

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BREVARD COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 03-1635
)
ROBERT DALE TAYLOR,)
)
 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 July 29 and 30, 2003, in Viera, Florida.

APPEARANCES

For Petitioner: Alan S. Diamond, Esquire
Amari & Theriac, P.A.
96 Willard Street, Suite 302
Cocoa, Florida 32922

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
2595 Tampa Road, Suite J
Palm Harbor, Florida 34684

STATEMENT OF THE ISSUES

Whether or not Respondent is incompetent to teach as defined in Rule 6B-4.009(1)(a), Florida Administrative Code; and whether or not Respondent's alleged incompetency to teach and perform his duties constitutes just cause to terminate his

employment and to terminate his continuing contract pursuant to Subsection 1012.33(4)(c), Florida Statutes.

PRELIMINARY STATEMENT

On or about April 22, 2003, a Petition for Dismissal urging the termination of the employment and continuing employment contract of Robert Dale Taylor, Respondent herein, was filed before the Brevard County School Board by the Superintendent of the Brevard County School District. The Petition for Dismissal, in part, alleged:

3. Respondent has received two (2) consecutive unsatisfactory annual evaluations for the 2001-2002 and 2002-2003 school years due to his inability to discharge his duties as a teacher.

4. Respondent is incompetent to teach and perform his duties as an instructional employee of the Brevard County School District as the term "incompetency" is defined by State Board of Education Rule 6B-4.009(1)(a).

5. Respondent's incompetency to teach and perform his duties constitutes just cause to terminate Respondent's employment and to terminate his continuing contract pursuant to Section 1012.33(4)(c), Fla. Stat.

On April 21, 2003, Respondent requested "a hearing on the charges against me in accordance with Section 231.36(6)(a), Florida Statutes." On April 30, 2003, an Order was entered by the Brevard County School Board confirming the Board's action accepting the Superintendent's recommendation and referring

"this matter for a formal Administrative Hearing by an Administrative Law Judge from the Division of Administrative Hearings." On that same day, the case was forwarded to the Division of Administrative Hearings.

On May 6, 2003, an Initial Order was sent to both parties. On May 30, 2003, the case was scheduled for final hearing on July 29 and 30, 2003, in Viera, Brevard County, Florida.

The case was presented as scheduled on July 29 and 30, 2003. Petitioner presented the testimony of five witnesses and offered six exhibits which were received into evidence and marked Petitioner's Exhibits 1 through 6. Respondent presented eight witnesses, including Respondent himself, and offered two exhibits which were received into evidence and marked Respondent's Exhibits 1 and 2.

The Transcript of Proceedings was filed with the Clerk of the Division of Administrative Hearings, on September 12, 2003. On September 18, 2003, an Order was entered confirming the Joint Stipulation as to Filing Deadlines, extending the time to file proposed recommended orders to September 26, 2003. Both parties filed Proposed Recommended Orders. All statutory citations are to Florida Statutes (2003), unless otherwise indicated.

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 Brevard County, Florida. It has entered into individual and collective agreements with the teachers it employs and has published bylaws and policies that control the activities of its teaching professionals.

2. Respondent is a teacher who was employed by Petitioner from 1976 until his termination in April 2003. He had taught at Palm Bay Elementary from 1984 until 2003. Respondent has a degree in health and physical education. Early in his teaching career he was a classroom teacher; he has taught physical education since 1984.

3. Petitioner conducts annual and interim evaluations of its instructional personnel using a formal Instructional Personnel Performance Appraisal System. The system delineates specific areas of evaluation, the basis for evaluation, and overall performance scores. The system evaluates nine "performance areas": planning, instructional organization and development, presentation of subject matter, instructional communication, knowledge of subject matter, responsibilities, relationships, management of student conduct, and student evaluation. In addition, there is an overall evaluation.

4. Administrative personnel, in the instant case, the principal and assistant principal, are trained to perform the instructional personnel evaluations. Teachers receive one of

three ratings in each performance area: unsatisfactory, needs improvement, or effective. Typically, evaluations are done annually.

5. During his teaching career, Respondent served under five principals. In 1998, Joan Holliday became principal of Palm Bay Elementary.

6. An analysis of the performance evaluations of Respondent's first 22 years of teaching reflects that he was an "effective" and "exemplary" teacher (high ratings during the particular rating periods). The same evaluations reflect recurring, but not consistent, shortcomings in the areas of planning and related responsibilities.

7. In Respondent's 1997-1998 annual evaluation, Principal Joseph F. Padula, Jr., who had evaluated Respondent from 1984 to 1998, rated him as unsatisfactory in "planning." Comments by Principal Padula describe Respondent's failure to meet the requirements of the Sunshine State Standards and show evidence of "maintaining pace with new curriculum requirements."

8. Principal Joan Holliday's first opportunity to provide an annual evaluation of Respondent was in the 1998-1999 school year. Her assessment reflects Respondent as a teacher who effectively teaches physical education, but could improve in planning, organization, and "could benefit from newer philosophies in physical education."

9. Respondent responded to his 1998-1999 evaluation by letter dated February 25, 1999. The letter is defensive and reflects his opinion that he is making attempts to improve but that he believes that he is an effective physical education teacher.

10. Respondent's 1999-2000 evaluations (there were two interim evaluations during the 1999-2000 school year) reflect that he was responding positively to the previous critical assessments although he continued to struggle with his lesson plans. The evaluations indicate that he was continuing to effectively teach and interact with students.

11. A 2000-2001 interim evaluation, dated December 11, 2000, contains an unsatisfactory rating. This occurs in the "relationships" assessment area and reflects an apparent problem Respondent has related to "kidding" students which was sometimes not well-received and resulted in sporadic complaints from parents. This rating appears to be incongruous with the effective rating he received in "management of student conduct" in the same evaluation. He continued to receive effective ratings in "presentation of subject matter" and "instructional communication." According to Petitioner's Instructional Personnel Performance Appraisal System, an effective rating describes performance of "high quality" and is the highest rating achievable.

12. The annual evaluation for the 2000-2001 school year rates Respondent unsatisfactory in the "relationships" category. Respondent's "kidding" of students, which caused parental complaints that evoked evaluator's concern and was the apparent basis for the unsatisfactory rating in "relationships" in the 2000-2001 interim and annual evaluations, was clearly subject to interpretation. Testimony did not reveal any "kidding" which would have caused the undersigned to believe Respondent warranted an unsatisfactory rating as defined in the Performance Appraisal System's rating scale definitions. In addition, negative references to Respondent's interaction with "classroom teachers" is not borne out by the testimony.

13. Respondent received five unsatisfactory ratings in his 2001-2002 school year evaluation. He is rated unsatisfactory in "planning," even though it is indicated that Respondent "does turn in his weekly lesson plans," and there is criticism of his failure "to integrate reading, mathematics and writing into [physical education] curricula." At the final hearing, Principal Holliday testified that Respondent's lesson plans for 2001-2002 and 2002-2003 were "adequate." He also is rated unsatisfactory in "responsibilities" and "relationships"; these ratings are supported by comments indicating perceived communications and cooperation problems with other faculty.

These perceived communications and cooperation problems were not borne out by the testimony of faculty members.

14. On March 11, 2003, immediately prior to his termination, Respondent received six unsatisfactory ratings on an interim appraisal. This interim appraisal is the only evaluation Respondent received during the 2002-2003 school year. The evaluator observes that Respondent continued to fail to indicate in lesson plans how he was integrating writing, reading, and mathematics into his physical education curriculum and that "developmentally appropriate activities should be planned and taught at each class." Respondent was rated unsatisfactory in "instructional communication"; during Principal Holliday's tenure, Respondent had been rated effective (the highest rating) in this area on five occasions. Comments in this category indicate that Respondent "addresses students in a loud, threatening voice." He was rated unsatisfactory in the "responsibilities" category. "Communication with classroom teachers" is referenced in the comments to this category. The unsatisfactory in "relationships" is referenced by a need to continue to "work on his written and oral communication skills with students, parents, and peers."

15. Principal Holliday had determined late in the 2001-2002 school year that she was going to recommend Respondent for

termination by reason of incompetency. As a result, the evidentiary value of this last assessment is questionable.

16. Principal Holliday acknowledges that most of her concerns with Respondent relate to "lesson planning and communication." If Respondent, in fact, had inappropriate communication with students, such communication reflects teacher misconduct, not incompetence. Her testimony reflects that she formally observed Respondent teaching his class infrequently and that when she formally observed, "he did everything he was supposed to do in a correct manner." Principal Holliday's opinions of Respondent's teaching abilities and utilization of new methodology are largely drawn from her review of his lesson plans, not observing Respondent teaching physical education to students. She is critical of Respondent's failure to implement new (sometimes controversial) physical education methodology; however, she acknowledges that none of these new educational theories are mandated. Respondent's lesson plans for his final teaching years were "adequate." As far as Principal Holliday knows all of Respondent's students met the Sunshine State Standards for physical education; the Sunshine State Standards were all noted in his plan book during the final years she evaluated Respondent. The ultimate goal of a teacher is to teach children, not to write lesson plans.

17. During the period of their relationship as principal-teacher, Principal Holliday wrote 29 letters of reprimand to Respondent. There are 58 faculty members at Palm Bay Elementary; during the five years she was principal, Principal Holliday issued four letters of reprimand to other faculty members. Most of the letters of reprimand concern subjects that appear in Respondent's interim and annual evaluations.

18. Six Palm Bay faculty members testified as witnesses for Respondent. They represent 115 cumulative years of teaching experience; each of their teaching careers at Palm Bay Elementary overlap Respondent's, giving each a familiarity with Respondent. While they did not assess Respondent's lesson plans, record and document production, and other administrative details solely in the cognizance of administration, they had ample opportunity to observe Respondent teaching his physical education classes, his interaction with students, his interaction with faculty, his attention to his faculty responsibilities, and other areas formally assessed by the Instructional Personnel Performance Appraisal System.

19. These informal evaluators collectively report Respondent as "very dependable," having "good rapport with the faculty," appearing to have "well-planned classes," and responsive to suggestions [made by other faculty members] for physical education for younger children, "very helpful." One

witness advised, "he jokes with the kids; talks with them in a way they understand." One witness offered the unsolicited comment, "we really consider him to be an asset to the school because of his rapport with some of the older children. It's really nice to have him there." A witness who had early morning bus duty with Respondent reported that he was punctual and dependable. Nothing reported by any of these teacher/witnesses suggests a lack of teaching competency; in fact, their testimony suggests that Respondent was a good teacher.

20. The evidence presented by Respondent's teaching contemporaries, admittedly not trained evaluators, presents a dramatically different assessment of Respondent's teaching performance than does that offered by Petitioner. The testimony of Respondent's teaching peers is credible.

21. The assistant principal, who authored critical interim evaluations, testified that she did not witness Respondent interact with any student in an inappropriate way, except that he spoke loudly on occasion; that when she observed him teaching, the children appeared to be learning; that he conducted class in an appropriate and effective way; and that, recently, he appeared to be complying with Sunshine State Standards in terms of developing students' physical skills.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter. Section 120.57.

23. Subsections 1001.32(2) and (3) read as follows:

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

24. A district school board is considered the "public employer," as that term is used in Chapter 447, Part II, "with respect to all employees of the school district." Subsection 447.203(2). 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.

25. "Under Florida law, a school board's decision to terminate an employee is one affecting the employee's substantial interests; therefore, the employee is entitled to a

formal hearing under section 120.57(1) if material issues of fact are in dispute," for "a school board is a state agency falling within Chapter 120 for purposes of quasi-judicial administrative orders." Sublett v. District School Board of Sumter County, 617 So. 2d 374, 377 (Fla. 5th DCA 1993).

26. 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). The parties agree that preponderance of evidence is the appropriate burden of proof in this case.

27. 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).

28. When a school board seeks to terminate an employee's contract for 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).

29. 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).

30. Petitioner's Petition for Dismissal, the charging document, states, in pertinent part:

* * *

3. Respondent has received as two (2) consecutive unsatisfactory annual evaluations for the 2001-2002 and 2002-2003 school years due to his inability to discharge his duties as a teacher.

4. Respondent is incompetent to teach and perform his duties as an instructional employee of the Brevard County School District as the term "incompetency" is defined by State Board of Education Rule 6B-4.009(1)(a).

5. Respondent's incompetency to teach and perform his duties constitutes just cause to terminate Respondent's employment and to terminate his continuing contractor to a pursuant to Section 1012.33(4)(c), Fla. Stat.

31. Respondent has a continuing employment contract with Petitioner. Section 1012.33 reads, in pertinent part, as follows:

(4)(a) An employee who had continuing contract status prior to July 1, 1984, shall be entitled to retain such contract and all rights arising therefrom as prescribed by rules of the State Board of Education adopted pursuant to s. 231.36, Florida Statutes (1981), unless the employee voluntarily relinquishes his or her continuing contract.

* * *

(c) Any member of the district administrative or supervisory staff and any member of the instructional staff, including any school principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him or her must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude, as these terms are defined by rule of the State Board of Education. Whenever such charges are made against any such employee of the district school board, the district school board may suspend such person without pay; but, if the charges are not sustained, he or she shall be immediately reinstated, and his or her back salary shall be paid. In cases of suspension by the district school board or by the district school superintendent, the district school board shall determine upon the evidence submitted whether the charges have been sustained and, if the charges are sustained, shall determine either to dismiss the employee or fix the terms under which he or she may be reinstated. If such charges are sustained by a majority vote of the full

membership of the district school board and such employee is discharged, his or her contract of employment shall be thereby canceled. Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the district school board.

32. The State Board of Education's definition of "incompetency" referenced in Section 1012.33 is found in Rule 6B-4.009(1)(a), Florida Administrative Code, and reads as follows:

The basis for charges upon which dismissal action against instructional personnel may be pursued are set forth in Section 231.36, Florida Statutes. The basis for each of such charges is hereby defined:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law (Section 231.09, Florida Statutes); (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers

under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

33. Rule 6B-4.009(1)(a), Florida Administrative Code, makes reference to Section 231.09, Florida Statutes (2001), renumbered to Section 1012.53, which reads as follows:

(1) The primary duty of instructional personnel is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement requirements, and to master the skills required to graduate from high school prepared for postsecondary education and work. This duty applies to instructional personnel whether they teach or function in a support role.

(2) Members of the instructional staff of the public schools shall perform duties prescribed by rules of the district school board. The rules shall include, but are not limited to, rules relating to a teacher's duty to help students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully, using prescribed materials and methods, including technology-based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the district school board.

34. Respondent urges that Rule 6B-4.009(1)(a), Florida Administrative Code, and Clark v. School Board of Lake County,

595 So. 2d 735 (Fla. 5th DCA 1992), require the "testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession" to prove "incompetency." Further consideration based on the arguments presented in the Proposed Recommended Orders does not persuade the undersigned to change the ruling made at the final hearing that expert witness testimony is not mandatory. The Fifth District Court's obiter dicta, acknowledging "difficulty in reaching a decision as to the incompetency of a teacher" is embraced, however.

35. Evidence in the instant case suggests that Respondent's lesson plan preparation was less than satisfactory and required continuing supervisory attention. In addition, his attention to administrative details was lacking, at times.

36. The unsatisfactory ratings in the interim and annual performance appraisals, which began in the 2000-2001 school year, are eroded by the testimony of the evaluators themselves and, more significantly, as related to teaching ability, interaction with students and fellow teachers, and general value to the school, are contradicted by credible evidence presented by Respondent's teaching peers. The evidence reflects the evaluators' frustration with Respondent's continuing marginal lesson plans and administrative weakness which tainted their ability to objectively consider other performance areas.

37. Petitioner has failed to demonstrate, by a preponderance of evidence, that Respondent is incompetent to teach and perform his duties as an instructional employee of the Brevard County School District as the term "incompetency" is defined by the State Board of Education, Rule 6B-4.009(1)(a), Florida Administrative Code.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Brevard County School Board, enter a final order finding that Respondent should not have been terminated and reinstating his continuing employment contract effective the date of his termination.

DONE AND ENTERED this 13th day of October, 2003, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
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 13th day of October, 2003.

COPIES FURNISHED:

Harold T. Bistline, Esquire
Stromire, Bistline, Miniclier & Griffith
1970 Michigan Avenue, Building E
Post Office Box 8248
Cocoa, Florida 32924-8248

Alan S. Diamond, Esquire
Amari & Theriac, P.A.
96 Willard Street, Suite 302
Cocoa, Florida 32922

Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
2595 Tampa Road, Suite J
Palm Harbor, Florida 34684

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

Dr. Richard A. DiPatri, Superintendent
Brevard County School Board
2700 Judge Fran Jamieson Way
Viera, Florida 32940-6699

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.