

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 03-1267
)
PETER W. NEWTON,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on June 24, 2003, in Largo, Florida.

APPEARANCES

For Petitioner: Jacqueline M. Spoto Bircher, Esquire
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For Respondent: Mark Herdman, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, Peter W. Newton, violated Pinellas County School Board Policies 8.25(1)(k), (v), and (x), the Code of Ethics and Principles of Professional Conduct of the

Education Profession in Florida, and, if so, what discipline should be imposed by Petitioner, Pinellas County School Board.

PRELIMINARY STATEMENT

By letter dated February 7, 2003, Pinellas County School Board Superintendent, J. Howard Hinesley, Ed.D., advised Respondent, Peter W. Newton, that he was recommending his dismissal for violation of school board policies when he administered the Parallel Reading-Florida Comprehensive Assessment Test in December 2002.

On February 18, 2003, Petitioner requested a formal administrative hearing. On April 8, 2003, Respondent forwarded the case to the Division of Administrative Hearings.

On April 9, 2003, an Initial Order was sent to both parties.

On April 17, 2003, the case was scheduled for final hearing on June 24 and 25, 2003, in St. Petersburg, Florida. On June 17, 2003, the site of the final hearing was changed by an Amended Notice of Hearing to Largo, Florida.

The hearing took place on June 24, 2003, as scheduled. Petitioner presented seven witnesses: Dale Ross, Joyce Maher, Kristen Sulte, Sue Frisby, Sharon Corvey, Sheila Jaquish, and Michael Bessette. Petitioner presented nine exhibits, which were received in evidence and marked Petitioner's Exhibits 1, 2,

8A, 9, 10, 11, 12, 13, and 15. Respondent testified and presented Richard Richardson as an additional witness.

The Transcript of Proceedings was filed on July 11, 2003. On July 16, 2003, an Order was entered enlarging the time for filing proposed recommended orders to July 28, 2003, and, later, to August 4, 2003. Both parties submitted Proposed Recommended Orders.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following findings of fact are made:

1. Petitioner operates, controls, and supervises the free public schools of Pinellas County, Florida. It has entered into individual and collective agreements with the teachers it employs and publishes policies that control the activities of its teaching professionals.

2. Respondent is employed by Petitioner as a teacher of emotionally handicapped third graders at Skycrest Elementary School and has been employed by Petitioner as a teacher of emotionally handicapped children for six years.

3. Petitioner assesses student and instructional performance utilizing the Pinellas Instructional Assessment Portfolio which consists of two tests: the Parallel Reading-Florida Comprehensive Assessment Test and the Parallel Math-Florida Comprehensive Assessment Test. These tests test

students on the Sunshine State Standards which are the Florida Department of Education Standards for student achievement in Florida public schools. These tests are given three times during each school year.

4. Emotionally handicapped students are required to take the Parallel Reading-Florida Comprehensive Assessment Test and the Parallel Math-Florida Comprehensive Assessment Test.

5. Published rules govern teacher conduct in administering these tests. Teachers can only make general statements of encouragement to students. A teacher cannot read any portion of the tests to the students nor can a teacher provide input or comment on a student's answers or failure to answer.

6. The Florida Comprehensive Assessment Test is a state-wide assessment test given to particular grades annually. The Florida Department of Education has mandated that third grade students achieve a passing score on the Florida Comprehensive Assessment Test be allowed to progress into the fourth grade. It is suggested that, in addition to the student and instructional assessment function, the district-wide Parallel Reading-Florida Comprehensive Assessment and Parallel Math-Florida Comprehensive Assessment Tests prepare students for the state-wide Florida Comprehensive Assessment Test.

7. Respondent acknowledged understanding the published rules prohibiting providing assistance to his students while

they took the Parallel Reading-Florida Comprehensive Assessment Test. He also acknowledged assisting his students during the December 2002 test in ways prohibited by those same rules.

8. Two full school days are dedicated to each portion of the test. Over the course of the test week, Respondent gave prohibited assistance to each of his nine emotionally handicapped students. Some of Respondent's students were apparently overwhelmed by the test and did not make a sincere effort. After examining their test booklets, he encouraged these students to go back and to continue trying. He examined answers to multiple-choice questions and sent students back to work harder on an answer, indicating by inference that the given answer to a particular question was incorrect. He read words and phrases to students, sounded out words, and pointed out sections of the text in which an answer could be found. While it does not appear that Respondent actually gave any student the correct answer to a question, he certainly directed students to answers.

9. Respondent acknowledged the inappropriateness of his conduct but offered the excuse that he was trying to give his students the confidence of believing in themselves, that they could make passing scores on the Florida Comprehensive Assessment Test and advance to the fourth grade.

10. Respondent's admittedly inappropriate conduct does not appear to be motivated by anything other than a misguided attempt to help his students by instilling the confidence that would necessarily result from the belief that they had done well on the test.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter. Section 120.57, Florida Statutes; Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

12. Subsections 1001.32(2) and (3), Florida Statutes, read as follows:

(2) DISTRICT SCHOOL BOARD.-In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.

(3) DISTRICT SCHOOL SUPERINTENDENT.- Responsibility for the administration and management of the schools and for the supervision of instruction in the district shall be vested in the district school superintendent as the secretary and executive officer of the district school board, as provided by law.

13. A district school board is considered the "public employer," as that term is used in Chapter 447, Part II, Florida Statutes, "with respect to all employees of the school

district." Subsection 447.203(2), Florida Statutes. As such, it has the right "to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or other legitimate reasons." Section 447.209, Florida Statutes. Any instructional staff member may be suspended or dismissed at any time during the school year for just cause which includes misconduct in office as that term is defined by the State Board of Education. Subsection 1012.33(1)(a), Florida Statutes.

14. The appropriate standard of proof in a school board dismissal proceeding is preponderance of evidence, unless the collective bargaining agreement covering the bargaining unit of which the employee is a member prescribes a more demanding standard of proof. McNeill v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996); Sublett v. Sumter County School Board, 664 So. 2d 1178 (Fla. 5th DCA 1995). Neither party here has pointed to or offered evidence of any contractual provision that would require Respondent to satisfy a stricter standard of proof.

15. Because the statute and rules providing grounds for terminating Petitioner's contract are penal in nature, they must be construed in favor of the employee. Rosario v. Burke, 605 So. 2d 523 (Fla. 2d DCA 1992); Lester v. Department of Professional Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977).

16. When a school board seeks to terminate an employee's contract for just cause, it must establish each and every element of the charge. MacMillan v. Nassua County School Board, 629 So. 2d 226 (Fla. 1st DCA 1993).

17. Any disciplinary action taken against the employee may be based only upon the conduct specifically alleged in the written notice of specific charges. Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Department of Business and Professional Regulation, 625 So. 2d 1237, 1238 (Fla. 2d DCA 1993); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

18. Petitioner's February 7, 2003, letter, which is the "charging document," alleges that

. . . in December, 2002, while administering the Parallel Reading Florida Comprehensive Assessment Test (PR-FCAT), you provided assistance to most of your students. You reviewed student answers, and if they were wrong, you directed students to go back and do more work on the test. You answered student questions and provided them with assistance to read the passages and the questions. You also directed students to rewrite their responses on the long answer questions and pointed to specific passages on the test where the answers could be found. In addition you boasted to co-workers about how well your students performed on the test. In your actions are a violation of School Board Policy

20. The term "misconduct in office" is not defined in Subsection 1012.33(1)(a), Florida Statutes; the term is defined in Rule 6B-4.009, Florida Administrative Code, as follows:

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

21. The "Code of Ethics of the Education Profession," Rule 6B-1.001, Florida Administrative Code, reads as follows:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

22. The "Principles of Professional Conduct for the Education Profession in Florida," Rule 6B-1.006, Florida Administrative Code, reads as follows:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.

(c) Shall not unreasonably deny a student access to diverse points of view.

(d) Shall not intentionally suppress or distort subject matter relevant to a student's academic program.

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital

status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

(h) Shall not exploit a relationship with a student for personal gain or advantage.

(i) Shall keep in confidence personally identifiable information obtained in the course of professional service, unless disclosure serves professional purposes or is required by law.

(4) Obligation to the public requires that the individual:

(a) Shall take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.

(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

(c) Shall not use institutional privileges for personal gain or advantage.

(d) Shall accept no gratuity, gift, or favor that might influence professional judgment.

(e) Shall offer no gratuity, gift, or favor to obtain special advantages.

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

(b) Shall not on the basis of race, color, religion, sex, age, national or

ethnic origin, political beliefs, marital status, handicapping condition if otherwise qualified, or social and family background deny to a colleague professional benefits or advantages or participation in any professional organization.

(c) Shall not interfere with a colleague's exercise of political or civil rights and responsibilities.

(d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

(e) Shall not make malicious or intentionally false statements about a colleague.

(f) Shall not use coercive means or promise special treatment to influence professional judgments of colleagues.

(g) Shall not misrepresent one's own professional qualifications.

(h) Shall not submit fraudulent information on any document in connection with professional activities.

(i) Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.

(j) Shall not withhold information regarding a position from an applicant or misrepresent an assignment or conditions of employment.

(k) Shall provide upon the request of the certificated individual a written statement of specific reason for recommendations that lead to the denial of increments, significant changes in employment, or termination of employment.

(l) Shall not assist entry into or continuance in the profession of any person known to be unqualified in accordance with these Principles of Professional Conduct for the Education Profession in Florida and other applicable Florida Statutes and State Board of Education Rules.

(m) Shall self-report within forty-eight (48) hours to appropriate authorities (as determined by district) any arrests/charges involving the abuse of a child or the sale and/or possession of a controlled substance. Such notice shall not be considered an admission of guilt nor shall such notice be admissible for any purpose in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. In addition, shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program, or entering of a plea of guilty or Nolo Contendere for any criminal offense other than a minor traffic violation within forty-eight (48) hours after the final judgment. When handling sealed and expunged records disclosed under this rule, school districts shall comply with the confidentiality provisions of Sections 943.0585(4)(c) and 943.059(4)(c), Florida Statutes.

(n) Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

(o) Shall seek no reprisal against any individual who has reported any allegation

of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), Florida Statutes.

(p) Shall comply with the conditions of an order of the Education Practices Commission imposing probation, imposing a fine, or restricting the authorized scope of practice.

(q) Shall, as the supervising administrator, cooperate with the Education Practices Commission in monitoring the probation of a subordinate.

23. For Respondent's conduct to constitute "misconduct in office" there are two essential elements: first, violation of the "Code of Ethics of the Education Profession," Rule 6B-1.001, Florida Administrative Code, and the "Principles of Professional Conduct for the Education Profession in Florida," Rule 6B-1.006, Florida Administrative Code; and, second, that violation of the aforementioned Code of Ethics and Code of Professional Conduct was so serious as to impair the individual's effectiveness in the school system. Without discussing the degree which Respondent's admitted misconduct violated the Code of Ethics or the Code of Professional Conduct, no evidence was presented that addressed whether Respondent's effectiveness as a teacher has been impaired. Therefore, no findings of fact has been made regarding this element of the proof of "misconduct in office." Petitioner has failed to carry its burden of proof that Respondent's actions were so serious that his effectiveness as a

member of the instructional staff was impaired, and neither the nature of the offense nor the circumstances in which the offense was committed can reasonably support an inference that Respondent's effectiveness as a teacher was impaired. While it is acknowledged that the presentation of specific evidence to support the allegation of impaired teaching effectiveness is not absolutely necessary, see, for example, Purvis v. Marion County School Board, 766 So. 2d 492, 498 (Fla. 5th DCA 2000), nothing in the evidence presented leads the undersigned Administrative Law Judge to conclude that Petitioner's over-all teaching effectiveness is impaired by the inappropriate assistance he gave his students on this occasion.

24. No evidence was presented that suggests that Respondent was guilty of "using [his] position for personal gain" in violation of School Board Policy 8.25(1)(k).

25. Respondent violated School Board Policy 8.25(1)(x) by providing his students prohibited assistance on the Parallel Reading-Florida Comprehensive Assessment Test.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, and being mindful that Petitioner, as stated in its Policy 8.25, Disciplinary Guidelines for Employees, "follows a system of progressive discipline," and giving full consideration to the apparent misguided motivation of Respondent, it is

RECOMMENDED that Petitioner reprimand Respondent for his conduct and suspend him without pay from February 25, 2003, through the end of the 2002-2003 school year.

DONE AND ENTERED this 19th day of August, 2003, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
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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.