.

FINDINGS OF FACT

1. Respondent received her Florida teacher certification in elementary education in 1988.

2. Since then, she has worked for four different elementary school principals, all in Palm Beach County Schools. Although she has received overall satisfactory evaluations throughout her career, only one of the four principals for whom she has worked found her performance satisfactory in all areas throughout an entire school year.

3. In its Petition for Suspension, the School Board seeks to terminate Kelson's employment, alleging that her teaching performance during the 2001-2002 school year at Jupiter was deficient in the areas of presentation of subject matter, knowledge of subject matter, planning, assessment and recordkeeping. Each of these areas has, over the years, often been identified as being an area of concern on evaluations

rendered by three out of four of the principals for whom Kelson has worked.

4. For the 2001-2002 school year, Kelson was offered by Jupiter's principal, Ann Wark (Wark), the opportunity to teach a small class of older elementary aged children who spoke little or no English.

5. Kelson accepted, never suggesting that she was not appropriately credentialed.

6. Kelson did not have a successful year in this assignment. Through counsel, she stipulated that the School Board has complied with all of the substantive and procedural requirements set forth in state law and in Kelson's contract with Petitioner for evaluating teaching performance. The evaluations were negative. Kelson further stipulated that the School Board has complied with all its legal and contractual obligations governing procedures for terminating employment due to deficient performance.

7. Numerous meetings were held between Kelson and School Board representatives to discuss her 2001-2002 performance. At least some of these meetings were also attended by Kelson's union representative. At no time did Kelson express disagreement with the substance of the evaluations.

8. The evidence affirmatively established that Kelson was properly evaluated by individuals qualified to conduct her

evaluations; that she was provided with sufficient and appropriate assistance, including improvement strategies reasonably calculated to enable her to bring her performance up to the district's minimum requirements; that she was given adequate opportunity to correct her deficiencies; and that she failed to do so.

9. By way of defense, Kelson contends that she was teaching out-of-field at the time the adverse evaluation was rendered. She argues that, as a matter of law, she cannot be terminated for performance deficiencies which occurred while teaching out-of-field.

10. However, the record affirmatively shows that Kelson was not teaching out-of-field. Neither was any evidence or legal argument offered to support the notion that if a teacher is assigned out-of-field, she has an absolute defense to termination.

11. Like most elementary school teachers employed in Florida, Kelson holds what is known as an English for Speakers of Other Languages (ESOL) endorsement to her elementary education certificate.

12. The endorsement arises pursuant to a "grandfathering" provision contained in a Consent Decree entered into by the State of Florida Department of Education on August 14, 1990.

13. The Consent Decree was aimed at assuring that children of limited English proficiency (LEP) would not be left out or left behind due to the language barrier between them and their teachers.

14. Like most of her colleagues, Kelson took the training contemplated in the Consent Decree and necessary to qualify for the ESOL endorsement to her teaching certificate.

15. The ESOL endorsement, or, more precisely, the classes required to earn the ESOL endorsement, provides the teacher with the requisite training, in fact and in law, to serve LEP students, including students with no ability to speak English.

16. In order to obtain an ESOL endorsement, a teacher must have obtained sufficient credentials to be presumed qualified to teach LEP students in a classroom where most of the children speak proficient English, as well as in a class of nothing but LEP students.

17. At first blush it is counterintuitive at a minimum that a child who speaks no English could learn academic content, including language arts, from a teacher who speaks not a word of the child's language.

18. Yet, the evidence established that in large school districts such as Palm Beach County, dozens of foreign languages may be spoken by students; it would be impossible to find teachers fluent in each of those languages.

19. The point of the Consent Decree is to assure that LEP students are appropriately served, whether or not their teacher is able to speak to them in their primary language. To that end, the grandfathering provision was put in place. Over time, the parties to the Consent Decree have come to be satisfied that the grandfathering provision has furnished teachers for LEP students who have the necessary credentials to teach them.

20. Kelson's theory rests upon a misunderstanding of what ESOL is and is not. ESOL is not a subject, like math or history. Instead, it is a method, or set of strategies, by which teachers who speak no language other than English can teach content to students who speak little or even no English.

21. Kelson, and all teachers who hold an ESOL certificate, have the training necessary to deliver content not only to LEP students in a class with English-speaking students, but also to students in classes which include only children who speak little, and perhaps even no English.

22. Kelson contends that the student population to which she was assigned could be lawfully taught only by a teacher with a state ESOL certification. A certification in ESOL requires substantially more classroom hours than Kelson or any other teacher with an ESOL endorsement would be expected to have.

23. Kelson's claim that only an ESOL certified teacher would have been qualified to teach her 2001-2002 class was not

supported by any evidence other than her personal opinion, and is rejected as factually and legally unsound.

24. Kelson claims that she accepted the assignment Wark offered because she felt pressured to do so. She intimated in general ways her belief that school officials, particularly Wark, were not dealing in good faith with her.

25. No evidence was offered upon which a finding could be based that Kelson's feeling of being pressured to teach any particular class was reasonable. Neither was there evidence that Petitioner or its employees acted in bad faith toward her. Rather, the evidence established that prior to the time she retained counsel, Kelson had not claimed to anybody that she was unqualified to teach her class.

26. In fact, Kelson was appropriately credentialed for the class she was teaching. It was her performance, not her resume, which was deficient.

27. Subsequent to obtaining her ESOL endorsement, she completed over one hundred hours of in-service points in ESOL. With this additional background, Petitioner could and did reasonably expect that not only was Kelson qualified to teach her assigned students, she was also credentialed to teach certain aspects of ESOL to other teachers.

28. In the spring of 2002, Kelson requested a transfer to another school, which request was denied.

29. On November 26, 2002, acting in accordance with the Superintendent's recommendation, the School Board voted to suspend Respondent without pay and terminate her employment effective December 11, 2002.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the parties and subject matter of this proceeding. Sections 120.57(1) and 231.36, Florida Statutes.

31. In order to terminate Kelson's employment contract, the School Board must prove by a preponderance of the evidence the allegations set forth in the Petition for Suspension. Allen v. School Board of Dade County, 571 So. 2d 568, 569 (Fla. 3rd DCA 1990). The School Board has satisfied its burden of proof.

32. The idea that Kelson was teaching out-of-field was brought to the attention of the School Board's attorneys long after she had conceded the bona fides of the School Board's claim that her classroom performance in the 2001-2002 school year was unsatisfactory. After careful scrutiny of the legal argument offered in support of this theory, together with the evidence and testimony in the record, it is concluded that Kelson's theory is unpersuasive.

33. As previously noted, ESOL is not a discipline or curriculum to be imparted to elementary school students.

Rather, it is a strategy or set of strategies used to teach LEP students.

34. It is possible to obtain certification in ESOL; this is a rigorous master's level program which few teachers undertake. There is no obligation at the elementary level that teachers of LEP students hold ESOL certification.

35. The ESOL endorsement is a sufficient credential for teaching elementary aged LEP students. Thus, as a matter of law, Kelson cannot be deemed to have been teaching out-of-field.

36. Assuming for the sake of discussion that Kelson was teaching out-of-field, there is no evidence that this would constitute a bar to dismissing a teacher under all circumstances, as Kelson contends.

37. No evidence was offered upon which a finding could be based that Kelson's feeling of being pressured to teach the ESOL class was reasonable, nor was there evidence that Petitioner or its employees acted in bad faith toward Kelson. In addition, Kelson's decision to rest her entire case upon the legal argument that she was teaching out-of-field renders irrelevant the personal feelings of the parties toward one another.

38. The School Board's decision to deny Kelson the transfer she requested is of no legal significance because there is no evidence that the district was under any legal duty to

provide a transfer, nor was there evidence that the transfer was denied in bad faith.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is RECOMMENDED that the School Board issue a final order terminating Cherlyn Kelson's employment for unsatisfactory performance as set forth in the Petition for Suspension dated November 26, 2002.

DONE AND ENTERED this 6th day of August, 2003, in Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of August, 2003.

COPIES FURNISHED:

Andrew DeGraffenreidt, III, Esquire
Powers, McNalis & Moody
Post Office Box 21289
2328 10th Avenue, North, Suite 601
Lake Worth, Florida 33461-6617

Jean Marie Nelson, Esquire
School District of Palm Beach County
3318 Forest Hill Boulevard, Suite C302
West Palm Beach, Florida 33407

Dr. Arthur C. Johnson, Superintendent
Palm Beach County School Board
3340 Forest Hill Boulevard, Suite C316
West Palm Beach, Florida 33406-5869

Honorable Jim Horne
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32499-0400

Daniel J. Woodring, General Counsel
Department of Education
1244 Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399-0400

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.