1-3-03

BEFORE THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

RUTH HENDERSON, Petitioner, v. BREVARD COUNTY SCHOOL BOARD, Respondent.	BOARD AGENDA ITEM NO. F-1 SEPTEMBER 23, 2003 DOAH CASE NO. 03-0412

JBC-Clos

AT

FILED
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FINAL ORDER

THIS CAUSE was referred to the Division of Administrative Hearings for a formal administrative hearing. The assigned Administrative Law Judge ("ALJ)" has submitted a Recommended Order to the Agency, Brevard County School Board ("School Board"). The Recommended Order of July 3, 2003, entered herein is incorporated by reference. Exceptions were filed by both parties to this proceeding.

RULING ON EXCEPTIONS

In a Section 120.57(1) proceeding an agency's Final Order is entered after a hearing is held, evidence is received, and the ALJ has submitted a Recommended Order. The general rule of deference to the ALJ's findings of fact is that an agency may reject or modify a finding of fact only if the finding is not supported by competent, substantial evidence. The agency has no authority to reweigh conflicting evidence. Section 120.57(1)(l), Fla. Stat., See e.g. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). The agency may adopt the ALJ's findings of

fact and conclusions of law in a recommended order, or the agency may reject or modify the conclusions of law over which it has substantive jurisdiction. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase the penalty without a review of the complete record and without stating with particularity its reasons therefore in the final order, by citing to the record in justifying its action. Section 120.57(1)(l), Fla. Stat.

The merits of the exceptions will now be addressed.

PETITIONER'S EXCEPTIONS

Petitioner excepts in whole or in part to findings of fact expressed in paragraphs 7, 13, 38 and 39 of the Recommended Order. Petitioner also objects to the recommendation by the ALJ that the "Respondent enter a final order finding that Petitioner inappropriately utilized corporal punishment in the discipline of the two students and that Petitioner be suspended without pay for seven months and then placed on two years probation." (Petitioner's Exception No. 5). Petitioner then generally excepts to the findings of fact by the ALJ by attacking the competency or the credibility of the two student witnesses (Petitioner's exceptions No. 6-12) and the ALJ's finding that Petitioner's conduct failed to protect the student from conditions harmful to their physical health and safety (Petitioner's Exception No. 13). The challenged findings are supported by competent substantial evidence, therefore, the exceptions are denied.

RESPONDENT'S EXCEPTIONS

Respondent excepts to the ALJ's conclusions of law in paragraph 35. of the Recommended Order that Respondent failed to carry its burden that Petitioner's actions constituted misconduct in office. Respondent also excepts to the recommended penalty of suspension without pay for seven months and two year's probation as being inappropriate under the facts of this case. Instead, Respondent urges that termination of employment is the appropriate penalty. Respondent's exceptions to the Recommended Order are granted for the reasons stated below.

FINDINGS OF FACT

The School Board adopts the findings of fact set forth in paragraphs 1 through 16 of the Recommended Order.

CONCLUSIONS OF LAW

The School Board adopts the conclusions of law set forth in the Recommended Order except where inconsistent with this final order. The abbreviation "R.O." refers to the Recommended Order.

I. MISCONDUCT IN OFFICE

The ALJ found that Petitioner violated School Board Rule 5630 and the Code of Ethics and The Principles of Professional Conduct of the Education Profession In Florida by utilizing corporal punishment on two kindergarten students in her class. The ALJ found that Petitioner's conduct in utilizing corporal

punishment failed to protect the students from conditions harmful to their physical health and safety and that although neither student suffered any lasting impairment to their physical health, Petitioner should have reasonably foreseen that an unintentional consequence of her conduct could cause physical harm (R.O. 37-39).

The School Board, as the elected body charged with providing a free appropriate education to the public school students in Brevard County, is a policy making board. As a matter of policy, the School Board has prohibited the utilization of corporal punishment of students in Brevard County public schools (R.O. 16). As part of her continuing contract, Petitioner agreed to faithfully observe the rules and regulations of the School Board as they relate to her teaching responsibilities (R.O. 15). Petitioner knowingly violated the School Board's rule prohibiting corporal punishment on two separate occasions involving two kindergarten students (R.O. 1-16). Petitioner's conduct could have resulted in physical harm to the students (R.O. 39).

In this case, an infusion of policy is required to make a conclusion of law whether Petitioner's conduct in violating the School Board's rule against corporal punishment and The Code of Ethics for the teaching profession constitutes misconduct in office. See Johnson v. School Board of Dade County, 578 So.2d 387 (Fla. 3rd DCA 1991); Goss v. District School Board of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992).

Petitioner's reaction to the misbehaving kindergarten children in her class by striking one student on his buttocks with her sandal and shaking another student in such a manner as to cause him to bump his head is not behavior or conduct acceptable to the School Board after an infusion of policy considerations. Petitioner's actions, besides being a knowing violation of a Board rule, could have resulted in lasting physical harm to the students.

The Board therefore rejects the ALJ's conclusion of law that Petitioner's actions did not constitute misconduct in office. On the contrary, the Board finds that on the factual record and after the infusion of policy considerations in applying its own rule prohibiting corporal punishment of students, that Petitioner did commit misconduct in office. See Purvis v. Marion County School Board, 766 So.2d 492 (Fla. 5th DCA 2000); Goss, 601 So.2d 1232.

II. THE PENALTY

In the Recommended Order the ALJ found that Petitioner knowingly violated the School Board's rule prohibiting corporal punishment of students, and that Petitioner's actions violated Rule 6B-1.006(3)(a) of the Florida Administrative Code (The Code of Ethics and The Principles of Professional Conduct of the Education Profession In Florida) by failing to protect the students from conditions harmful to their health (R.O. 37-38). As a penalty, the ALJ recommended that Petitioner be suspended without pay for seven months, and that upon her return to teaching that she be placed on twenty-four months probation (Recommendation page 24 of R.O.).

The Board rejects the recommended penalty and hereby increases the penalty to dismissal from employment and termination of Petitioner's continuing contract for the following reasons:

(a) **Intentional violation of School Board Rule and Policy.** The record demonstrates that Petitioner knowingly and intentionally violated the School Board's rule and policy by administrating corporal punishment on two kindergarten students in her class (R.O. 5-16).

(b) **Risk to student's health and safety.** The record shows that Petitioner's conduct could have resulted in physical harm to the students (R.O. 39).

(c) **Petitioner's conduct violated the community standard against corporal punishment of children in the public schools.** School Board Rule 5630 reflects the community's judgment, as determined by the elected members of the School Board, that corporal punishment of students has no place in Brevard County public schools (R.O. 15-16).

(d) **Petitioner's conduct violated the Code of Ethics and the Principles of Professional Conduct of The Education Profession In Florida by failing to protect the students from conditions harmful to their health and safety.** The record establishes that although the students suffered no lasting physical injury, Petitioner's conduct could have resulted in physical harm (R.O. 39).

(e) **Severity of the misconduct.** The School Board will not tolerate physical or corporal punishment of students by instructional personnel. The record shows that Petitioner administered corporal punishment on two separate occasions within one week on two children who were 5 and 6 years old (R.O. 7-13). Petitioner's failure or inability to deal with the classroom disruptions of the two kindergarten age students by appropriate disciplinary measures justifies termination of Petitioner's employment.

III. CONCLUSION

The School Board rejects the conclusion of law by the ALJ that Petitioner did not commit misconduct in office by inappropriately utilizing corporal punishment in the discipline of the two kindergarten students. On the contrary, the School Board finds that Petitioner's actions do constitute misconduct in office as a matter of law. Purvis; 766 So.2d 492, 498; Johnson, 578 So.2d 387; Goss, 601 So.2d 1232.

The School Board also rejects the penalty recommended by the ALJ and finds that termination of Petitioner's employment is the correct and appropriate penalty based upon the facts of this case and the application of policy considerations by the Board. Criminal Justice Standards v. Bradley, 596 So.2d 661 (Fla. 1992); Allen v. School Board of Dade County, 571 So.2d 568 (Fla. 3rd DCA 1990).

Therefore, Petitioner is dismissed from employment as an instructional employee and her continuing contract terminated effective December 11, 2002.

DONE AND ORDERED this 26th day of September, 2003.

THE SCHOOL BOARD OF BREVARD COUNTY, FLORIDA

BY: _____
JANICE KERSHAW, Chairman

RIGHT TO APPEAL

Parties to this Final Agency Action are hereby advised of their right to seek judicial review of this Final Agency Action pursuant to Section 120.68, Florida Statutes, and Florida Rules of Appellate Procedure 9.030(b)(1)(C) and 9.110. To initiate an appeal, one copy of a Notice of Appeal must be filed, within the time period stated in the Florida Rule of Appellate Procedure 9.110, with the Clerk of the Brevard County School, 2700 Judge Fran Jamieson Way, Viera, Florida 32940. The second copy of the Notice of Appeal, together with the filing fee, must be filed with the appropriate District Court of Appeal.

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the following persons by U. S. Mail this 26 day of September, 2003, to:

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