

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, AS COMMISSIONER)
OF EDUCATION,)
)
Petitioner,)
) Case No. 03-0913PL
vs.)
)
BRENDA MONTGOMERY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on May 19, 2003, in Miami, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gonzalo R. Dorta, Esquire
334 Minorca Avenue
Coral Gables, Florida 33134-4304

For Respondent: Mark F. Kelly, Esquire
Kelly & McKee, P.A.
1718 East 7th Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

STATEMENT OF THE ISSUE

Whether Respondent, an assistant principal, committed the offense alleged in the Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

On February 13, 2002, Petitioner filed an Administrative Complaint against Respondent alleging certain facts pertaining to three work orders for tee shirts that she signed as an assistant principal at Lawton Chiles Middle School (LCMS), a public school in the Miami-Dade County School District. The Administrative Complaint contained one count. The gravamen of the charge was that Respondent failed to follow purchasing policies and instructions from her principal, thereby engaging in conduct which seriously reduced her effectiveness as an employee of the School Board, in violation of Section 231.2615(1)(f), Florida Statutes.

At the final hearing, Petitioner presented the testimony of Karen Robinson (principal of LCMS) and Respondent. Petitioner presented ten sequentially numbered exhibits, each of which was admitted into evidence. Respondent presented no other testimony, but presented six sequentially numbered exhibits, each of which was admitted into evidence.

One volume of the transcript of the proceedings was filed on June 27, 2003. The second volume of the transcript was filed on July 1, 2003. The parties filed Proposed Recommended Orders, which have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, Respondent held Florida Educator's Certificate No. 527473, covering the areas of English, Gifted, and Administration-Supervision. This certificate is valid through June 30, 2004.

2. During the 2000-2001 school year, Respondent was an assistant principal at LCMS, the position she held at the time of the final hearing.

3. James Cerra was the principal of LCMS during the 2000-2001 school year.

4. Prior to November 9, 2000, Respondent became aware that certain groups of students and parents were interested in purchasing tee shirts bearing the school's mascot. Respondent and Mr. Cerra discussed the proposed purchase and Respondent arranged for several vendors to submit proposals. Mr. Cerra told Respondent that money would have to be collected from students and parents before the tee shirts could be ordered so that the school would have the funds to pay for the tee shirts when they were delivered.

5. On November 9, 2000, Respondent met with a representative of Stitch Imprint, the vendor that was selected to produce the tee shirts. On that date Respondent signed three separate forms for a total price of \$10,418.36. Each form was styled "work order" and described the size and number of various

tee shirts to be delivered. Each of the work orders provided for a delivery date in late November 2000. Each of the work orders contained the following caveat:

This order covers special merchandise made for you and not carried in stock. It is not subject to cancellation, return or exchange. The balance is required C.O.D. or within 30 days of job completion.

6. When she signed the work orders on November 9, 2000, Respondent was aware that Mr. Cerra had authorized the purchase of the tee shirts contingent upon there being sufficient funds collected to pay for the tee shirts, and Respondent knew or should have known that sufficient funds to pay for the tee shirts had not been collected.

7. Respondent testified at the final hearing that she believed the forms she signed on November 9 only pertained to a work-up of the art that would appear on the various tee shirts and did not constitute firm orders for the tee shirts. Respondent's testimony in this regard is rejected because it is self-serving, uncorroborated, and contrary to the clear language of the three work orders she signed.

8. The tee shirts were made and delivered to LCMS on December 18, 2000. Sufficient funds to pay for the tee shirts had not been collected. Consequently, LCMS could not pay for the tee shirts either upon delivery or within 30 days, as specified on the work orders executed November 9, 2000. An

agreement was reached between LCMS and the vendor for payment in installments over a period of time. The vendor had been paid in full as of the time of the final hearing.

9. Petitioner alleged in its Administrative Complaint that Respondent violated district purchasing policies by signing the three work orders. Ms. Robinson, the current principal of LCMS, testified that Respondent should have had Mr. Cerra sign a requisition form which would have been sent to a district office for the generation of a purchase order. Ms. Robinson testified that the tee shirts should have been purchased by use of a purchase order, not a work order. Respondent presented evidence that the use of a purchase order would have been optional under the circumstances of this case and that a work order could have been used. Because of that conflicting evidence, it is found that Petitioner failed to establish with any specificity that Respondent violated an established district rule or policy by utilizing the work order instead of a purchase order.

10. Although the evidence was not clear that Respondent violated district purchasing policies, the evidence was clear that she failed to comply with Mr. Cerra's clear instructions as to how the procurement had to be handled.

11. As a result of this procurement, the Miami-Dade County School District issued to Respondent a letter of reprimand and

placed her on a Professional Development Program, which she completed.

12. Petitioner presented insufficient evidence to establish that Respondent's effectiveness as an employee of the Miami-Dade County School had been impaired. To the contrary, there was credible evidence that her effectiveness had not been impaired. At the end of the 2000-2001 school year, Mr. Cerra gave Respondent a satisfactory evaluation on her job performance, and Ms. Robinson testified that Respondent's effectiveness as an assistant principal had not been impaired by the subject procurement.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

14. Respondent argued that the Administrative Complaint should be dismissed because the legislature has repealed Section 231.2615(1)(f), Florida Statutes (2001),¹ the statute cited by Petitioner in the Administrative Complaint.² Respondent argued that her due process rights were violated because Petitioner failed to amend the Administrative Complaint to reflect that it was now relying on the provisions of Section 1012.795, Florida Statutes,³ which the legislature enacted to replace the repealed portions of Chapter 231 cited in the Administrative Complaint.

15. It is well-settled that disciplinary statutes are penal in nature and that a licensee, such as Respondent, should not be prosecuted based on allegations that are not properly pled. See Delk v. Department of Professional Regulation, 595 So. 2d 996 (Fla. 1st DCA 1992); Luskin v. Agency for Health Care Administration, Board of Medicine, 731 So. 2d 67 (Fla. 1st DCA 1999); and United Insurance Company v. Department of Insurance, 793 So. 2d 1182 (Fla. 1st DCA 2001).

16. An appropriate test for an alleged violation of one's due process right to a fair hearing is the harmless error test generally applied in civil cases. An error is not harmless where there is a reasonable probability that a different result would have been reached but for the error committed. Chrysler v. Department of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993). Respondent's argument that her due process right to a fair hearing was violated should be rejected because the Administrative Complaint correctly cited the law in effect at the time of the offense and adequately informed Respondent of the charges against her, thereby satisfying due process requirements. Petitioner's subsequent citation to Section 1012.795, Florida Statutes, is, at most, harmless error.

17. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing

Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994).

18. Petitioner failed to prove that Respondent's conduct impaired her effectiveness as an employee of the school district, which is an essential element of the charge against Respondent. Consequently, Petitioner failed to prove Respondent guilty of the charge alleged in the Administrative Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order finding Respondent not guilty of the charge alleged in the Administrative Complaint.

DONE AND ENTERED this 22nd day of July, 2003, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
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 22nd day of July, 2003.

ENDNOTES

1/ Prior to its repeal, Section 231.2615(1)(f), Florida Statutes, provided the following as a grounds for disciplining a licensee:

(f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.

2/ Count I of the Administrative Complaint is as follows:

The allegations of misconduct set forth herein are in violation of Section 231.2615(1)(f), Florida Statutes, in that she has been found guilty of personal conduct which seriously reduces her effectiveness as an employee of the school board.

3/ When it repealed Section 231.2615(1)(f), Florida Statutes, the legislature enacted Section 1012.795(1)(f), Florida Statutes, which provides the following as a grounds for disciplining a licensee:

(f) Upon investigation, has been found guilty of personal conduct which seriously reduces that person's effectiveness as an employee of the district school board.

COPIES FURNISHED:

Gonzalo R. Dorta, Esquire
334 Minorca Avenue
Coral Gables, Florida 33134-4304

Mark F. Kelly, Esquire
Kelly & McKee, P.A.
1718 East 7th Avenue, Suite 301
Post Office Box 75638
Tampa, Florida 33675-0638

Kathleen M. Richards, Executive Director
Education Practices Commission
Department of Education
325 West Gaines Street, Room 224E
Tallahassee, Florida 32399-0400

Marian Lambeth, Program Specialist
Bureau of Educator Standards
Department of Education
325 West Gaines Street, Room 224E
Tallahassee, Florida 32399-0400

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.